ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2003

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

Civil Misc. Writ Petition No.11804 of 1991

Dr. (Smt.) Shashi Bala Srivastava
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri U.S.M. Tripathi
Sri P.C. Srivastava
Sri Shailendra
Sri S.L. Yadav

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

Constitution of India Article 226-Service-Appointment-as Lecturer-on single permanent post-petitioners name at serial no. 1 in Select List- endorsed by Committee of Management-and approved by the Vice Chancellor-only petitioner could be allowed to join-joining of any other person illegal and void.

Held-Para 18

It is well settled that once Selection Committee recommendation, endorsed by the Committee of Management, was approved by the Vice Chancellor, nothing remained in substantive law to accomplish factum of Appointment, except formality of issuing appointment letter-a ministerial act on the part of the Committee of Management. The Committee of Management had no authority whatsoever to decline or to refuse to appoint the petitioner. Petitioner being at serial no.1 and one permanent post of lecturer being available, petitioner ought to have been allowed to join the post and paid her salary against the same. No objection in law could be taken to it. No one, except the petitioner, could be allowed to join the said permanent post. Anybody, if manipulated to have joined said post, the same is illegal & void.

Constitution of India Article 226-Service-petitioner a Lecturer claiming senior scale and consequential benefits and privileges-on basis of-notional-functioning-such period, held, to be counted for purposes of computing seniority, higher scale, annual increments, post retrial benefits etc.-but not for any monetary-benefits.
Held- Para 28

We also issue a writ, in the nature of mandamus directing the respondents, officers, authorities etc. to treat the petitioner as deemed appointed with effect from 11.12.1981 till defac to joining the institution on the basis of her appointment letter dated 16.1.1990 (Annexure-12 to the Writ Petition No.16275 of 1999) and accord all consequential benefits and privileges, except monetary payments, for the period she is notionally treated to be working with effect from 11.2.1981 and continue to pay salary along with all allowances, increments etc. as may be available time to time for the period petitioner has defacto worked on the basis of joining in pursuance to the appointment letter dated 16.1.1990. It is made clear that the petitioner will not be entitled to any monetary benefits for the period she is notionally working. Her notional functioning in the institution with effect from 11.12.1981 is for the purposes of computing seniority, higher scale, annual increments, post retiral benefits etc.

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

1. Dr. (Smt.) Shashi Bala/petitioner represented by Sri Shailendra, Advocate;

State of U.P., Director of Education (H.E.) and District Inspector of Schools, Deoria, Respondents no.1, 2 & 3 represented by Standing Counsel; Committee of Management Madan Mohan Malviya Post Graduate Degree College, Respondent no.4, represented by Sri A.K. Mishra, Advocate.

2. Both the writ petitions, noted above, are being heard together since they emerge from common facts and a dispute between the same parties.

Madan Mohan Malviya Post Graduate Degree College, Bhatpar Rani, District Deoria, is an affiliated College of Gorakhpur University, governed by the provisions of U.P. State Universities Act, 1973, called- 'Act 1973', First Statute, Ordinances and Regulations of the University framed under Act, 1973 and U.P. Higher Education Service Commission Act and Rules framed thereunder. Subject of Ancient History was initially granted, provisional affiliation in the College for running postgraduate classes in the said subject. Consequently, in June 1981 three posts of lecturers were advertised and several candidates applied against it. Eligible candidates, including the petitioner were called for interview. Selection Committee on the basis of interview recommended names of five candidates in the panel for appointment on aforesaid three posts of lecturers.

3. It is not disputed, that in the said panel name of the petitioner, Dr. (Smt.) Shashi Bala Srivastava was at serial No.1.

Para-3 & 4 of writ petition, not controverted by any of the respondents, read:-

"3. That a Selection Committee was duly constituted which made unanimous recommendation on 8.9.1981 for the appointment of three Lecturers in the order of priority as under :-

(i) Dr. (Smt.) Shashi Bala Srivastava,
(ii) Mr. Alok Mani Tripathi,
(iii) Mr. Surendra Nath Singh,
(iv) Dr. Amar Nath Tripathi,
(v) Mr. Prem Kumar Mishra."

"4. That it is clear that the petitioner Dr. (Smt.) Shashi Bala Srivastava was placed at Serial No.1 in the priority list recommended by the Selection Committee."

Committee of Management of the College forwarded relevant papers to the University for seeking approval of the Vice Chancellor.

4. Vice Chancellor of the University, accorded approval, modifying the order of preference provided by the Selection Committee, vide order dated December 7, 1981 (Annexure-1 to the writ petition).

5. Vice Chancellor, while agreed with recommendation of Selection Committee in favour of petitioner's name at Serial No.1; placed Sri Amar Nath Tripathi at Serial No.2 (instead of Serial No.4). Sri Alok Mani Tripathi (who was at Serial No.2) was brought down to Serial No.3; Sri Surendra Nath Singh, candidate at Serial No.3 came down to Serial No.4 last chance being offered appointment against available three posts.

6. The petitioner pleads that in spite of all statutory essential ingredients being fulfilled for making appointment, the Management of the College illegally and

arbitrarily withheld appointment letter; she ran pillar to post and approached all concerned authorities but to no avail. The petitioner complains that Management allowed- Alok Mani Tripathi and Dr. Amar Nath Tripathi (placed at Serial Nos. 2 & 3 by the Vice Chancellor), to join the college. Surendra Nath Singh, (brought down from Serial No.3 to Serial No.4, by the Vice Chancellor) and the petitioner were prevented and not allowed to join the College.

7. Surendra Nath Singh and the present petitioner filed representations before Chancellor under Section 68 of Act 1973. The Chancellor, by means of order dated May 18, 1983, allowed petitioner's representation, Annexure-2 to the writ petition. In pursuance to the said order of the Chancellor, petitioner again filed representations before the Management and the University authorities vide letters dated 27.6.1983, 17.8.1983, 13.2.1984, 15.6.1985, 3.9.1985 12.9.1989 and 2.9.1990 (Annexures 3 to 9 to the writ petition).

8. The petitioner finally succeeded in her long struggle when Management issued appointment letter dated January 16, 1990, Annexure-11 to the writ petition.

9. The petitioner, thereafter, filed representation dated 18.8.1990/Annexure-12 to the petition before the District Inspector of Schools for payment of salary with effect from January 16, 1990 to July 1990, Annexure-12 to the writ petition.

10. Again a protracted correspondence took place. Petitioner approached higher authorities, including Directorate of Higher Education and requested for payment of salary in accordance with law. Reference may be made to the letters dated 5.9.1990 and 4.10.1990, Annexures 13 & 14 to the petition.

11. The District Inspector of Schools vide letter dated 3.12.1990 asked the Management to submit papers and relevant record (Annexure-15 to the petition). The District Inspector of Schools vide letter dated 28.1.1991, addressed to the Manager of the College, (Annexure-17 to the writ petition) directed the Management to take steps for ensuring payment of salary. The District Inspector of Schools, however, vide impugned order dated March 11, 1991 (Annexure-19 to the writ petition) held that petitioner Dr. (Smt.) Shashi Bala Srivastava could not be paid salary in absence of a post.

The petitioner being aggrieved, filed Writ Petition No.11804 of 1991 before this Court and this Court passed an interim order dated 18.4.1991, relevant extract of it reads–

".....The District Inspector of Schools, Deoria is directed to make payment of salary and other dues permissible under law to the petitioner within three months from the date of receipt of a certified copy of this order for the period commencing from the date when she joined the service."

13. The relevant extract of para 3 of the counter affidavit has been filed on behalf of respondents 1,2 and 3 reads-

"3. That Madan Mohan Malviya Post Graduate Degree College, Bhatpar

Rani, District Deoria is aided institution affiliated to Gorakhpur University the post of lecturer of ancient history was advertised by the College, the selection proceedings were conducted by the institution. The name of Dr. (Smt.) Shashi Bala Srivastava was recommended by the Selection Committee at Serial No.1 in the order of priority and the name of Sri Amar Nath Tripathi was placed at serial no.2. This order of priority was also by the Vice Chancellor, Gorakhpur University but the Management of the institution ignoring the priority offered appointment to Sri Amar Nath Tripathi whose name was recommended at serial no.2. Feeling aggrieved that Dr. (Smt.) Shashi Bala Srivastava, the petitioner approached the Chancellor of the University. The reference was called by his Excellency Chancellor and accordingly a direction was given to offer appointment of Dr. (Smt.) Shashi Bala Srivastava. It is reported that Dr. (Smt.) Shashi Bala Srivastava has resumed work with effect from 16.1.1990 since there is only one post of lecturer of ancient history sanctioned in the institution on which one Sri Amar Nath Tripathi was offered appointment and is continued to be paid his salary. There is no additional post of lecturer of ancient history is in the institution. In the circumstances the payment of salary of Dr. (Smt.) Shashi Bala Srivastava is not being made. Since one payment against one post is already being made to Sri Amar Nath Tripathi and absence of any additional sanctioned post does not lie in the power of the District Inspector of Schools to make payment of salary under delegated power given to him by Regional Deputy Director for payment of salary to the teacher of degree College. Rest of the allegation do not relate to District Inspector of Schools."

14. In reply thereto the petitioner vide para 3 of her rejoinder affidavit asserted-*"in any circumstances, Amar Nath Tripathi could not be allowed to be absorbed against first sanctioned post. Absorption of Mr. Tripathi against the single sanctioned post was illegal and being aggrieved against the said petitioner field the present writ petition."*

15. The Committee of Management in para 3 of the counter affidavit, sworn by Sri Bhartendu Misra admits that- *"as a matter of fact, the petitioner who was placed at serial no.1 was issued letter of appointment vide order No.4710 dated 9.12.1981 which was duly sent through registered post to the petitioner after expiry of more than 25 days time from the date of issuance of the letter of appointment, when the petitioner did not join, another order No.4732 dated 3.1.1982 was sent to the petitioner intimating her that in case she failed to join within a period of one week then it will be treated that she is not interested in accepting the appointment and she herself will be solely responsible for it. Despite, the reminder issued to the petitioner, since she did not turn up in the institution the Committee of Management treated that she is not interested in joining the post. The letter of appointment dated 9.12.1981 and reminder letter dated 3.1.1982 are enclosed as Annexures 1 & 2 respectively to this counter affidavit."*

16. Para-4 of her rejoinder affidavit, in reply to aforequoted para-3 of the counter affidavit, reads-

"4. That the contents of paragraph no. 3 is denied while paras no.7 to 15 of writ petition is reiterated while fact placed by respondent no.4, it is clear that authorities are playing fraud, as they are making statement that they issued letter of appointment in favour of petitioner on 9.12.1981 and on 3.1.1982 issued reminder to the petitioner providing 1 week more time for joining of the petitioner but on the same time they are also claiming appointment of Amar Nath Tripathi on 11.12.1981. Therefore, either the claim of opposite party for issuing of letters for appointment on 9.12.1981 and 8.1.1982 are incorrect or claim of joining of Amar Nath Tripathi on 11.12.1981 is incorrect, statement is contrary to the respondent Management may ask to put an explanation that how both the statements are correct, otherwise averment in para under reply is misconceived and deserved to be rejected……"

17. The admitted position on record… down to the petitioner clearly that the Committee of Management had accepted decision of the Selection Committee, and the Vice Chancellor had approved name of the petitioner at Serial No.1 in the Panel. There is no doubt that the Committee of Management is guilty of acting arbitrarily playing fraud in withholding appointment letter of Dr. (Smt.) Shashi Bala Srivastava with ulterior motive to give undue advantage to the candidates lower in rank. Otherwise also we find that after the matter was finally decided by the Chancellor, question of validity of appointment of the petitioner cannot be reopened. It is also to be noted that the petitioner's name was recommended at serial no.1 which is not disputed and or at any point of time from any quarter.

18. It is well settled that once Selection Committee recommendation, endorsed by the Committee of Management, was approved by the Vice Chancellor, nothing remained in substantive law to accomplish factum of Appointment, except formality of issuing appointment letter-a ministerial act on the part of the Committee of Management. The Committee of Management had no authority whatsoever to decline or to refuse to appoint the petitioner. Petitioner being at serial no.1 and one permanent post of lecturer being available, petitioner ought to have been allowed to join the post and paid her salary against the same. No objection in law could be taken to it. No one, except the petitioner, could be allowed to join the said permanent post. Anybody, if manipulated to have joined said post, the same is illegal & void.

19. Objection raised by the District Inspector of Schools for non-payment of salary to the petitioner on the ground of non-availability of a sanctioned post is perverse, misconceived and against record.

20. It is to be further noted that the District Inspector of Schools passed aforesaid order without affording opportunity of hearing to the petitioner and thus, being in violation of principle of natural justice is void and non est.

21. Impugned order dated 11.3.1991, passed by District Inspector of Schools (Annexure-19 to the writ petition) is unsustainable, and therefore, liable to be quashed. Writ Petition deserves to be allowed.

22. In the result, a writ in the nature of certiorari, calling for the record of the case and the impugned orders dated 11.3.1991, Annexures 19 & 20 to the writ petition, and all other consequential orders are hereby quashed. We further issue a writ in the nature of mandamus commanding Respondents Nos. 1,2 and 3, their officers, employees, etc. to ensure payment of salary month by month to the petitioner giving credit of notional annual increments, revised pay scales (as may have been enforced from time to time) and also pay all arrears etc. in accordance with law along with 12% p.m. simple interest due with effect from January' 1990 and Rs.10,000/- as costs within three months of receipt of certified copy of this Judgment and Order.

Facts of Civil Misc. Writ Petition No.16275 of 1999:

23. The petitioner was constrained to file above petition claiming benefit of senior scale on the ground of her completing five years services in 1995, which was rejected by the Principal. The petitioner again represented the matter before Committee of Management, claiming senior scale and submitted reminder again on 27.4.1998. The Management of the institution, vide impugned order dated 9.9.1998 (Annexure-1 to the Supplementary Affidavit, accepted today) rejected the claim of the petitioner. The petitioner also seeks quashing of the impugned order dated 24.2.1998 passed by the Principal of the College refusing selection grade on the ground that petitioner's Writ Petition No.16275 of 1999 was pending in the Court. The petitioner has again in paragraphs 13 and 14 of the present petition, complained of illegal act of not allowing her to join and work in the institution with effect from December 1981. In Para 13 of the writ petition, it is pleaded that-*"while on the same time they assisted another candidate who was at serial no.2 for joining working and payment of salary since 11.12.1981. The petitioner was entitled to allow joining either with effect from 11.12.1981 or prior to that. As in order of merit, she was above to Dr. Amar Nath Tripathi."*

Again, Para 45, 46 & 47-A of the writ petition read:-

*"**45.** That in view of these facts and circumstances this Hon'ble Court may take serious cognizance asking the management to provide all benefit to the petitioner given to preferential treatment against the respondent no.5 and she must be treated working against the post got sanctioned one after approval of her appointment by the Vice Chancellor, she is entitled of the benefit in view of the decision of the Chancellor dated 18.5.1983 and even prior to that, since the approval given by the Vice Chancellor dated 7.12.1981 as she was not only recommended at serial no.1 but also approved at the same position by the Vice Chancellor.*

***46.** That the Committee of Management is guilty of showing disrespect of high degree to decision of His Excellency the Chancellor, Gorakhpur University, Gorakhpur dated 18.5.1983. They also guilty of violating the order of Vice Chancellor dated 7.12.1981. They also guilty of introducing unfair practice in the matter of selection while providing appointment immediately to respondent no.5, only because of he is being relative to the then Manager as well*

as to the present Manager, i.e. for extraneous consideration adversely effecting the career in all respect of the petitioner.

***47-A**. That it is expedient in the interest of justice and equity that this Hon'ble Court may pass an ad-interim order, objection the counter and Management to allow selection grade and promotion on the post of Reader to petitioner treated his appoint since 1981 as per order of Vice Chancellor dated 7.12.1981 and order of Chancellor dated 18.5.1983 or may pass such further order this Hon'ble Court may deem fit in the circumstances of the case otherwise it will come irreparable injury to the petitioner."*

24. The petitioner, therefore, prayed for writ of certiorari and also for issuing a writ of mandamus directing the respondents to provide all benefits, including senior scale as announced by the Government Order dated 7.1.1989 as also the benefit as per Government Order dated 16.2.1999.

25. Learned counsel for the petitioner Sri Shailendra, has made a categorical statement before us that the petitioner (though entitled to all benefits, privileges etc. treating her notionally working on the post at least from the date with effect from 11.12.1991, i.e., prior to joining by candidates at Serial No.2 & 3) claim arrears and or monetary gain for the period for which she has not defacto discharged her duties but this Court may accord all other benefits and privileges treating her notionally in continuous service with effect from 11.12.1991

26. We are of the view that the petitioner should not be made to suffer for no fault of her and only because of illegal and arbitrary acts of the Manager.

27. In the result, we issue a writ, in the nature of certiorari, calling for the record of the case, and quash the impugned order dated 24.2.1998 written by the Manager to the College Principal (Annexure 20 to the Writ Petition No.11804 of 1991) and letter dated 9.9.1998 written by the Manager of the College to the petitioner (Annexure-1 to the Supplementary Affidavit) are hereby quashed.

28. We also issue a writ, in the nature of mandamus directing the respondents, officers, authorities etc. to treat the petitioner as deemed appointed with effect from 11.12.1981 till defacto joining the institution on the basis of her appointment letter dated 16.1.1990 (Annexure-12 to the Writ Petition No.16275 of 1999) and accord all consequential benefits and privileges, except monetary payments, for the period she is notionally treated to be working with effect from 11.2.1981 and continue to pay salary along with all allowances, increments etc. as may be available time to time for the period petitioner has defacto worked on the basis of joining in pursuance to the appointment letter dated 16.1.1990. It is made clear that the petitioner will not be entitled to any monetary benefits for the period she is notionally working. Her notional functioning in the institution with effect from 11.12.1981 is for the purposes of computing seniority, higher scale, annual increments, post retiral benefits etc. Petitioner whose name is at Serial No.1 in

select list, shall be treated Senior to others in the said select list.

Both the Writ Petitions, details given above, stands allowed.

No order as to costs.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 9.5.2003

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

Criminal Misc. Application No. 1191 of 1998

Ms. Nina Nagpal ...Applicant/Petitioner
Versus
Judicial Magistrate-I Meerut and another ...Opposite parties/Respondent

Counsel for the Petitioner:
Sri Kushal Kant
Sri G.S. Chaturvedi

Counsel for the Respondents:
Sri Ravi Kiran Jain
Sri Ajay Rajendra
A.G.A.

Code of Criminal Procedure- section-482- Circumstances under which the power can be exercised- Quashing of criminal proceeding under article 226 or under section 482 Cr. P.C. awaited well settled by various decisions of the Supreme Court that where the allegation made in the F.I.R. or the complaint, even if they are taken on its face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused; also where the allegation made in the F.I.R. or complaint are so absurd and inherently improvable on the basis of which no prudent person can reach a just conclusion that there is sufficient ground for proceeding against the accuse. Impugned order quashed.

Held- pare 12 & 15

In the case on hand, in view of the allegations made in the complaint none of the ingredients are satisfied, in as much as, it is not alleged by the complainant, respondent no. 2 that he had entrusted the amount in question with the petitioner or the petitioner having dominion over the said amount dishonestly misappropriated it. The learned Magistrate without looking to the accusation and the statutory provision mechanically took cognizance of the offence of criminal breach of trust which in my considered opinion is not legally sustainable.

Added to what has been stated above, the case may be viewed from another angle. For realisation of the amount deposited with the OTCEI, respondent no. 2 filed a writ petition in the Delhi High Court arraying petitioner as one of the respondent and admittedly, the said writ petition is pending for decision. He concealed this fact while filing the present case. True it is, law is well settled that even if the facts give rise to a civil claim, yet a criminal proceeding is maintainable and both the proceedings can simultaneously continue. But so far the present case is concerned, as stated earlier, the allegations taken in entirety do not make out any offence, more so, offence under Sections 406 and 420 I.P.C. If on a reading of the complaint ingredients of those two offences would have been spelt out, this Court would have been slow to interfere with the impugned orders of the learned Magistrate taking cognizance of the offence in exercise of inherent power. Rather what appears is that since the writ petition is pending in the Delhi High Court and no early decision could be obtained, respondent no. 2 adopted this devise in initiating the criminal proceeding in order to force the petitioner to refund back the amount.

Cases referred to:
2002(44) ACC 520
(1976) 3 SCC 736
1992 Supp (1) SCC 335

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

1. Over The Counter Exchange of India (hereinafter referred to as 'the OTCEI'). New Delhi a company incorporated under the Companies Act, 1956 is a recognized Stock Exchange within the meaning of Section 4 of the Security Contracts (Regulation) Act. It has been promoted by premier Government financial institutions like Unit Trust of India, Industrial Development Bank of India, Life Insurance Corporation of India and others. The OTCEI through advertisement invited applications for selection of dealers with stipulation that the applicant shall meet the requirement as laid down in clause (8) of the Securities Contracts (Regulation) Rules, 1957. It was further stated that the applicant should be required to pay application fee of rupees one lakh adjustable against one time non-refundable admission fee of rupee six lakhs for the successful applicant. In case of an unsuccessful applicant, application fee would be refunded to him after deduction of rupees five thousand towards processing fee etc. Accordingly respondent no. 2 applied for the dealership and paid application fee of rupees one lac and appeared for computer based examination and on the basis of his performance in the examination, he was requested to appear for interview vide letter dated 12th June, 1995. Thereafter, the OTCEI informed him of his being selected as a dealer and requested him to comply with the formalities as mentioned in the letter dated 24th August, 1995. The case of the petitioner is that respondent no. 2 agreeing to have dealership deposited one time non-refundable admission fee in addition to rupees one lac which was deposited along with the application. He also submitted an undertaking to comply with the OTCEI's rules and regulations. On acceptance of his dealership, the OTCEI processed the documents and forwarded the same to the Securities and Exchange Board of India (in short 'the SEBI') to register him as a dealer. The letter however, returned the same asking the OTCEI to resubmit along with the documents with regard to age and qualification of respondent no. 2. The OTCEI in turn vide its letter dated 11th March, 1996 sought the documents from respondent no. 2 in support of his age and experience as required by the SEBI. While the application of respondent no. 2 was under consideration of the SEBI Respondent no. 2 addressed a letter dated 22nd August, 1996 to the OTCEI stating therein the he had come to know from reliable source that he was not entitled to dealership on account of his having crossed the age of sixty five years and, therefore, the admission fee deposited by him be refunded to him. In response thereto, the OTCEI informed him that upon acceptance of the dealership, it processed his documents and forwarded to the SEBI for registration of his name as a dealer. But upon review of the documents, SEBI sought for certain additional information with regard to his age and experience and in the meanwhile, he asked for refund of admission fee and therefore, the fee being non-refundable the OTCEI cannot refund the same. In the above backdrop, respondent no. 2, it is alleged, moved the Delhi High Court by filing a writ petition being civil misc. writ petition no. 1970 of 1997 seeking

issuance of a writ of mandamus for release of the fees deposited with the OTCEI together with compensation. While the said writ petition was pending adjudication, respondent no.2 moved a criminal complaint before the Judicial Magistrate, Ist Class, Meerut arraying the petitioner and another as accused.

2. In short, the allegation of respondent no. 2 is that in response to the advertisement for appointment of dealership, he made an application fulfilling all the conditions. Both petitioner and the co-accused had assured him that within three months he would get the letter of appointment of dealership. On their assurance he deposited huge amount but in fact they had no power of appointment of dealership on behalf of the SEBI. It is further alleged that both petitioner and co-accused hatched a conspiracy to cheat respondent no.2 by making a false promise that he would be appointed as a dealer and consequently, defrauded him of lacs of rupees.

3. Upon such complaint, the learned Magistrate examinee respondent no.2 under Section 200 Cr.P.C. and recorded his statement. Thereafter, by order dated 16th March, 1998 he took cognizance of the offence under Sections 406 and 420 I.P.C. and issued summons to the petitioner and the co-accused for their appearance. Aggrieved thereby, the petitioner by filing this petition has prayed for quashing of the complaint as well as the summoning order.

4. Shri G.S. Chaturvedi, learned Senior Counsel appearing for the petitioner contended that on the basis of the advertisement by the OTCEI published in the newspapers inviting applications for dealership in different cities, respondent no. 2 and, therefore, the former cannot be attributed with any criminal liability as alleged by respondent no. 2. he further urged that the prosecution allegation in entirety even if taken on its face value as alleged in the complaint, does not make out any offence under Section 406/420 I.P.C. and in that view of the matter the court, in order to secure ends of justice, should interfere with the said order and quash the same in exercise of inherent power.

5. On facts, Sri Chaturvedi contended that the OTCEI accepted dealership application of respondent no. 2, processed all the documents and forwarded to the SEBI for registration, who in turn asked for the details regarding age and experience of respondent no. 2 and accordingly communication was made with Respondent no. 2 by letter dated 11.3.1996 and he was asked for supply of necessary documents in support thereof. Instead of complying the requirement, he informed the OTCEI to return back the deposit. In the circumstances, therefore, no motive can be attributed either to the OTCEI or the petitioner and other officials in not registering him as a dealer on the OTCEI. Rather, from the conduct of respondent no. 2 it appears that initially he intended to have a dealership, but subsequently he changed his mind and asked for return of his deposit. The plea taken by him that he having crossed the age of 65 years was not entitled to dealership according to the Rules framed by the SEBI and that is the reason why he asked for refund of the deposit is quite false and baseless and therefore, cannot be accepted. Since the dealership fee paid by him was non-refundable, he was intimated accordingly

and it was only thereafter that he, moved the Delhi High Court by filing writ petition no. 1970 of 1997 and concealing this fact, he filed the criminal complaint in order to coerce the petitioner and the OTCEI to return the non-refundable fee. The dispute regarding return of the deposit being a civil dispute and the Delhi High Court having taken cognizance thereof, the present criminal proceeding is not entertainable in law.

6. Shri Ravi Kiran Jain, learned Senior Counsel assisted by Shri Ajay Rajendra would urge that affidavit sworn to by Sheo Kumar on behalf of the petitioner in support of the writ petition being not in terms of the High Court Rules, should be rejected and consequently, the writ petition being not maintainable should be dismissed. It was further contended that inherent power can be sought to be exercised if there is no specific provision in the Cr.P.C. to challenge a criminal proceeding. But in the present case the petitioner could have raised the questions as are being raised here before the learned Magistrate in seisin of the case in view of the law laid down by this Court in ***Bhopal Sugar Industries Limited Vs. State of U.P.*** 2002(44) ACC 520 and it was for the Magistrate to decide whether the criminal proceeding should be allowed to continue or not. Lastly, it was submitted that none of the illustrations given in the celebrated judgement in the case of ***State of Haryana Vs. Bhajan Lal and others,*** 1992 Supp (1) SCC 335 apply to the case on hand and, therefore, the criminal complaint filed by respondent no. 2 should be allowed to be decided on merit by the trial court.

7. It is well neigh settled that the High Court in exercise of inherent power conferred by Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C.') or extra-ordinary writ jurisdiction under Article 226 of the Constitution of India can quash a criminal complaint /FIR if the allegations taken in entirety do not prima-facie constitute any offence, or where the allegations are absurd and inherently improbable or the proceeding is manifestly attended with mala fide or it is instituted to wreak vengeance on the accused. There is, however, a note of caution that such power should be exercised sparingly and in rarest of rare cases. It needs no emphasis that Section 482 Cr.P.C. does not confer new power upon the Court. It only saves the power which the Court inherently possessed. As the section goes, inherent power can be exercised in three circumstances; namely (i) to give effect to any order under the Code; (ii) to prevent abuse of the process of the Court or (iii) otherwise to secure the ends of justice.

8. The legislature in its wisdom has invested inherent power with the High Court, since it being superior Court will exercise the same with caution where circumstance of the case so warrants. The Apex Court in **R.P. Kapur (vs) State of Punjab,** AIR 1960 SC 866 laid down the following circumstances when the Court in exercise of inherent power can quash the criminal proceeding:

"(i) where it manifestly appears that there is legal bar against the institution or continuance of a criminal proceeding for want of sanction;
(ii) where the allegations in the first information report or the complaint, even if they are taken at their face value and

accepted in their entirety, do not constitute the offence alleged and
(iii) where the allegations constitute an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge."

9. Further reference may be made also to the observation made n **Nagawwa vs. Veeranna Shivalingappa Konjalgi;** (1976) 3 SCC 736 where the Apex Court held that a criminal proceeding can be quashed in the following circumstances :

"1. where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
2. where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
3. where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and
4. where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

In **Madhavrao Jiwajirao Scindia vs. Sambhajirao Chandrojirao Angre;** (1988) 1 SCC 692, the Apex Court observed thus –

"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the Court cannot be utilized for any oblique purpose and where in the opinion of the Court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the Court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage".

10. The scope and ambit of exercise of inherent power by the Court came to be further decided in the celebrated judgement in the case of **State of Haryana vs. Bhajan Lal;** 1992 Crl. L.J. 527 and the guidelines laid down therein and relevant for the purpose are extracted here-under.

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) to (4) xxxxxxxxxxxx

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

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

11. Keeping in mind the law enunciated by the Apex Court as discussed above, it is desirable to scrutinize the allegations made in the complaint in order to find whether the same constitute offence of 'criminal breach of trust' and 'cheating' punishable under Sections 406 and 420 I.P.C. In order to constitute the offence of 'criminal breach of trust' the prosecution must prove that the accused was entrusted with some property or with dominion or power over it. It is also to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion, use or disposal in violation of legal contract by the accused himself or by someone else which he willingly suffered to do.

12. In the case on hand, in view of the allegations made in the complaint none of the ingredients are satisfied, in as much as, it is not alleged by the complainant, respondent no. 2 that he had entrusted the amount in question with the petitioner or the petitioner having dominion over the said amount dishonestly misappropriated it. The learned Magistrate without looking to the accusation and the statutory provision mechanically took cognizance of the offence of criminal breach of trust which in my considered opinion is not legally sustainable.

13. As regards the offence of 'cheating', at the outset it may be stated that the prosecution allegation taken as a whole does not make out such offence. The requirement of the offence of cheating defined in Section 415 I.P.C. are:

"(i) there should be fraudulent or dishonest inducement of a person by deceiving him;

(ii) (a) the person so deceived should be induced to deliver any property to any person or to consent that any person shall retain any property or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he was not so deceived;

(iii) in cases covered by (ii) (b) the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

14. It is not the case of respondent no.2, the complainant that the petitioner deceived or fraudulently or dishonestly induced him to deposit any amount with the OTCEI. From the facts narrated it appears that whatever the petitioner did was in her official capacity as General Manager of OTCEI and her personal interest was not involved. Why should she induce respondent no. 2 to deposit the amount with the OTCEI which would not benefit her personally? The grievance of respondent no. 2 that the petitioner and other co-accused had assured him that after deposit was made, they would handover the appointment letter of dealership within three months is too big a pill to be swallowed. Respondent no.2 is

not an illiterate person having no experience in contractual transaction. He being a retired officer of the Life Insurance Corporation of India knew quite well that registration of his dealership in the OTCEI would be done by the SEBI and so far the petitioner is concerned, she is due discharge of her official duty as General Manager of the OTCEI was required to send all the papers and documents to the SEBI for taking a decision. In view of such back ground facts, I am of the opinion that the case is squarely covered by illustrations (1) and (5) as laid down by the Apex Court in Bhajan Lal (Supra). Had the learned Magistrate looked to all these aspects of the case he would have been slow to pass the impugned order taking cognizance of the offence either under Section406 or 420 I.P.C.

15. Added to what has been stated above, the case may be viewed from another angle. For realisation of the amount deposited with the OTCEI, respondent no. 2 filed a writ petition in the Delhi High Court arraying petitioner as one of the respondent and admittedly, the said writ petition is pending for decision. He concealed this fact while filing the present case. True it is, law is well settled that even if the facts give rise to a civil claim, yet a criminal proceeding is maintainable and both the proceedings can simultaneously continue. But so far the present case is concerned, as stated earlier, the allegations taken in entirety do not make out any offence, more so, offence under Sections 406 and 420 I.P.C. If on a reading of the complaint ingredients of those two offences would have been spelt out, this Court would have been slow to interfere with the impugned orders of the learned Magistrate taking cognizance of the offence in exercise of inherent power. Rather what appears is that since the writ petition is pending in the Delhi High Court and no early decision could be obtained, respondent no. 2 adopted this devise in initiating the criminal proceeding in order to force the petitioner to refund back the amount.

16. Regard being had to the facts and circumstances of the case as discussed above, I would hold that impugned order passed by the Magistrate taking cognizance of the offence being unsustainable in law should be set at naught. It is accordingly so ordered.

17. In the result, criminal misc. application succeeds and is allowed and consequently the impugned order as well as the proceedings in complaint case no. 127/9 of 1998 pending in the court of judicial Magistrate-I, Meerut are quashed.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.5.2003

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

Criminal Misc. Writ Petition No. 2517 of 2003

Tribhuwan Nath Tripathi ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Appellant:
Sri G.S. Chaturvedi
Sri Samit Gopal

Counsel for the Respondents:
A.G.A.

Constitution of India-Article 226-Maintainability–Order directing the authorities to lodge F.I.R. and initiate disciplinary action against the petitioner-Held-Petition is totally premature-not maintainable.

Held- Para 8

It is well settled legal position that the High Court does not ordinarily interfere with the investigation, which is in the domain of the police after the lodging of an F.I.R. concerning commission of a cognizable offence. In the present case, the F.I.R. has not yet been lodged and the petitioner simply wants to stifle the first step to spark the plugs of criminal machinery by lodging of the F.I.R. In our opinion, the petitioner cannot challenge the authority of the Government directing the lodging of the F.I.R. The writ petition as this stage is pre mature, misconceived and not maintainable

Case Law:
AIR 1945 PC 18
AIR 1980 SC 326

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

1. We have heard Sri G.S. Chaturvedi learned Senior Advocate for the petitioner and learned A.G.A.

2. Through this writ petition the petitioner has prayed for quashing the order dated 30th April, 2003- annexure 1 to the writ petition, passed by the Secretary, Government of U.P. Home (Police), Anubhag 4, Lucknow, addressed to the Director General of Police, U.P. for taking disciplinary action and also to lodge an FIR against the concerned police personnel involved in the incident of police encounter dated 14th February, 2003.

3. The facts are that the petitioner is a Circle Officer of police. A police encounter took place on 14th February, 2003 at about 11.30 A.M. in the jungle in village Abhirawa Pali, Police Station Kacaura, District Jalaun in which three persons had received injuries and died. First information Reports were lodged and cases registered with regard to that incident. One Arvind Kumar Bhautik made an application on 6th April 2003 to Sri G.S. Dinkar, M.L.A. Baberu, District Banda. On the basis of the said application the latter wrote a letter to the Chief Minister, requesting that appropriate legal action be taken against the concerned police officials as his relative Jagat Aaurwar was shot dead by the police and was intentionally wrongly identified as Sudhir Nishad and that the said incident was wrongly shown as police encounter. In the ultimate result, some enquiry was conducted by Commissioner of Jhansi Division, who submitted a report, finding certain police personnel including the petitioner to be negligent in duty with regard to the identification of the third dead person, namely, Jagat Ahirwar. As the said letter (Annexure 1) has been issued to the Director General of Police, Lucknow by the Secretary of Government of U.P. Home (Police), the petitioner challenges the same and contends that the same is arbitrary and is meant to harass him. It is also assailed as illegal.

4. On the other hand, learned A.G.A. has countered the argument of Sri Chaturvedi, urging that there is nothing illegal or arbitrary in the order in question and the unwarranted attempt of the petitioner is simply preempt the lodging of the F.I.R. against him and consequent investigation.

5. It was held by Privy Council long back in the case of Emperor Vs. Khyaja Nazir Ahmad, AIR 1945 PC 18 that it is of utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of inquiry. There is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judiciary. The functions of the judiciary and the police are complementary and not overlapping.

6. We may also refer to the case of State of Bihar vs. J.A.C. Saldanna, AIR 1980 SC 326 wherein, the Supreme Court held as under:

"*There is a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department, the superintendence over which vests in the State Government. The executive which is charged with duty of keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offence to book. Once it investigates and finds an offence having been committed it is his duty to collect evidence for the purpose of proving the offence. Once that is completed and the Investigating Officer submits report to the Court requesting the Court to take cognizance of the offence under section 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in section 173 (8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court, and to award adequate punishment according to law for the offence proved to the satisfaction of the Court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate."*

7. The decision of the Privy Council in the case of Emperor Vs. Khwaja Nazir Ahmad (supra) was approved.

8. It is well settled legal position that the High Court does not ordinarily interfere with the investigation, which is in the domain of the police after the lodging of an F.I.R. concerning commission of a cognizable offence. In the present case, the F.I.R. has not yet been lodged and the petitioner simply wants to stifle the first step to spark the plugs of criminal machinery by lodging of the F.I.R. In our opinion, the petitioner cannot challenge the authority of the Government directing the lodging of the F.I.R. The writ petition as this stage is pre mature, misconceived and not maintainable.

9. The writ petition is hereby dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.5.2003

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

Habeas Corpus Writ Petition No. 4839 of 2003

Sachin @ Banti ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Swetashwa Agrawal
Sri Rishi Chadha

Counsel for the Respondents:
S.C.

(A) National Security Act-Section 3 (2)-Detention order period of detention not specified whether is the detention order bad on this account ? held- No.

Held- Para 13

In view of the above decisions, the detaining authority is not under obligation to specify the period of detention and the detention order is not rendered illegal on account of detaining authority's failure to specify period of detention in the order. It is also clear that the words 'during such period as may be specified in the order' occurring in section 3 (2) of the Act relate to the delegation/authorization to the District Magistrate or the Commissioner of the Police and not to the period of detention of a detenu. Therefore, we find no force in the above detention and hold that the detention is not invalid on account of non mentioning of period of detention of the detenu.

(B) National Security Act- Section 3 (2)-Delay in decision of Representation–unexplained unreasonable delay-held-detention order illegal.

Held- Para 50

In view of our findings on the above points in Writ Petition No. 4842 and 4846, there was un-explained delay on the part of Central Government in deciding representation of the petitioner. Therefore, continued detention of petitioner Rajesh and Subhash have rendered invalid. We also find that there is no force in the writ petition of other petitioners Sachan, Vinod and Nauratan.

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

1. The above five writ petitions have been filed separately by each of the petitioner for quashing their detention order dated 16.12.2002 passed by District Magistrate, Rampur, respondent no. 2 under section 3 (2) of National Security Act.

2. Each of the petitioner was separately served with the grounds of detention, alongwith order of detention, which stated that on 16.11.2002 at about 5 p.m. one Darashan Lal resident of Balmiki Basti, Radha Road, Civil Lines, district Rampur lodged a report at the Police Station Civil Lines against the petitioners alleging that on 15.11.2002 a quarrel had taken place between his son Sumit and the petitioners Vinod and Subhash on playing cricket, which was pacified by the people of the Mohalla. But the petitioners were not happy. On account of above incident, all the petitioners armed with country made pistols, in order to create terror in the Biradari raided the house of Sumit and fired on him with intent to kill him. When

hearing sound of fire, his neighbours came to his rescue, the petitioners again attacked on them. Due to which Rahul, Vijay, Ram Prasad, Papoo, Deepak and Ankush aged about 4 years were badly injured. The petitioners had also cut the telephone wire, so that information of the incident could not be sent to the authorities concerned.

3. On the basis of above report a case at crime no. 157 of 2002 under sections 147, 148, 149, 307 IPC was registered at P.S. Civil Lines, Rampur. On account of above incident, public order was badly affected and in order to maintain public order, police of neighbouring police stations was called. Investigation of the case was done by Sri Mahabir Singh, Sub Inspector, who had reached the spot at 4.30 p.m. on receiving telephonic information. During investigation injured Sumit, Deepak, Pappu, Rahul, Ankush and Vijay were interrogated on 16.11.2002. The confirmed the incident in their statements and also told that on account of incident a sense of terror and insecurity was created on the spot. Persons present on the road started running helter skelter and chaos was created. People closed their doors. The people of the locality felt insecure and could not dare to come out of their houses. Normal flow of life was stopped. The traffic on the road also stopped on account of incident.

4. The news of incident was published in daily news papers 'Dainik Jagran' and 'Amar Ujala' with photographs, which again created a sense of insecurity and terror in the mind of public. The Local Intelligence Unit also submitted a report on 17.11.2002 that petitioners had created terror in their 'Birdadari' and committed atrocities on persons on petty matters. The incident was committed in the month of Ramjan when the people were busy in purchasing articles for 'Roja Aftar'. On account of the incident in the month of Ramjan public order of the society was adversely affected. The people of Muslim community also became sensitive.

On 21.11.2002 petitioner Subhash was arrested at 1.30 p.m. in Mohalla Power House, Panwaria along with country made pistol and cartridge regarding which a case at crime no. 1579 of 2002 under sections 25 Arms Act was registered. On 23.11.2002 petitioner Vinod and Nauratan were arrested at 4.10 p.m. On Government Press Road and each of them were found in possession of a country made pistol and cartridges, regarding which cases at crime no. 1548 of 2002 and 1585 of 2002 under section 25 Arms Act were registered. Petitioners Rajesh @ Boby and Sachin @ Banti were taken into police custody and on their pointing out country made pistols used in the incident were recovered on 27.11.2002 at 2.05 p.m., regarding which cases at crime no. 1607 of 2002 and 1608 of 2002 were registered. The petitioners committed dare devil incident dated 16.11.2002 to show that nobody could dare to raise voice against them.

5. The petitioners were detained in jail in district jail Rampur in connection with case crime no. 1571 of 2002. They had also moved bail applications in the Court on 28.1.2002. There was real possibility of petitioners being released on bail and after release on bail, their indulging in similar activities prejudicial to maintenance of public order.

6. On the basis of above materials the detaining authority was satisfied that detention of petitioners under section 3 (2) of National Security Act was essential.

The detention order was approved by the State Government on 18.12.2002 for a period of one year.

7. All the five writ petitions were connected with each other and detention orders were passed on account of the same incident. Common questions of facts and law are involved in all the writ petitions and therefore all the writ petitions are being disposed of by a common order with the consent of learned counsel for the parties.

We have heard learned counsel for the petitioner, learned A.G.A. and learned Standing Counsel for the respondents and have perused the record.

Learned counsel for the petitioners raised following grounds for challenging the detention order of the petitioners.

(1) The detaining authority had not mentioned the period of detention in the detention order and non mention of the period of detention makes the order invalid.

(2) The detaining authority had not supplied the power of delegation under which he was authorised to pass detention order and non supply of the above authority rendered detention order invalid.

(3) (a) The detention order was passed on a solitary incident, which was only matter of law and order and it had no effect or impact on public order.

(b) At the time of passing of detention order, the petitioners were detained in Jail and there was no cogent material or compelling necessity before the detaining authority to record his satisfaction that the petitioners on release on bail would indulge in similar activities prejudicial to maintenance of public order.

(4) There was delay in deciding representation of the petitioners.

Point No. 1

8. Learned counsel for the petitioners contended that since the impugned detention order did not specify the period for which each of the petitioner was required to be detained and therefore the order was illegal. He further contended that in the instant case the order of detention was passed by the District Magistrate, who was having delegated power under section 3 (2) of National Security Act, which says that the State Government may direct that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub section (2), exercise the powers conferred by the said sub section. Therefore, the detaining authority was under obligation to specify the period for which the order of detention was passed.

9. Section 3 of National Security Act reads as under:-

"Power to make orders detaining certain persons–(1) The Central Government or the State Government may-

(a) if satisfied with respect to any person that with a view to preventing him

from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, of the security of India, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion for India.

it is necessary so to do, make an order directing that such person be detained.

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation- For the purpose of this sub section, 'acting in any manner prejudicial to the maintenance of supplies and services essential to the community' does not include 'acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community' as defined in the Explanation to sub section 1 of section 3 of the Prevention of Backmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.

(3) If having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub section (2), exercise the powers conferred by the said sub section.

Provided that the period specified in an order made by the State Government under this sub section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

(4) When any order is made under this section by an officer mentioned in sub section (3), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government:

Provided that where under Section 8 of the grounds of detention are communicated by the officer making the order after five days but not later than ten days from the date of detention, this sub section shall apply subject to the modification that, for the words 'twelve

days' the words 'fifteen days' shall be substituted.

(5) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.

9. Section 3 (2) empowers the State Government to delegate its power as conferred on it under sub section 1 to the District Magistrate or Commissioner of Police, if he is satisfied that the circumstances prevailing or likely to prevail in an area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, makes it necessary to delegate the power to them. It further provides that the order of delegation shall be in writing and it shall also specify the period during which the District Magistrate or the Commissioner of Police, is authorised to exercise the power of the State Government under sub section (1) of Section 3. Proviso to sub section (2) lays down that the delegation should not be for an unlimited period. It should not be for a period of more than three months. Once the State Government's power under section 3 (1) is delegated to the District Magistrate or Commissioner of Police, they are authorised to exercise that power on the ground specified in Section 3 (1) of the Act.

10. In the case of Ashok Kumar vs. Delhi Administration and others, AIR 1982 SC 1143 : 1982 SCC (Crl.) 451 it was held in para 11 As below:

"It is plain from a reading of S. 3 of the National Security Act that there is an obvious fallacy underlying the submission that the detaining authority had the duty to specify the period of detention. It will be noticed that sub –s. (1) of S. 3 stops with the words ' make an order directing that such person be detained', and does not go further and prescribe that the detaining authority shall also specify the period of detention. Otherwise, there should have been the following words added at the end of this sub section 'and shall specify the period of such detention'. What is true of sub section 1 of section 3 is also true of sub section 2 thereof. It is not permissible for the Courts, by a process of judicial construction, to alter or vary the terms of a section. Under the scheme of the Act, the period of detention must necessarily vary according to the exigencies of each case i.e. the nature of the prejudicial activity complained of. It is not that the period of detention must in all circumstances extend to the maximum period of 12 months as laid down in S. 13 of the Act.

11. The above question was again considered by the Apex Court in the case of T. Devaki v. Government of Tamil Nadu and others, 1990 SCC (Crl.) 348.

12. After discussing the decisions of the Apex Court in the cases of Gurbux Anandram Bhiryani, 1988 SCC (Crl.) 914, Ujagar Singh vs. State of Punjab, AIR 1952 SC 350, Suna Ullah Butt v. State of J&K 1973 SCC (Crl.) 138, Suresh Bhojraj Chellani v. State of Maharashtra, 1983 SCC (Crl.) 202 and A.K. Roy v. Union of India, 1982 SCC (Crl.) 152 the Apex Court held as below: -

"It is thus clear that the view taken in Gurbux Bhiryani case (supra) on the interpretation of Section 3 of the Maharashtra Act is in correct. This Court has while considering the question of the validity of the detention order made under different Acts, consistently taken the view that it is not necessary for the detaining authority or the State Government to specify the period of detention in the order. In the absence of any period being specified in the order the detenue is required to be under detention for the maximum period prescribed under the Act, but it is always open to the State Government to modify or revoke the order even before the completion of the maximum period of detention. We are, therefore, of the opinion that the impugned order of detention is not rendered illegal on account of the detaining authority's failure to specify period of detention in the order".

13. In view of the above decisions, the detaining authority is not under obligation to specify the period of detention and the detention order is not rendered illegal on account of detaining authority's failure to specify period of detention in the order. It is also clear that the words 'during such period as may be specified in the order' occurring in section 3 (2) of the Act relate to the delegation/authorization to the District Magistrate or the Commissioner of the Police and not to the period of detention of a detenu. Therefore, we find no force in the above detention and hold that the detention is not invalid on account of non mentioning of period of detention of the detenu.

Point No. 2

14. The grounds of detention though does not indicate by which Government order the Detaining Authority was authorised to pass order of detention. But his authority have no where been challenged in any paragraph of the writ petition. Therefore, the Detaining authority did not disclose his authorization in his counter affidavit. The learned A.G.A. has pointed out that by Notification No. 111-1-1-80 C x 7 dated September 13, 2002, published in U.P. Extraordinary Gazettee dated September 13, 2002, (Chapter 4 Part B) in exercise of power conferred on him by Sub section 3 of Section 3 of National Security Act, 1980, the Governor of U.P. was pleased to empower all the District Magistrate of the State to exercise the powers conferred by sub section 2 of section 3 for a further period of three months with effect from September 17, 2002. Fax copy of above notification was also shown.

15. The impugned detention order was passed on 16.12.2002 and therefore on the date of passing the detention order the District Magistrate was authorize to exercise power conferred by section 3 (2) of National Security Act. Therefore, the order of detaining authority was not without jurisdiction and non mentioning his above authority does not invalidate the detention order.

Points No. 3 (a), 3 (b)

16. Learned counsel for the petitioners contended that incident in question related to simply law and order problem, as it was a solitary incident and has no effect or impact on public order. Therefore, detention order on the basis of

above incident is invalid. He further contended that a solitary incident was not sufficient without any other material on record to record satisfaction of the detaining authority that on release on bail, each of the petitioner would indulge in similar activities prejudicial to the maintenance of public order. He has placed reliance on the decision of Apex Court and of this Court in Ayya @ Ayub vs. State of U.P. 1989 (1) AWC 90, Vashistha Narain Karwaria vs. State of U.P., 1991 AWC 558, Seshdhar Misra vs. Superintendent, Central Jail, Naini and others, 1985 (suppl.) ACC 304, Smt. Shashi Agarwal vs. State of U.P. and others, 1988 SCC (Crl.) 178, Rajeev Bharati vs. District Magistrate, 1995 AWC 120, Surya Prakash Sharma vs. State of U.P. and others, 1994 SCC (Crl.) 1691, Dharmendra Suganchand Chelawat and another v. Union of India and others AIR 1990 SC 1196 and Gulab Mehra vs. State, 1987 SCC (Crl.) 721.

17. On the other hand, the learned A.G.A. contended that the incident in question taken as a whole, in the back ground in which it was committed, the previous antecedents of the petitioners, which are clear from the material available on record clearly indicated that incident in question related to public order and there were sufficient materials before the detaining authority to record his satisfaction that on release on bail, the petitioners would indulge in similar activities prejudicial to the maintenance of public order.

The term 'public order' and 'law and order' have been considered by the Apex Court and this Court in several cases.

18. In Gulab Mehra vs. State of U.P. and others (supra) it was held by the Apex Court that an act whether amounts to a breach of law and order or a breach of public order solely depends on its extent and reach to the society. If the act is restricted to particular individuals or a group of individuals it breaches the law and order problem but if the effect and reach and potentiality of the act is so deep as to affect the community at large and or the even tempo of the community then it becomes a breach of public order.

19. In Smt. Angoori Devi for Ram Ratan vs. Union of India, 1989 (26) ACC 1 SC the Apex Court observed as below :

"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 two concepts.

20. In T. Devakai vs. Government of Tamil Nadu and others (supra) it was held that 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 the extent of the reach of the act upon the society. A solitary assault on one individual can hardly be said to disturb public order in jeopardy so much as to bring the case within the pur view of the Act providing for preventive detention. Such a solitary incident can only raise a law and order problem and no more.

21. In the case of Sheshdar Misra vs. Superintendent, Central Jail, Naini and others (supra) a Full Bench of this Court considered the question of distinction between law and order and public order under section 3 of the Act and held:

"Wherein a detention order the detenue was alleged to have committed murder of an Advocate at a public place as a result of which local residents closed the doors of their houses and shops and it was further alleged to have threatened the prosecution witnesses to desist from tendering evidence in the murder case pending against him, the two grounds being intimately connected with incident of murder committed on account of personal animosity and there being no material on record to suggest that the detenue would have indulged into similar activities of murder, in future, it could not be said that the single act of murder had its impact on the society to such an extent as to disturb the normal life of the public. Merely because the local residents closed the doors of their houses and shops did not mean that the balanced tempo of the life of the general public was disturb as a result of which the members of the public not carry on normal avocation of their life.

22. In the case of Arun Ghosh vs. State of West Bengal, AIR 1970 SC, 1228 the Apex Court held as below:-

"This Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was aid to enhance more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order.

23. It means therefore that the question whether a man has only committed 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 the extent of reach of the act upon the society."

24. The incident in instant case if tested on the guidelines laid down in above decisions, we find that an altercation had taken place on 15.11.2002 at about 5 p.m. between petitioner Subhash and Sumit S/o Darshan Lal on playing cricket. On account of above incident all the petitioners to show their highhandedness and to create terror in their biradari armed with country made pistols raided the house of Sumit, S/o Darshan Lal and fired by country made pistols in order to kill Sumit. When the

neighbouring persons heard the sound of fire came to the spot, all the petitioners fired on them, due to which Rahul, Vijay, Ram Prasad, Pappu, Deepak and Ankush aged about 4 years were badly injured. Not only this, the petitioners before committing the above incident had cut telephone wire, so that the information of the incident could not be sent to Higher Authorities. The above incident was committed in the month of Ramjan when the people of Muslim community were busy in purchasing articles for Roja After. The material on record further shows that the locality in which the incident took place had mixed population of Hindus and Muslims and the manner in which the dare devil incident was committed by the petitioners created a sense of insecurity, chaos and panic amongst the people of the locality. The report of Local Intelligence Unit dated 17.11.2002 placed before the Detaining Authority also indicated that the petitioners were persons of criminal mentality and on the occasion of "Holi" they had also attacked on Sikh community, but due to their terror nobody could dare to lodge report against them. On one side of the locality in which the incident in question took place there lived people of Muslim community and on other side people of Sikh community were residing and they became fear stricken and sensitive on account of dare devil incident committed at public place in broad day light. The injury report and the statement of injured persons also indicated that on account of incident even tempo of life was badly disturbed and every person of the locality was having sense of fear and insecurity in coming out of his house. Therefore, the incident in question coupled with the circumstances and the manner in which it was committed in order to show highhandedness of the petitioners and to create tension among the persons of different community clearly indicated that it affected public order and it was not simply a question of law and order problem.

25. It is not disputed that the detention order can be passed against a person who is detained in jail provided the detaining authority record his satisfaction that there is real possibility of being the detenu released on bail and on release on bail he would indulge in similar activities prejudicial to the maintenance of public order.

26. In the case of Smt. Shashi Agarwal vs. State of U.P. and others, 1988 SCC (Cri) 178 it was held by the Apex Court that every citizen has right to move the Court for bail when he is arrested under the ordinary law of the land and he cannot be interdicted from moving the court for bail clamping an order of detention. The possibility of the Court granting bail may not be sufficient. Nor a bald statement that the person would repeat his criminal activities would be enough. There must also be a credible information or cogent reasons apparent on the record that the detenu, if enlarged on bail, would act prejudicially to the interest of public order.

27. In the case of Dharmendra Sugan Chand Chelawat and another vs. Union of India and others, (supra) the Apex Court held as below:-

"The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention

must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression "compelling reasons" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenue is likely to be released from custody in the near future and (b) taking into account the nature of the antecedents activities of the detenue, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

28. In the case of Surya Prakash Sharma vs. State of U.P. and others, (supra) relying on the principles laid down in Rameshwar Shah vs. District Magistrate, Burdwan, AIR 1964 SC, 334 and Dharmendra Suganchand Chelawat and another v. Union of India and others, AIR 1990 SC, 1196 the Apex Court held as below:-

"The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention."

29. In the case of Smt. Kamrunnisa vs. Union of India, AIR 1991 SC, 1640 the Apex Court held as below:-

"From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly by 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 he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing, if the authority passes an order after recording his satisfaction in this behalf, such an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question if before a higher court.

30. In the light of above decisions we would consider whether the detaining authority was justified in passing the detention order while the petitioners were in jail.

The detaining authority has recorded his satisfaction in the grounds of detention as below:

"At present you along with your associates are detained in District Jail, Rampur in connection with case crime no. 1571 of 2002 under Sections 147, 148, 149, 307 IPC and 25 Arms Act. The bail application was moved by you in the Court on 28.11.2002 and there is possibility of allowing it. In case you are released on bail in the above crime, you would indulge in similar criminal

activities and would affect the public order of the locality."

31. Therefore, the District Magistrate had recorded satisfaction that detenu at the time of passing of order was detained in jail and had moved bail application on 28.11.2002 and there was real possibility of being him released on bail. The question which remains for determination is whether there was cogent material and compelling necessity for recording satisfaction by the detaining authority that on release on bail, the petitioners would indulge in similar activities prejudicial to maintenance of public order.

32. As mentioned above, the incident in question was not the sole incident, which was committed by the Petitioners. According to report of Local Intelligence Unit and other materials on record, the petitioners were of criminal mentality and on the occasion of Holi they also attacked on Sikh Community. On account of their terror nobody could dare to lodge report against them and they were in habit of committing crimes affecting the maintenance of public order. No doubt, the incident, which took place on Holi had no live link and nexus with the detention order, but it shows the tendency of the petitioners in indulging the acts prejudicial to the maintenance of public order. Therefore, there were sufficient materials before the Detaining Authority to record his satisfaction that petitioners if released on bail would indulge in similar activities prejudicial to the maintenance of public order. Therefore, the detention order is not invalid on this count.

Point No. 4

33. For determining delay we have to consider each case separately.

(1) Habeas Corpus Writ Petition No. 4839 Sachin @ Banti vs. State. In this petition, according to the counter-affidavit of Sri Amar Pal, Deputy Jailor, District Jail Rampur, the petitioner Banti submitted his representation on 26.12.2002, which was sent to District Magistrate, Rampur on same day. The District Magistrate rejected it on same day, information regarding it was received in the jail on 28.12.2002 and the detenu was communicated about rejection on same day i.e. 28.12.2002.

34. The counter affidavit of Sri S.K. Verma, District Magistrate, Rampur shows that the representation of the petitioner dated 26.12.2002 was received by him on same day and was rejected on same day. The other copies of the representation were sent to State Government as well as Central Government through special messenger well within time.

35. Counter affidavit of Sri C.P. Singh, Deputy Secretary, Home and Confidential, Department, U.P. Civil Secretariat shows that the representation of the petitioner dated 26.12.2002 was received in the concerned section of the State Government on 28.12.2002. The State Government sent the copies of the representation and parawise comments thereon to U.P. Advisory Board, vide its letter dated 30.12.2002 and to Central Government by letter dated 30.12.2002. Thereafter, the concerned section of the State Government examined the representation and submitted a detailed

note on 30.12.2002 and Deputy Secretary examined it on 30.12.2002 and special secretary examined it on 30.12.2002 and thereafter, it was submitted to Secretary, who examined it and rejected on 31.12.2002.

36. The counter affidavit of Sri Ramesh Kumar, Under Secretary, Ministry of Home Affairs, Government of India stated that the representation of the petitioner dated 26.12.2002 was received by the Central Government on 6.1.2002 and on concerned desk of Ministry of Home Affairs on 7.1.2002. The representation was immediately processed for consideration and case of detenu was put up before the Under Secretary on 14.1.2002. The Under Secretary considered it on 14.1.2002 and submitted before Director, Ministry of Home Affairs on 14.1.2003. The Director considered the same and sent to Joint Secretary, Ministry of Home Affairs on 14.1.2003. The Union Home Minister considered on 14.1.2002 and finally rejected on 17.1.2002. It also disclosed that 11 and 12 January, 2003 were holidays. This shows that there was no delay in deciding the representation of detenu by District Magistrate State Government and Central Government.

(2) Habeas Corpus Writ Petition No. 4840 of 2003 Vinod vs. State of U.P. and others.

Counter affidavit of Sri Amar Pal, Deputy Jailor shows that the petitioner submitted his representation on 4.1.2003 and the same was submitted to District Magistrate on same day i.e. 4.1.2003. The District Magistrate decided the representation on same day and communicated to the jail Authorities on 6.1.2003 and detenu was accordingly informed on 6.1.2002.

37. Counter affidavit of Sri Surendra Kumar Verma, District Magistrate, Rampur shows that representation of the petitioner dated 4.1.2003 was considered by him on same day and was rejected by him on same day. The remaining copies of representation along with parawise comments were sent to State Government through special messenger on same day i.e. 4.1.2002.

38. Counter affidavit of Sri C.P. Singh, Deputy Secretary, Home and Confidential Department U.P. Civil Secretariat, Lucknow disclosed that representation of the petitioner dated 4.1.2003 was received in the concerned section of State Government on 6.1.2003. The State Government sent copies of the representation and parawise comments thereon to the U.P. Advisory Board, vide letter dated 7.1.2003 and to the Central Government vide letter dated 7.1.2003. He examined the representation on 8.1.2003, the Special Secretary examined it on 8.1.2003 and thereafter submitted to the Secretary, who examined it on 8.1.2003 and submitted to the Higher Authorities for final order of the State Government. After due consideration, the said representation was finally rejected by State Government on 9.1.2003.

The counter affidavit of Sri Ramesh Kumar, Under Secretary, Ministry of Home Affairs, Government of India disclosed that representation of the petitioner dated 4.1.2003 was received by the Central Government on 9.1.2003. It was processed for consideration and was put up before Under Secretary on 13.1.2003 as 11 and 12.1.2003 were

holidays. The Under Secretary considered it on 14.1.2003. The Director considered it on 14.1.2003, the Joint Secretary considered it on 14.1.2003 and Union Home Secretary on 17.1.2003 and finally rejected it on 17.1.2003.

39. It indicates that there was no delay in deciding representation by District Magistrate, State Government and Central Government. Thus, there was no delay in deciding the representation of the petitioner.

(3) Habeas Corpus Writ Petition No. 4842 Ramesh vs. State of U.P.

Counter affidavit of Sri Amar Pal, Deputy Jailor, Rampur shows that the petitioner submitted his representation on 4.1.2003, which was sent to District Magistrate on same day. The District Magistrate rejected it on same day and communicated on 6.1.2003. The detenu was informed about this rejection by District Magistrate on 6.1.2003.

40. Counter affidavit of Sri S.K. Verma, District Magistrate, Rampur shows that representation of the petitioner dated 4.1.2003 was received by him on same day and he rejected it on same day. Thereafter, aforesaid representation was sent through Special messenger to the State Government as well as the Central Government on 5.1.2003.

41. Counter affidavit of Sri C.P. Singh, Under Secretary, Home and Confidential Department U.P. Civil Secretariat, Lucknow shows that representation of the petitioner dated 4.1.2003 was received in the concerned section of State Government on 6.1.2003. The State Government sent copies of representation and parawise comments thereon of U.P. Advisory Board, vide letter dated 7.1.2003 and to the State Government, vide letter dated 07.01.2003. Thereafter, the concerned Section of the State Government examined the representation and submitted detailed note on 07.01.2003. The deponent examined it on 08.01.2003 and the Special Secretary examined it on 08.01.2003 and thereafter, submitted to the Secretary. The Secretary examined it on 08.01.2003 and submitted to the higher authorities for final orders of the State Government. After due consideration, the said representation was finally rejected by State Government on 09.01.2003.

42. There is no counter-affidavit on behalf of Union of India. The counter-affidavit of Sri Amar Pal, Deputy Jailor no doubt shows that the information regarding rejection of representation of detenu dated 4.1.2003 was received from Central Government on 23.1.2003, vide radiogram dated 21.1.2003. But it is not clear as to when the representation of the detenu was received by Central Government and when it was decided. Therefore, the delay in deciding the representation of the detenu by the Central Government un-explained.

(4) Habeas Corpus Writ Petition No. 4845 of 2003 Nauratan vs. State of U.P.

Counter-affidavit of Sri Amar Pal, Deputy Jailor, District Jail, Rampur shows that the petitioner submitted his representation on 04.01.2003 in six copies and the same were sent through the District Magistrate, Rampur by his letter dated 04.01.2003. The representation of the Petitioner was rejected by the Detaining Authority on same day and

information was received on 06.01.2003, which was communicated to the detenu on 06.01.2003.

43. Counter-affidavit of Sri S.K. Verma, District Magistrate, Rampur shows that representation of the petitioner dated 04.01.2003 was received by the Jail Authorities on 04.01.2003, which was considered and rejected by him on same day. Thereafter, the aforesaid representation was sent though special messenger to the State Government and Central Government on 05.01.2003.

44. Counter-affidavit of Sri C.P. Singh, Under Secretary Home and Confidential Department, U.P. Civil Secretariat, Lucknow disclosed that petitioner's representation dated 4.1.2003 along with parawise comments thereon forwarded by the District Magistrate, Rampur, vide his letter date 4.1.2003 was received in the concerned Section on 6.1.2003. The State Government sent copies of representation and parawise comments thereon to U.P. Advisory Board, vide letter dated 7.1.2003 and to the Central Government, vide letter dated 7.1.2003. The concerned Section of State Government examined representation and submitted detailed note on 7.1.2003. Under Secretary examined it on 8.1.2003. Special Secretary examined on 8.1.2003 and Secretary examined on 8.1.2003. The above representation was finally rejected by the State Government on 9.1.2003.

45. Counter affidavit of Sri Ramesh Kumar, Under Secretary, Ministry of Home Affairs, Government of India, New Delhi disclosed that representation of the petitioner dated 04.01.2003 was received by Central Government in the Ministry of Home Affairs on 09.01.2003, and in the concerned desk in the Ministry of Home Affairs on 10.01.2003, 11.01.2003 and 12.01.2003 were holidays. The representation was immediately processed for consideration on 13.01.2003. Under Secretary considered it on 14.01.2003, Director considered it on 14.01.2003, Joint Secretary considered it on 14.01.2003 and Union Home Secretary considered and finally decided on 17.1.2003.

46. It also shows that action was taken on the representation immediately by the authorities concerned and it was decided without any delay.

(5) Habeas Corpus Writ petition No. 4846 of 2003 Subhash vs. State of U.P. and others.

Counter-affidavit of Sri Amar Pal, Deputy Jailor, District Jail, Rampur shows that petitioner submitted his representation on 04.01.2003 in six copies and the same has been sent to the District Magistrate on same day i.e. 04.01.2003. The District Magistrate rejected it on same day and communication received on 06.01.2003. The detenu was communicated on 06.01.2003.

47. Counter-affidavit of Sri S.K. Verma, District Magistrate, Rampur shows that the representation of the petitioner dated 04.01.2003 was received by him on same day he considered and rejected it on same day and thereafter aforesaid representation was sent through special messenger to State Government and Central Government on 05.01.2003.

48. Counter-affidavit of Sri C.P. Singh, Deputy Secretary, Home and Confidential Department U.P. Civil

Secretariat, Lucknow shows that representation of the petitioner dated 04.01.2003 was received n the concerned section on 06.01.2003. The State Government sent copies of the representation and parawise comments thereon to U.P. Advisory Board, vide its letter dated 07.01.2003 and to the Central Government, vide letter dated 07.01.2003. He examined the representation of the petitioner on 07.01.2003 the Special Secretary examined it on 08.01.2003 and submitted to the Secretary. The Secretary examined it on 08.01.2003 and submitted it to the higher authorities for final decision by the State Government. After due consideration, the State Government finally rejected on 09.01.2003.

No counter-affidavit has been filed on behalf of Central Government.

49. Though para 13 of counter affidavit of Sri Amar Pal, Deputy Jailor, District Jail, Rampur disclosed that representation of the petitioner dated 04.01.2003 has been rejected by the Central Government and information was sent on 07.02.2003 and same was received on 10.02.2003, which was served on the petitioner. But it is not clear as to when the representation was received by Central Government and when it was finally rejected. Thus, the delay in disposal of representation of the petitioner by the Central Government has not been explained.

50. In view of our findings on the above points in Writ Petition No. 4842 and 4846, there was un-explained delay on the part of Central Government in deciding representation of the petitioner. Therefore, continued detention of petitioner Rajesh and Subhash have rendered invalid. We also find that there is no force in the writ petition of other petitioners Sachan, Vinod and Nauratan.

Accordingly, writ petitions no. 4839 of 2003 Sachin Vs. State, 4840 of 2003 Vinod vs. State and 4845 of 2003 Naratan vs. State have no force and are; accordingly, dismissed Writ petition No. 4842 of 2003 Rajesh Vs. State and 4846 Subhash vs. State are, accordingly, allowed. Continued detention of above petitioners is held illegal and respondents are directed to release them (Rajesh and Subhash) to set at liberty forth with unless want to be detained in connection with some other case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.5.2003

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

Civil Misc. Writ Petition No. 4274 of 2003

Ram Nihor Singh ...Petitioner
Versus
Principal Secretary (Law), Sachivalaya and others ...Respondents

Counsel for the Petitioners:
Sri T.P. Singh
Sri V.K. Singh

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

Legal Remembrance Manual-7.08 (6) Extention of age limit–Petitioner completed 60 yrs. as D.G.C. claming continuance beyond 62 yrs. Pursuance of G.O. Dt. 11.12.02– whether the extension can be claimed as a matter of Right ? held–No.

Held Para 9 & 12

We see no illegality in the impugned G.O. dated 11.12.2002. No doubt the note of para 7.08 (6) of the L.R. Manual contemplates continuation of service of a government counsel beyond 60 years but that does not mean that they have a right to continue forever. It is open to the government to fix the age limit and they have fixed it at 62 years and we see no illegality in the same.

Thus there is no illegality in the impugned G.O. dated 11.12.2002. This writ petition and all other similar writ petitions pending in this Court challenging the G.O. dated 11.12.2002 reducing the age limit of 62 years are hereby dismissed.

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

1. This writ petition has been filed against the impugned G.O. dated 11.12.2003 Annexure 13 to the writ petition and the impugned order dated 1.1.2003 and 13.1.2003 Annexure 11 and 1 to the writ petition. The petitioner has also prayed for a mandamus directing that he should be allowed to continue functioning as D.G.C. (Civil) till the age of 65 years.

Heard learned counsel for the parties.

2. The petitioner was appointed as A.D.G.C. (Civil), Allahabad by order dated 23.9.1978 and was given appointment letter dated 6.10.1978 vide Annexure 1 to the writ petition. It is alleged in paragraph 5 of the writ petition that he continued to work as such by virtue of his satisfactory service as recommended by the District Judge and District Magistrate in pursuance of various renewal orders issued from time to time.

3. It is alleged in paragraph 6 of the writ petition that a permanent vacancy of D.G.C. (Civil) arose and the petitioner was asked to take over charge vide letter dated 3.2.1990 Annexure 2 to the writ petition. He was appointed as full fledged D.G.C. (Civil) by order dated 31.7.1990 Annexure 3 to the writ petition. This tenure was extended till 31.12.1991 vide Annexure 4 to the writ petition and thereafter he was given extensions from time to time.

4. The petitioner's service came to an end on his completion of his age at 60 years on 2.1.2001 against which he filed writ petition no. 5160 of 2001 which was allowed vide judgment dated 18.5.2001 copy of which is Annexure 8 to the writ petition.

5. It may be mentioned that the note to paragraph 7.08 (6) of the L.R. Manual states:

"The renewal beyond 60 years of age shall depend upon continuous good work, sound integrity and physical fitness of the Counsel."

6. It appears that it was on the basis of that note that the Division Bench decided writ petition no. 5160 of 2001 Ram Nihore Singh vs. State of U.P., 2001 A.G.J. 896 holding that the petitioner's termination of service at the age of 60 years was illegal since the note to para 7.08 (6) itself contemplates continuing the service beyond 60 years.

7. However, by the impugned G.O. dated 11.12.2002 it has been stated that the term of D.G.C. (Civil) can be continued till the age of 62 years provided he is physically fit as certified by the

Chief Medical Officer and has done good work as certified by the District Magistrate.

8. Thus the maximum age limit of D.G.C./A.D.G.C. is now 62 years as mentioned in the G.O. dated 11.12.2002. Since the petitioner completed 62 years on 1.1.2003 his term was not extended.

9. We see no illegality in the impugned G.O. dated 11.12.2002. No doubt the note of para 7.08 (6) of the L.R. Manual contemplates continuation of service of a government counsel beyond 60years but that does not mean that they have a right to continue forever. It is open to the government to fix the age limit and they have fixed it at 62 years and we see no illegality in the same.

10. Learned counsel for the petitioner submitted that in the earlier G.O. dated 22.12.2001 Annexure 10 to the writ petition the maximum age limit was 65 years but now it has been curtailed to 62 years. He has submitted that this is illegal because this deprived the government counsels of their vested right to continue till 65 years. We do not agree. It is open to the government to fix the age limit as to when the term of a government counsel shall come to an end. The G.O. dated 22.12.2001 is an executive order and one executive order can be modified by another executive order under Section 21 of the General Clauses Act and Article 166 of the Constitution. Fixing of age limit at 65 years was not done by any legislative enactment but only by a G.O., and hence it can be modified or revoked by another G.O. and that is what has been done in this case. We do not agree that any accrued right has been taken away by the impugned G.O. dated 11.12.2002.

11. Learned counsel for the petitioner stated that some government counsels have continued as such even after the age of 62 years. If that is so their term will be deemed to have come to an end forthwith provided they have crossed the age of 62 years.

12. Thus there is no illegality in the impugned G.O. dated 11.12.2002. This writ petition and all other similar writ petitions pending in this Court challenging the G.O. dated 11.12.2002 reducing the age limit of 62 years are hereby dismissed. The interim order if any is hereby vacated.

13. Let the Registrar General of this Court send copy of this judgment forthwith to the Law Secretary, U.P. and all District Judges in the State.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.5.2003

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

Civil Misc. Writ Petition No. 19655 of 2003

Raghuraj Pratap Singh alias Raja Bhaiya ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri T.P. Singh
Sri Rajiv Gupta
Sri Dilip Kumar
Sri A.K. Singh
Sri J.R. Singh Tomar

Counsel for the Respondents:
S.C.

U.P. Gangsters and anti social activities (Prevention) Act 1986- Section 7 (4)- order passed of State Govt. under Section 7 (4) by which petitioner's case transferred from Special Judge (Gangster Act) Allahabad to Kanpur challenged-Held totally administrative nature-not a quasi judicial-does not effects rights & habilities- No interference-

Held-para-4

In our opinion though the dividing line between an administrative order and a quashi judicial has become thin but it has not been totally obliterated. A quashi judicial order affect rights and habitries but the impugned order does not do so.

Case law:
AIR 1970 SC 150, 2002(4) AWC 3221 (Para II), 2001 (2) SCC 186, AIR 1996 S.C. 11

U.P. Gangster and Anti Social activities (Prevention) Act 1986- Section 7 (1)- Petitioner challenged order on the ground that only special court at Allahabad has jurisdiction -Held-order passed on the report of District Magistrate Kelating Law & order point valid-state Govt. can pass such order under Section 7 (4).

Held- Para 7

In our opinion, the petitioner was a resident of Pratapgarh and was elected from Kunda Assembly Constituency, Pratapgarh. His activities relating to the criminal cases are alleged to have arisen at Pratapgarh and hence the District Magistrate, Pratapgarh was fully competent to give such a report.

Constitution of India Article 166- Whether principal Secretary (Law) can pass such order? On behalf of the Governor? Held-Order passed by principal Secretary (Law) under Section 7 (4) to be deemed as an order of the Governor.

Held- Para 9

In our opinion the Secretary or even the Deputy Secretary, U.P. Govt. can pass orders on behalf of the Governor under the Rules of Business and Standing Orders. The impugned order, though it has been signed by the Principal Secretary (Law) U.P. Government, has to be deemed as an order of the Governor. As held by the Supreme Court in Samsher Singh Vs. State of Punjab (AIR 1974 SC 2192 vide para 35) When a ;civil servant takes a decision he does not do it as a delegate of his Minister. He does it on behalf of the Government. The officers are the limbs of the Government, and not its delegates.
Case law-
AIR 1974 SC 2192 (Vide para 35)

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

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

2. The petitioner has challenged the impugned order dated 29.4.2003 (Annexure VIII to the writ petition). By the impugned order the State Government has directed that certain criminal cases against the petitioner be transferred under section 7 (4) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 from the Court of special Judge (Gangsters Act) Allahabad to the Court of Special Judge (Gangsters Act), Kanpur Nagar.

3. Learned counsel for the petitioner has challenged the impugned order relying upon a Full Bench decision of the Court in **Ashok Kumar Dixit vs. State of U.P. and another** 1987 (24) ACC 169 and has invited our attention to paragraph 64 and 65 of that decision it has been observed in paragraph 64 of that decision

that the power under section 7 (4) to transfer cases is not unconstitutional. However, in paragraph 65 it has been observed that this power is exceptional in nature and cannot be exercised on mere humour, whims of fancies. The State Govt. will have to record reasons.

4. The State Government has relied upon the report of the District Magistrate, Pratapgarh, wherein it has been stated that the petitioner has to be brought from Kanpur to Allahabad on specific dates and this is creating problem of law and order and security, and traffic is also adversely affected causing difficulties for the general public. In our opinion an order under section 7 (4) of the Act is an administrative order and not a quashi judicial order. The learned counsel for the petitioner has relied upon a decision of the Supreme Court in **A.K. Kraipak and others vs. Union of India and others** (AIR 1970 Supreme Court 150) wherein it has been held that the dividing line between administrative order and a quashi judicial power has become thin. In our opinion though the dividing line between an administrative order and a quashi judicial has become thin in our opinion though the dividing line between an administrative order and a quasi judicial order has become thin but it has not been totally obliterated. A quashi judicial order affect rights and habilities but the impugned order does not do so.

5. Learned counsel for the petitioner submits that by the order transferring the case under section 7 (4) from one Special Judge to another special judge (Gangsters Act) a lis is involved because certain amenities which will be available at the Naini Jail, Allahabad are not available at Kanpur Jail. We do not agree. Mere grant or non grant of amenities in a Jail does not create any lis.

6. The learned counsel for the petitioner has submitted that under section 7 (1) only the Special Court which is at Allahabad has jurisdiction over the case. However, section 7 (1) has to be read along with section 7 (4) which gives power to the State Govt. to transfer cases under the Gangsters Act.

7. The impugned order was passed on the basis of the report of the District Magistrate, Pratapgarh and it is alleged by the petitioner that he did not have any knowledge about the law and order situation at Allahabad or Kanpur. In our opinion, the petitioner was a resident of Pratapgarh and was elected from Kunda Assembly Constituency, Pratapgarh. His activities relating to the criminal cases are alleged to have arisen at Pratapgarh and hence the District Magistrate, Pratapgarh was fully competent to give such a report.

8. Learned counsel for the petitioner then submitted that the Principal Secretary (Law) could not have validly passed the impugned order under section 7 (4) and it could be passed only by the Governor. He has relied on Article 166 of the Constitution of India for this purpose.

9. In our opinion the Secretary or even the Deputy Secretary, U.P. Govt. can pass orders on behalf of the Governor under the Rules of Business and Standing Orders. The impugned order, though it has been signed by the Principal Secretary (Law) U.P. Government, has to be deemed as an order of the Governor. As held by the Supreme Court in **Samsher Singh Vs. State of Punjab** (AIR 1974 SC 2192 vide para 35) When a; civil servant

takes a decision he does not do it as a delegate of his Minister. He does it on behalf of the Government. The officers are the limbs of the Government, and not its delegates. …..Constitutionally the act or decision of the official is that of the Minister."

10. In our opinion the order under section 7 (4) is an Administrative order and it is well settled that the Court has very limited scope of interference in administrative orders. The Court cannot sit in appeal over administrative orders vide **P.K. Misra vs. Indian oil Corporation**, 2002 (4) AWC 3221 (Para 11). The Court can only interfere with the administrative orders if they are arbitrary or mala fide. In **Om Kumar vs. Union of India**, 2001 (2) SCC 386, the Supreme Court referred to the wednesbury Principle while discussing the scope of judicial review of administrative decisions. In **Tata Cellular vs. Union of India**, AIR 1996 SC 11, it was held that the scope of such review is limited. In the instant case we do not find any good ground for interference with the impugned order. Moreover, writ is a discretionary remedy, and we are not to exercise our discretion in this case.

We do not find any merit in the writ petition and it is dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.5.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 9600 of 1984

Ram Prasad Prajapati ...Petitioner
Versus
Labour Court, (U.P.) at Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri R.C. Singh
Sri Arvind Kumar

Counsel for the Respondents:
Sri M.B. Saxena
S.C.

Constitution of India Article 226-Dismissal-workman found guilty of using abusive works-riotous and disorderly violent behaviour-finding recorded by Labour Court-not perverse-cannot be interfered-dismissal order held proper.

Held- Para 14
From the record and the evidence which was looked into by the Labour Court under Section 11-A of the Industrial Disputes Act it is noted that the workmen were found responsible in riotous behaviour, beating the officials of the company and using abusive language and slogans. There are findings of fact by the Labour Court. The Courts in catena of decisions have held that the punishment of dismissal for using abusive language and beating the superior officers is proportionate to the charge.
Case law discussed:
2002 (1985) FLR 949

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

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

This petition arises from an award passed by the Labour Court, Allahabad dated 23 Februrary, 1984 in Adjudication Case No. 196 of 1981. The award was enforced by publication on the Notice board under Section 6 (3) of the U.P. Industrial Disputes Act, 1947 on 28.4.1984.

2. The dispute arises due to termination of the services of the petitioner on 18.12.1980 by the Company. Aggrieved by his termination the petitioner raised an industrial dispute, which was referred by the State Governement in exercise of the powers under Section 4-K of the Act to the Labour Court Allahabad where it was registered as Adjudication Case No. 196 of 1981.

3. The case set out by the employer was that the workman along with other workers assaulted the Chief Executive Officer of the Company. He was found responsible for riotous and disorderly behaviour and was dismissed from service after holding enquiry. It was also the case of the employer that some of the workers who were with the dismissed workman had accepted their guilt, which establishes the fact of involvement and participation of the workman in the aforesaid act of misconduct.

4. The case as set out by the petitioner workman before the Labour Court was that he was victimized for such behaviour, charge sheeted for the alleged misconduct and illegally dismissed from service. Question mark was also raised regarding the fairness of the domestic enquiry on the basis of the pleadings of the parties an additional issue was framed before the Labour Court as to whether the domestic enquiry by the employer was fair and proper. The Labour Court by its interim award held that the domestic enquiry was fair proper and in accordance with law. This interim award is also part of the final award of the Labour Court.

5. By the impugned award the Labour Court has held that the petitioner workman misbehaved with the Chief Executive Officer of the establishment of the company, was involved in the act of beating him along with others, instigated other workers to indulge in such violent activity and as such it was not proper to keep such a person in service for the reason that industrial discipline, peace and harmony have to be maintained and if the workman is let out, indiscipline would increase. He found that the punishment of dismissal was not disproportionate, illegal and unjustified. The operative portion of the findings recorded by the Labour Court in paras 4, 5 and 6 are as under:

4. इस विवाद में एक प्रारम्भिक वाद बिन्दु इस बात को निश्चित करने के लिए बनाया गया कि घरेलू जांच न्यायसंगत और उचित ढंग से की गयी या नहीं। इस बाद बिन्दू पर मैंने 1.12.83 को निर्णय दिया और इसमें मैंने जांच की कार्यवाही को उचित तथा न्यायसंगत पाया । अब केवल यह देखना है कि श्रमिक को जो दण्ड दिया गया वह उचित है अथवा नहीं।

5. 30.5.80 की घटना इस प्रकार हुई। विघुत विभाग ने एक नोटिस दिया कि 28.5.80 से 2 जून सन 80 तक कोई भी उघोग संस्था बिजली का प्रयोग नहीं करेगी । इस नोटिस को प्राप्त करने पर प्रतिष्ठान ने ले ऑफ कर दिया। इस ले आफ के कारण श्रमिकगण उत्तेजित हो गये । 30.5.80 को प्रातः नौ बजे कुछ श्रमिकगण ने गैर कानूनी मजमा बनाकर मुख्य कार्यकारी अधिकारी के कक्ष में घुस गये और उन्हें घसीटकर बाहर ले आये और उनको मारने लगे। जिन कर्मचारियों ने इन श्रमिकगण को रोकने का प्रयत्न किया, उन्हें ढकेल दिया गया। इस कार्य में सम्बन्धित श्रमिक ने भाग लिया और वह मारने वालों को उत्तेजित करता रहा। सम्बन्धित श्रमिक तथा उनके अन्य साथियों को आरोप पत्र दिये गये। श्रमिक ने जांच कार्यवाही में भाग लिया। उसने गवाहों से जिरह किया। जांच अधिकारी ने 1.12.80 को अपनी रिर्पोट दिया। सम्पूर्ण साक्ष्य का विश्लेषण करने के उपरान्त वह इस निष्कर्ष

पर पहुँचा कि आरोपित श्रमिकगण पर लगाये गये सभी आरोप सिद्ध हुये। यह निर्णय में पहले ही दे चुका हूं कि जांच की कार्यवाही न्यायसंगत और उचित ढंग से की गयी है।

6. प्रतिष्ठान के मुख्य कार्यकारी अधिकारी के साथ दुर्व्यवहार करने में सम्बन्धित श्रमिक ने भाग लिया। कुछ श्रमिक ने मुख्य कार्यकारी अधिकारी को मारा पीटा सम्बन्धित श्रमिक ने इन मारने वालों को उत्तेजित किया। मेरे विचार से इस प्रकार के श्रमिक को सेवा में रखना उचित नहीं है, क्योंकि इस प्रकार के लोगों से अनुशासनहीनता को बढावा मिलेगा। मेरे विचार से सेवा मुक्त का आदेश किसी प्रकार से अवैध या अनुचित नहीं है।

6. Learned counsel for the petitioner has denied in his argument that the workman concerned was dismissed from service for any trade union activity. It is alleged that he was dismissed from service as he was found responsible to organize riotous and disorderly behaviour and such an act cannot be said to be a trade union activity.

7. Learned counsel for the petitioner submits that in paras 1 and 3 of the written statement filed by the employer it has been stated that the petitioner along with others forcibly entered in the office of the respondents and assaulted the Officer but in the enquiry the Chief Security Officer has stated that the workman tried to enter in the gate and there were 200 workers whereas the Labour Court in its award held that the petitioner was only inciting the workers. On the basis of these averments the argument advanced by the learned counsel for the petitioner is that the finding of the labour Court that the petitioner was inducing the other workmen is never pleaded in the written statement filed by the employer hence it can not be improved by any other evidence. He has placed reliance on **1982 Smt. Bibbe Vs. Smt. Ram Kali, A.W.C. 665** in which it has been held that a decision based on facts not pleaded. No evidence would be permissible to be led with regard to a fact, which has not been pleaded. Relying the case of **Sy. Yakub Vs. K.S. Radhe Krishnan 1964 SC-477** he submits that the perversity of the order would warrants intervention by High Court under Article 226 of the Constitution of India. It is not denied that there was no evidence against the workman to incite the other workers and participate in the beating of the Chief Executive Officer.

8. Though it has not been alleged in the written statement of the employer that the petitioner has incited the other workers but by this the gravity of his misconduct is not reduced to an extent that punishment other than dismissal may be given. In paragraphs 1, 2 and 3 of the written statement it has been stated that on 30.5.80 some workmen of the concern along with Ram Prasad, Chandra Bali, Bhola, Lal Mani Akhaibar and others left their place of work and forcibly entered in the office of the Chief Executive Officer of Company pulled him out of the office, man handled him and also assaulted other officers of the Company. It is also stated that Ram Prasad and six others were assaulting the officers in broad daylight in presence of several employees of the company. They were immediately recognized and in view of the seriousness of the miscondenct of involvement in the riotous and disorderly behaviour collectively and they were charged of the offence and dismissed from service. There is sufficient evidence on record of involvement and participation of the worker in the aforesaid acts of misconduct and argument to the contrary is against the record.

9. The second argument of the learned counsel for the petitioner is that even if the charge of inducement is proved dismissal of the petitioner from service on the background of facts of the case is excessive and disproportionate to the charge leveled against him. He submits that the background of the case is explained in para 5 of the award and that the plea of Section 11-A of the Industrial Disputes Act was considered by the Labour Court in para 4 of the award and as such, this Court may interfere in the matter as the Labour Court in exercise its power under Section 11-A of the Industrial Disputes Act as the same was pleaded before the Labour Court. The quantum of punishment is not proportionate to the charge levelled against the petitioner. In this regard he has placed reliance on **AIR 1982 Rama Kant Misra Vs. State of U.P. SC-1552, 1984 Ved Prakash Vs. M/s Delton Cable SC-914 and 1989 (i) SCJ 232 Scooter India Limited Vs. Labour Court.**

10. However, from the award it is clear that the Labour Court has given a finding of fact that the punishment was not disproportionate to the charge levelled against him as such the aforesaid cases of Rama Kant, Ved Prakash and Scooter India Limited (Supra) are not applicable to the facts of the present case.

11. Relying on the case of **Dr. Ramesh Chandra Tyagi Vs. U.O.I., 1994 2SCC-416, B.C. Chaturvedi Vs. U.O.I., 1995 6 SCC-749, Ram Kishan Vs. U.O.I., 1995 6 SCC-157, U.P.S.R.T.C. Vs. Mahesh Kumar Misra, 2000 (3) SCC-450 and Shiv Prakash Rai Vs. State of U.P., 2001 3 UPLBEC 2222** he submits that even if plea of awarding lesser punishment is not taken before the High Court, it can still in exercise of power under Article 226 of the Constitution of India may interfere if it feels that the punishment is highly disproportionate to the charge/ misconduct.

12. He further submits that Section 2-A of the U.P. Industrial Disputes Act, 1947 which is equivalent to Section 11-A of the Industrial Disputes Act (Central) was inserted by U.P. Act No. 34 of 1978. There is no ban or restriction on exercise of Section 11-A of the Industrial Disputes Act. He submits that by the insertion of this Section the powers of the authority giving the award in the matter of relief has been widened as now the authority making the award has power to substitute the punishment given by the employer and reinstate the workman on the terms and conditions it deems fit and proper.

13. From perusal of the record it appears that the Labour Court has recorded a categorical finding regarding the guilt and participation of the workman in riotous behaviour inciting the workers and beating the Chief Executive Officer of the company. The punishment of dismissal awarded for such riotous and disorderly violent behaviour can not be said to be too harsh. Peace and harmony are necessary elements for creation of industrial atmosphere conducive for production and if this is disturbed the relationship between the master and the servant would be strained and production will suffer. If this is viewed with notional angle loss in production could be national loss. The reasons given by the Labour Court for not reinstating the petitioner are cogent reasons. After examining the evidence and the arguments I find that the Labour Court has neither committed any

error in law in holding the workman guilty and nor the award is perverse. The findings of fact, which are not perverse, should not be overturned in exercise of powers under Article 226 of the Constitution of India. I am also supported with my view by a recent judgment of the Apex Court in **2002 (1985) FLR 949 M/s Esen Dinki Vs. Rajiv Kumar** in this regard.

14. From the record and the evidence which was looked into by the Labour Court under Section 11-A of the Industrial Disputes Act it is noted that the workmen were found responsible in riotous behaviour, beating the officials of the company and using abusive language and slogans. There are findings of fact by the Labour Court. The Courts in catena of decisions have held that the punishment of dismissal for using abusive language and beating the superior officers is proportionate to the charge.

15. For these reasons and as a result of the aforesaid discussions it is not a fit case for exercise of powers under Article 226 of the Constitution of India. The writ petition fails and is dismissed.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.5.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No 7008 of 1984

Yogesh Chandra Rajvedi ...Petitioner
Versus
II Additional District Judge, Kanpur and others ...Respondents

Counsel for the Petitioner:
Sri Navin Sinha
Sri Vipin Sinha

Counsel for the Respondents:
Sri P.N. Saxena
Sri S.K. Chaturvedi
S.C.

U.P. Urban Building (Regulation of Letting & Rent) Control Act 1972-U.P. Act No. 13 of 1972-Section 18 (3)-power of the Execution Court-District Magistrate exercising power of execution authority-whether can go beyond the terms of judgement/order? Held 'No'.

Held- Para 14

The District Magistrate while exercising power under section 18 (3) of the Act to that of executing Court, cannot go beyond the terms of the order sought to be enforced and he cannot enter into the merit or de-merit of the case. The same view has been held by this court in 1998 (1) AWC 260 Dr. Smt. Keshav Devi Vs. The Addl. District Magistrate (Civil Supply) Lucknow and 1984(1) ARC 327 Abdul Ghafoor Vs. The Rent Control and Eviction Officer/D.S.O. Saharanpur and another.

Case law discussed:
1998 (1) AWC-260
1984 (1) ARC-32

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

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

The petitioner has filed the present writ petition challenging the judgments and order dated 18.6.1983 and 15.2.1984, Annexure-3 and Annexure-4 to the writ petition passed by respondents no. 2 and1 respectively. By the aforesaid order dated 18.61983 the Addl. City Magistrate held that:-

"उभयपक्षों के विद्वानों वकीलो की बहस तथा पत्रावली साक्ष्य के आधार पर मैं इस निश्कर्ष पर पहुंचा हूं कि प्रार्थी गण योगेशचन्द्र आदि के विद्वान वकील का यह तर्क रिवीजन में जिला जज महोदय ने कोई स्पेसीफिक आदेश दिया था जिसके अनुपालन बिना किसी आपत्ति आदि को सुने भी हुये इस न्यायालय का कर्तव्य है। मानने योग्य नहीं है। जैसा कि माननीय उच्च न्यायालय ने अपनेआदेश दिनांक २७.१.८३ में स्पष्ट कर दिया है। योगेशचन्द्र के प्रार्थना प्रपत्र के समर्थन में केवल इसी एक तर्क पर बल दिया जा रहा था। जो माननीय उच्च न्यायालय के विस्तति के आदेश के बाद बिलकुल मानने योग्य नहीं प्रतीत होता। अब न यह लाईसेन्सी है वाद न किराये दार है। और न सह ग्रहस्वामी है। इस सम्बन्ध में कि उनको किस हैसियत से कब्जा वापस दिलाया जाय उन्होनें न तो कोई साक्ष्य दिया है और न तो कानून दिखाया है। धारा १८/३/ पर आदेश पारित करने का अधिकार इस न्यायालय को ही है। अतः योगेशचन्द्र आदि को धारा १८/३/ का प्रार्थना पत्र निरस्त किया जाता है।

ह० जे० डी० श्रीवास्तव
अति० नगर मजि० ततीय/कि०नि०अ०
कानपुर। दिनांक १८.६.८३"

By order dated 15.2.1984 it has been held that:-

"I have gone through these two pronouncements and I am not to agree with the learned counsel that this court after issuing order for restitution on 7.7.78 can again pass an order for restitution specially when the R.C.&E.O. acting on the guide line laid down by the Hon'ble High Court in the writ petition decided on 17.1.83 has chosen to reject the same. The application to my mind is, not maintainable. It has therefore, to be rejected as not maintainable.

Order

The application is a accordingly rejected as not maintainable. The parties are left to bear their own cost.

S/d D.C. Srivastava
II Addl District Judge, Kanpur.
Dt. 15.2.84.

2. The prayer for restoring possession over the premises in dispute has been rejected.

The brief facts of the case are that the house in dispute was purchased by the father of the petitioner, Satish Chandra, since deceased, Benami in the name of his wife Smt. Sarasdwati Devi, respondent no.5. After the death of the father, the petitioner and his mother were residing in the aforesaid premises. Respondent no. 5 sold the property to respondent no. 3 through sale deed dated 23.11.1976 and handed over the possession of that premises, which was in her occupation.

3. Respondent no.3 after purchasing the property and taking over the possession of the portion of respondent no. 5 moved the release application under section 16 (1) (b) of U.P. Act No. XIII of 1972 against the petitioner on the ground that he was an unauthorized occupant. The vacancy in the aforesaid premises was notified by the Rent Control and Eviction Officer and the application for releases was allowed on 13.4.1977. Subsequently an order for delivery of possession was passed on 11.5.1977 and

the petitioner was dispossessed from the disputed house.

4. Aggrieved, the petitioner moved an application under Section 16 (5) of the Act for review of the order dated 13.4.1977, which was dismissed by the Rent Control and Eviction Officer III vide order dated 16.6.1977. The petitioner preferred a revision under section 18(1) of U.P. Act No. XIII of 1992, which was allowed and the order dated 16.6.1977 under section 16 of the Act was set aside and a finding was recorded that the petitioner was not an unauthorized occupants as he was a member of the family and was in possession from before, the revisional authority had not directed the Rent Control And Eviction Officer (RCEO) to restore the possession of the disputed portion to the petitioner vide Annesure-1.

5. The Court below relied upon the admission of Smt. Saraswati Devi in the sale deed that the petitioner occupied the portion on her behalf without any payment of rent and is not a tenant and held that this admission is binding upon her successor in interest and as such section 12 (1) (C) of the Act did not apply to the case. The operative portion of the order passed by the II Addl,. District Judge, Kanpur in Revision No. 99 of 1977 Yogesh Chandra Rajvedi Vs. Lal Chand and others is as follows:-

6. "Revision allowed. Order of the Tribunal dated 16th June, 1977 is rescinded. Review application of Yogesh Chandra is allowed. Order of the Tribuanl releasing the premises in occupation of Yogesh Chandra is cancelled. Now the Tribunal has ceased. Hence the Rent Control and Eviction Officer shall proceed under Section 18 (3) for placing the parties back in the position which they could have occupied but for orders dated 13th April and 16th June, 1977.

Since the case involved complicated questions of law and jurisdiction I would leave the parties to bear own costs all through.

Sd/- S.R. Bhargava,
II Addl. District Judge,
Kanpur. Dt. 7.7.78."

7. Respondent no. 3 challenged the validity and correctness of the order dated 7.7.1978 passed by the revisional court in writ petition no. 5590 of 1978, which was dismissed by judgment and order dated 30.6.1980. He filed special leave petition before the Hon'ble Supreme Court, which was also dismissed by judgment and order dated 19.2.1981.

8. After dismissal of the Special Leave Petition by the Apex Court, respondent no. 3 filed a civil suit in the court of Munsif, Kanpur arraying Rent Control and Eviction Officer as defendant no. 2. In the said suit an application for interim injunction was made restraining the petitioner, which was dismissed by the trial court. Aggrieved, he filed an appeal, which was also dismissed by the Ist Additional District Judge, Kanpur vide order dated 18.8.1982. The petitioner again filed another writ petition no 10427 of 1982 Lal Chand Vs. Yogesh Chand and others challenging the judgment dated 18.8.1982 of the Additional District Judge, Kanpur. The aforesaid writ petition was dismissed with the observation that the petitioner should move an application for restoration of possession before respondent no.2. His application under section 18 (3) of the Act was dismissed by Rent Control and Eviction Officer-III, Kanpur after making enquiry regarding

restitution of possession and set aside the findings recorded by respondent no.1. By order dated 15.2.1984 petitioner's application against the order dated 18.6.1983 was also dismissed by respondent no. 1.

9. The contention of the counsel for the petitioner is that once the orders dated 13.4.1977 and 16.6.1977 passed under section 16 of U.P. Act No. XIII if 1972 were set aside by the revisional court under section 18 (1) of the Act by order dated 7.7.1978, the District Magistrate has no power to review the order under Section 18 (1) and set aside the findings. It is further submitted that the District Magistrate under section 18 (3) has a power like executing Court, but it cannot set aside the order passed under section 18 (1) of the Rent Control Act. It is also submitted that the District Magistrate Under Section 18 (3) of the Act implements and enforce the order made under Section 16 of the Act. Once the District Judge has rescinded the order and has directed the applicant to be put back in possession, the District Magistrate while enforcing the said order cannot go beyond the order and sit in appeal over the same. Reliance has been placed in this regard in 1988 (1) AWC 260 and 1984 (1) ARC327.

10. From the above narration of facts, it is crystal clear that respondent no. 3 has been making attempt to thwart the proceedings as contemplated under section 18 (3) of U.P. Act No. XIII of 1972.

11. It appears from the record that in the sale-deed it was recited that Smt. Saraswati Devi had delivered possession of her portion to the purchaser and other family members including Yogesh Chanbdra Rajvedi would vacate the other portion of the house, which was in their respective possession. It has also mentioned in the sale deed that in the even her family members do not vacate their portion, it would be open to respondent no. 3 to get vacated the said portion through court or in any other manner.

12. The only short question involved in this writ petition is whether in the facts and the circumstances of the case stated above, respondent no. 3 could get the house vacated now.

13. It is contended by respondent no.3 that Smt. Saraswati Devi was owner of House No.119-69-A Nasimabad, Kanpur and this question had attained finality and cannot be re-agitated in the writ petition. It is submitted that Smt. Saraswati Devi was residing as owner in a portion of the house in question and Yogesh Chandra Rajvedi and Smt. Shankuntala were residing in ground floor portion and in first floor portion respectively of the house in dispute. Even if the petitioner was occupying any specific portion in the house in dispute, he was only the licensee of Smt. Saraswati Devi and this question has already been decided finally between the parties.

14. It is submitted that the notice of the release proceeding was duly served upon the petitioner, but he did not appear to contest the same and as such he was in unauthorized possession of the portion of the house in dispute and had not right to move any application under section 16 (5) of the Act for restoration of possession. The fact that the petitioner was a licensee, has also been confirmed by the revisional

Court. It is stated that the question of restoration of possession to the petitioner whose licensce was revoked, was not considered by this court nor the question of jurisdiction of the revisional court to pass an order for restoration of possession for which only the District Magistrate had been authorized under section 18 (3) of the Act.

15. Admittedly the order dated 13.4.1977 and 16.6.1977 passed under section 16 of the Rent Control Act, were set aside by the revisional Court under section 18 (1) of U.P. Act no. 13 of 1972 by order dated 7.7.1978. As such the District Magistrate had no power to review its own order under section 18 (3) of the Act are analogous to the executing court and it can only execute, implement and enforce the order by which an order of release or allotment under section 16 of the Act is rescinded. Once the District Judge has rescinded the order and has directed the applicant to be put back in possession, the District Magistrate while enforcing the aforesaid order, cannot go beyond it and sit in appeal over it. Under the scheme of the Act the powers exercised by the District Magistrate are subject to the powers of supervision given to the District Judge under Section18 (1) of the Act. The District Magistrate while exercising power under section 18 (3) of the Act to that of executing Court, cannot go beyond the terms of the order sought to be enforced and he cannot enter into the merit or de-merit of the case. The same view has been held by this court in 1998 (1) AWC 260 Dr. Smt. Keshav Devi Vs. The Addl. District Magistrate (Civil Supply) Lucknow and 1984 (1) ARC 327 Abdul Ghafoor Vs. The Rent Control and Eviction Officer/D.S.O. Saharanpur and another.

16. For the aforesaid reasons, the writ petition is allowed. The impugned orders 18.6.1983 and 15.2.1984 are quashed. The matter is remanded back to the court below for fresh decision in accordance with law in the light of observations made above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2003

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

Civil Misc. Writ Petition No.18229 of 2001

M/s C.L. Gupta & Sons and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.P. Gupta
Sri Suneet Kumar
Sri U.N. Sharma

Counsel for the Respondents:
Sri N. Das
Sri A. Pandey
Sri S.P. Pandey
Sri Ravi Kant
Sri Amarendra Pandey
Sri R.R. Agarwal
S. C.

Constitution of India Article 226-Practice and procedure unless the decision of administrative authority, arbitrary ground or illegal High Court not to interfere or to act like court of appeal.

Held- Para 9

It is well settled that in administrative matters the Court should not sit in

appeal over the decisions of the interfere where there is total arbitrariness or illegality vide Tata Cellular Vs. Union of India, AIR 1996 SC 11. We see nothing arbitrary or illegal in the method adopted by the respondents. The selection was done by a committee of senior officials of the department and the opinion of the Audit Section and Finance Controller was also obtained. There is no merit in this petition and it is dismissed.

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

1. This writ petition has been filed for a writ of certiorari to quash the contract granted in favour of respondent no.5 and for mandamus directing the respondents to execute the contract in favour of the petitioner firm.

Heard learned counsel for the parties.

2. The petitioner nos. is a partnership firm and petitioner no.2 is a partner of the said firm. The petitioner manufactures and exports brasswares etc.

3. The respondent no.4 Commandant, 11th B. PAC Sitapur issued an advertisement in the newspapers inviting tenders for sale of mutilated empty cartridge cases made of brass. The petitioner firm submitted its tender. As per the terms and conditions the tenders were opened on 28.1.2000. There were 26 firms who submitted their tenders. It is alleged in paragraph 9 of the petition that the market value of the scraps is approximately Rs. 1.5 crore.

4. On 28.1.2000 the tender forms of the 26 firms were opened and it is alleged in paragraph 11 of the writ petition that the petitioner's bid was the highest. However, the contract was settled in **administrative authorities, but can only** favour of the respondent no.5. It is alleged in paragraph 20 of the petition that the respondents have acted on extraneous considerations in settling the contract in favour of the respondent no.5 at a much lower rate. It is stated in paragraph 12 of the petition that the petitioner's offer was Rs.75.11 per kg. Where as the offer of the respondent no.5 was 75.10 per kg.

5. Counter affidavit has been filed on behalf of respondent no.1 to 4 and we have perused the same. In paragraph 25 of the same it is stated that the rates mentioned in paragraph 12 of the writ petition are exclusive of expenses and taxes, and if expenses and taxes are added then the rate offered by the respondent no.5 will be the highest. Annexure-CA-3 is a comparative chart of the petitioner as well as the respondent no.5. 75.11 per Kg. but inclusive of taxes and expenses it will be Rs.8097.77 paisa per quintal. On the other hand, the rate quoted by the respondent no.5 is 75.10 per Kg. exclusive of taxes and expenses, but it is Rs. 8501.53 paisa after adding taxes and expenses. Hence if taxes and expenses are added the rate quoted by the respondent no.5 is higher than that of the petitioner. The matter was considered by a Committee constituted by the Police Head Quarter in which four Officers of the Police Head quarter at Allahabad as well as the Commandant, 11th Bn.PAC, Sitapur were members. The Committee also obtained the opinion of the Audit Section and Finance Controller, Hence it is alleged that there was full transparency in the matter. In paragraph 33 of the same it is stated that the respondent no.5 has already filed materials on several dates and there is no malafide.

A counter affidavit has also been filed by the respondent no.5.

6. Annexure-CA-1 to the same contains the terms and conditions. According to the Clause–12 of the same, besides the tender rates the buyers would be charged to trade tax at 5%, Departmental charge at 5% and Handling charge at 2%. In paragraph 10 of the same it is stated that the tender rate of the petitioner was Rs.75.11 per kg whereas that of the respondent no.5 was Rs.75.10 per kg. Thus the difference was every small. In paragraph 12 of the same it is stated that the petitioner has been granted recognition certificate for the purchase of raw material at concessional rate vide Annexure-CA-3 to the affidavit. It is alleged that it is not necessary that the highest bidder should always be granted the contract.

7. In paragraph 17 and 18 of the counter affidavit it has been stated that if the tender of the petitioner had been accepted the State Government would have suffered a substantial loss. As the respondent no.5 will be paying Rs. 1,48,77677.05 to the State where the petitioner would have paid only Rs.1, 41,71,097.50 paisa. Thus the respondent no.5 will be paying about Rs.7 Lakhs more to the State.

8. On the facts of the case we find no merit in this petition. No doubt if the rate exclusive of taxes and expenses is seen the petitioner rate is slightly higher than the rate of the respondent no.5. but if the taxes and expenses are included vide Annexure-CA-3 to the counter affidavit then the rate of respondent no.5 is higher. Thus it was the option of the authorities to which of the two methods should be adopted i.e. whether the rate exclusive of taxes and expenses should be seen, or the rate inclusive of taxes and expenses is to be seen. When the authorities had adopted the second alternative it is not for this Court to sit in appeal over their decision.

9. It is well settled that in administrative matters the Court should not sit in appeal over the decisions of the administrative authorities, but can only interfere where there is total arbitrariness or illegality vide **Tata Cellular Vs. Union of India**, AIR 1996 SC 11. We see nothing arbitrary or illegal in the method adopted by the respondents. The selection was done by a committee of senior officials of the department and the opinion of the Audit Section and Finance Controller was also obtained. There is no merit in this petition and it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2003

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

Civil Misc. Writ Petition no. 38847 of 2002

Durgesh Kumar Tiwari ...Petitioner
Versus
Chief General Manager State Bank of India and others ...Respondents

Counsel for the Petitioner:
Sri B.D. Mandhyan
Sri Khurshad Alam

Counsel for the Respondents:
Sri A.K. Misra

Constitution of India, Article 226-Compassionate appointment-philosophy of appointment foundation of social Justice & right to life-if must prevail over technicalities 3 daughter and one son, alongwith widow-amount of pension

sum of Rs.450/- meagre-No due impugned order rejecting the claims cannot sustain.

Held: Para 7

Constitutional philosophy of appointment on compassionate ground has its foundation in social justice and right to life. Having regard to this philosophy the social justice must prevail over any technical rule. In the instant case, the deceased employee was survived by three daughters and one son. Two daughters were married off out of whatever the family of the deceased was recipient as terminal benefits. As stated supra, the pension has now been downsized to Rs.450/-. This pension is too meagre to feed one son, one unmarried daughter and the widow of the deceased. By a rough reckoning, if the family of three is made to sustain itself on two square meal at the rate of Rs.10/- per square meal per head, the family bereft of other basic facilities would need a sum of Rs.60/- per day and by this reckoning, the need of the family would aggregate to not less than a sum of Rs. 1800/- for fooding alone excepting other necessities of life. I am, therefore, constrained to observe that while rejecting the request of the petitioner a second time pursuant to the direction of this Court, the Bank authorities showed their insensitivity at its crudest form and did not seem to act like a model and an ideal employer. Rather they seemed to be oblivious that they were authorities within the meaning of Article 12 of the Constitution and were obligated to act in terms of avowed objective of social and economic justice as enshrined in the Constitution.

Case law discussed:

2002 (2) E.S.C. (Alld.), 1992 (2) ESC- Alld.
2003 (iii) UPLBEC-2055, 2000(iii) ESC-1618 (SC)

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

consideration given by the authorities-

1. Petitioner, the son of deceased employee of State Bank of India has invoked the extra-ordinary jurisdiction of this Hon. Court under article 226 of the Constitution for quashment of the impugned communication dated 27.8.2002 and for a writ of mandamus for appointment on compassionate ground.

2. Brief facts as are necessary for adjudication of the disputation in the present petition are that Sri Hans Nath Tiwari a regular employee of State Bank of India died in harness on 31.1.1997 and at the time of his death he was serving as clerk-cum-cashier in the State Bank of India Belthera Road Branch Ballia. The mother of the petitioner sought compassionate appointment but the same met with disapproval of the Bank authorities and by means of communication dated 25.5.1999, the prayer was declined with cryptic order that indigent circumstances do not exist. Para 2 of the order enumerated resources and the fund, which the family was possessed of. The family was stated to be recipient of the following amount in the wake of the death of the sole breadwinner: Provident fund- Rs. 1.96 lacs; gratuity-Rs. 1.08 lacs and lump sum relief- Rs. 0.20 lacs paid under Staff Mutual Welfare Scheme; family pension Rs. 3,421/- and monthly relief- Rs.500/- under staff Mutual Welfare Scheme, moveable assets valued at Rs. 0.30 lacs and immovable property valued at Rs. 3.00 lacs, agricultural land of 4 Bighas yielding income of Rs. 5000/- per annum, interest income of Rs. 3000/- per month from investments and terminal dues claim of life Insurance Corporation of India Policy of Rs.50,000/- paid to the family and invested in term deposit with the

Bank. The Bank authority seemed to have assessed sufficiency of resources on the basis of the above and converged to the conclusion that the family did not suffer from scantiness of resources. Aggrieved, the petitioner instituted writ petition no. 30406 of 2000. This Court, while allowing the writ petition issued direction to the respondent authorities to reconsider the application of the petitioner for appointment on compassionate ground in view of the observations embodied in the said judgment dated 9.4.2002. Again, the compassionate appointment was declined to the petitioner and it is in this backdrop that the petitioner has preferred the instant petition.

3. In the instant petition, the petitioner has repudiated the contention stating that picture drawn by the Bank Authorities as to the income has been magnified beyond all proportions and it has been spelt out that the lump sum amount of Rs. 1.83 lacs has been enumerated by the Bank without discrediting the liability towards Bank Loan. It was further submitted that the family pension has suffered diminution and has been rescheduled to Rs.450/- per month on the basis of basic pay with effect from 1.2.2002. On the other hand, the learned counsel appearing for the Bank strenuously repudiated the claim of the petitioner to his claim to appointment on compassionate ground. However, he did not repudiate the factum of reduced pension and other contentions pertaining to income of the deceased family nor did he state in justification of the figures unfolded in its order by the Bank authorities. He placed copious reliance on various authorities both of this Court and the Apex Court. The cases cited in vindication of his hand are the decision in Special Appeal No. 575 of 2000 delivered by a Division Bench of this Court on 26.3.2003, decision rendered by a Division Bench of Patna High Court dated in C.W.J.C. No. 11781 of 2002, Single Judge decision in W.P. No. 7222 of 2002 dated 19.12.2002, Single Judge decision in Manoj Kumar Tiwari v. State of U.P. and others reported in (2002) 2 E.S.C. (All.), Division Bench decision of this Court in Anand Kumar v. Union of India reported in (2992) 2 ESC (Alld).

4. From a perusal of the record, it would transpire that the family is leading a very precarious existence. Before his death, the deceased suffered a protracted illness due to cancer and consequent treatment which sapped the family of whatever it had for purposes. It is stated in para 4 of the writ petition that lump sum amount of Rs. 1.83 lacs including all retiral benefits and to the exclusion of deduction of loan amount which admittedly was sanctioned by the Bank for treatment of the deceased and further that the family was initially sanctioned pension of Rs. 1267/- which was paid upto 31.1.2002 and thereafter, it suffered diminution and has been reduced to Rs. 450/-. The assertion has not been denied by the respondent Bank in the counter affidavit. In para 14 of the writ petition, it is submitted that the land which has been taken into consideration adding to the source of income is not arable land nor the same is yielding any income. The averments in this para have not bee denied. It would thus appear that the Bank authorities have not scanned the entire facts and circumstances in correct perspective and stampeded into holding that there existed no indigent circumstances. It should not be lost sight of the fact that the employer in the instant

case is a statutory body within the meaning of Article 12 of the Constitution and as such, it has an obligation to act in terms of the avowed objective of social and economic justice as engrafted in the Constitution. As enunciated by the Apex Court in Balbir Kaur and another v. Steel Authority of India[1] "the concept of social justice is the yardstick to the justice administration system or the legal justice and ……and the greatest virtue of law is in its adaptability and flexibility and thus it would be otherwise an obligation for the law courts also to apply the law depending upon the situation since the law is made for the society and whichever is beneficial for the society, the endeavour of the aw Court would be to administer justice having due regard in the direction." It is in the context of the above observation that the Court feels disposed to screen the impugned order qua the condition of life in the aftermath of the death of sole bread earner. Upon regard being had to the factual matrix unfolded above, it would transpire that the Bank authorities were swayed to converge to the conclusion of sufficiency of resources and funds collected from varied sources without delving into its correctness, or reliability. It has not been reckoned with by the Bank authorities whether the resources delineated in para 2 of the impugned order were sufficient to keep the pot of the family boiling and whether the family would face resource crunch after meeting the liabilities left behind by the deceased employee. It brooks no dispute upon comparison of the assertions in the writ petition with the averments in the counter affidavit that the family received Rs. 1.83 lacs including all retiral benefits to the exclusion of liabilities towards Bank's loan and that the pension has since suffered diminution and stands reduced to Rs. 450/- per month only. It is also worthy of notice that two of the sisters have already been married off and the third sister has attained marriageable age and therefore, the resources which the family is possessed of cannot be adjudged to be sufficient to keep the pot boiling. In converging to the sufficiency of resources, the Bank authorities have not acted like a model and an ideal employer having regard to the avowed objective of social and economic justice as enshrined in the Constitution and executive imperviousness and zeal is more than apparent on which wrecked the repeated requests of the family for compassionate appointment.

5. On behalf of the Bank authorities, the learned counsel has cited series of decisions. The first decision cited is a decision rendered by a Division Bench of this Court in Special Appeal no. 575 of 2000 on 26.3.2003. It was a case in which family was receiving a pension of Rs. 6000/- per month and in this case the learned Single Judge upon consideration of the family resources and the pension had held that the family could not be said to be in distress. Be that as it may, it was a decision rendered in the peculiar facts and circumstances of that case and it cannot be imported to be applied in the facts and circumstances of the present case. Yet another case cited by the learned counsel is the order passed in Writ Petition no. 7222 (S/S) of 2002 passed by learned Single Judge on 19.12.2002. This order does not contain any detailed discussion and the learned Single Judge converged to the conclusion that the family was not in distress ostensibly on the basis of income stated to be Rs.6231/-.

[1] (2000) 3 UPLBEC 2055

This order stemmed from peculiar facts and circumstances of that case and thus cannot be called in aid in vindication of the stand as propounded by the learned counsel appearing for the Bank Authorities. The third authority cited by the learned counsel is a decision of Patna High Court. In this decision rendered in C.W.J.C. No. 11781 of 2002. It is again a brief order in which any of the aspects as discussed in the ex-cathedra decisions of the Apex court has not been dwelt upon or discussed at length. This decision too is based on peculiar facts and circumstances of the case and cannot be called in aid to distract me from the view I am taking in the matter. The fourth authority cited by the learned Counsel is Manoj Kumar Tiwari v. State of U.P. and others decided by single Judge of this Court. It was a matter in which the deceased employee worked between 1961 to 1973 as Gram Sewak and it was claimed that the family of the deceased. On this ground, the deceased family claimed compassionate appointment. It was a decision on peculiar facts and circumstances and does not involve any of the aspects as delineated in this petition. The last decision cited by the learned counsel is Anand Kumar v. Union of India and others passed in Writ Petition No. 16616 of 2001 decided on 24.1.2002. In this case learned Tribunal was satisfied with the financial condition of the family and the Division Bench merely upheld the view taken by the Tribunal. This case too is distinguishable.

6. In the earlier two decisions particularly the decision in Smt. Kanti Srivastava v. State Bank of India Nariman Point Mumbai and others, I have taken a consistent view having regard to the ratio decidendi in Balbir Kaur and another v. Steel Authority of India Ltd and others[2] that feeling of security drops to zero on the death of the bread earner and insecurity thereafter reigns and further that 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 instant case, as stated supra, the family has been received a meagre sum of Rs. 450/- since 1.2.2002 and having regard to the liabilities left behind by the deceased employee, the lump sum amount of Rs.1.83 lacs and the pension of Rs. 450/- being paid to the family since 1.2.2002 are too paltry to be adjudged as sufficient to keep the pot boiling. The authorities have not given due consideration to the condition of the family and by this reckoning, the impugned order cannot be sustained and is liable to be quashed.

7. Before parting, I would not forbear from observing that Constitutional philosophy of appointment on compassionate ground has its foundation in social justice and right to life. Having regard to this philosophy the social justice must prevail over any technical rule. In the instant case, the deceased employee was survived by three daughters and one son. Two daughters were married off out of whatever the family of the deceased was recipient as terminal benefits. As stated supra, the pension has now been downsized to Rs.450/-. This pension is too meagre to feed one son, one unmarried daughter and the widow of the deceased. By a rough reckoning, if the family of three is made to sustain itself on two square meal at the rate of Rs.10/- per

[2] 2000 (3) ESC 1618 (SC)

square meal per head, the family bereft of other basic facilities would need a sum of less than a sum of Rs. 1800/- for fooding alone excepting other necessities of life. I am, therefore, constrained to observe that while rejecting the request of the petitioner a second time pursuant to the direction of this Court, the Bank authorities showed their insensitivity at its crudest form and did not seem to act like a model and an ideal employer. Rather they seemed to be oblivious that they were authorities within the meaning of Article 12 of the Constitution and were obligated to act in terms of avowed objective of social and economic justice as enshrined in the Constitution.

8. In the facts and circumstances discussed above, the petition is allowed and the impugned order is quashed and the respondents are directed to offer appointment to the petitioner having regard to the financial condition in the light of what has been discussed in the present petition.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.4.2003

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

Civil Misc. Writ Petition No. 44407 of 1992

Shiv Shanker Tiwari ...Petitioner
Versus
Director of Agriculture, U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ramesh Upadhyaya

Counsel for the Respondents:
Sri N.B. Tiwari
S.C.

Rs.60/- per day and by this reckoning, the need of the family would aggregate to not

Constitution of India, Article 226-Service law-disciplinary proceeding-initiated in 1967-Petitioner placed under suspension-during pendency of disciplinary Proceeding the petitioner-retired from service in July, 2000-for unreasonable delay the authorities themselves are responsible-held-for all practical purpose-the delinquent employee shall be treated in service-suspension order quashed with 75% past salary.

Held- Para 11

The disciplinary proceedings have illegally been delayed by the respondents themselves and were not concluded within reasonable time and when the petitioner has already retried from service in July, 2000 the entire proceedings deserve to be quashed by this Court, in the light of the observations given in the Judgement of N. Radhakishan (supra) and also in Shatrughan (supra) with the further direction to the respondents that the petitioner should be treated in continuous service for all practical purposes and should be paid arrears of 75% salary of his past salary. The petitioner has already retired from service on 31.07.2000 his post-retirement benefits is also directed to be finalised.

Case law discussed:
AIR 1988 SC 1833
1998 (3) SCC 123
J.T. 1998 (6) SC-55

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

1 In this petition prayer has been made for the writ of certiorari quashing entire proceedings of enquiry initiated against the petitioner in sequence to his suspension and further prayer has been made for direction of mandamus to

reinstate the petitioner into service with entire arrears of salary.

(1) Heard learned counsel Sri Ramesh Upadhyay for the petitioner as well as learned Standing counsel for the respondents.

(2) It has been submitted for petitioner that he was suspended in the year 1971 and the disciplinary proceedings were initiated, however, before its conclusion the petitioner was retired from service on 31.07.2000.

(3) As contended by the petitioner he was appointed as Assistant Agriculture Inspector on 20.05.1964 and was posted at Ghazipur on -9.06.1994. The petitioner was, however, suspended on 29.01.1971 and a 'charge sheet' was served on him on 27.09.1971 without any documents relied upon. The petitioner made an application on 10.12.1971 requesting for copies of the documents referred to in the charge sheet and as shown in Annexure-8 to the writ petition. Without following the procedure prescribed by law and in utter disregards to the principles on natural justice the petitioner was dismissed by an order dated 24.07.1976.

(4) The order of dismissal was challenged by the petitioner before the U.P. Public Service Tribunal whereby the order of dismissal was quashed on the ground that adequate opportunity was not given to the petitioner and the documents relied in support of the charges were neither shown nor supplied to the petitioner. The Tribunal directed for reinstatement of the petitioner with continuity of service with a liberty to the respondents to conduct the enquiry afresh, if they so desire, however, case was decided by the Tribunal the petitioner was again placed under suspension by an order dated 02.05.1983 (annexure-2 to the writ petition) and the Project Officer Agriculture, Varanasi was appointed as Inquiry Officer. It appears the petitioner kept on approaching the District Agriculture Officer Gazipur and also the Inquiry Officer and the Inquiry Officer wrote several letters to the District Agriculture Officer Ghazipur one namely 9.2.1987 (annexure no.5 to the writ petition) to show the petitioner all the documents relied by them in support of the charges yet the concerned documents were never shown to the petitioner nor its copies were ever made available to the petitioner.

(5) It was also contended by the petitioner that the delay in conducting the enquiry was not due to any fault of the petitioner as reflected from the letter dated 21.07.1988 (annexure 1 to the supplementary affidavit) by which subsistence allowance has been raised to $3/4^{th}$. In this letter the Additional Director of Agriculture (Administration), Lucknow has specifically written that the delay in the enquiry is not because of any fault of the petitioner.

(6) In the counter affidavit filed by Dr. Ashok Kumar Singh on behalf of all the respondents in earlier paragraphs efforts have been made to justify the enquiry proceedings which was already quashed by the Tribunal. According to the petitioner without showing the documents the respondents have erroneously mentioned in the counter affidavit that the documents have already been shown to the petitioner in the year 1984 itself and all the other 15 letter were wrongly issued by the respondents, however, on filing the

present writ petition Court was pleased to stay the order of suspension and the enquiry by observing "there is not only undue delay in concluding the departmental proceedings, but prima facie it also appears to be abuse of power". "The respondents are called upon to show cause as to why the said proceedings be not quashed".

(7) No justification was given in the entire counter affidavit for prolonging the enquiry unnecessarily and delaying the enquiry without there being any fault of the petitioner from 1983 to December, 1992. Even a single word has not been stated in the counter affidavit as well as in the supplementary affidavit to justify the inordinate delay in concluding the enquiry from 02.05.1983 to 01.12.1992.

(8) Learned counsel for the petitioner has placed reliance on A.I.R. 1988 S.C.(1833) = J.T. 1998 (3) S.C. 123 State of Andhra Pradesh Vs. Radha-specifically paragraph 15, 17, 19 and 20.

"In considering whether delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much disciplinary authority is serious in pursuing the charges against its employee. Disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse considerations.(Para 19)"

"It is not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the court has to take into consideration all relevant factors and to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when delay is abnormal and there is no explanation for the delay. (Para 19)"

"Charges have been framed against the respondent merely on the basis of the report dated November 7, 1987 from the Director General, Anti- Corruption Bureau, which is of general in nature raising accusing fingers on the various officers of the Corporation, but without any reference to the relevant files and pin pointing if respondent or any other official charged was at all concerned with the alleged deviations and unauthorised construction in multi-storied complex. (Para 15)"

"If memo of charge had been served for the first time before 1991 there would have been no difficulty. However, in the present case it could be only an irregularity and not an illegality vitiating the inquiry proceedings in as much as after the Inquiry Officer was appointed under memo no.1412 dated December 22, 1987, there had not been any progress. If

a fresh memo is issued on the same charges against the delinquent officer it cannot be said that any prejudice has been caused to him. (Para 17)"

"The case depended on records of the Departmental only and Director General, Anti Corruption Bureau had pointed out that no witnesses had been examined before he gave his report. The Inquiry Officer, who had been appointed one after the other, had just to examine the records to see if the alleged deviations and constructions were illegal and unauthorised and then as to who was responsible for condoning or approving the same against the bye-laws. It is nobody's case that respondent at any stage tried to obstruct or delay the inquiry proceedings. The Tribunal rightly did not accept the explanations of the State as to why delay occurred. In fact there was hardly any explanation worth consideration. In the circumstances the Tribunal was justified in quashing the charge memo dated July 31, 1995 and directing the State to promote the respondent as per recommendation of the DPC ignoring memos dated October 27, 1995 and June 1, 1996. (Para 20)"

(9) In J. T. 1998(6) SC 55 (State of U.P. Versus Shatrughan Lal and another) it was held;

"One of the principles of natural justice is that a person against whom an action is proposed to be taken has to be given an opportunity of hearing. This opportunity has to be an effective opportunity and not a mere pretence. In departmental proceedings where charge-sheet is issued and the documents which are proposed to be utilised against that person are indicated in the charge sheet but copies thereof are not supplied to him in spite of his request, and he is, at the same time, called upon to submit his reply, it cannot be said that an effective opportunity to defend was provided to him. (Para 4)"

"Preliminary inquiry which is conducted invariably on the back of the delinquent employee may, often, constitute the whole basis of the charge-sheet. Before a person is, therefore, called upon to submit his reply to the charge sheet, he must, on a request made by him in that behalf, be supplied the copies of the statements of witnesses recorded during the preliminary enquiry particularly if those witnesses are proposed to be examined at the departmental trial. (Para 6)"

"Merely saying that the respondent could have inspected the documents at any time is not enough. He has to be informed that the documents, of which the copies were asked for by him may be inspected. The access to record must be assured to him. The respondent was not afforded an effective opportunity of hearing particularly as the appellant failed to establish that non-supply of the copies of statements recorded during preliminary enquiry had not caused any prejudice to the respondent in defending himself. (Para 8, 10)"

(10) In the present case there is no explanation for the delay in conducting the disciplinary proceedings and the respondents themselves had written the letter dated 21.7.1988 (Annexure-1 to the supplementary affidavit) that the delay is not because of any fault of the petitioner, rather it is their own fault and that they could not complete the enquiry. It appears

that till today the documents relied in petitioner have not been shown to the petitioner.

(11) The disciplinary proceedings have illegally been delayed by the respondents themselves and were not concluded within reasonable time and when the petitioner has already retried from service in July, 2000 the entire proceedings deserve to be quashed by this Court, in the light of the observations given in the Judgement of N. Radhakishan (supra) and also in Shatrughan (supra) with the further direction to the respondents that the petitioner should be treated in continuous service for all practical purposes and should be paid arrears of 75% salary of his past salary. The petitioner has already retired from service on 31.07.2000 his post-retirement benefits is also directed to be finalised.

In view of the above observations writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 44599 of 1998

Nazra ...Petitioner
Versus
State of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri S.P. Singh

Counsel for the Respondent:
C.S.C.

U.P. Fundamental Rule 1987-Rule 56 (i)-Retirement-challenge made on ground support of the charges levelled against the **whether retirement Notice attaining the age of Superannuation is correct?**

Held- Yes Rule 56(1) provides the age of retirement extended from 58 year to 60 year appointed before 5 th November 1985 on regular & permanent post-petitioner appointed on temporary post after the cut off date.

Held- Para 6

From the records the petitioner has not been able to conclusively prove that he was a permanent Beldar working in permanent capacity on a permanent post. The appointment of the petitioner being 11.3.1988, which is undisputed, the petitioner is not entitled to any relief.

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

1. This petition has been preferred for quashing the order dated 17/18.11.1998 (Annexure-3 to the writ petition) whereby the petitioner was informed that he would retire on attaining the age of superannuation on 31.12.98. The petitioner was class IV (Group-D) employee working in the office of Executive Engineer Lok Nirman Vibhag District Bulandshahar. He was retired by the impugned order 18.11.98 on attaining the age of 58 years. The date of birth recorded in his service book was 30.12.1940. By Government Order dated 28.7.1987 U.P. Fundamental Rules were amended. The amendment was introduced in the U.P. Fundamental First Amendment Rule, 1987 and on that basis Rule 56 (i) was amended which provides that Group-D employees appointed before 1985 are to retire from service on the attaining the age of 60 years. The amended G.O. dated 28th July, 1987 is as under:

"उत्तर प्रदेश, सरकार
वित्त (सामान्य) अनुभाग-२
संख्या जी-२-४६६/दरा-५३४(१६)५७
लखनऊः दिनांक २८ जुलाई, १९८७

<u>अधिसूचना</u>
प्रकीर्ण

संविधान के अनुच्छेद ३०६ के परन्तुक द्वारा प्रदत्त शक्ति का प्रयोग करके राज्यपाल फाइनेंशियल हैण्ड बुक खण्ड-दो, भाग-दो से चार में दिये गये फण्डामेण्टल रूल्स में संशोधन करने की दृष्टि से निम्नलिखित नियमावली बनाते हैं:-

उत्तर प्रदेश फण्डामेन्टल (प्रथम संशोधन) नियमावली, १९८७

संक्षिप्त नाम और प्रारम्भ	१-(१) यह नियमावली उत्तर प्रदेश फण्डामेन्टल (प्रथम संशोधन) नियमावली, १९८७ कही जायेगी। (२) यह ५ नवम्बर, १९८५ से प्रवृत्त हुई समझी जायेगी।
फण्डामेन्टल रूल ५६ का संशोधन	२- फाइनेन्शियल हैण्डबुक खंड-दो भाग-२ से चार में दिये गये उत्तर प्रदेश फण्डामेन्टल रूल्स के नियम ५६ में खण्ड(ए) के स्थान पर निम्नलिखित खंड रख दिया जायेगा, अर्थात -

"५ (क)-इस नियम के अन्य खण्डों में अन्यथा उपबन्धित के सिवाय प्रत्येक सरकारी सेवक उस माह के जिसमें यह अठ्ठावन वर्ष की आयु प्राप्त करें अन्तिम दिन अपरान्ह में सेवानिवृत्त होगा। उसे अधिवर्षता पर सेवानिवृत्ति के दिनॉक के पश्चात सरकार की पूर्व स्वीकृति से लोक आधार पर जिसे अभिलिखित किया जायेगा, सेवा में रखा जा सकता है किन्तु अति विशेष परिस्थितियों के सिवाय उसे साठ वर्ष की आयु के पश्चात सेवा में नहीं रखा जाना चाहिए

परन्तु ५ नवम्बर, १९८५ के पूर्व भर्ती किया गया और समूह "घ" पद को धारण करने वाला कोई सरकारी सेवक उस मास के जिसमें यह साठ वर्ष की आयु प्राप्त करें, अंतिम दिन अपरान्ह में सेवा से निवृत्त होगा।

<u>स्पष्टीकरण</u>:- उपर्युक्त परन्तुक उन मामलों पर लागू नहीं होगा जहॉं उक्त परन्तुक में निर्दिष्ट पद/पदों की प्रतिस्थिति में २७ फरवरी, १९८२ के पश्चात परिवर्तन किया गया हो और उच्चतर समूह के पद/पदों में वर्गीकृत किया गया हो।"

(२) खंड (ख) निकाल दिया जायगा।

आज्ञा से,
बी.के. सक्सेना,
प्रमुख सचिव।"

2. This amended G.O. applies to a regular permanent employee appointed on Group-D post prior to 5th November 1985.

3. The petitioner has filed photocopy of service book issued from the office of the respondents under the signatures of Assistant Engineer on 30.4.88 in which the age of the petitioner was mentioned as 45 years as on 30.12.1985.As per certificate issued by the Chief Medical Officer and his date of birth was 30.12.1940. It is also apparent from the perusal of the Photostat copy of the service book that the petitioner's pay fixation was done under the Superintending Engineer's circular letter No. 6824/EB-51/84 dated 17.1.1985. The pay was fixed on 1.1.1984 and was countersigned by the Assistant Engineer of P.W.D. The petitioner claims that he was working as Beldar (Group-D) employee much before 1.1.84 and in these circumstances his pay was fixed. He further alleges that it means that he was permanently working as Group-D employee in the department of the respondents much before 1.1.84.

4. The last contention of the petitioner is that he is an illiterate person and can hardly put his signature. He does not have knowledge about the conditions of service in his appointment letter, which has been appended as Annexure-CA-1 issued on 11.3.1988. From the appointment letter of the petitioner Annexure-CA-1 it appears that he was appointed on temporary basis. Clause-VI of the terms and conditions of the appointment letter was that he was appointed on temporary post. The appointment letter is as under:

"कार्यालय अधिशाषी अभियन्ता
प्रान्तीय खण्ड लो० नि० वि० बुलन्दशहर।
पत्रॉक /ई० डबलू० दिनॉक

कार्यालय आदेश

श्री नजरा पुत्र श्री हकीमुल्ला की नियुक्ति स्थाई नियमित चकदार के श्री सरता राम राम लाल पुत्र श्री राम स्वरूप (सेवा निवृत्त) के रिक्त पद पर कार्यालय आदेश के दिनॉक वेतनमान 305-5-330 द०रो०-6-360 द०रो०-6-390 में की जाती है। इन्हें शासन द्वारा समय समय पर उचित नियमानुसार मंहगाई भत्ता आदि भी दिया जायेगा।

इनकी नियुक्ति निम्न शर्तों पर की जाती है ।

(१) इनकी सेवा किसी भी समय लिखित रूप में एक माह का नोटिस देकर समाप्त की जा सकती है और यह नोटिस उनके द्वारा नियुक्ति अधिकारी को दिया जायेगा या फिर नियुक्ति अधिकारी द्वारा इनको दिया जाएगा।

(२) इस नोटिस की अवधि को जो अधिकारी द्वारा उनको दिया जायेगा या उनके द्वारा अधिकारी को दिया जायेगा एक माह होगी। प्रतिबन्ध यह होगा कि यदि अधिकारी चाहे तो नोटिस के पूर्व एक माह की अवधि के स्थान पर वेतन दे दें। इस बात की नियुक्ति अधिकारी को छूट होगी कि यह बिना नोटिस के कार्य से मुक्त करें या कम अवधि का नोटिस न देने पर उनको कुछ भी हरजाना नहीं देना होगा ।

(३) इनकी नियुक्ति के कार्यभार ग्रहण करने हेतु कोई यात्रा भत्ता देय नहीं होगा ।

(४) इनकी सेवा योग्य चिकित्सा अधिकारी के प्रमाण पत्र मुख्य चिकित्सा अधिकारी के द्वारा प्राप्त करके कार्य ग्रहण करने के समय प्रस्तुत होगा।

(५) इनकी सेवा जिले के किसी भी भाग में स्थानान्तरित की जा सकती है ।

(६) यह अस्थाई पद है।

(ह० आर०के० जैन)
अधिशासी अभियन्ता,
प्रान्तीय खण्ड सा०नि०वि०,
बुलन्दशहर।
10-3-89"

5. Learned counsel for the respondents states that the appointment of the petitioner was temporary and that he had not been able to establish that his appointment on Group-D post was permanent and before 5th November, 1985, as such, he is not entitled to the benefit of the G.O. dated 28.7.1987. He further contends that the petitioner has not disputed that he was appointed on 11.3.1988. He is not entitled to get any retrial benefits treating him to be retired at the age of 60 years pursuant to the aforesaid G.O. dated 28.7.1987.

6. From the records the petitioner has not been able to conclusively prove that he was a permanent Beldar working in permanent capacity on a permanent post. The appointment of the petitioner being 11.3.1988, which is undisputed, the petitioner is not entitled to any relief.

7. For all the reasons stated above, the petitioner is not entitled to the benefit of the G.O. dated 28.7.1987 and he has rightly been retired on attaining the age of 58 years.

The petition is dismissed.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.5.2003

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

Civil Misc. Writ Petition No. 21941 of 2000

Vibhuti Prasad Mishra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Arun Tandon
Sri Dhananjai Rai
Sri Rajesh Nath Tripathi
Ekta Kour

Counsel for the Respondents:
S.C.

Constitution of India Article 226 Principle of Natural Justice Disciplinary proceedings without charge sheet etc. without any information to the petitioner-Whether valid? Held-No.

Held- Para 14

In the present case, it appears that proper efforts was not made to convey the intimation of suspension, charge sheet, disciplinary inquiry being conducted against the writ petitioner by means of communication of the registered letter or by publishing the same in the newspaper, only one mode has been adopted by affixing all the information to the door of the house of the petitioner which was not sighted without asserting that the petitioner was residing at the place or not? No notice of suspension and charge sheet and day, time and place was ever communicated or served personally to the petitioner.

Cases referred to:
(i) 1998 (7) SCC 569, (ii) (2002) 1 UPLBEC 425, (iii) (2000) 1 UPLBEC 275, (iv) (2003) 1 UPLBEC 224, (v) (2000) 7 S.C.C. 90, (vi) 2001 (1) UPLBEC 908, (vii) 2002 UPLBEC 1321, (viii) 1994 (2) SCC 746, (ix) 1994 Supp. (2) SC 256, (x) 1999 (4) AWC 3227, (xi) AIR 1963 SC 1719, (xii) 1995 Supp. (3) SCC 212, (xiii) AIR 1960 SC 160, (xiv) 1963 II LLJ 396, (xv) 1962 II LLJ 78 SC, (xvi) (2001) 2 UPLBEC 1676

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

Heard Sri Rajesh Nath Tripathi and Ekta Kour learned counsel for the petitioner as well as learned counsel for the respondents.

2. In this petition prayer has been made for issuance of writ of certiorari to quash the order dated 7.4.2000 passed by respondent no. 2 Inspector General of Police, Lucknow Zone, Lucknow and order dated 8th November, 1989 passed by respondent no.3 Deputy Inspector General of Police, Lucknow Zone, Lucknow. Further prayer has been made for writ of mandamus commanding the respondents to treat the petitioner in continuous service even after 8th November, 1989 and to pay full salary to the petitioner. Further prayer has also been made for seeking direction to the respondents to pay the difference of salary for the period between 6th October, 1987 till 8th November, 1989 and for payment of the interest at the rate of 24% on the arrears of salary and the difference of salary unpaid to the petitioner.

3. Brief facts necessary for adjudication of the writ petition was that the petitioner was appointed as Sub-inspector in U.P. Police in the year 1987 and when he was posted as Sub-inspector in Special Investigation Cell Sahkarita Mukhyalaya, Sitapur the petitioner left the place of posting on 5.10.1987 after recording his lefting at serial no. 3 in G.D. of the office at 9.00 p.m. on 5.10.87 for recording his evidence before Special Investigation Cell Sahkarita Mukhyalaya, Lucknow for 5.10.87 as such the petitioner was on duty on 5.10.87 and 6.10.87.

4. The information of recording his evidence was intimated to the petitioner by the Superintendent of Police, Sitapur, as such the permission was already granted, however without waiting the return of the petitioner, the petitioner was

placed under suspension on the charge that the petitioner had not taken permission prior to leave the office on 5.10.87. In the suspension order the petitioner was not attached to any place or posted to any office. As contended by the petitioner no charge sheet was served to the petitioner neither any inquiry officer was appointed nor the petitioner was intimated with regard to the any disciplinary proceeding or departmental inquiry being conducted against the petitioner till 8.11.89, no information was given to the petitioner, however the petitioner when unofficially gathered information about the disciplinary proceeding, he immediately moved an application before the D.I.G. for supply of notice and charge sheet so that he may participate in the alleged inquiry. After five months the petitioner's service was dismissed on the ground of unauthorised absence for a period of 28 days i.e. from 7.10.87 to 4.11.87. One charge for unauthorised absence is for a period of 5.10.87 and 6.10.87 for which the petitioner was on duty for recording the evidence before Investigation Cell. The petitioner has been visiting the police office for receiving substantial amount even then no charge sheet was served to the petitioner and no notice was ever given to the petitioner before passing of the dismissal order.

5. The petitioner has also submitted that he was never served charge sheeted and he was not afforded opportunity to file the reply and no opportunity was afforded to him for adducing evidence or cross examine the witnesses. The documents relied upon by the respondents have not been furnished to him and no date, time and place of inquiry was intimated to him and by paper work the respondents have endeavoured to show that the intimations were sent to the petitioner by way of affixing the notice at the residential address of the petitioner. According to the petitioner no inquiry report or any show cause notice in respect of the dismissal was also intimated to the petitioner. According to the petitioner the dismissal order is illegal and the appeal of the petitioner has been dismissed by non-application of mind.

6. The counter affidavit has been filed. According to the respondents the order of suspension dated 6.10.1987 was served by the Superintendent of Police, Sitapur to the petitioner and it was the prime duty of the petitioner to remain present during the period of suspension to give full cooperation in disciplinary proceeding against him. According to the respondents efforts were made to serve the charge sheet by Special Messenger and when the petitioner did not receive, the same was pasted at the house of the petitioner. According to the respondents the information about the suspension and disciplinary proceedings were communicated to him through the Superintendent of Police, Deoria on 29.12.1987 as he was continuously absent from the District Headquarters, Sitapur. Effort was made to serve the copy of the show cause notice to the petitioner through Sub Inspector Om Shankar Shukla, District Sitapur and when the petitioner could not be traced out the said Sub Inspector pasted a copy of show cause notice at the residence of the petitioner on 22.4.89 in presence of two witnesses. The respondents have contended in the counter affidavit that all the notices and orders were served to the petitioner residence by paste.

7. According to the petitioner the contents of para 22,23,24,25,26 and 30 of the writ petition that no notice nor any chargesheet nor the information of the appointment of the inquiry officer was ever served upon the petitioner or the petitioner was never informed the date, place and time of enquiry by the inquiry officer for the purpose of his participation and no letter about the disciplinary proceedings were ever sent by registered post to the petitioner and the entire proceedings were taken behind the back without involving the petitioner in violation of para 490 of the Police Regulation. According to the petitioner the averments made in the above paragraphs of the writ petition were not emphatically denied and reply was given only by para 19,20,22 and 25 of the counter affidavit by admitting that they have not sent the notices, charge sheet or information with regard to the disciplinary proceeding by registered post or by publishing the same in the news paper, as such the endeaverance of the respondents in respect of communication about the disciplinary proceedings including the notices were in violation of the decision of the Supreme Court in **Union of India Vs. Deena Nath, Sant Ram reported in 1998 (7) SCC 569** as followed by this Court in the judgement dated 8.12.1999 decided in the case of **Shobh Nath Goutam Vs. State of U.P. and others.**

8. I have heard learned counsel for the petitioner and perused the documents

9. In **(1998) 7 Supreme Court Cases 569 Union of India and others Vs. Dinanath Shantaram Karekar and others,** the respondent was appointed as an unskilled labour in the Naval Armament Deport, Bombay. He was subsequently promoted to the post of Gun Repair Labourer Grade I. He was removed from the service which was challenged before the Services Tribunal on the grounds that neither the charge sheet nor the show cause notice were ever served upon him, therefore, the entire proceedings were vitiated. The tribunal found that the charge sheet issued to the petitioner by registered post was returned with the postal endorsement 'not found', while the show cause notice was published straightaway in Dainiki Sagar, Navshakti. The Tribunal found the service of the charge-sheet and the show cause notice on the respondent as insufficient and, therefore, set aside the order of dismissal by which the respondent was removed from service. In Special Leave petition preferred by the Union of India it was contended that the respondent-writ petitioner has been absented himself from the office unauthorisedly and the service of charge sheet sent to him by registered post should be treated as sufficient. The Supreme Court Dinanath Shantaram Karekar (Supra) has observed as below:

"3. The respondent was an employee of the appellants. His personal file and the entire service record was available in which his home address also had been mentioned. The charge-sheet which was sent to the respondent was returned with the postal endorsement "not found". This indicates that the charge-sheet was not tendered to him even by the postal authorities. A document sent by registered post can be treated to have been served only when it is established that it was tendered to the addressee. Where the addressee was not available even to the postal authorities, and the registered cover was returned to the

sender with the endorsement "not found", it cannot be legally treated to have been served. The appellant should have made further efforts to serve the charge-sheet on the respondent. A single effort, in the circumstances of the case, cannot be treated as sufficient. That being so, the very initiation of the departmental proceedings was bad. It was Ex parte even from the stage of the charge sheet which, at no stage, was served upon the respondent.

4. So far as the service of show-cause notice is concerned, it also cannot be treated to have been served. Service of this notice was sought to be effected on the respondent by publication in a newspaper without making any earlier effort to serve him personally by tendering the show-cause notice either through the office peon or by registered post. There is nothing on record to indicate that the newspaper in which the show-cause notice was published was a popular newspaper which was expected to be read by the public in general or that it had a wide circulation in the area or locality where the respondent lived. The show-cause notice cannot, therefore, in these circumstances, be held to have been served on the respondent. In any case, since the very initiation of the disciplinary proceedings was bad for the reason that the charge-sheet was not served, all subsequent steps and stages, including the issuance of the show-cause notice would be bad.

5. Lastly, in order to save the lost battle, a novel argument was raised by the learned counsel for the appellant. He contended that since the charge-sheet as also the show-cause notice, at different stages of the disciplinary proceedings, were despatched and had been sent out of the office so that no control to recall it was retained by the Department, the same should be treated to have been served on the respondent. It is contended that it is the communication of the charge-sheet and the show-cause notice which is material and not its actual service upon the delinquent. For this proposition, reliance had been placed on the decision of this Court in State of Punjab Vs. Balbir Singh (1976) 3 SCC 242 : 1976 SCC (L&S) 411 : AIR 1977 SC 629.

7. As would appear from the perusal of that decision, the law with regard to "communication" and not "actual service" was laid down in the context of the order by which services were terminated. It was based on a consideration of the earlier decisions in State of Punjab Vs. Khemi Ram (1969) 3 SCC 28 : AIR 1970 SC 214, Bacchittar Singh Vs. State of Punjab AIR 1963 SC 395 : 1962 Supp (3) SCR 713, State of Punjab Vs. Amar Singh Harika AIR 1966 SC 1313 : (1966) 2 LLJ 188 and S. Partap Singh Vs. State of Punjab AIR 1964 SC 72 : (1964) 4 SCR 733 : (1966) 1 LLJ 458. The following passage was quoted from S. Partap Singh judgment:

"It will be seen that in all the decisions cited before us it was the communication of the impugned order which was held to be essential and not its actual receipt by the officer concerned and such communication was held to be necessary because till the order is issued and actually sent out to the person concerned the authority making such order would be in a position to change its mind and modify it if it thought fit. But once such an order is sent out, it goes out of the control of such an authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it. In our view, once an order is

issued and it is sent out to the government servant concerned, it must be held to have been communicated to him, no matter when he actually received it."

9. Where the services are terminated, the status of the delinquent as a government servant comes to an end and nothing further remains to be done in the matter. But if the order is passed and merely kept in the file, it would not be treated to be an order terminating services nor shall the said order be deemed to have been communicated.

10.Where the disciplinary proceedings are intended to be initiated by issuing a charge-sheet, its actual service is essential as the person to whom the charge-sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. So also, when the show-cause notice is issued, the employee is called upon to submit his reply to the action proposed to be taken against him. Since in both the situations, the employee is given an opportunity to submit his reply, the theory of 'communication' cannot be invoked and "actual service" must be proved and established. It has already been found that neither the charge-sheet nor the show-cause notice were ever served upon the original respondent, Dinanath Shantaram Karekar. Consequently, the entire proceedings were vitiated.

10. In **{(2002) 1 UPLBEC 425} K.K. Dutta Vs. Managing Director, U.P. Cooperative Spinning Mills Federation Ltd., Kanpur and another,** dismissal was set aside in reference to non-communication of the date of inquiry or for recording evidence and the day, time and place of inquiry following the judgement of Subhash Chandra Sharma Vs. Managing Director and others, (2000) 1 UPLBEC 541.

11. In **(2000) 1 UPLBEC 275 Shobh Nath Gautam Vs. State of U.P. and others,** dismissal of the Sub Inspector of Police was set aside in reference to the non-compliance Regulation 490 of U.P. Police Regulations and for non-compliance of mandatory provisions of the procedure prescribed in Regulation 490 and in the circumstances when notice of show cause was not served upon the petitioner directly and for violation of principles of natural justice and depriving the writ petitioner to defend himself the High Court in Shobh Nath Gautam has observed as below :

"12. Regulation 490 specifically provides that in the departmental trial of a police officer, after the preliminary enquiry, charge-sheet shall be framed, copy of which shall be given to the delinquent, Police Officer shall be asked to submit his reply, it should be oral or in writing.. If the Officer accepts the charge, no further evidence will be required to be record, the orders may be passed on the basis of the same but in case of denial, evidence will have to be produced to prove the charge/charges. It further provides that the delinquent Police Officer, if the evidence is produced by the prosecution, shall be allowed to cross-examine the witnesses. He shall also be allowed to inspect the record of the case. The documents mentioned in the charge-sheet shall also be supplied to him. Officer shall be at liberty to make his defence and produce such witnesses, he desires, in his defence. After the evidence is concluded, Superintendent of Police shall record findings taking into

consideration the evidence on the record. If he intends to award any major penalty i.e., dismissal, removal or reduction in rank, the Officer charged shall be supplied copy of the findings and shall be called upon to show cause as to why said penalty be not awarded to him. After receipt of the reply, papers are required to be forwarded, in cases of major penalty, to the D.I.G. Police through District Magistrate for final orders. The D.I.G. on receipt of the papers, is required to supply copy of the findings recorded by the Superintendent of Police, to the Officer charged simultaneously calling upon him to show cause against the imposition of punishment. On receipt of the explanation of the Officer charged, he may pass order of punishment. Clause II of the Regulation 490 provides that in any case in which Superintendent of Police considers that special circumstances justify a departure from any of these rules, he should record reasons for him decision act in any such case, it will be for the Superintendent of Police to show in his finding that the Officer charged has not been prejudiced by this departure from the usual procedure. In the present case, no reasons have been recorded by the Superintendent of Police for deviation from the normal procedure under the aforesaid Regulation and the orders have been passed against the petitioner without following the procedure prescribed under the said Regulation and in contravention thereof.

15. Even if the petitioner was evading service of charge-sheet and show cause notice issued by the department of the inquiry officer, if does not give any licence to the respondents to proceed ex parte against the petitioner. A reference in this regard may be made to the decisions in Dr. Ramesh Chandra Tyagi Vs. Union of India & others, (1994) 2 SCC 116, and Union of India & others Vs. Dinanath Shantaram Karekar & others, (1998) 7 SCC 569, wherein it has been ruled by the Apex Court that notice charge sheet should be served personally, and if they are not served, they should be send under registered cover. Even if service is not effected they may be published in the newspapers."

12. In **(2003) 1 UPLBEC 224 Raj Bahadur Singh Vs. Director of Agriculture, U.P. at Lucknow and others,** this court has observed as below :

The petitioner has placed reliance on the decision **Jagdamba Prasad Shukla Vs. State of U.P. and others** (2000)7 S.C.C.90 para 8

"where the Supreme Court has held that the payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance, No justifiable ground has been made out for non payment of the subsistence allowance all through the period of suspension i.e. from suspension till removal. One of the reasons for not appearing in inquiry as intimated to the authorities was the financial crunch on account of non payment of subsistence allowance and the other was the illness of the appellant. The appellant in reply to the show cause notice stated that even if he was to appear in inquiry against medical advice, he was unable to appear for want of funds on account of non payment of subsistence allowance. It is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the appellant to defend himself in the departmental enquiry.

Thus, the departmental enquiry and the consequent order of removal from service are quashed."

The petitioner has also placed reliance on A.I.R.l999 S.C.l4l6 para 33 Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and another "Where employee was not provided any subsistence allowance during the period of suspension and the adjournment prayed for by him on account of his illness, duly supported by medical certificates, was refused resulting in ex-parte proceedings against him, the appellant has been punished in total violation of the principles of natural justice and he was literally not afforded any opportunity of hearing. Moreover, on account of his penury occasioned by non payment of subsistence allowance, during pendency of departmental proceedings he could not undertake a journey to attend the disciplinary proceedings from his home town, the findings recorded by the inquiry Officer at such proceedings, which were held ex parte, stand vitiated.

"The petitioner also placed reliance on the judgements of this High Court **200l(l) U.P.L.B.E.C. 908 K.P. Giri Vs. State of U.P. and others** Para 7 and 8 as well as on **(2002 U.P.L.B.E.C.l32l Bajrang Prasad Srivastava Vs. U.P. Pariyojana Prabandha U.P. State Bridge corporation Ltd. and others.** It was held in the case of **K.P. Giri (Supra)**

"even in the absence of any reply submitted by the petitioner to the charge-sheet, it was incumbent upon the enquiry officer to fix the date in the enquiry and to intimate the petitioner about the same which has not been done in the present case.. Moreover, from a perusal of the order of dismissal dated 20.3.98 it will be seen that the management had produced the evidence in support of the charges levelled against the petitioner had been accepted by the enquiry officer without making any effort to confront the same to the petitioner. Thus, the entire proceedings have been conducted in gross violation of equity, fair play and is in breach of the principles of natural justice."

In respect of change of inquiry officer the petitioner has further placed reliance on **l994(2) S.C.C. 746** page l2 **(Registrar of Co-operative Societies Madras and another Vs. F.X. Farnando)** where it was held that justice must not only be done but must be seen to be done, therefore, the Supreme Court has directed that an another enquiry officer be appointed in order to remove any apprehension of bias on the part of the respondent. In **l994 Supp.(2) S.C. 256 Para 5 Indrani Bai (Smt.) Vs. Union of India and others.** The Supreme Court has held that

"it is seen that right through, the delinquent officer had entertained a doubt about the impartiality of the enquiry to be conducted by the enquiry officer. When he made a representation at the earliest, requesting to change the enquiry officer, the authorities should have acceded to the request and appointed another enquiry officer, other than the one whose objectivity was doubted."

The petitioner has placed reliance on **l999(4) A.W.C.3227 Para 5 Subhash Chand Sharma Vs. M.D. U.P. Co-Op. Spg. Mills Fed. Ltd.** In this judgment of this Court in which one of us Hon'ble Mr. Justice M. Katju was part has expressed that

"In our opinion, after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry, then an ex-parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case, it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge-sheet. he was given a show cause notice and thereafter the dismissal order was passed. In our opinion, this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion, the impugned order is clearly violative of natural justice.

In Meenglas Tea Estate V. Workmen A I R 1963 S.C. 1719,the Supreme Court observed

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

In S.C. Girotra Vs. United Commercial Bank 1995 Supp.(3) SCC 212 the supreme Court set aside the dismissal order which was passed without giving the employee an opportunity of cross examination. In **Punjab National Bank AIPNBE Federation, AIR 1960 S.C. 160(vide para 66)** the Supreme Court held that in such enquiries evidence must be recorded in the presence of the charge sheeted employee and he must be given an opportunity to rebut the said evidence. The same view was taken in **ACC Ltd. Vs. Their Work Man 1963 II LLJ 396 and in Tata Oil Mills Co. Ltd. Vs. Their Workmen 1963 II LLJ 78 S.C.**

In the case of Radhey Shyam Pandey Vs. The Chief Secretary, State of Uttar Pradesh, Lucknow and others {(2001) 2 UPLBEC 1676} this court (D.B.) has held that:-

"The respondents have not conducted the inquiry according to the proper procedure prescribed under Rule 99. No specific date, time and place of inquiry was fixed oral and documentary evidence against the petitioner should have been adduced in his presence and he should have been given an opportunity to cross examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. A dismissal order is a major punishment having serious consequences and hence should be passed only after complying with the rules of natural justice. Since in the present case no regular and proper inquiry was held nor was subsistence allowance paid, hence in

these circumstances, it is clear cause that the petitioner had not been afforded a fair opportunity much less a reasonable opportunity to defend himself that has resulted in violation of principal of natural justice and fair play. The ex- parte inquiry is illegal and the order of dismissal dated 27.3.2001 is quashed."

In *Raj Bahadur Singh (supra) this court has observed in para 12 as below :*

"(12) I have heard learned counsel for the petitioner and perused the pleadings of both the writ petitions and also I have heard learned Standing Counsel for the respondents and I find that proper procedure for making the disciplinary inquiry has not been followed. The petitioner has not been given subsistence allowance and taking into consideration only the explanation of petitioner, the dismissal order has been passed, and no date and time place has been fixed while making an inquiry. The petitioner has not been afforded opportunity to adduce the evidence and cross examination the witnesses which indicates that the principle of nature justice has not been observed, therefore for lack of opportunity of hearing to the petitioner the dismissal in question based on is illegal and erroneous disciplinary inquiry could not be sustained. The dismissal order dated 2.7.1991 is set aside and petitioner is directed to be re-instated in service with all consequential benefits however keeping in view the gravity of charges alleged against the petitioner it is open to the employer after giving charge sheet to hold a fresh proper inquiry in accordance with law. With these observation the writ petition is allowed".

13. It was held in (2001) 2 UPLBEC 1676/para 25 (**Radhey Shyam Pandey Vs. The Chief Secretary, State of Uttar Pradesh, Lucknow and others)** that the respondents have not conducted the inquiry according to the proper procedure prescribed under Rule 99. No specific date, time and place of inquiry was fixed. Oral and documentary evidence against the petitioner should have been adduced in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. A dismissal order is a major punishment having serious consequences and hence should be passed only after complying with the rules of natural justice. Since in the present case no regular and proper inquiry was held nor was subsistence allowance paid, hence in these circumstances, it is clear cause that the petitioner had not been afforded a fair opportunity much less a reasonable opportunity to defend himself that has resulted in violation of principle of natural justice and fair play. The ex-parte enquiry is illegal and the order of dismissal dated 27.3.2001 was quashed.

14. In the present case, it appears that proper efforts was not made to convey the intimation of suspension, charge sheet, disciplinary inquiry being conducted against the writ petitioner by means of communication of the registered letter or by publishing the same in the newspaper, only one mode has been adopted by affixing all the information to the door of the house of the petitioner which was not sighted without asserting that the petitioner was residing at the place or not? No notice of suspension and charge sheet and day, time and place was

ever communicated or served personally to the petitioner. The petitioner has not witnesses. The documents relied by the respondents have also not been furnished or was shown to the petitioner. In the present case notice of charge sheet and inquiry was neither served personally nor sent by the registered post nor the same were published in the news papers even the petitioner was not given proper attachment order in respect of the place and the office in the suspension order consequently the charge sheet, notice for disciplinary inquiry cannot be deemed or held to have been served upon the petitioner. If the petitioner was evading service of notice or charge sheet issued by the police department or any of the information of the inquiry officer, it does not give any licence to the respondents to proceed ex parte against the petitioner. Here this is a glaring case where the petitioner has been dismissed from service without adopting the proper procedure for dismissal on the aspects of the lack on the procedure and by not providing the petitioner proper opportunity of hearing, the dismissal order and the appellate order both are in violation of the principles of the natural justice and cannot legally be sustained.

15. The allegations against the petitioner was not irrespective of the moral or in respect of the financial irregularities or embezzlement, the charges are mainly for absence from duty, therefore, this court cannot think even in the present facts and circumstances to allow the respondents to initiate to give charge sheet afresh to initiate the disciplinary proceeding because it is irony of fate of the petitioner that since the appointment from the year 1964 as Sub inspector, he could not visualise fortunate been afforded to adduce evidences or allowed opportunity to cross examine the comfortable days in his service career and has been only dragged under inquiry for frivolous allegations for which the respondents have not even bothered to conduct the inquiry in accordance with law.

16. In these circumstances, the orders dated 8th November, 1989, 7th April, 2000 and 17th February, 1994 passed by respondents no. 3, 1 and 2 respectively are set aside and the petitioner is directed to be treated into service and shall be allowed to be given 75% of the back wages only. The petitioner is reinstated without consequential benefits of back wages as well as increments. All the benefits to be given to the petitioner consequent upon this order to be finalised within three months from this order.

The writ petition is allowed.
No order as to costs.

Certified copies of the judgements delivered today where the State Government is party may be given to Sri M.C. Chaturvedi, Addl. Chief Standing counsel free of cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2003

BEFORE
THE HON'BLE S.P. SRIVASTAVA, J.
THE HON'BLE K.N. OJHA, J.

Special Appeal No. 363 of 2003

Committee of Management ...Appellant
Versus
Regional Deputy Director of Education (Basic) Meerut & others ...Respondents

Counsel for the Appellant:
Sri S.K. Mishra

Counsel for the Respondents:
Sri P. Padia
Sri H.R. Misra
S.C.

Rules of Court–Chapter VIII Rule 5–Judgment meaning thereof-Impugned order passed by the learned Single Judge can be said to be a judgment–yes, it has the traits and trappings of finality is a final order within the definition of judgment-Termination order passed without inquiry and in utter violation of the principles of natural justice, quashed-liberty given to proceed against the petitioner after holding the regular inquiry as contemplated under the Rules.

Held: Para 11 and 15

The learned counsel for the appellant as well as the learned Standing Counsel representing, the Regional Director of Education, Meerut, as well as Basic Shiksha Adhikari, Ghaziabad, respondent nos. 1 and 2, respectively have stated that they will have no objection to the quashing of the aforesaid two orders dated 24.10.2001 and 31.10.2001, as the petitioner had no been afforded any opportunity of hearing before passing of the said order. He, however, further stated that they may be given liberty to proceed against the petitioner after holding the regular inquiry, as contemplated under the rules

The impugned order contains the traits, trappings and qualities and characteristics of a final order. Although the expression 'judgment' has not been defined either in the Letters Patent or under the Rules of the Court but whatever tests may be applied, the order impugned in the present case clearly shows that the order impugned in the present case clearly shows that the order has in it the traits and trapping of finality and taking into consideration its ultimate effect, has to be taken to be in the nature of a final order so as to fall within the definition of the 'judgment'.

Case referred:
AIR 1974 SC 1719

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

1. Heard the learned counsel for the appellant.

2. Shri H.R. Misra, the learned Standing Counsel representing the respondent nos. 1 and 2 as well as Dr. Padia, learned Senior Advocate, representing the petitioner–respondent no. 3 have also been heard.

3. Perused the record.

4. The dispute in this case relates to the appointment and the entitlement of respondent no. 3 to hold the post of an Assistant Teacher in an educational institution known as Nehru Jai Jawan Jai Kisan Junior High School, Galand, Ghaziabad, which institution imparts education up to the standard of class–VIII and receives the grant-in-aid from the State. At present an Authorised Controller has been appointed for that institution vesting him with the jurisdiction exercisable by the Committee of Management.

5. This appeal has been filed by the Committee of Management through the learned single judge holding that the respondents which included the Regional Deputy Director of Education and Basis Shiksha Adhikari, Ghaziabad were not entitled to be heard in opposition to the writ petition as they had in utter disregard of the impugned order dated 22.02.2002

passed by this court had not carried into effect the said order.

6. It may be noticed that feeling aggrieved by the interim order dated 22.02.2002, a Special Appeal had been filed, which was registered as Special Appeal No. 343 of 2002 and was finally disposed of vide the order dated 21.03.2002, directing that the writ petition be listed on 16.04.2002, indicating the expectation that the writ petition shall be disposed of as early as possible. The appellant was given a liberty to move an application for vacating the interim order. Pursuant to the aforesaid order passed by the Division Bench disposing of the special appeal, an application seeking vacation of the interim order was filed on 16.04.2002. The learned Single Judge vide the order dated 25.03.2003 had directed the respondents to inform the court by the next date fixed as to whether the interim order dated 22.02.2002 with regard to the payment of current salary of the petitioner had been complied with or not, providing further that the interim order dated 22.02.2002 shall continue to remain operative until further orders of this court. The learned counsel for appellant has urged that in spite of the order passed by the Division Bench for the expeditious hearing of the writ petition and even fixing a date for its disposal, nothing was done and the writ petition continues to remain pending undecided.

7. The grievance raised by the learned counsel for the appellant is that on the one hand the writ petition is kept pending and on the other hand the appellant is being insisted to comply with the interim order granted in favour of the petitioner ignoring altogether the fact that the petitioner had obtained the interim order by practicing fraud and on the basis of misrepresentation of facts. It is urged that in the present case the fraud and misrepresentation is writ large yet the learned Single Judge has passed the impugned order without disposing of the application seeking vacation of the interim order.

8. A perusal of the writ petition giving rise to the Special Appeal indicates that the main grievance of the petitioner is that absolutely no inquiry, whatsoever, was held, by the College Management/ Authorised Controller, which was the competent authority under the relevant rules and even the Basis Shiksha Adhikari concerned, before passing the impugned order which visited the petitioner with evil consequences. It is further urged that the services of the petitioner could not be terminated after a long period of 22 years and payment of her salary could not be denied after such a long period of regular working without affording a reasonable opportunity of being heard to her.

9. Learned counsel for the petitioner–respondent has further urged that the District Basis Shiksha Adhikari had no jurisdiction to pass the impugned order, as it was only the Managing Committee, which could terminate the services of as person who is an employee of the Institution.

10. The record indicates that the authorized controller had passed an order on 24.10.2001 wherein it was held that the petitioner had obtained a B.Ed. Degree from a non-existent University and further that she had secured an appointment on the post in question at a time when she was studying in the same

college. The Basic Shiksha Adhikari was of the further view that being the wife of the then Manager, she could not be selected by a Selection Committee of which the Manager was a member. It was contrary to the statutory provision. On the aforesaid findings, holding that the B.Ed. Degree claimed to have been obtained by the petitioner was a fictitious document, her entitlement for getting salary was negatived. On 31.03.2001 the Authorised Controller consequentially passed an order terminating the services of the petitioner.

11. The learned counsel for the appellant as well as the learned Standing Counsel representing, the Regional Director of Education, Meerut, as well as Basic Shiksha Adhikari, Ghaziabad, respondent nos. 1 and 2, respectively have stated that they will have no objection to the quashing of the aforesaid two orders dated 24.10.2001 and 31.10.2001, as the petitioner had no been afforded any opportunity of hearing before passing of the said order. He, however, further stated that they may be given liberty to proceed against the petitioner after holding the regular inquiry, as contemplated under the rules into the matter of fraud and misrepresentation and ineligibility of the petitioner to get an appointment as an Assistant Teacher in the institution. Learned counsel for the petitioner has urged that taking advantage of her own fraud and misrepresentation the petitioner is trying to get the salary etc. which will cause financial loss to the State Exchequer.

12. Learned counsel for the petitioner states that the petitioner is ready to face the full-fledged inquiry into the aforesaid aspects before the termination of her service.

13. It has been urged by the learned counsel for the respondent–petitioner that the impugned order passed by the learned Single Judge cannot fall within the ambit of the expression "*judgment*" as envisaged under Chapter–VIII Rule 5 of the Court and in this view of the matter the present Special Appeal cannot be held to be maintainable.

14. As pointed out by the Apex Court in its decision in the case of *Shanti Kumar R. Canji Vs. the Home Insurance, Co. of New York,* report in *AIR 1974 SC 1719* in finding out whether the order is a Judgment, it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability.

15. The impugned order contains the traits, trappings and qualities and characteristics of a final order. Although the expression 'judgment' has not been defined either in the Letters Patent or under the Rules of the Court but whatever tests may be applied, the order impugned in the present case clearly shows that the order impugned in the present case clearly shows that the order has in it the traits and trapping of finality and taking into consideration its ultimate effect, has to be taken to be in the nature of a final order so as to fall within the definition of the 'judgment'.

16. In view of what has been indicated hereinabove, the objection in regard to the maintainability of the

Special Appeal is clearly devoid of merit and is not at all sustainable.

17. Taking into consideration the facts and circumstances as brought on record, we are clearly of the opinion that it will be appropriate that the impugned orders, which are claimed to have been passed without affording any reasonable opportunity of hearing to the petitioner deserve to be quashed with the liberty to the present appellant as well as the present respondent nos. 1 and 2 to hold an inquiry into the aforesaid matter of fraud and misrepresentation of facts and other aspects going to the root of the matter after proceeding in accordance with law ensuring that the entire exercise is completed within three months from today.

18. This Special as well as the writ petition shall stand disposed of accordingly.

19. It is, however, provided that the salary and other allowances to which the petitioner is entitled on the basis of the earlier approval of her appointment by the Basis Shiksha Adhikari dated 06.02.1993 shall be paid to her henceforth subject to her furnishing adequate security for the amount to the satisfaction of the Basis Shaiksha Adhikari, Ghaziabad. The security may included the amount lying with the State to the credit of the petitioner like provident Fund etc.

20. The petitioner–respondent shall cooperate in the inquiry.

Ordered accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.7.2003

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

Civil Misc. Writ Petition No. 47222 of 2002

Shaukat Ali ...Petitioner
Versus
Allahabad Development Authority and another ...Respondents

Counsel for the Petitioner:
Sri Sudhir Kumar
Sri M.K. Khan

Counsel for the Respondents:
Sri B.B. Paul
Sri A.K. Misra

U.P. Urban Planning and Development Act, 1973- Sections 15 (2-A), 2 (ee), 2 (jj), 2 (kk), 33, 35, 36, 37 and 38-U.P. Regulation of building operations Act, 1958- Ss 5 and 7 (2-(C)- U.P. Water supply and sewerage Act, 1975- Power under–Arbitrary exercise of– Illegal- Application for sanction of map-Demand notice demanding exorbitant amounts as permit fee, water fee, stocking fee, division fee, development charges, Inspection fee and open area penalty- held arbitrary and illegal. Since no development activity services rendered by ADA- cannot charge development charge.

Held- paras 62 and 63

In the present cases we find that the demand is not preceded by any development work which might have been done by the A.D.A. in relation to the land in question.

In view of the above discussion, we are of the opinion that the impugned demands levied by the A.D.A. are ex facie unauthorized and illegal and are hereby quashed.

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

1. These two writ petitions are being disposed off by a common judgment.

Heard learned counsel for the parties.

2. These two writ petitions as well as several similar writ petitions listed today before us disclose how the local authorities in the State are demanding and realizing illegal amounts from the citizens causing immense harassment and hardship to the common man.

3. What is happening in Allahabad and other cities of the State is that whenever a citizen wants to make a building on his own land he has to apply for sanction of a map under section 15 of the U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as the Act), and whenever such application for sanction of a map is made the Allahabad Development authority immediately sends a bill to the applicant demanding exorbitant amounts before sanction of the map. These bills have been challenged in these two writ petitions and in several others connected writ petitions and a perusal of the same shows that almost all these demands are illegal (as will be presently demonstrated). However unless these amounts are paid the map is not sanctioned or released, causing great harassment to the applicant. Thus the Allahabad Development Authority, as well as other Development Authorities in the State, which have been constituted under the Act have become agencies of harassment to the public instead of being agencies of service to the people.

4. In writ petition no. 47222 of 2002 the petitioner Shaukat Ali has challenged the impugned demand notice dated 23.10.2002 issued by the Allahabad Development Authority (hereinafter referred to as A.D.A.) copies of which are Annexures 7 and 8 to the writ petition.

5. A perusal of Annexure 7 to the writ petition shows that the A.D.A. has demanded from the petitioner the following amounts, permit fee, water fee, stacking fee, division fee, development charges, inspection fee, open area penalty etc. The total amount comes to Rs. 1,03,281/-. Approximately the same amount has also been demanded by the notice, copy of which is Annexure 8.

6. The facts in writ petition no. 47222 of 2002 are that the petitioner had acquired a portion of property no.24/30 Thornhill Road, Allahabad from the recorded owner vide sale deeds Annexure 1 to 4, to the petition. On 24.9.2002 and 23.10.2002 the petitioner had submitted two separate applications with maps of the constructions he wanted to make on this property. Copies of the receipts of deposit of permit fees are Annexures 5 and 6. In response to these applications, the A.D.A. has issued the impugned demand notices Annexure 7 and 8.

7. As regards the demand for permit fees it is stated in para 7 of the petition that the petitioners has already deposited the permit fees vide receipts Annexure 5 and 6 to the petition. Hence further demand of permit fee is clearly illegal.

8. It is stated in para 8 of the petition that the A.D.A. itself does not supply any

water for construction of the building. Water supply is done by the Jal Sansthan. Hence the demand of water fee/charges by A.D.A. is also illegal.

9. As to the demand of stacking fee (Malwa charge), it is alleged in para 9 of the petition that the A.D.A. has not rendered any assistance to the petitioner for raising the constructions. Hence the demand is illegal.

10. As regards the demand of division charge it is alleged in paras 10 of the petition that this is without any statutory sanction and hence it is illegal.

11. Concerning the demand of development charges, petitioners assert in para 11 of the petition that the A.D.A. does not provide any assistance, much less development, and hence this demand is also illegal.

12. As regards inspection charges and open area penalty demanded by the A.D.A., the petitioners contended that the same have no sanction of law, and hence are illegal.

13. The A.D.A. has filed counter affidavit and it is alleged in para 7 of the same that the demand raised by the impugned notices is just and proper. In para 11 it is stated that the demand of water charges is referable to section 15 (2A) of the Act read with Section 2 (ii) of the said Act. As regards the demand of Malwa charges the same is referable to Section 15 (2A) read with Section 2 (kk). As regards division charges, inspection charges and open space charge it is alleged in para 13 that the same is referable to Sections 5 and 7 (2C) of the U.P. Regulation of Building Operations Act, 1958.

14. A supplementary counter affidavit has also been filed by the A.D.A. in writ petition no. 47222 of 2002 and in para 4 it is admitted that the A.D.A. does not supply water. However it is alleged that the A.D.A. is entitled to collect water fee from the parties seeking sanction of the proposed construction building, and subsequently the same is transferred to the concerned local authority, the A.D.A. has given a list of the colonies allegedly constructed by the A.D.A.

15. Writ petition no. 23281 of 2001 has been filed against the impugned demand notices dated 28.5.2001 issued by the A.D.A. (annexures 8 and 9 to the petition) by which demand has been made from the petitioners of various charges.

16. The petitioners in writ petition no. 23281 of 2001 purchased a portion of house no. 130-A Civil Station Allahabad, through registered sale deeds. The property was initially lease property but in 1995 it was converted into free hold property by the District Magistrate, Allahabad.

17. The petitioners applied for sanction of a plan to construct a residential house on the land but no such sanction was granted by the A.D.A. Subsequently the petitioners raised some construction over the land and also applied on 14.5.99 for compounding the constructions under the scheme framed by the A.D.A. The petitioners no. 1 deposited Rs. 1,18,000 on 11.3.2001 and Rs. 16,000 on 12.5.99 vide Annexure 1 and 2. The petitioner no. 2 deposited Rs. 50,000 on 24.3.2001 and Rs,.16,000 on 12.5.1999

vide Annexure 3 and 4. The petitioner no. 1 also deposited Rs. 6038 towards water charges with Jal Sansthan Allahabad, on 17.10.2002 while petitioner no. 2 deposited Rs. 4704 and Rs. 1175 with Jal Sansthan vide Annexures 6 and 7. In para 9 of the petition it is stated that the A.D.A. has issued two separate demand notices dated 28.5.2001 to the petitioners for an amount of Rs. 2,42,457/- and Rs. 1,17,184/- respectively vide annexure 8 and 9.

18. A perusal of the demand notice shows that it has demanded Rs. 14152/- as water charges and Rs. 4544/- as malwa charges. A further amount of Rs. 16929/- has been demanded as sub division charges while another amount of Rs. 96,189/- has been demanded towards development charges and Rs. 84645/- has been demanded towards open space charges.

19. In para 12 of the petition it is stated that the demand made by the A.D.A. is wholly illegal. As regard the water charges, it is alleged in para 14 of the petition that the same was already deposited by the petitioners with the Jal Sansthan, Allahabad and hence no further demand can be raised. As regard malwa charges, the demand is illegal as no property of the Nagar Nigam or A.D.A. has been utilized by the petitioners for the purpose of storage. It is alleged in para 16 of the petition that although Section 302 (1) (b) of the U.P. Nagar Mahapalika Adhiniyam 1959 permits charge of fee for the use of land or street vested in the Mahapalika (now Nagar Nigam) for the deposit of the building material, no demand can be made in this respect from the petitioners as they have not used any property or street of the Mahapalika for storing the building materials.

20. It is alleged in para 17 of the petition that the U.P. Urban Planning and Development Act, 1973 prescribes the matter in which permission for raising construction is to be granted by the development authority, and the charge or taxes which can be levied for this purpose. It is alleged that the Act does not provide for the levying of any development charges from a person who raises constructions, and hence the demand is illegal. Section 33 empowers the authority to provide amenities or carry out development at the cost of the owner only in the event of his default. Section 33 has been quoted in para 20 of the writ petition. In para 21 of the petition it is alleged that the A.D.A. has not provided any amenity nor has it carried out any development activity in respect of the plots over which the constructions have been raised by the petitioners, and all the development activities and the amenities have been provided by the petitioners themselves from their own resources. Hence the development charges are illegal. As regard the betterment charges under section 35, the same can be imposed only if the value of the property has gone up due to the development scheme of the authority. It is alleged that no such development scheme has been initiated by the A.D.A. and as such the demand is illegal. It is alleged in para 23 of the petition that the sub division charge is not justified as no levy can be imposed by the A.D.A. under the Adhiniyam or Regulations. As regard the open space charges a perusal of the demand notice would indicate that initially the word 'parking fee' was printed therein which has subsequently scored out and the same

has been substituted as open space charges. It is alleged in para 25 of the petition that neither any park has been provided by the A.D.A. ;nor any space or any other ground has been provided to the petitioners or other residents and as such this charge is illegal. It is alleged in para 26 that the petitioners have already deposited a substantial amount with the A.D.A. towards compounding charges but no amount is payable as malwa charges, water charges and sub division charges, development charges or open space charges.

21. A counter affidavit has been filed by the A.D.A. and we have perused the same. In para 3 of the same it is stated that Nazul plot no. 130-A Civil Station Allahabad originally belonged to one R.S. David and others and their representative who floated a residential colony thereon without submitting a lay out plan before the competent authority under the U.P. Urban Planning and Development Act, 1973 and the Rules and Regulations framed there under. This residential colony did not contain any external and internal development. It also lacked roads, water supply, drainage and sewerage system etc. The petitioners raised their constructions without taking sanction and also applied for compounding. The respondents have relied on the decision the Supreme Court in State of U.P. versus Smt. Malti Kaul 1997 (1) UPLBEC 99. In para 20 of the counter affidavit it is stated that the water charges can be levied by the development authority under the Act. It is stated that charging of malwa fees/stacking fee by the development authority are referable to the Section 35 to 38 of the Act, and have rightly been demanded. Sub Division charges and open space charges are also permitted under the Act and the Regulations.

22. We have also perused the rejoinder affidavit, and have carefully considered the submission of the learned counsel for the parties.

We may deal with the various demands made by the impugned notices seriatim. These demands are :

(i) Water charges
(ii) Malwa charges
(iii) Sub Division Charges
(iv) Development charges
(v) Open space charges

23. As regard the water charges it may be mentioned that clause (ii) of Section 2 of the Act as amended by U.P. Act no. 3 of 1997 defines water fees as follows:

"Water fees' means the fees levied under Section 15 upon a person or body for using water supplied by the Authority for building operation or construction of building'.

Section 15 (2A) after its amendment by U.P. Act no. 3 of 1997 states:

"The Authority shall be entitled to levy development fees, mutation charges, stacking fees and water fees in such manner and as such rates as may be prescribed."

Water charges are claimed by the A.D.A. in accordance with the aforesaid provision. The rate calculated is (a) 29 of the construction cost of ground floor and (b) of the construction cost of first floor and above. In this connection G.O. dated 15.5.88 has been filed by the A.D.A. as Annexure 2 to the Supplementary Counter

Affidavit in Writ Petition No. 23244 of 2001 Smt. Rekha Bhargawa versus A.D.A. and others.

24. Clause (ll) of Section 2 of the Act was inserted by U.P. Act No. 3 of 1997 which came into effect from 1.5.97. There was no mention of water fee earlier in the Act. The demand of water fee charges pertaining to any period before 1.5.97 is obviously illegal because clause (ll) has not been inserted retrospectively. The question, however, remains about the prospective operation of clause (ll).

25. Clause (ll) defines 'water fee to mean' fee levied under section 15 upon a person or body for using water supplied by the Authority for building operation or construction of building."

26. It may be seen from the above definition that water fee can only be charges if water is supplied by the A.D.A. It has been admitted in para 4 of the supplementary affidavit of the A.D.D. in writ no. 47222 of 2002 that the A.D.A. does not supply water to any one. In fact it is common knowledge that in Allahabad, as in other cities in U.P. water is supplied by the Jal Sansthan constituted under the U.P. Water Supply and Sewerage Act, 1975. The A.D.A. has no water works of its own. We can take judicial cognizance of these facts. Hence the demand of water charges is clearly unauthorized and illegal, because section 2 (ll) states that water fee can be charged when the water is supplied by the Authority and not by some other authority. Moreover, no proof has been furnished by the A.D.A. that it passes on the water fee collected by it to the Jal Sansthan. Also, the petitioners have alleged in the writ petition that they have paid water charges to the Jal Sansthan, and this is not denied.

We now come to the second demand, namely, of Malwa charges. The petitioners in writ petition no. 23281 of 2001 in para 14 have alleged that no property or street of the Nagar Nigam or A.D.A. has been utilized by the petitioners for the purposes of storing the building material and hence the demand is illegal.

Staking fee is claimed by the A.D.A. under Section 2 (kk) read with Section 15 (2A) of the Act as amended by U.P. Act No. 3 of 1997. The rate calculated is Rs.11/- per square meter of the proposed construction plan vide G.O. dated 5.2.98 which is Annexure 4 to the supplementary counter affidavit filed in writ petition no. 23244 of 2001.

Sub section (kk) of the section 2 as inserted by U.P. Act No. 3 of 1997 states:

"(kk) 'stacking fees' means the fees levied under section 15 upon the person or body who keeps building materials on the land of the Authority or on a public street or public place.'

27. The above definition clearly mentioned that the stacking fee can only be charged for keeping material on the land of the Authority or public place or street, and it cannot be charged for keeping building material elsewhere (e.g. on one's own land).

28. It is alleged in para 14 of the writ petition no. 23281 of 2001 that no property of the Nagar Nigam or A.D.A. has been utilized by the petitioners for stacking the building material. In para 16

it is alleged that no property or street of the Mahapalika now (Nagar Nigam) has been utilized by the petitioners for the purposes of storing the building material.

29. The reply to paras 14 and 16 of the writ petition is contained in paras 21 of the counter affidavit merely states:

"That contents of paragraph 14 of the writ petition as stated are not correct and denied. It is added that charging of Malwa fees/stacking fee by the development authority is specifically permitted under U.P. Act No. 3 of 1997 amending U.P. Urban Planning and Development Act, 1973".

Paragraph 22 of the counter affidavit states:

"That contents of paragraph nos. 15, 16 and 17 of the writ petition as stated are not correct and denied and in reply it is reiterated that demand notice dated 28.5.2001 issued by respondent development authority to the petitioners is just and proper and the same is well founded on law and facts involved in the case."

30. A perusal of both the paras 21 and 22 of the counter affidavit shows that the allegations of the petitioners in writ no. 23281 of 2001 that they are not stacking their building material on the land of the authority or public street have not been specifically denied by the respondents. It is a well settled law of pleadings that a specific averment must be given a specific reply, otherwise it will be deemed to be admitted. When the petitioners have specifically denied that they stacked their materials on the land of the authority or public place then it was incumbent on the A.D.A., if it wanted to levy staking fee, to have clearly mentioned where exactly did the petitioners stack their materials, but that has not been done. Hence the allegations in paras 14 and 16 of the writ petition have to be treated as unrebutted and the demand of stacking fee is thus wholly illegal. Reference by the respondents to sections 35 to 38 of the Act are wholly misconceived, as these provisions deal with betterment charges which, as a bare perusal of section 35 indicates, can only be levied if any development scheme has been executed by the Authority in the area in question due to which the value of the property has increased or will increase. No such development scheme has been executed in the area in question, as stated in paragraph 21 of the writ petition no. 23281 of 2001 and paragraph 11 of the writ petition no. 47222 of 2002.

31. We now come to the third demand i.e. of sub division charges. It is alleged in para 23 of writ petition no. 23281 of 2001 that a demand of Rs. 16929/- from petitioner no. 1 and Rs. 7837/- from petitioner no. 2 towards sub division charges is not justified as no such levy can be imposed by the development authority under the provision of the Act or Regulations framed there under. It is also alleged that the Development Authority can only realize fee or taxes as provided for under the Act and no levy can be made which is not contemplated by the Act.

32. The reply to paras 23 and 24 of writ petition no. 23281 of 2001 is contained in para 26 of the counter affidavit of the A.D.A. It is stated therein that the sub division charge and open space charge are permissible under the

Act and the rules and regulations framed there under. However, in the counter affidavit no specific mention of any particular provision of the Act or rules or Regulations has been made. In our opinion the A.D.A. can only levy such taxes, fees or charges as are contemplated by the Act. We have not been shown any provision of the Act, which permits the levy of sub division charges or open space charges. Even in the amendment to the Act by U.P. Act no. 3 of 1997 there is no mention of open space charges or sub division charges.

33. It may be mentioned that section 15 (2A) of the Act refers only to development fees, mutation charges, stacking fee and water charges. There is no mention of open space charges or sub division charges in section 15 of the Act. No doubt para 4 of the supplementary counter affidavit mentions that sub division charge is referable to certain G.Os., but in our opinion a G.O. is not a statutory provision. Hence the charge is illegal.

34. As regards section 33 of the Act, in our opinion this provision does not permit the A.D.A. to levy sub division charges or open space charges, as a bare perusal of the provision indicates. Moreover it has been categorically asserted in para 21 of writ petition no. 23281 of 2001 that the A.D.A. has not provided any amenity nor has it has carried out any development activity in respect of the plots over which constructions have been raised by the petitioners, and all the development activities and amenities have been provided by the petitioners themselves from their own resources. This allegation in para 21 of the petition has been replied to in paragraph 25 of the counter affidavit. Paragraph 25 of the counter affidavit states :

"That contents of paragraph no. 21 of the writ petition are denied. It is reiterated that demand of development charge is specifically allowed under U.P. Act no. 3 of 1997."

35. It is well settled that a bald denial to a pleading will tantamount to an admission vide Bagat and Co. vs. East India Trading Co. AIR 1964 SC 538 (para 11). A specific plea has to be given a specific reply, and a mere bald denial is not sufficient. This is clearly provided for in order 8 Rule 5 C.P.C., and even though the C.P.C. is not in terms applicable to writ jurisdiction many of its general principles apply. In our opinion the principle of order 8 Rule 5 C.P.C. applies to writ petitions also. Hence we are of the opinion that the averments of the petitioners in para 21 of writ petition no. 23281 of 2001 that the A.D.A. has not provided any amenity nor carried out any development activity in respect of the plots in question, and all amenities and development have been provided and done by the petitioners themselves through their own resources, is correct.

36. We now come to the fourth demand of the A.D.A. i.e. of development charges. We have already mentioned that in para 21 of writ petition no. 47222 of 2002 the petitioners have stated that the A.D.A. has not done any development work in respect of the plots in question nor provided any amenity and this allegation has not been specifically denied by the A.D.A. in its counter affidavit.

37. Learned counsel for the A.D.A. has however, relied on the decision of the

Supreme Court in State of U.P. versus Smt. Malti Kaul 1996 (10) SCC 425.

We have carefully perused the above decision.

38. It may be mentioned that this Court in Smt. Malti Kaul vs. A.D.A. AIR 1995 All 397 had held that there is no statutory provision for realizing development charges. This court had relied on the decision of the Supreme Court in A.D.A. vs. Sharad Kumar AIR 1992 SC 2038 in which it was held that without an express statutory provision authority cannot impose a tax or fee. This court also referred to the decisions in Hingir Rampur Coal Co. vs. State of Orissa AIR 1961 SC 459, Jagannath Ramanuj Das versus State of Orissa AIR 1554 SC 400 and Delhi Municipal Corporation vs. Mohd. Yasin AIR 1983 SC 617 in which it was consistently held by the Supreme Court that there should be a specific statutory provision empowering the authority to impose a levy, otherwise the imposition will be illegal. The A.D.A. had urged before this Court in Malti Kaul's case that development fee can be levied on the basis of the G.O. dated 12.8.1986, but this Court negatived this contention holding that there must be a statutory provision for imposing of the development fee/ charge and since there was none, the said charge/fee is illegal.

39. Against the decision of this Court in Smt. Malti Kaul's case (supra) the State Govt. filed an appeal before the Supreme Court which was allowed vide state of U.P. vs. Malti Kaul 1996 (10) SCC 425. We have carefully examined the decision of the Supreme Court in Malti Kaul's case. In para 8 of the said decision it has been observed that Section 33 of the Act give the power to the development authority to provide amenities or carry out development at the cost of the owner in the event of his default and to levy chess in certain cases. Under sub section 1 of section 33 if the authority is satisfied after conducting an enquiry that any amenity in relation to any land in the development area has not been provided in relation to that land, which in the opinion of the authority, ought to have been provided, then after giving opportunity of hearing to the owner it may impose the development charges. Sub section 2 of section 33 contemplates that if any amenity is not provided and development not carried out within the time specified the authority may itself provide the amenity or carry out the development itself or through some agency as it deems fit, and all expenses incurred in this work can be recovered from the owner in the manner indicated in sub section 4.

40. Thus the Supreme Court has held that the power to impose development charge/fee is contained in section 33 of the Act.

Section 33 of the said Act states:

"(1) If the authority after holding a local inquiry or upon report from any of its officers or other information in its possession, is satisfied that any amenity in relation to any land in the development area has not been provided in relation to that land which, in the opinion of the Authority ought to have been or ought to be provided or that any development of the land for which permission, approval or sanction had been obtained under this Act or under any law in force before the coming into force of this Act has not been

carried out, it may, after affording the owner of the land or the person providing or responsible for providing the amenity a reasonable opportunity to show cause, by order require him to provide the amenity or carry out the development within such time as may be specified in the order.

(2) If any amenity is not provided or any such development is not carried out within the time specified in the order, then the Authority may itself provide the amenity or carry out the development or have it provided or carried out through such agency as it deems fit.
Provided that before taking any action under this sub section, the Authority shall afford a reasonable opportunity to the owner of the land or to the person providing or responsible for providing the amenity to show cause as to why such action should not be taken.

(3) All expenses incurred by the Authority or the agency employed by it in providing the amenity or carrying out the development together with interest at such rate as the State Government may be order fix from the date when a demand for the expenses is made until payment may be recovered by the Authority from the owner or the person providing or responsible for providing the amenity as arrears of land revenue, and no suit shall lie in the civil court for recovery of such expenses."

41. We have carefully perused the said section, which indicates that development charges under section 33 can only be realized if, and only if, the authority does some development work or some amenity is provided by it. Also, a perusal of Section 33 indicates that the procedure mentioned in that provision has to be strictly followed before development charge can be levied. According to that procedure, first the development authority has to be satisfied (after an enquiry or a report or information) that some development has not been done or amenity not provided by the owner. The Authority must then, after giving the owner opportunity of hearing, order him to do so. If after such order the owner does not comply with it then the Authority, after giving the owner another opportunity of hearing, may itself develop the land or provide the amenity, and realize the cost from the owner.

42. Thus an elaborate procedure has been laid down in Section 33 which must be complied with before development charges can be realized. This procedure has been given a complete go by the A.D.A., and instead the invariable practice adopted by it is what whenever an Application is filed for sanction of a map (under section 15) a demand for development charges (and also other charges) is immediately issued. This is clearly in violation of Section 33.

In para 21 of writ petition no. 23281 of 2001 it has been stated by the petitioner:

"That the petitioners categorically assert that the development authority has not provided any amenity nor it has carried out any development activity in respect of the plots over which the constructions have been raised by the petitioners, and all the development activities and the amenities have been provided by the petitioners, themselves from their own resources. Thus the Development Authority has not incurred any expenses towards the aforesaid head and in view of which the demand made

towards development charges is clearly unjustified in law". The reply to paragraph 21 of the writ petition is contained in para 25 of the counter affidavit which states:

"That contents of paragraph no. 21 of the writ petition are denied. It is reiterated that demand of development charge is specifically allowed under U.P. Act No. 3 of 1997".

43. A perusal of para 25 of the counter affidavit shows that there is no specific denial of the factual allegations of the petitioners in para 21 of writ petition No. 23281 of 2001 that no development activity has been done by the A.D.A. nor any amenity has been provided to the petitioners by the A.D.A. It is well settled that a bald denial will amount to an admission. The averment in para 21 of the writ petition no. 23281 of 2001 should have been specifically replied to by the A.D.A. in its counter affidavit. The petitioner has categorically alleged in para 21 of the writ petition that no development work has been done by the A.D.A. on the land in question nor has any amenity been provided to the petitioners. It was incumbent on the respondents if it wished to deny the said allegations to have specifically mentioned what development activity has been done by the A.D.A. and what amenity has been provided by it to the petitioners in respect of the petitioners' land, but that has not been done. In the absence of any specific pleadings in the counter affidavit we have to accept the allegation in para 21 of writ petition no. 47222 of 2002 that no development activity in respect of the plots in question was done by the A.D.A. nor any amenity provided by it. The houses in question are situated at Thornhill Road, Allahabad which is a road built during British times (as in well known) and it is maintained by the P.W.D. The A.D.A. has neither built the Thornhill Road nor maintains it. In fact it was not even in existence when Thornhill Road was built. No doubt the A.D.A. has power under section 33 to impose development charges if it does some development work, but in the case of the petitioners no such development activity has been done by the A.D.A.; nor amenity provided by it to the petitioners, and the procedure prescribed in section 33 was clearly not followed. In fact all the development work in the area was done by the concerned authorities in Allahabad in British days, as is of common knowledge. We can take judicial cognizance of this fact.

44. The land on which the buildings in question were built was not developed by the A.D.A. but by some other agency or authority (probably the P.W.D.). Hence in our opinion no development fee/charge can be levied in this connection.

45. However, there are some colonies in Allahabad which have been built by the A.D.A. whose list is given in Annexure SCA to the supplementary counter affidavit in writ petition no. 47222 of 2002. The A.D.A. can charge development charges in respect of these colonies which it developed (though even here the levy of development charge/fee must have some co-relation to the expenses incurred by the A.D.A. for the development work it has done, and it should not be arbitrary or exorbitant). It can also levy development charge in respect of other land in relation to which it has done some development work. However, even in such cases it must

comply with the procedure laid down in Section 33.

46. We are therefore, of the opinion that A.D.A. can levy development fee/charge only where some development work has been done by the A.D.A. in relation to the land in question, and there too, the charge must have some co-relation with the expenses incurred by the A.D.A. in this connection, and the procedure of section 33 must be followed.

47. There are certain colonies in Allahabad which have been developed by bodies other than the A.D.A. e.g. the Awas Evam Vikas Parishad constituted under the U.P. Awas Evam Vikas Parishad Act, which is a statutory body. One fails to understand how the A.D.A. can charge development charges from the owners of the building in such colonies which were not developed by the A.D.A. and no amenity has been provided to them by it. Hence we make it clear that only where some development work was done by the A.D.A. can it charge development charges, and there too the levy should have some co relation to the expenses incurred in the development work, and the procedure laid down in section 33 must be followed.

48. In Smt. Malti Kaul's case (supra) the Supreme Court has referred (in para 10 of the judgement) to Section 59 (1) (c) of the Act which states that any directions or regulations made under the U.P. (Regulation of building operations) Act, 1958 in force on the date immediately before the date of commencement of the Act, shall in so far as they are not inconsistent with the provisions of this Act, continue in force until altered, repealed or amended by any competent authority under the Act.

49. The Supreme Court in Malti Kaul's case (supra) has referred to clause 8 (vii) of the U.P. (Regulations of building operation) Directions 1960 which states :

"(vii) The applicant has entered into an agreement with the local body concerned for the land and for provision of other amenities and has either deposited the full estimated cost of the development and provision of other amenities with that local body in advance or has given to it a bank guarantee equivalent to such cost, or has entered into an agreement with that local body, providing that the full cost thereof may be realized by it out of the sale proceeds of the plots that may be sold by the applicant;

Provided that any such agreement between the applicant and the local body may provide for any part of the development and provision of other amenities being carried out by the applicant himself, however that in respect of any such part he shall give adequate security to the local body to secure that he shall carry out such part of the development and provide other amenities in accordance with the approved standards and specifications to the satisfaction of the Controlling Authority."

A careful perusal of clause (vii) shows that this clause is applicable where the applicant has entered into an agreement with the local body concerned for development of the land and for provisions of their amenities. Hence obviously it has not application where

there is no such agreement between the applicant and the local body for the development of the land and for the provision of other amenities. It is not alleged by the respondents in this case that there was any; such agreement between the petitioners and the local body concerned for development of the land and for provision of amenities.

50. In para 21 of the writ petition no. 23281 of 2001 it has been categorically asserted that the development authority has not provided any amenity nor has it carried out any development activities in respect of the plots over which the constructions have been raised by the petitioners, and the development activities and amenities have been provided by the petitioners themselves from their own resources.

51. We, therefore, clarify that clause (vii) of the said Directions will only apply where there is an agreement between the applicant and the local body for the development of the land and for providing of other amenities.

52. Moreover the use of the words 'providing' that the full cost thereof may be realized by it out of the sale proceeds of the plots that may be sold by the applicant' which occurs in clause (vii) seems to indicate that this clause really relates to cases of development by a colonizer who develops the land and does plotting on the same and then sells the plots.

53. It may be mentioned that sub section 2 A of section 15 which has been inserted by U.P. Act no. 3 of 1997 permits the authority to levy development fee. Development fee has been defined in Section 2 (gg) which has also been inserted by U.P. Act No. 3 of 1997 as follows :

"development fee' means the fee levied upon a person or body under section 15 for construction of road, drain, sewer line, electric supply and water supply lines in the development area by the development authority."

"development with its grammatical variations means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material charge in any building or land, and includes re-development."

54. A careful perusal of the definition of development fee' shows that it can be levied upon a person or body for construction of road, drain, sewer line, electric supply and water supply by the development authority. Thus the A.D.A. can not charge development charge or fee when it has not done any development work, and when the road is constructed by the P.W.D., drain and sewer are established by the Municipality (now known as Nagar Nigam), water supply arranged by the Jal Sansthan and Electric supply given by the U.P. State Power Corporation.

55. What has been happening in Allahabad (and other cities in U.P.) is that the A.D.A. or other development Authority invariably demands development charge or other charges in advance whenever any building is sought to be constructed in the city, and an application is made for sanction of the map for this purpose, even though the A.D.A. may not have done any

development work in this connection. This is clearly unauthorized and illegal, being directly in contravention of the language and the scheme of the statute. This will be apparent from a simple analysis of the provisions of section 33 of the Act which clearly envisages that the development charge is recoverable only as, and by way of, recompense for any development work actually undertaken by the development authorities upon the default of the owner to carry out his obligations in regard to the proposed construction. What was supposed to be recompensed cannot be converted into means of augmenting the revenues of the A.D.A. which is what the A.D.A. has been actually doing.

56. As regards the Supreme Court decision in Malti Kaul's case (supra) a careful perusal of the same shows that all that the Supreme Court has held therein is that there are statutory provisions for levying development charge. The Supreme Court overruled the decision of this Court in Malti Kaul's case which had held that there is no statutory provision for levying development charge.

57. However, it is well settled that existence of power is one thing, and exercise of that power is another. For instance, in the Cr.P.C. there is power in the police to arrest , but as held by the Supreme Court in Joginder Kumar vs. State of U.P., AIR 1994 SC 1349 (vide para 24) this does not mean that the police can arrest in every case.

58. Similarly, in 'In the matter of 'k' A Judicial Officer, 2001(3) SCC 54 the Supreme Court observed that the superior courts undeniably have power to pass strictures on a subordinate judiciary officer, but this power is to be exercised only when necessary for the purpose of reaching a decision.

59. In Consumer Action Group V. State of Tamilnadu 2000 (7) SCC 425 the Supreme Court held that even though wide power may be conferred by the statute, the power must be exercised reasonably and for the public good.

60. In Maneka Gandhi v. Union of India, AIR 1978 SC 597 a seven Judge Constitution Bench of the Supreme Court held that arbitrariness violates Article 14 of the Constitution. It follows that even if the A.D.A. has statutory power to levy development fees/charges this power cannot be exercised arbitrarily.

61. Hence merely because there are statutory provisions enabling the A.D.A. to levy development charge this does not mean that the A.D.A. can levy development charge as of course and in every case, irrespective of whether it has done development work or not. In our opinion the A.D.A. can levy development fee/charge only when it has done development work in relation to the land in question, and that too after strictly complying with the procedure laid down in section 33, and the charge/fee must have some co-relation with the expenses incurred in this connection by the A.D.A.

62. In the present cases we find that the demand is not preceded by any development work which might have been done by the A.D.A. in relation to the land in question.

63. In view of the above discussion, we are of the opinion that the impugned demands levied by the A.D.A. are ex facie

unauthorized and illegal and are hereby quashed.

64. The last demand which has been challenged is the demand for open space charges and sub division charges. We have not been shown any provision in the Act which empowers the A.D.A. to levy the open space charge or sub division charge. In para 25 of the petition it is alleged that neither any park has been provided by the A.D.A. nor any open space has been provided to the petitioners. It has not even been alleged by the respondents that a park has been provided in the vicinity of the land in question. In para 27 of the counter affidavit the reply to para 25 of the writ petition is as follows:

"That contents of paragraph nos. 23, 24 and 25 of the writ petition as stated are not correct and denied. It is submitted that sub division charges and open space charges are also permitted under U.P. Urban Planning and Development Act, 1973 rules and regulations of the respondent development authority framed hereunder. Rest of the averments and the averments to the contrary are incorrect and denied. True facts have already been stated.

Further reply if necessary shall be given subsequently".

65. A perusal of para 27 of the counter affidavit indicates that the factual allegation in para 25 of the writ petition has not been denied by the respondents and they have only stated that they have power to levy sub division charge and open space charge. They have not denied that no park or open space has been provided to the petitioners or in their vicinity. Hence in our opinion the demand of park fee, sub division fee or open space charge is clearly illegal. Moreover, these charges are not relatable to any statutory provision under the Act. A G.O. is not statute and hence it cannot justify such a levy. A bare perusal of Section 5 and Section (2-A) of the U.P. Regulation of Building Operations Act, 1958, on which the respondents rely, shows that these provisions do not authorize the concerned authority to impose the aforesaid charges.

66. It is well settled that no tax or fee can be levied or realized without a statutory provision, vide Ahmedabad Urban Development Authority v. Sharad Kumar AIR 1992 SC 2038 (Para 6). Since there is no statutory provision for imposing park fee, open space charge, sub division charge, inspection fee or permit fee obviously the demands for the same are illegal, and they are quashed. Moreover, the petitioner in writ petition no. 47222 of 2002 has already paid permit fee as stated in para 4 of his writ petition, and we fail to understand how it can be demanded again.

67. In view of the above discussion, the writ petitions are allowed. The impugned demand notices in both these petitioners are quashed. If any amounts mentioned in the impugned notices have been realized from the petitioners they shall be refunded to them forthwith. If the refund is not made by the A.D.A. within one month from the date of this judgment then it will have to pay interest at 12% per annum from the date of realization to the date of refund to the petitioners.

68. Before parting with these cases we are constrained to observe that an alarming state of affairs has been

prevailing in this state regarding the manner in which the local bodies in general and the development authorities in particular operate, so much so that the Court can take judicial cognizance of this fact. Instead of serving as instruments of looking after the welfare of the citizens, those in charge of operating such authorities have made them a tool of extracting money illegally from citizens, by fair means of foul. We have just seen how a provision which was designed only to enable the development authority to recompense itself for any expense which it might have incurred on the fault of the private individual has been used, or rather misused, and huge demands utterly illegally have been made against the common people, for whose welfare these authorities were supposed to function. We can take judicial notice of these facts. We are reminded of the observation made by the celebrated Justice Brandois of the U.S. Supreme Court who remarked 'A' Judge is surely expected to know what every one in society knows' (see the Legacy of Holmes and Brandeis' by Samuel Konefsky).

69. It is well known that in U.P. and perhaps in many other states, whenever a person applies for sanction of a map for constructing a building or room the authorities demand bribe, otherwise the map will not be sanctioned and all kinds of hyper technical objections are raised. It is common knowledge that almost every Municipality or local authority in the country has fixed a rate of this bribe for sanctioning a map. One has to pay a hefty sum of money to the Municipality or Development authority officials if one wishes to get a map sanctioned for constructing a building or room, and if one does not pay this amount the map will not be sanctioned come what may. How long the citizens of this country will tolerate this scandalous state of affairs if anyone guess. The time has now come when it has become the duty of the Court to intervene in this disgraceful state of affairs and voice its protest. The Judiciary has to speak out on behalf of the people in such matters and bring them out to the notice of the people at the helm of the affairs.

70. We are also informed that more often than not when a person applies under section 15 of the Act for sanction of a plan unless he gives some extraneous consideration to the concerned officials the application is kept pending for a long time giving rise to unnecessary hardship to the applicant. This is highly objectionable. The application should, in our opinion, be decided not later than three months of applying for the same and it should be allowed or rejected on certain objection criteria (mentioned in the relevant rules) and not arbitrarily or on extraneous considerations. If the application complies with the objective criteria mentioned in the relevant rules it should be allowed and it should not be rejected. If there is a defect in the application or map the applicant should be informed in writing about the defect and the relevant rule which the application or map allegedly violates, and he should be called upon the remove the defect. If the applicant satisfies the concerned authority that in fact there is no defect in the application or map then sanction should be granted. If however, the applicant cannot satisfy the concerned authority, and does not remove the defect within a reasonable period, then, after giving the applicant a personal hearing (if he so desires), the concerned authority can

reject the application, but in the rejection order he must give reasons and must refer to the relevant rule which will be violated if the map is sanctioned. This procedure will obviate any misgivings or misapprehensions in this connection, and will be conducive to transparency in administration.

71. Let the Registrar General of this Court send copy of this judgment forthwith to the Chief Secretary and the Urban Development Secretary, U.P. Government, who will communicate it to the Chairman and Vice Chairman of all Development Authorities as well as other concerned local bodies and authorities in U.P. with the direction that this judgement should be strictly complied with.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.7.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 27882 of 1997

Nagar Palika Parishad, Mirzapur and another ...Petitioners

Versus

Presiding Officer, Labour Court, Allahabad and another ...Respondents

Counsel for the Petitioners:
Sri S.N. Shukla
Sri C.K. Parekh

Counsel for the Respondents:
Sri R.S. Sharma
Sri G.S. Sharma
Sri K.S. Rathore
S.C.

Constitution of India, Article 226-Service Law-Practice of procedure-Delay in filing-Recall application to set aside ex-parte award-Rejected-Held-Labour Court rightly rejected no case for condonation of delay out.

Held- Para 5

So far as the order refusing to entertain the application for setting aside the ex-parte award is concerned, in my opinion, the Labour Court has given sufficient reason to the effect that the employers have not been able to make out a case for condonation of delay in filing the application for setting aside the ex-parte award, which was admittedly beyond time and the reasons given by them have not been believed by the Labour Court. This Court in exercise of power under Article 226 of the Constitution of India will not sit in appeal over the findings recorded by the Labour Court while arriving at the conclusion that the employers have failed to make out a case.

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

1. The employers Nagar Palika Parishad, Mirzapur aggrieved by an award of the Labour Court, U.P., Allahabad dated 13th March, 1995, passed in adjudication case No. 38 of 1993, which is an ex-parte award and the order dated 6th June, 1997 refusing to set aside the ex-parte award, approached this Court by means of present writ petition under Article 226 of the Constitution of India, copies whereof are annexed as Annexure-'7' and '11' to the writ petition.

2. The following reference was made to the Labour Court for adjudication:-

"क्या सेवायोजकों द्वारा अपने श्रमिक/कर्मचारी श्री राम नरायन, टैक्स कलेक्टर की सेवायें ११.११.१९७६ से समाप्त किया जाना उचित तथा/अथवा वैधानिक है? यदि नहीं; तो

संबंधित श्रमिक/कर्मचारी क्या हितलाभ (रिलीफ) पाने का अधिकारी है एवं अन्य किस विवरण सहित ?"

3. The Labour Court has given the aforesaid award ex-parte after recording a finding that inspite of service of notice from the Labour Court by Registered post A/D, nobody appeared on behalf of the employers. The employers thereafter moved a recall application for setting aside the ex-parte award, which application has been rejected by the Labour Court on the ground that no sufficient cause has been given for making the application at the belated stage. The chequered history between the parties of the litigation clearly demonstrates that the workman concerned had approached the U.P. Public Service Tribunal, which found that the claim petition moved on behalf of the workman is not maintainable. Thereafter the workman preferred a writ petition before this Court, which also found that the writ petition is not maintainable, as the petitioner has a remedy by way of raising an industrial dispute. The workman concerned thereafter raised a dispute, which has been referred to the labour Court, as stated above.

4. The Labour Court has held that inspite of notice being served upon the employers, nobody appeared on their behalf to contest the case set up by the workman and arrived at the conclusion that the services of the workman were terminated by the employers without complying with the provision of Section 6-N of the U.P. Industrial Disputes Act, 1947 and that the workman has completed more than 240 days of working in previous calendar year. These findings remain un-assailed. Learned counsel appearing on behalf of the petitioners-employers tried to assail these findings recorded by the Labour Court, but in vain. In view of the facts and circumstances of the case and the finding recorded by the Labour Court, I do not find any justification to interfere with these findings.

5. So far as the order refusing to entertain the application for setting aside the ex-parte award is concerned, in my opinion, the Labour Court has given sufficient reason to the effect that the employers have not been able to make out a case for condonation of delay in filing the application for setting aside the ex-parte award, which was admittedly beyond time and the reasons given by them have not been believed by the Labour Court. This Court in exercise of power under Article 226 of the Constitution of India will not sit in appeal over the findings recorded by the Labour Court while arriving at the conclusion that the employers have failed to make out a case. This being the legal position and for the reasons stated above, this writ petition deserves to be dismissed.

6. However, in the interest of justice and as argued by learned counsel for the employers, the award of the Labour Court is modified to the extent that the workman concerned will be entitled only half of the wages from the date of termination of his services till the date of the award and thereafter he shall be entitled to full back wages.

7. In view of what has been stated above, this writ petition has no merit and is accordingly dismissed with the modification to the extent that the workman concerned shall be entitled to half back wages from the date of

termination of his services till the date of the award and thereafter workman shall be entitled for full back wages. The interim order, if any, stands vacated. However, there shall be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2003

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

Civil Misc. Writ Petition No. 27899 of 1998

Jagat Narain Singh ...Petitioner
Versus
Director of Education (Secondary) and others ...Respondents

Counsel for the Petitioner:
Sri A.S. Diwekar

Counsel for the Respondents:
Sri S.C. Mishra
Sri S.K. Pal
Sri K.R. Singh
Ms. Manju Chauhan
S.C.

U.P. Intermediate Education Act, Regulations, Chapt.II, Regulation 6 (6)-U.P. Secondary Education Services Selection Board Act 1982, Sec. 32-U.P. Secondary Education Services Commission Rules 1983, Rule 9-concept of deemed approval of appointment-as contained in Regulation 6 (6)-has been replaced by Rule 9-by virtue of Sec. 32-in absence of specific period-plea of deemed approval-held not sustainable.

Held-Para 5

Even though under Regulation 6 (6) of chapter 2 of the regulation framed under U.P. Intermediate Education Act there was provision that if the D.I.O.S. within three weeks did not communicate the decision on the proposal of the promotion sent by committee of Management. It would be deemed that D.I.O.S. had given his concurrence to the resolution. However, under rule 9 of 1983 Rules framed under the commission Act, there was no provision for such deemed approval if commission did not communicate its decision within a certain time. By virtue of section 32 of the commission Act only those provisions of U.P. Intermediate Education Act and the regulations made there under in so far as they are not in consistent with the provisions of the commission Act or the rules made there under shall continue to be in force for the purposes of selection, appointment, promotion etc of a teacher. Regulation 6 of chapter 2 having been virtually replaced by rule 9 of 1983 Rules framed under the commission Act ceased to be in force and it was rule 9 of 1983 Rules (as it stood at the relevant time), which covered the situation.

(B) Service-Appointment-teacher in C.T. Grade-against a substantive vacancy-wrongly made on adhoc basis-prescribed procedure not followed-such appointment held illegal.

Held- Para 4

In my opinion, Director has rightly decided that vacancy was not a short-term vacancy. Director has also rightly held that appointment of the petitioner on ad-hoc basis on the substantive vacancy created by promotion of Ram Raj Singh was illegal as procedure prescribed under first removal of difficulties order under the ordinance/Act was not followed as held by the Full Bench of this Court reported in Radha Raijada 1994 (Vol.III) U.P.L.E.B.C. 1551. In view of this writ petition filed by J.N. Singh is devoid of any merit and is dismissed.

Case laws discussed:
1989 (2) UPLBEC 98
2002 (4) ESC 412
1998 (3) UPLBEC 1722

2000 (3) ESC 1990
1999 (2) UPLBEC 1420
1992 (2) UPLBEC 1483
2002 (1) SCC 791 and
1999 (3) UPLBEC 1734
1994 (3) UPLBEC 1551

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

1. J.N. Singh, petitioner in the first writ petition and B.P. Singh petitioner in the second writ petition are rival claimants for one post of teacher in Sri Laxmi Narain Uchtar Madhyamik Vidyalay Meja, Allahabad (hereinafter referred to as the college). Director of education by order-dated 22.4.1998 has negatived the claim of both. The Director passed the order on appeal of J.N. Singh, which was filed in pursuance of judgment-dated 11.11.1997 given in special appeal, by this court, which was filed by J.N. Singh. Judgment of the special appeal No. 270 of 1995 is annexure 7 and consequent order of the Director is annexure 8 to the first of the aforesaid writ petitions filed by J.N. Singh.

2. In the judgment of the aforesaid special appeal it was directed that the Director of Education shall decide the appeal after providing opportunity of hearing to the parties. It was observed that "matter should be considered by the Director of Education who will consider the validity or otherwise of the appointments of the appellant (i.e. J.N. Singh) and respondent No. 3 (i.e. B.P. Singh). It has been argued on behalf of J.N. Singh that an earlier order of D.I.O.S. against B.P. Singh was not challenged hence it became final. His argument is not entertain able as in view of the observations in the judgment of special appeal. The Director was required to decide the entire matter afresh.

3. The brief facts of the case are that late Sri R.N. Singh, a teacher in L.T. Grade died in harness on 10.4.1985. Committee of Management proposed promotion of Ram Raj Singh, a C.T. Grade teacher and the proposal was sent to D.I.O.S. on 19.10.1985. This proposal/recommendation was accepted/ approved on 16.3.1988 by the U.P. Secondary Education services Commission and in pursuance thereof Ram Raj Singh joined on 25.4.1988. Petitioner R.N. Singh claims to have been appointed on 11.2.1989 on the post of C.T. Grade teacher falling vacant due to promotion of Ram Raj Singh of L.T. Grade. In the writ petition of J.N. Singh it has been stated in para 16 to 19 that Ram Raj Singh was promoted on substantive vacancy under first removal of difficulties order 1981 framed under the U.P. Secondary Education Service commission ordinance/Act). Meaning thereby that the promotion of Ram Raj Singh was ad-hoc and to remain in operation until regularly selected candidate selected by the commission joined. It has further been asserted in the said writ petition that in this manner a short-term vacancy came into existence in C.T. Grade against which petitioner J.N. Singh was appointed on 11.2.1989. In the counter affidavit on behalf of the Director and Deputy Director of education, it has been stated in para 4 that on 16.3.1988 approval of promotion of Ram Raj Singh was granted by the commission, under rule 9 of 1983 rules framed under the Act (as existed at the relevant time). Approval of commission was required only if the promotion was on the post of to be filled by promotion under promotion quota of

40% (as applicable at the relevant time) under chapter 2 Regulation 5 and 6 of the regulations framed under U.P. Intermediate Education Act. It is, therefore, abundantly clear that promotion of Ram Raj Singh approved by the commission was substantive and final in nature and not ad-hoc until candidate selected by the commission joined. Consequently the vacancy, which occurred in C.T. Grade due to promotion of Ram Raj Singh under promotion quota and its approval by commission, was the substantive vacancy and not a short-term vacancy. In the rejoinder affidavit of J.N. Singh in para 3 this fact has not been denied that approval-dated 16.3.1988 was granted by the commission. However, it has been stated therein that it was wrongly granted by the commission and it ought to have been granted by the D.I.O.S. By way of elaboration it has been stated that if it had been an appointment under promotion quota names of three persons would have been forwarded. Under chapter 2 Regulations 5 and 6 and rule 9 of 1983 rules framed under the commission Act only those teachers who possess minimum qualification for teaching subject concerned and five years experience shall be considered of promotion. It is quite possible that apart from Ram Raj Singh no other teacher was available for promotion hence no other name was forwarded by the committee of management. In any case approval dated 16.3.1988 granted by the commission was neither challenged in any of the earlier writ petition nor in the instant writ petition, hence its validity can not be questioned by the petitioner J.N. Singh.

4. In my opinion, Director has rightly decided that vacancy was not a short-term vacancy. Director has also rightly held that appointment of the petitioner on ad-hoc basis on the substantive vacancy created by promotion of Ram Raj Singh was illegal as procedure prescribed under first removal of difficulties order under the ordinance/Act was not followed as held by the Full Bench of this Court reported in Radha Raijada 1994 (Vol.III) U.P.L.E.B.C. 1551. In view of this writ petition filed by J.N. Singh is devoid of any merit and is dismissed.

5. As far as the second writ petition of B.P. Singh is concerned it is liable to be dismissed only on the ground that according to the said petition he was appointed on 1.9.1986 when there was no vacancy. Ram Raj Singh was selected for appointment by promotion by the commission on 16.3.1988 and joined the post on 25.4.1988 hence there cannot be said to be any vacancy before 25.4.1988. Even though under Regulation 6 (6) of chapter 2 of the regulation framed under U.P. Intermediate Education Act there was provision that if the D.I.O.S. within three weeks did not communicate the decision on the proposal of the promotion sent by committee of Management. It would be deemed that D.I.O.S. had given his concurrence to the resolution. However, under rule 9 of 1983 Rules framed under the commission Act, there was no provision for such deemed approval if commission did not communicate its decision within a certain time. By virtue of section 32 of the commission Act only those provisions of U.P. Intermediate Education Act and the regulations made there under in so far as they are not in consistent with the provisions of the commission Act or the rules made there under shall continue to

be in force for the purposes of selection, appointment, promotion etc of a teacher. Regulation 6 of chapter 2 having been virtually replaced by rule 9 of 1983 Rules framed under the commission Act ceased to be in force and it was rule 9 of 1983 Rules (as it stood at the relevant time), which covered the situation. Consequently writ petition filed by B.P. Singh is also liable to be dismissed.

6. Learned counsel for the petitioner B.P. Singh has cited the following authorities:-

(1) 1989(2) U.P. L.B.E.C.98,
(2) 2002(4) E.S.C. 412,
(3) 1998(3) U.P.L.B.E.C. 1722,
(4) 2000(3) E.S.C. 1670,
(5) 2000(3) E.S.C. 1990.
(6) 1999(2) U.P.L.B.E.C. 1420,
(7) 1992(2) U.P.L.B.E.C. 1483.
(8) 2002(1) S.A.C. 791 and
(9) 1999(3) U.P.L.B.E.C. 1734

7. The first authority deals with promotion under first removal of Difficulties order. In the instant case promotion of Ram Raj Singh was under Chapter II Regulation 5 and 6 and rule 9 of 1983 Rules, hence the said authority is not applicable to the facts of the case. The second authority also deals with ad-hoc promotion over and above the 40 % quota. The 3rd, 4th, 5th, 6th, 8th and 9th authorities deal with the appointment on short terms vacancies, which are not applicable to the facts of the case. Sri Ram Raj Singh was promoted on permanent basis in 1988, giving rise to a substantive vacancy. Until acceptance/ approval of promotion of Ram Raj Singh under 40% quota by the Commission, no vacancy either substantive or short term came into existence, hence alleged appointment of B.P. Singh in 1986 was against no vacancy.

8. As far as 7th authority, reported in 1992(2) UPLBEC 1483 is concerned, it is also not applicable to the facts of the case as in that authority the matter pertained to the valid appointment of teacher in CT Grade before 20.6.1989. In the said authority the only question considered was that of applicability of circular dated 20.6.1989.

9. The Director in his order dated 22.4.1998 has rightly directed committee of management, D.I.O.S., Regional Deputy Director of Education, Joint Director of Education to take immediate steps to make the appointment against the post in dispute. The said directions must be complied with by the concerned authorities forthwith.

Competent authority/body must be passed within six months from the production of certified copy of this order.

Accordingly writ petition is allowed as aforesaid.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.07.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 1256 of 1997

M/S. Gangeshwar Limited ...Petitioner
Versus
Presiding Officer, Labour Court, Dehradun and another ...Respondents

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

Counsel for the Respondents:
Sri B.N. Singh
S.C.

U.P. Industrial Disputes Act, 1947-S. 4-K-Notification dated 18.7.1982-Termination of Service-without payments of gratuity-validity-Tribunal held retiring workman shall be deemed to be in service and entitled to full wages and all benefits as long as employer does not tender due amount of gratuity to him-Termination order-held illegal-

Held- Para 5

From the reference, it is clear that the services of the workman concerned were terminated by the petitioner-employer with effect from 1st November, 1986. It is not disputed either before this Court, or before the labour Court that while terminating the services of the workman concerned, the gratuity, which is found due upon the employer, has not been paid to the workman. In this view of the matter, the labour Court found that in terms of the aforesaid Notification *"the retiring workman shall be deemed to be in service and shall be entitled to full wages and all fringe benefits as long as the employer does not tender the due amount of gratuity to him"* and held that the termination of services of the workman concerned with effect from 1st November, 1986 is illegal and that the workman is entitled for gratuity/arrears of gratuity, wages and all fringe benefits, as if the workman is still in employment.

Cases referred:
AIR 1960 SC 610

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

1. This writ petition was heard and dismissed by me vide Order dated 02.07.2003 for the reasons to be recorded later on. Now, here are the reasons for dismissing the aforesaid writ petition.

2. This writ petition is listed under the heading 'Order', as there is a stay vacate application filed on behalf of the contesting Respondent. Leaned counsel appearing on behalf of the petitioner stated that since the writ petition is listed only for orders, this Court should not decide the matter on merits. I find that interest of justice demands that it is in the interest of the petitioner as well as the contesting Respondent that the matter may be finally decided, therefore, I have heard learned counsel for the parties on merits.

3. The petitioner, by means of present writ petition under Article 226 of the Constitution of India, has challenged the award of the labour Court, U.P., Dehradun dated 23rd May, 1996, passed in adjudication case no. 139 of 1990, copy whereof is annexed as Annexure-'2' to the writ petition. The following dispute was referred to by the State Government in exercise of power under Section 4-K of the U.P. Industrial Disputes Act, 1947 {hereinafter referred to as the 'Act'} vide its order dated 24th August, 1990, before the labour Court for adjudication.

"क्या सेवायोजकों द्वारा अपने श्रमिक मोहनलाल, पद गन्ना सुपरवाइजर को ग्रेच्युटी का भुगतान न करके दिनांक १.११.८६ से सेवानिवृत्त किया जाना अनुचित/अथवा अवैधानिक है? यदि हॉ, तो संबंधित श्रमिक क्या लाभ/अनुतोष (रिलीफ) पाने का अधिकारी है तथा अन्य किस विवरण सहित?"

4. After receipt of the reference, the labour Court issued notices to the parties and the parties concerned have exchanged their affidavits and adduced evidence. The labour Court has relied upon a Notification dated 15th July, 1982, copy whereof is annexed along with the counter affidavit, which is a statement registered under the provisions of U.P. Industrial

Disputes Act, 1947, which provides as under :

" **ORDER**

1. The management shall pay the amount of gratuity to a retiring workmen as may be found due to him by the management on receipt of a clearance slip from the workmen in respect of articles of stores, advance etc. The workman shall simultaneously vacate his quarter and hand over its possession to the management.

2. The retiring workman shall be deemed to be in service and shall be entitled to full wages and all fringe benefits as long as the employer does not tender the due amount of gratuity to him.

3. Receipt of payment of the amount of gratuity found due by the employer shall not prejudice the right of the workman to raise a dispute about it, if he considers the amount disputable even on vacation of the quarter and exit from the service.

4. This order shall apply to all workman covered by the Wage Board for the Sugar Industry and shall remain inforce till December 31, 1983."

5. From the reference, it is clear that the services of the workman concerned were terminated by the petitioner-employer with effect from 1st November, 1986. It is not disputed either before this Court, or before the labour Court that while terminating the services of the workman concerned, the gratuity, which is found due upon the employer, has not been paid to the workman. In this view of the matter, the labour Court found that in terms of the aforesaid Notification ***"****the retiring workman shall be deemed to be in service and shall be entitled to full wages and all fringe benefits as long as the employer does not tender the due amount of gratuity to him****"*** and held that the termination of services of the workman concerned with effect from 1st November, 1986 is illegal and that the workman is entitled for gratuity/arrears of gratuity, wages and all fringe benefits, as if the workman is still in employment. Learned counsel for the petitioner-employer has relied upon a phraseology used in the aforesaid Government Notification, referred to above, that at least in the year 1993 the employer has tendered the amount of gratuity and therefore the view taken by the labour Court in awarding the wages till the date of the award is wholly erroneous. If the language used in paragraph 1 of the aforesaid Notification compared with the language of Section 25-F and Section 6-N of the Industrial Disputes Act, 1947, which has been interpreted by the apex Court in the case of ***The State of Bombay and others*** **Versus** ***The Hospital Mazdoor Sabha and others*****, reported in A.I.R. 1960 Supreme Court, 610,** it reveals that apex Court while interpreting the provision of Section 25-F, which is para materia to the language used in paragraph 1 of the aforesaid Notification, has held that the termination of services of the workman concerned without payment of retrenchment compensation will be illegal. I do not find that the view taken by the labour Court in interpreting the aforesaid provision of the Notification, referred to above, suffers from any error, much less error of law. In this view of the matter, the argument advanced on behalf

of the petitioner-employer deserves to be rejected and is hereby rejected. No other argument was advanced on behalf of learned counsel for the petitioner.

6. In view of what has been stated above, this writ petition has no force and is accordingly dismissed. The interim order, if any, stands vacated. However, the parties shall bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.7.2003

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

Civil Misc. Writ Petition No. 24488 of 2001

Bijendra Singh ...Petitioner
Versus
State of U.P. through Chief Secretary and others ...Respondents

Counsel for the Petitioner:
Sri Pankaj Mithal

Counsel for the Respondents:
S.C.

Constitution of India Article 226-Service-Promotion-On post of Chief Engineer-denied without plausible justification-while juniors considered- no specific denial about merit of petitioner-direction to consider his case for notional promotion-with all benefits and privilege.

Held- Para 18 and 19

In view of unrebutted pleadings in the Writ Petition, referred to above, we find that name of the petitioner has been ignored without plausible justification. Impugned order contains no indication of the material which has been relied against the petitioner.

If the petitioner is found fit for being promoted on the date on which his juniors were promoted, the petitioner shall be entitled to all benefits and privileges treating notionally promoted w.e.f. the date his juniors have been given promotion and place him just above the next person junior to him in the cadre of Superintending Engineer.

Case law discussed:
1998 (6) SCC 720
1976 (2) SCC

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

1. Heard learned counsel for the petitioner and learned Standing Counsel on behalf of the respondents at length.

The petitioner joined as Assistant Engineer in the Department of Irrigation, State of U.P., in December 1966 on adhoc basis. Thereafter he appeared in the competitive Combined State Engineering Services Examination conducted by U.P. Public Service Commission and declared successful in the year 1968 and joined on regular basis. His ad-hoc tenure was added with the tenure on regular basis.

2. Petitioner was promoted on the post of Executive Engineer on 31.1.1988. While working as Executive Engineer he was communicated with certain remarks in his service record. Petitioner submitted a representation. Petitioner was, thereafter considered for next promotion to the post of Superintending Engineer by the Departmental Promotion Committee and promoted on 29.10.1999 to the post of Superintending Engineer w.e.f. 12.3.1998. The petitioner, however, got aggrieved when matter of promotion to the post of

Chief Engineer (Level-II) in the department arose.

3. The petitioner contends that DPC did not find favour with the petitioner's candidature, his candidature ignored and promotion to the next higher post denied to him while juniors considered and accorded promotion. It is also contended that such juniors had much less quality points as compared to the petitioner who was eligible to get 19 quality points.

4. In para 14 to the Writ Petition, it is categorically pleaded that criterion for promotion to the post in question is 'seniority-cum-merit' to be determined on the basis of entries in the Character Roll preceding last ten years. The said para 14 has been replied vide para 7 of the Counter Affidavit filed on behalf of the contesting respondents (sworn by one L.B. Singh). The categorical averments in para 14 of the Writ petition to the effect that promotion was on the basis of criterion 'seniority-cum-merit' has not been denied.

5. The meaning of expression 'seniority-cum-merit' came up for consideration before the Apex Court and the same has been explained in the case of ***B.V. Sivaiah and others Versus K. Addanki Babu and others***- (1998) 6 SCC 720 pp 726 (Paras 9,10 & 11)- which are, for convenience, reproduced:-

"9. The principle of "merit-cum-seniority" lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal. In the context of Rule 5 (2) of the Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, 1955 which prescribed that "selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority" Mathew, J. in Union of India V. Mohan Lal Capoor (1973) 2 SCC 836: 1974 SCC (L&S) 5, has said: (SCC p 856 para 37)

(F) or inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or, if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale."

6. Similarly, Beg, J. (as the learned Chief Justice then was) has said: (SCC P. 851, para 22)

"*22. Thus, we think that the correct view, in conformity with the plain meaning of words used in the relevant Rules, is that the 'entrance' or 'inclusion' test for a place on the select list, is competitive and comparative applied to all eligible candidates and not minimal like pass marks at an examination. The Selection Committee has an unrestricted choice of the best available talent, from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is the governing factor."*

10. On the other hand, as between the two principles of seniority and merit, the criterion of "seniority-cum-merit" lays

greater emphasis on seniority. In State of Mysore V. Mahmood 3 while considering Rule 4 (3) (b) of the Mysore State Civil Services General Recruitment Rules, 1957 which required promotion to be made by selection on the basis of seniority-cum-merit, this Court has observed that the rule required promotion to be made by selection on the basis of "seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion." It was pointed out that where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.

11. In State of Kerala V. N.M. Thomas (1976) 2 SCC 310: 1976 SCC (L&S) 227, A.N. Ray, C.J. has thus explained the criterion of "seniority-cum-merit": (SCC p.335, para 38).

"With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority."

7. In the case of ***Manna Prasad Jaiswal Versus District Inspector of Schools, Deoria and others-****1999* Allahabad civil Journal 1021, (Pr. 12), a Division Bench of this Court had the occasion to explain the meaning of the expression-"Seniority subject to rejection of Unfit"- in the following words-

*"12. In B.V. Sivaiah (supra) the Supreme Court has held that "**criterion of seniority-cum-merit in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and** a comparative assessment of merit is not required to be made." It was further held in that case that for assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. It would be seen from Rule 16 of the Rules that it does not lay down any standard of judging the minimum merit apart from prescribing the standard of judging unfitness. In other words of merit of a teacher for the purpose of promotion under rule 16 is that no criminal case involving moral turpitude is pending enquiry or trial against him; and/or no disciplinary proceeding is being conducted against him. Absence of the disabilities referred to in clause (b) of the Explanation to Rule 16 of the Rules, in our opinion, would be taken to be merit for the purpose of giving ad-hoc promotion on the basis of **"seniority subject to rejection of unfit.** Accordingly keeping in view the distinction, albeit very thin between the principles of **"Seniority-cum-merit"** and **"seniority subject to rejection of unfit"** we are of the considered view that for the purpose of ad-hoc promotion in Section 18 of the Act read with Rule 16 of the Rules, seniority will prevail except where the senior teacher suffers from any of the demerits referred to in clause (b) of the Explanation appended to Rule 16. In so far as assessment of job performance is concerned, the same is not comprehended*

unwed rule 16 of the Rules and since ad-hoc promotion under Section 18 is required to be made in the manner prescribed in the Rules aforestated, it would not be permissible to cull out any other criterion of ad-hoc promotion. On the admitted facts the order passed by the District Inspector of Schools, in our opinion, id not suffer from any infirmity and the Learned Single Judge was not right in remitting the mater to the District Inspector of Schools with a direction to re-examine the matter on the basis of comparative assessment of the merits of the rival claimants."

8. In para 19 of the Writ Petition, petitioner has given details of the entries awarded to him during 1989-90 to 1999-2000. It shows that the petitioner had earned three entries for three years 'good', four year's entries 'outstanding', and one year's entry 'very good'.

9. Further in para 29 of the Writ Petition it is asserted that on the basis of relevant entries in the Character Roll he was entitled to 19 points on merit before DPC.

10. In para 30 of the Writ Petition it is contended that the DPC which met in March, 2000 for considering promotion of Superintending Engineer to the higher post, without rhyme or reason, refused to recommend the name of the petitioner on the post of Chief Engineer (Civil) level-II and instead recommended name of juniors to him.

11. In para 31 it is also pleaded that the candidate recommended by the DPC has obtained only 18 quality points.

Para 19,29,30 and 31 of the Writ Petition have been replied vide para 9, 14 & 15 of the Counter Affidavit.

Contents of para 19 of the Writ Petition, wherein petitioner has elaborated his character roll entries, have not been denied.

12. The respondents merely questioned the propriety of the Petitioner having knowledge of the confidential entries. Respondents have not, as of fact, denied contents of para 19 of the Writ Petition. How petitioner came to know of the 'entries' is not relevant for our purpose.

13. In para 19 & 21 of the Counter Affidavit again it is being alleged that criterion for promotion is the merit and that petitioner's name was ignored by the DPC because of the service record of the petitioner not being up to the mark.

14. The respondents have however not taken the trouble to point out categorically the material which has been taken into account against the petitioner or the relevant rule providing for the criterion of promotion.

15. In other words it has not been pointed out which year entries have been found not good and what was the material on the basis of which the members of DPC did not find the petitioner's candidature to be considered for promotion.

16. Averments in para 29 of the Writ Petition (that petitioner was entitled to 19 quality points on merit, to be awarded on the basis of service record/Character Roll)

have not been specifically denied in para 14 of the Counter Affidavit.

17. Perusal of the impugned order dated September 11, 2000 Annexure 18 to the Writ Petition also does not disclose as to which records were taken into account and what was the material on the basis of which members of the DPC ignored the name of the petitioner for promotion.

18. In view of unrebutted pleadings in the Writ Petition, referred to above, we find that name of the petitioner has been ignored without plausible justification. Impugned order contains no indication of the material which has been relied against the petitioner.

19. In view of the above, the impugned order dated September 11, 2000 is hereby quashed, concerned respondents and its authorities, servants, nominees, etc. are directed to consider the name of the Petitioner within four weeks of the receipt of the certified copy of this judgment and pass appropriate order in accordance with law. If the petitioner is found fit for being promoted on the date on which his juniors were promoted, the petitioner shall be entitled to all benefits and privileges treating notionally promoted w.e.f. the date his juniors have been given promotion and place him just above the next person junior to him in the cadre of Superintending Engineer.

20. Writ Petition succeeds.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2003

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

Civil Misc. Writ Petition No. 29108 of 2003

Rakesh Kumar Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B. Prasad

Counsel for the Respondents:
Sri Subodh Kumar
S.C.

Constitution of India-Article 226 violation of Injunction order-interim injunction-proper remedy is to file application under order 39 Rule 2A of C.P.C. and not to file writ petition. The petition is misconceived and dismissed with a Special Cost of Rs. 25,000/-

Held- Para 2

If this temporary injunction was not being obeyed then the petitioner should have filed an application under Order 39 Rule 2 A of the CPC, but instead this writ petition has been filed. There can be no clearer case of abuse of the process of this Court. This writ petition should never have been filed, and we are constrained to observe that learned counsel in this case has not given correct advice to his client.

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

1. This writ petition discloses how the process of the High Court is being abused by filing frivolous writ petitions in large numbers when there is already a

huge burden on this Court due to the large arrears. There was a time in this country when learned counsel used to give correct advice to clients and the preliminary screening of the case was done in the chamber of the learned counsel itself, and if there was no useful purpose in filing a case the learned counsel would frankly say so to his client. Today this hardly happens and the learned counsels file all kinds of frivolous cases thus causing immense problems to this Court, which is already highly overburdened with the pending cases.

2. This malpractice has been committed in this case too. The petitioner has already filed civil suit no. 364 of 2002 for the same relief, which he is claiming in this writ petition. In that suit a temporary injunction was granted, copy of which is Annexure-5 to the writ petition, which was passed after hearing both the sides. In this temporary injunction order, the operative portion of which is on pages 134 and 135 of the writ petition, the precise relief which the petitioner is praying for in this writ petition has been granted in that temporary injunction. The defendant-respondents were restrained from withdrawing the amount from the respondent Bank and from depositing the same in any other Bank account. If this temporary injunction was not being obeyed then the petitioner should have filed an application under Order 39 Rule 2 A of the CPC, but instead this writ petition has been filed. There can be no clearer case of abuse of the process of this Court. This writ petition should never have been filed, and we are constrained to observe that learned counsel in this case has not given correct advice to his client.

3. It is well settled that if there is an alternative remedy available this Court does not normally interfere in writ jurisdiction. In this case not only is there an alternative remedy, that remedy is actually being availed of by the petitioner by filing a civil suit, and in fact the petitioner has got a temporary injunction order. This is not an isolated case, and a large number of frivolous petitions are being filed in this Court. It passes all comprehension why such frivolous cases are being filed in this Court, and the time has now come when this Court must start taking serious action in such matters otherwise it will be flooded with Lakhs and Lakhs of frivolous case.

4. We therefore, **dismiss** the writ petition. We also direct the petitioner to pay costs of Rs.25,000/= which will be paid by the petitioner within a month from today to the State Government, failing which it will be recovered by the District Magistrate Hathras as arrears of land revenue. Learned Standing counsel as well as Registrar General of this Court, will communicate this order to the District Magistrate, Hathras forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2003

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

Civil Misc. Writ Petition No. 38343 of 2002

M/s Gupta Service Station and another ...Petitioner

Versus

Indian Oil Corporation Limited and others ...Respondent

Counsel for the Petitioners:
Sri Saumitra Singh

Counsel for the Respondents:
Sri R.G. Padia
Sri Prakash Padia
Sri Arun Tandon
S.C.

Constitution of India Article 226- Rejection of Tender–Indian Oil Corporation invited tenders to carry petrol/diesel from terminal point to their respective Dealers–Clause (c) (iv) of the agreement provides that the vehicle should not be more than 15 years old on date of the tender. Rejection on their ground that vehicle is more than 15 yrs. Old. Whether justified? – yes

Held : Para 16

In our opinion, there is no merit in these petitions. The matter is purely contractual and this Court cannot interfere in such matters. It is for the concerned authorities to decide what should be the proper age limit of the vehicles and it is not proper for this Court to interfere in such administrative matters as held by the *Supreme Court in Tata Cellular Vs. Union of India* AIR 1996 Supreme Court 11. The Court has very limited scope of judicial review in Administrative matters. In our opinion, there has been no arbitrariness in the matter and the decision of the respondents has been taken on sound reasons, namely, the public safety and ecology.

Cases referred to:
(1998) 6 SCC 63
AIR 1996 SC 11
2002 (4) AWC 3221
2003 (4) SCC 289

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

1. This writ petition and connected writ petition nos. 33665 of 2002, 34179 of 2002, 37098 of 2002, 38346 of 2002, 38348 of 2002, 38352 of 2002, 41445 of 2002 41447 of 2002, 41448 of 2002 and 53829 of 2002 are being disposed off by a common judgment.

2. Heard learned counsel for the parties.

3. The petitioner has prayed for a writ of certiorari quashing para 11 (c) (iv) of the Special Tender Conditions of Tender No. JOINT/POL/02/16 (Annexure 5 to the petition) and for a mandamus directing the respondent authorities to permit the petitioner to participate in the Tender in question dated 29.7.2002 without placing the restriction that vehicles should be less than 15 years old.

4. The petitioner no. 1 is a partnership concern and petitioner no. 2 is one of his partners doing the business of maintaining a retail petrol and diesel outlet at Mughalsarai, District Chandauli for the purpose of transporting petrol and diesel from the Indian Oil Corporatrion Terminals at Chandauli. The petitioner had also engaged their oil tankers with Hindustan Petroleum Corporation Ltd. (HPCL). The engagement of the oil tankers had been done by the HPCL by calling tenders from various oil tanker owners. Such tenders have been called every Two/Three years for engaging oil tankers for the purpose of transporting petrol and diesel from the terminals to different petrol and diesel outlets within the local area of operation of the terminals.

5. It is alleged in para 5 of the petition that the petitioner's oil tankers were engaged by the Hindustan Petroleum Corporations for the past several years on

the basis of tenders, and work orders allotted to them. In the tender number JOINT/POL/002, the terms and conditions of engagement of oil tankers so far as the age of vehicle is concerned, was as follows:

AGE OF THE VEHICLE

"Any quoted vehicle over 20 years old shall be replaced within one year from the date of the Work Order for the Transport Contract. This condition will be superseded by the Court Order/Statutory Requirement, wherever applicable. However, no further extension of this time limit will be granted."

6. On the basis of the above tender, three vehicles of the petitioner, which were more than 15 years old and are running with the Hindustan Petroleum Corporation were engaged as stated in para 9 of the petition. It is alleged in para 10 of the petition that the above vehicles are in good running condition and having fitness certificates granted by the Regional Transport Authorities under the Motor Vehicles Act, vide Annexure-2. The vehicles also have necessary explosive licence granted by the Deputy Chief Controller of Explosives, Allahabad, vide Annexure-3 to the petition. They have also permits granted by the Regional Transport Authority vide Annexure-4.

7. In para 13 of the petition, it is alleged that the Indian Oil Corporation alongwith three other petroleum corporations namely HPCL, BPCL and IBP had called upon tenders for another term of two years from 1.10.2002 to 30.9.2004 (further extendable for a period of one year) being general tender no. JOINT/POL/02. For supply location of Chandauli, the tender no. specified is JOINT/POL/02 which has been issued on 29.7.2002, fixing the last date for submission of tender as 21.8.2002, with new terms and conditions in so far as the age of vehicle is concerned which has been reduced to 15 years.

8. Para 11 (c) (iv) of Annexure 5 to the petition may be seen in this connection, which states:

"Age of the vehicle should not exceed 15 years on the date of opening of tender."

9. A perusal of the above clause shows that a vehicle which is over 15 years old, is debarred from participating in the tender on behalf of its owner. It is alleged in para 14 of the petition that on the basis of the above condition, the vehicles of the petitioner referred to above shall not be able to be included in the list of vehicles for the purposes of qualifying the tenders, though they are in perfect running condition and having fitness certificate, explosive license and permits issued by the authorities.

10. It is alleged in para 15 of the petition that the operation of the limit of the petitioner's vehicles is restricted to the retail outlets within the jurisdiction of the concerned oil terminal, and the same never exceeds 50 Kms.

11. It is alleged that there in no age bar of transport vehicles mentioned in the Motor Vehicles Act or Rules, and as such the age limit of 15 years is only illegal.

12. It is alleged that the above condition is highly unreasonable and violates the principles of natural justice.

13. In our opinion, there is no merit in these petitions. The special tender conditions, copy of which is Annexure-5 to the petition, embodies the terms on which the contract can be finalized. If the petitioner or any other party does not find any condition mentioned therein as acceptable, he is not obliged to make a bid for the contract. It is for the concerned corporation to decide about the terms and conditions on which they will give the contract.

14. A counter Affidavit has been filed by the Indian Oil Corporation Reference has been made therein to the direction of the Supreme Court in M.C. Mehta Vs. Union of India (1998) 6 SCC 63 in which direction was issued to restrict plying of commercial vehicles including Taxis which are 15 years old. In para 10 it is stated that the age of 15 years of vehicles is fixed as per policy guidelines and the judgment of the Hon'ble Supreme Court. It is a matter of policy involving not only safety of the traffic and the fact that the petroleum product is highly inflammable, but the object is also to maintain environment and ecological balance which is one of the directive principles in the Constitution. It is alleged that the petitioner has no legal right to have his aged vehicles considered for the contract.

15. In para 14, it is stated that there is no question of giving any opportunity of hearing in the matter, since a policy decision has been taken. The petitioner has no legal right in his favour. The provisions of the Motor Vehicle Acts or Rules are wholly irrelevant.

16. In our opinion, there is no merit in these petitions. The matter is purely contractual and this Court cannot interfere in such matters. It is for the concerned authorities to decide what should be the proper age limit of the vehicles and it is not proper for this Court to interfere in such administrative matters as held by the *Supreme Court in Tata Cellular Vs. Union of India* AIR 1996 Supreme Court 11. The Court has very limited scope of judicial review in Administrative matters. In our opinion, there has been no arbitrariness in the matter and the decision of the respondents has been taken on sound reasons, namely, the public safety and ecology.

17. As held by this Court in 2002 (4) AWC 3221, *Pramod Kumar Misra Vs. Indian Oil Corporation Ltd. and others*, this Court cannot sit in appeal over the decisions of the Administrative Authority.

As Chief Justice Neely observed:

"***I have very few illusions about my own limitations as a judge. I am not an accountant, electrical engineer, financer, banker, stockbroker or system management analyst. It is the height of folly to expect Judge intelligently to review a 5000 page record addressing the intricacies of public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administrator."***

18. In Federation of Railway Officers Association and others Vs. Union of India, (2003) 4 Supreme Court Cases

289, the Supreme Court observed that the Court should not ordinarily interfere with policy matters requiring technical expertise.

19. The submission of learned counsel for the petitioner that there is no such age restriction in the Motor Vehicles Acts or Rules, or that natural justice was violated, is wholly misconceived. The restriction in question has been placed by a party who wishes to enter into a contract. A contract by its very nature is a voluntary bilateral transaction, by which two parties enter into an agreement of their own freewill. Hence the corporation can decide the terms on which it is agreeable to give the contract, just as the petitioner is free to make a tender or not, and neither party can be compelled in this connection.

Petitions dismissed. Interim orders vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JULY 11TH, 2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 12588 of 1998

Ghazipur Central Consumers Co-operative Stores Ltd. and another ...Petitioners

Versus

The Presiding Officer, Labour Court, Varanasi and another ...Respondents

Counsel for the Petitioners:
Sri Ajit Kumar Singh
Sri Devendra Pratap Singh

Counsel for the Respondents:
S.C.

U.P. Industrial Disputes Act, 1947-Section 6-N-Constitution of India-Article 226-Writ Jurisdiction-Exercise of-Reinstatement-Termination of Services of petitioner without conducting enquiry-No opportunity to show cause-reinstatement of workman held- legal-Finding not perverse-No error of law pointed out-

Held- Para 8

The law is well established that the finding arrived at by the labour court on the basis of the pleadings and the evidence adduced by the parties should not be lightly interfered unless the same are demonstrated to be perverse or suffering from any manifest error of law. Nothing sort has been pointed out by the learned counsel for the petitioner that the finding recorded by labour court is contrary to law.

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

1. This petition under Article 226 of the Constitution of India has been filed by the petitioners-employer challenging the award of the Labour Court, Varanasi dated 29th August, 1997 passed in Adjudication Case No. 179 of 1989.

2. The following dispute was referred to for adjudication to Labour Court:

"क्या सेवायोजकों द्वारा अपने श्रमिक राजेन्द्र प्रसाद तिवारी, पुत्र बलभद्र तिवारी शाखा प्रबन्धक की सेवायें दिनांक 21.8.87 से समाप्त किया जाना उचित तथा/अथवा वैधानिक है? यदि नहीं, तो श्रमिक क्या अनुतोष पाने का अधिकारी है?"

3. After receipt of reference labour court issued notices to the parties. The parties have exchanged their pleadings and adduced evidence before labour court. The case set up by the workman-

respondent no. 2 is that he was appointed with the employer on 7th January, 1974 as Branch Manager and since then he was regularly working till 28th August, 1986 when he was suspended to the false allegations regarding embezzlement. No charge sheet has been served on him, no enquiry officer was appointed, no enquiry was conducted to the knowledge of the workman concerned. The workman received a notice to appear on 30th July, 1987 for enquiry . The workman presented himself but no enquiry was conducted nor any opportunity was given by the so called enquiry officer. It appears that some sort of enquiry report is obtained behind the back of the workman concerned and the workman concerned has not been supplied even the copies of the documents and records. It is on the basis of the exparte enquiry report, the services of the workman concerned has been terminated on 21st August, 1987. The workman raised the dispute which is referred to labour court which has answered the reference in favour of the workman, thus, this writ petition by employer.

4. The employer have also filed their written statement and stated that the workman has been afforded full opportunity and after enquiry services of workman has been terminated. The case set up by the employer is that the regular enquiry was conducted against the workman concerned and he was given full opportunity. It is only when the charges were proved in the enquiry, his services were terminated. The employer have further submitted that in case domestic enquiry conducted by the employer was found not to be in accordance with the principles of natural justice, the employer may be afforded an opportunity to prove the charges against the workman concerned before the labour court.

5. The labour court directed the parties to produce their relevant documentary evidence and on 13th March, 1996, which was the date fixed, the employers' representative made a statement that if domestic enquiry was not found fair and proper, the employer may be given an opportunity to prove the charges before the labour court. Thereafter, the employer have produced one Bhavan Prakash Lal Srivastava, Accountant as witness to prove the documents and the charge against the workman concerned. The statement of aforesaid Bhavan Prakash Lal Srivastava was completed on 24th April, 1997 and thereafter 26th August, 1997 was fixed for the statement of the workman concerned and his statement was recorded on oath but the employers' representative Sri S.K. Tripathi had informed the labour court that he will not participate in the enquiry as no employee of the employer has contacted him with records.

6. In this view of the matter, the statement of the workman concerned remained uncontroverted as no body was prepared to cross- examine the workman concerned. The labour court, therefore, decided to proceed the case on the basis of the material available on record.

7. The labour court after considering the material on record has arrived at the conclusion that in fact no enquiry what to domestic enquiry was conducted and the services of the workman concerned were terminated without complying with provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947. The labour Court, therefore, recorded a finding that

neither any opportunity was given, nor the employer inspite of opportunity being given by labour court after coming to conclusion that no enquiry was conducted have tried to prove the charges against the workman concerned before labour court. The labour court, therefore, directed the reinstatement of the workman concerned with continuity of service and full back wages. It is this award which is under challenged by means of the present writ petition, as stated above.

8. The law is well established that the finding arrived at by the labour court on the basis of the pleadings and the evidence adduced by the parties should not be lightly interfered unless the same are demonstrated to be perverse or suffering from any manifest error of law. Nothing sort has been pointed out by the learned counsel for the petitioner that the finding recorded by labour court is contrary to law.

9. In this view of the matter, the finding record by the labour court to the effect that no enquiry has been conducted by the employer in the matter of charges against the workman concerned and that the workman has not been afforded any opportunity, whatsoever, remains unassailable. No other point has been argued.

10. In view of what has been said above, this writ petition deserves to be dismissed and is hereby dismissed. The interim order, if any, stands vacated. There will be no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 6.5.2003

BEFORE
THE HON'BLE M.C. JAIN, J.
THE HON'BLE K.N. OJHA, J.

Criminal Appeal No.2912 of 1980

Shrilal ...Petitioner

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
Sri S.S. Tiwari
Sri K.K. Srivastava
Sri V.K. Sharma

Counsel for the Respondent:
Sri G.S. Bisaria
A.G.A.

Indian Penal Code Section 34, 302-immediate and strong motive to commit crime-presence of two witnesses on place of occurrence well explained-delay in lodging FIR also explained-finding of fault recordes by trial court upheld-appeal dismissed.
Held-paras 17 and 18
On consideration of all relevant and important aspects, we find ourselves in agreement with the finding of guilt recorded by the learned trial judge against the two accused appellants.

Resultantly, we subscribe to the view taken by the trial judge and find no merit in these two appeals. The appellants have rightly been convicted under Section 302 I.P.C. read with section 34 I.P.C. for the murder of Bachchu Singh with sentence of life imprisonment awarded to each of them.

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

1. Both these criminal appeals arise out of the judgment and order dated

16.12.1980 passed by Sri Bhanwar Singh, the then VIII Additional Sessions Judge, Agra in Sessions Trial No.359 of 1980. The appellant in Criminal Appeal No.2912 of 1980 is Shrilal whereas Amar Singh is the appellant in Criminal Appeal No.2952 of 1980. Both of them have been convicted under Section 302 I.P.C. read with Section 34 I.P.C. and sentenced to life imprisonment. Both of them were allegedly armed with knives and committed the murder of Bachchu Singh between the night of 4/5.4.1980 at about 1 O' clock near the brick-kiln of Durga Prasad in village Khera Pangai, P.S. Tajganj, District Agra. The report was lodged on 5.4.1980 at 8.15 A.M. by Shiv Singh PW 3. The distance of the police station from the place of occurrence was about 5 kms.

2. Broad spectrum of the case may be set forth for the appreciation of the subsequent discussion. Bachchu Singh deceased and Veerpal were the nephews of informant Shiv Singh PW 3. On 4.4.1980 at about 10 A.M., they had gone to see a fair in village Semari Tal. In the fair at about 1 P.M., the two accused appellants teased Km. Malti Devi PW 1-sister of Bachchu Singh and Veerpal. Km. Malti Devi complained of it to her brothers Bachchu Singh and Veerpal who were annoyed on hearing about her teasing by the accused appellants. They gave a beating to them and insulted them for such mis-behaviour. This occurrence was witnessed by Udal, Nanhey PW 4 and Udaibir Singh PW 8. They pacified Bachchu Singh and Veerpal and rescued the accused persons from their clutches. After this incident, the accused persons went away issuing a threat that they would kill Bachchu Singh and Veerpal by the same night to take revenge of their insult. Bachchu Singh and Veerpal with their sister Km. Malti Devi also returned home from the fair after this incident.

3. Again, Bachchu Singh accompanied by some other boys of the village, went to the fair in the night at about 9 P.M. to hear the HOLI (songs chanted by the villagers in the fair). After hearing HOLI songs, Bachchu Singh set out for his village at about 2 A.M. in the night. When he reached near the brick-kiln of Durga Prasad, the two accused persons with their other two companions who were putting on red shirts accosted Bachchu Singh and killed him with knives and Kachcha half bricks. Bachchu Singh raised hue and cry. His shrieks attracted the witnesses Dal Chand, Niranjan Singh PW 6 and Darab Singh PW 7 who were going in the night to hear the HOLI songs in the Fair. They challenged the assailants viz., the present two appellants and their two unknown companions. Before they would come nearer to the place of occurrence, the assailants finished their job in the sight of the said witnesses and escaped towards the west of the place of occurrence. The witnesses saw the assailants killing the deceased in the torch light as each of them had a torch with him. Amongst the four assailants, present two appellants were very well identified by the witnesses, while the remaining two remained unidentified. When the witnesses reached near Bachchu Singh, he was groaning and crying of pain and within a second he breathed his last. Dal Chand informed the family members of Bachchu Singh. On receiving information, the family members of the deceased reached at the site of occurrence and saw Bachchu Singh lying dead in a pool of blood. Due to fear, no body dared to go to the police station in the night to report

about the incident. In the morning, three constables, who were on duty in fair, reached at the site and guarded the dead body. Leaving the dead body to be guarded by them and the family members of the deceased and some villagers who had collected their, Shiv Singh PW 3 reached the police station and lodged the F.I.R. at 6.15 A.M., as stated earlier. The investigation was taken up by S.I. Ram Niwas Mishra PW 13. He reached the spot, prepared the inquest report of the dead body of the deceased and busied himself with other activities related to the investigation of the case. The dead body was sent for post mortem which was conducted on 6.4.1980 at 3 P.M. by Dr K.P.Singh PW 5. The deceased was 18 years of age and about 1½ days had passed since he died. The following ante mortem injuries were found on his person:

(1) Lacerated wound 1" x 2/10" x upto the bone deep upper side head 3" above the left ear.

(2) Incised wound 3/10" x 1/10" x 1"on the left (punctured wound) side neck. 1" below on the outer left ear.

(3) Contusion 6" x 2½" on the left side angle from mandible extending to the ear.

(4) Abrasion 4½" x 1½" on the right scapular region.
(5) Abrasion 2" x 1½" on the right side neck 1" above the clavicle.

(6) Abrasion 1" x ½" on the right outer part of the heel.

4. Both eyes were blue and swollen. On internal examination there was found a depressed fracture of the left parietal bone corresponding to injury No.1. The membranes and brain were congested. The cause of death was coma as a result of injury no.1 (head injury).

5. On the arrest of Amar Singh, his bushirt was found to be blood stained which was got removed by the Investigating Officer.

6. The defence was of denial and of false implication. According to Amar Singh, he had been falsely implicated because of party factions between Jats and Jatavas of village Pachgai Khera, he being Jatav and the deceased being Jat. Shrilal stated under Section 313 Cr.P.C. that Shiv Singh and others were jealous of him because he had constructed two storeyed Pakka house. He being a Jatav, his such prosperity was not digested by them.

7. The prosecution, in all, examined 13 witnesses. No witness was produced by the defence.

8. None responded from the side of the appellants on the revision of the list. On record, Amar Singh is represented by Sri S.K.Chaturvedi, Sri Tapan Ghosh and Sri V.K. Sharma, Advocates and appellant Shrilal is represented on record by Sri S.S.Tiwari, Sri K.K.Srivastava and Sri V.K.Sharma, Advocates. We have heard Sri G.S.Bisaria, learned A.G.A. from the side of State. We propose to decide the appeals on merits.

9 Having gone through the record and evidence and after hearing learned A.G.A., we intend to deal with the important aspects of the matter in succeeding discussion.

10. The incident took place at about 1 O' clock in between the night of

4/5.4.1980 at the outskirts of village Semari Tal and the report was lodged by Shiv Singh PW 3 on 5.4.1980 at 6.15 A.M. at P.S. Tajganj. The distance of the police station from the place of occurrence was about 5 kms. We note from the judgment of the lower court that an argument was raised there about late lodging of the F.I.R. However, on consideration, we find that there was satisfactory explanation as to why the report could not be lodged earlier. The incident having been witnessed by Niranjan Singh PW 6, Darab Singh PW 7 and Dal Chand, one of them, namely, Dal Chand rushed to inform the family members of the deceased. The distance of the house of the deceased from the place of occurrence was about 1½ furlongs. Having reached there, Dal Chand narrated the incident to the family members of the deceased whereafter they rushed to the site of occurrence finding the victim to be dead. It has come in the evidence of the eyewitnesses and also Shiv Singh informant PW 3 that half of the dead body of the deceased was lying in the Nali and half of it was outside. Naturally, it was decided to remove the dead body from the Nali and keep at even place. On being taken out from the Nali, it was placed on the chak road. Obviously, it must have consumed sometime. Still, it was dead of night. Not even Shiv Singh, as stated by him, was prepared to go to the police station at that hour out of fear which was at a distance of about 5 kms. The report was got written by him by Kalyan, as he himself suffered some injury in his finger while operating his tractor earlier. Further, the cycle which Shiv Singh used for reaching the police station went out of order in the way due to chain breaking as stated by him. He went to the shop of one Inder Singh Yadav in Semari Tal but since it was still early in the morning no mechanic had turned up till then. Resultantly, he had to leave the cycle at the shop of Inder Singh Yadav and had to walk on foot upto the police station Tajganj. He reached there at 8.15 A.M. to lodge the F.I.R. The F.I.R. mentions this fact too that due to fear none could dare to reach the police station in the night to lodge the F.I.R. To come to the point, lodging of the F.I.R. on 5.4.1980 at 8.15 A.M. is very well explained and the defence could not score any point by complaining delay in lodging the F.I.R.

11. The second aspect is of motive. It is found that both the appellants Shrilal and Amar Singh had immediate and strong motive against the deceased. Km. Malti Devi PW 1, Veerpal Singh PW 2 and Udai Veer Singh PW 8 are the witnesses of the earlier incident which took place on 4.4.1980 at about 1 P.M. in the fair of Semari Tal. Km. Malti Devi PW 1 is the own unmarried sister of the deceased and Veerpal Singh PW 2 is the brother of the deceased. It had so happened in the fair at about 1 P.M. that the accused appellant Amar Singh had placed his foot on the Chappal of Km. Malti Devi. At this mischief, she had raised objection. Amar Singh was at that time accompanied by Shrilal. In consequence of the objection raised by Km. Malti Devi, both of them had started abusing her and when she disclosed their mischief and misbehaviour to her brothers-Bachchu Singh deceased and Veerpal Singh PW 2, they took ill of it and gave beating to both of them. Bachchu Singh had even given shoe beating to Amar Singh as stated by Veerpal Singh PW 2. He (Veerpal Singh PW 2) had also beaten him up. Udaibir Singh PW 8 and Udal Singh had

intervened in the matter and got them separated. However, the two accused appellants had taken this insult deep inside and while going away, both of them issued threat that they would kill Bachchu Singh by night. This earlier incident is found mentioned in the F.I.R. too. It is noted from the impugned judgment that the defence wanted to make capital out of an admission of Km.Malti Devi that that day she had attended the school and school hours were 12 to 2 P.M. It was reasoned that it being so, she could not at all be present in the fair at about 1 P.M. However, it was crystal clear that she, a girl aged about 12 years only, happened to say so under some confusion. 4.4.1980 was actually a holiday, being Good Friday. Therefore, there could be no question of school being open on that day. The learned trial judge has well dealt with this aspect of the matter while rejecting the argument of the defence that Veerpal Singh PW 2 fully corroborated the version of Km. Malti Devi PW 1 as regards the earlier incident, he having also joined Bachchu Singh deceased in beating the two appellants when Km. Malti Devi had complained to them about the mischief of one of them Amar Singh in placing foot on her Chappal. The testimonial assertions of the sister and brother were corroborated by the independent witness Udaibir Singh PW 8, who had intervened and separated the two parties. It is there in his testimony too that the two appellants had left the scene, saying that they would avenge themselves of the insult by killing Bachchu Singh and Veerpal Singh by night. This witness is neither inimical to the accused appellant nor friendly to the members of the family of the deceased. No time gap had intervened which could heal up the bruised feelings of the accused appellants. They got an opportunity the same night and by joining their two associates murdered Bachchu Singh upon whom they could lay hands that very night. They were in search of an opportunity which came handy to them as he had again gone to the fair in the night. The evidence adduced by the prosecution about the earlier incident was perfectly believable and the accused appellants, as we said, had a very strong motive to commit this crime.

12. Thirdly, the eyewitness account rendered by Niranjan Singh PW 6 and Darab Singh PW 7 was capable of inspiring confidence. Both of them had been named as such in the F.I.R. It consistently flows from their testimony that the occurrence took place around 2 O' clock in the night. Both of them had started from their village at about 1.45 A.M. and within a few minutes had reached near the place of occurrence where they heard cries of a lad in distress. The distance of their village from the spot was less than half km. Within seconds they reached the site and saw the accused appellant killing the deceased. As per the post mortem report and the statement of Dr K.P.Singh PW 5 also, killing could have taken place at about 2 O' clock in the night. It is there in the testimony of Niranjan Singh PW 6 that, he accompanied by Darab Singh PW 7 and Dal Chand, was going towards Semari Tal to enjoy songs in the fair. He (Niranjan Singh) had a torch and lathi whereas Darab Singh and Dal Chand had torches. Keeping of torches at that hour of night was natural. The cries of a lad in distress had attracted these witnesses. From a distance of 10-20 paces that Niranjan Singh PW 6 saw the accused appellants near the brick-kiln killing the deceased.

As regards the place of occurrence, Darab Singh PW 7 also gave the same version. The site plan prepared by the Investigating Officer shows that the way from Pachgai (village of these witnesses) to Semari Tal goes north-south from the brick-kiln of Durga Prasad.

13. We note that Niranjan Singh PW 6 tried to help the accused appellant Shrilal while in the witness box by omitting to identify him in the Court. A careful reading of his statement makes it abundantly clear that he did so in an attempt to provide Shrilal accused a base to create a dent in the prosecution version so far as he was concerned. At the start of his statement, Niranjan Singh PW 6 had named both the accused appellants and two unknown persons as the assailants of the deceased Bachchu Singh. He stated that Amar Singh and an unknown person with red shirt were assaulting the deceased with knives whereas Shrilal and another unknown person with red shirt were assaulting the deceased with bricks. Though Shrilal accused appellant was present in the Court, but he defaulted in not identifying him. He did so deliberately. Shrilal was the resident of his village as admitted by him in his cross-examination. It could not at all be believed that he (Niranjan Singh PW 6) did not know Shrilal accused appellant living in the same village. Niranjan Singh PW 6 clearly stated that Amar Singh appellant was one of the assailants who was assaulting Bachchu Singh with knife, but assumed a lukewarm posture as regards Shrilal accused appellant by omitting to identify him in the Court, though stating that he and one unknown person with red shirt were assaulting the deceased with bricks. An argument was raised before the learned trial judge from the side of State that Shrilal was a wealthy man and he might have exercised his influence on Niranjan Singh and succeeded in winning him over. There is no evidence in this behalf and, really speaking, it is difficult to find any evidence regarding the winning over of a witness by the accused. But it is crystal clear that Niranjan Singh PW 6 had deliberately omitted to identify Shrilal in the Court to provide him a defence base. He as well as Darab Singh PW 7 had flashed their torches on hearing cries of a boy and had then witnessed the incident of the assaulting of the deceased by four persons out of whom two were the present appellants. Amar Singh was assaulting the deceased with a knife and Shrilal accused appellant with brick. The testimonial assertions of Niranjan Singh PW 6 and Darab Singh PW 7 taken together conclusively proved the involvement of both the accused appellants in committing murder of Bachchu Singh. It may also be stated at the risk of repetition that both of them had strong motive to commit this crime and they were together in the fair the preceding day where the earlier incident with that Km.Malti Devi PW 1 had taken place and they had been beaten up and insulted by Bachchu Singh and Veerpal Singh PW 2 over the issue of mischief played by them with Km.Malti Devi.

14. The presence of both these witnesses at the scene of occurrence is well explained that they were going to hear *Bhajans* at Semari Tal Fair. The enjoyment of hearing *songs/Bhajans* is usual source of entertainment for the villagers. It is also gleaned from the testimony of the two witnesses that interesting *Bhajans* were chanted only after midnight, though the programme

started at about 11 P.M. Thus, there was nothing unnatural if these two witnesses were going to hear *Bhajans* from their village at about 1.45 A.M. Giving knife blows to the deceased by Amar Singh was spoken not only by Darab Singh PW 7 but by Niranjan Singh PW 6 too (who developed a soft corner for Shrilal by omitting to identify him in Court to provide a base for defence). The testimony of Darab Singh PW 7 is clinching and beyond ray of doubt against Shrilal too that he used brick in killing the deceased.

15. An argument was also raised before the learned trial judge from the side of accused that there was only one knife injury sustained by the deceased whereas according to Niranjan Singh PW 6 and Darab Singh PW 7, Amar Singh and one another unknown person attacked the deceased with knives. We note that Darab Singh PW 7 stated that in his presence Amar Singh gave only one knife blow which struck the neck of the deceased. Incised wound found on the person of the deceased was on the neck. It could be caused by knife. Suffice it to say in this regard that it is just possible that blow (s) given by the other person missed the target and did not strike on the person of the deceased. A look at the post mortem report shows that four assailants including present two appellants had targeted the head of the deceased and possibility cannot be ruled out that some blows missed the target. The point of the matter is that the present two accused appellants and two unknown persons acted in concert. Amar Singh used a knife and Shrilal made use of brick in assaulting the deceased. The deceased did sustain injuries capable of being caused by knife as well as brick. The ante-mortem injury nos. 1 and 3 could be caused by brick blows. Injury no.1 was a lacerated wound which had caused depressed fracture of parietal bone capable of being caused by brick blow. The impact of other blows might have resulted in contusions and abrasions as found on the dead body of the deceased. Thus, the ocular and medical evidence completely reconcile. The halves of *Kachcha* bricks were found lying by the Investigating Officer near the dead body and they were blood stained as per the report of Chemical Examiner. The human blood was found on these *Kachcha* bricks as per the report of Chemical Examiner on record.

16. Fourthly, it is also pertinent to state that the bushirt (Ext. I) was got removed by the Investigating Officer from the person of the accused appellant Amar Singh when he was arrested and he was brought to the site of occurrence. The accused appellant Amar Singh admitted that bushirt to be belonging to him, but his explanation was that after getting bushirt removed from his person, it was stained with blood from the dead body. The learned trial judge rightly rejected this explanation observing that the Investigating Officer could not have dared to do so in the presence of so many villagers who had collected at the site of occurrence when the investigation was going on. We also note that it was not even suggested to the Investigating Officer, Ram Niwas Mishra PW 13 in his cross-examination. It exposes the hollowness and falsity of this contention. For the first time, this contention was raised by him in his statement under Section 313 Cr.P.C.

17. On consideration of all relevant and important aspects, we find ourselves in agreement with the finding of guilt recorded by the learned trial judge against the two accused appellants.

18. Resultantly, we subscribe to the view taken by the trial judge and find no merit in these two appeals. The appellants have rightly been convicted under Section 302 I.P.C. read with section 34 I.P.C. for the murder of Bachchu Singh with sentence of life imprisonment awarded to each of them.

19. In view of the above discussion, we dismiss both these appeals No.2912 of 1980 and 2952 of 1980 and affirm the conviction of the accused appellants Shrilal and Amar Singh under Section 302 I.P.C. read with Section 34 I.P.C. and sentence of life imprisonment awarded to each of them. They are on bail. They shall be arrested and lodged in jail to serve out the sentence of life imprisonment. The Chief Judicial Magistrate, Agra shall cause them to be arrested and lodged in jail.

20. The office shall send the copy of this judgment along with the record to the lower court to ensure compliance under intimation to this Court within two months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2003

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

Civil Misc. Writ Petition No. 21541 of 2003

Jyoti alias Jannat & another...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri B.B. Paul

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

Constitution of India-Article 21- Section 3 of Indian Majority Act 1875-a person in the age of 18 years is major, and he/she may live with any body. In a free democratic and secular country no body has any right to interfere in his/her affairs.

Held- Para 2

Once a person becomes a major that person cannot be restrained from going anywhere or living with any body. Individual liberty under Article 21 has the highest place in our Constitution.

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

Heard counsel for the parties.

1. The petitioners as well as the mother of petitioner no. 1 have appeared before us. Petitioner No. 1 is a major as is evident from her High School Certificate filed as annexure 2 to the writ petition, which shows that her date of birth is 20.7.1984. Thus she is over 19 years of age. According to the provisions of the

Indian Majority Act, 1875, a person who is 18 years of age is major vide Section 3 of the said Act. The law deems that a major understands his/her welfare, hence a major can go wherever he/she likes and live with any body. This is a free, democratic and secular country. Hence if a person is a major even parents cannot interfere with that individual.

2. The petitioners who appeared before us have stated that they are living with each other of their own free will. In the counter affidavit which has been filed it has been stated that a First Information Report has been lodged under Section 363 and 366 I.P.C. That may be so, but once a person becomes a major that person cannot be restrained from going anywhere or living with any body. Individual liberty under Article 21 has the highest place in our Constitution.

3. Under the facts and circumstances of this case, the writ petition is allowed. A mandamus is issued to the respondents not to harass or threaten the petitioners and allow them to live peacefully with each other. The Senior Superintendent of Police Agra and Superintendent of Police Firozabad will ensure compliance of this order.

4. The petitioners have stated that they need security to go from here to Firozabad as they have apprehension about their safety. The Court Officer of this Court will contact the local police for providing security to them at Allahabad and for their journey to Firozabad. Further the petitioners shall be provided security at Firozabad, by the police authorities concerned there.

5. Let a certified copy of this order be given to the learned counsel for the petitioners on payment of usual charges today itself.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2003

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

Civil Misc. Writ Petition No. 31015 of 2003

Chandra Charu Mishra ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri A.P. Tewari
Sri S.S. Tripathi

Counsel for the Respondents:
S.C.

Constitution of India, Article 14- cut of date G.O. dated 1.7.01 providing revision the pay scale w.e.f. 1992-Petitioner retired on 30.6.01-whether can claim the benefit of such G.O.? Held- 'No', recording the reason for fixing the cut of date-not necessary.

Held- Para 3

Even if no reason has been given for the basis of a cut off date, the Court cannot interfere in such matters. It is for the administration to fix the cut off date and the Court should not interfere in such administrative matters as held in the aforesaid decisions. Some persons are bound to have a grievance by a cut off date, but that would not make it arbitrary, vide *Dr. Ami Lal Bhat v. State of Rajasthan (supra)*

Case law discussed:
J.T. 1991 (6) S.C. 400
2000 (3) SCC 736

1996 (9) SCC 133
J.T. 1997 (6) SC 72
1994 (4) SCC-212
1990 (3) SCC-398

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

1. Heard learned counsel for the petitioner.

The petitioner has challenged the impugned G.O. dated 20.7.2001, 8.8.2001, 3.9.2001 and 20.12.2001 on the ground that they are ultra vires Article 14 of the Constitution. The petitioner has also prayed for a mandamus directing the respondent to fix the pension of the petitioner according to revised pay scale given by the fifth pay Commission.

2. The petitioner was appointed as Assistant Teacher in Government Model School on 4.1.1967 and was confirmed on 1.7.1971. He was provided selection Grade from 4.1.1983 and the pay scales were revised by the pay Commission in 1986 and 1996. The petitioner retired on 30.6.2001. By the impugned G.O. a teacher who was in service on 1.7.2001 is entitled to get the benefit of the revised pay scale from 1.1.1996.

3. Admittedly, the petitioner retired on 30.6.2001 and hence he was not governed by the said G.O. Learned counsel for the petitioner submitted that the cut of date i.e. 1.7.2001 is ultra vires Article 14 of the Constitution. We do not agree. Cut off dates have been upheld in several decisions of the Supreme Court e.g. *All India Reserve Bank Retired Officers Association v. Union of India, J.T. 1991 (6) S.C. 400, State of Punjab v. J.L. Gupta, 2000 (3) S.C.C. 736, Multipurpose Health Workers Association v. State of Haryana, 1996 (9) S.C.C. 133, Dr. Ami Lal Bhat v. State of Rajasthan, J.T. 1997 (6) S.C. 72, Union of India v. Sudhir Kumar Jaiswal, 1994 (4) S.C.C. 212, etc.* that even if no reason has been given for the basis of a cut off date, the Court cannot interfere in such matters. It is for the administration to fix the cut off date and the Court should not interfere in such administrative matters as held in the aforesaid decisions. Some persons are bound to have a grievance by a cut off date, but that would not make it arbitrary, vide *Dr. Ami Lal Bhat v. State of Rajasthan (supra)*

4. Petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 14755 of 1998

General Manager/Managing Director, and another ...Petitioners
Versus
Presiding Officer, Labour Court, Kanpur and another ...Respondents

Counsel for the Petitioners:
Sri S.N. Singh

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

Constitution of India-Article 226-14-Service Law-Termination order attendant worked for more than 240 days in a calendar year-Labour Court given award for reinstatement with full back wages-challenged on the basis of no work no pay-question whether workman entitled for full back wages or otherwise? Reason for not giving full back wages well

discussed-Award modified accordingly with half of the back wages.

Held- Para 5

Lastly, it has been submitted by the learned counsel for the petitioner that the workman concerned has not worked from the date of termination till the date of award. Therefore, on the basis of principle of 'No work No Pay', the labour court has definitely committed error in granting reinstatement with full back wages at the rate of Rs.600/- per month from the date of termination till the date of reinstatement. In my opinion, this argument deserves to be accepted. It is not disputed that the workman concerned had admittedly not worked during all these period and considering the interest of justice, the award of the labour court is modified to the extent that instead of payment of back wages at the rate of Rs. 600/- per month, the workman concerned is entitled for the back wages at the rate of Rs.300/- per month from the date of termination till the date of award.

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

1. Heard learned counsel for the parties.

Learned counsel appearing for the parties agreed that instead of deciding the stay vacation application, the writ petition itself may be heard and decided on merits.

2. The petitioners aggrieved by the award of the Labour Court-IV, Kanpur dated 17th January, 1998 passed in Adjudication Case No. 60 of 1996, (Annexure '3' to the writ petition), have approached this Court by means of this writ petition under Article 226 of the Constitution of India.

The following dispute was referred for adjudication to the labour court:

"क्या सेवायोजकों द्वारा श्रमिक श्री वीरेन्द्र सिंह पुत्र श्री रक्षपाल सिंह, अटेण्डेण्ट को दिनांक 13.10.93 से कार्य से पृथक/वंचित किया जाना उचित एवं वैधानिक है? यदि नहीं, तो संबंधित श्रमिक क्या हितलाभ/क्षतिपूर्ति पाने का अधिकारी है किस तिथि एवं अन्य किस विवरण के साथ?"

3. The labour court issued notice to the parties, namely, workman and the employer. The parties have exchanged their pleadings and adduced the evidence. The labour court has categorically recorded a finding after considering the evidence on record that from the perusal of Ext. 25 to Ext. 45, it is apparent that the workman concerned has worked from the year 1991 to 12th October, 1993 when his services were terminated. Thus, he has worked for more than 240 days in the proceeding calendar year. The labour court has also recorded a finding that it will not make any difference whether the nature of the appointment of the workman concerned was temporary in nature and further there was direction from the State of terminate the services of the temporary workman, like the respondent no. 2. Thus, the labour court directed after holding that the termination of the services of the workman concerned with effect from 13th October, 1993 is illegal and directed the reinstatement of the workman concerned with continuity of service and back wages at the rate of Rs.600/- per month.

4. Learned counsel for the petitioner tried to assail the findings arrived at by the labour court but, in my opinion, has not been able to demonstrate that the finding recorded by the labour court suffers from error of law much less manifest error of law so as to warrant an interference by this Court in exercise of

powers under Article 226 of the Constitution of India.

5. Lastly, it has been submitted by the learned counsel for the petitioner that the workman concerned has not worked from the date of termination till the date of award. Therefore, on the basis of principle of 'No work No Pay', the labour court has definitely committed error in granting reinstatement with full back wages at the rate of Rs.600/- per month from the date of termination till the date of reinstatement. In my opinion, this argument deserves to be accepted. It is not disputed that the workman concerned had admittedly not worked during all these period and considering the interest of justice, the award of the labour court is modified to the extent that instead of payment of back wages at the rate of Rs.600/- per month, the workman concerned is entitled for the back wages at the rate of Rs.300/- per month from the date of termination till the date of award.

6. In view of what has been stated above, this writ petition deserves to be dismissed and is hereby dismissed except with the modification that instead of payment of back wages at the rate of Rs.600/- per month, the workman concerned is entitled for the back wages at the rate of Rs.300/- per month from the date of termination till the date of award. The interim order, if any, stands vacated. There will be no order as to costs.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.07.2003

BEFORE
THE HON'BLE R.K. DASH, J.
THE HON'BLE UMESHWAR PANDEY, J.

Criminal Misc. Writ Petition No.249 of 2003

Vishal Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri K.K. Dwivedi
Sri Prem Prakash

Counsel for the Respondents:
Sri G.S. Chaturvedi
Sri Samit Gopal
Sri Surendra Singh, A.G.A.
Sri Amarjeet Singh, A.G.A.
Sri S.K. Saxena

Code of Criminal Procedure, Section 24 (8)-appointment of Special Public Prosecutor-person appointed has due qualification and experience-appointment can not be quashed-on the ground of endorsement made by Principal Secretary the appointment has been made without-consideration of suitabilidy of law department-However such practice not to be adopted in future.

Held- Para 11 & 14

The respondent no.4 having a long experience of working as Legal Advisor/Public Prosecutor with Central Buearo of Investigation and after laying down his office actively practicing in the Courts of law as an Advocate, has if been appointed as Special Public Prosecutor under sub Section (8) of Section 24 of the Code, there is no scope to challenge his such appointment on the ground of non eligibility or arbitrariness.

The record dealing with the appointment of respondent no.4 as Special Public Prosecutor in the aforesaid murder trial of Nitish Khatara also shows that the appointment of Sri Saxena was made in pursuance of an endorsement/direction of Principal Secretary to the Chief Minister. This endorsement was made on the letter of Sri Saxena dated 23.10.2002. It appears that without making any scrutiny as to the suitability of the person for such appointment through the Law Department, the Government Orders dated 24.10.2002 were taken out. It is unusual and we accordingly suggest that the Government should not adopt such method of appointment by ignoring all the norms.

Case law discussed:

AIR 1992 SC pg. 1213 and JT 2001 (i) SC 236 cited/referred.

(Delivered by Hon'ble Umeshwar Pandey, J.)

1. The petitioner an accused of murder case crime no.192 of 2002, Police Station Kavi Nagar district Ghaziabad, under Article 226 of the Constitution of India, has challenged the appointment of respondent no.4 as Special Public Prosecutor, under Section 24 (8) of the Code of Criminal Procedure (for short the 'Code') to conduct the Trial of the aforesaid case before the Additional Sessions Judge, Patiyala House Courts, New Delhi.

2. It is stated that by an order, the Apex Court on the petition of the complainant of the case directed transfer of the Sessions Trial from the Court of Sessions Judge, Ghaziabad to the Court of Additional Sessions Judge, Patiyala House Courts, New Delhi. The respondent no.1, while had assigned the job of prosecuting the trial earlier to one Public Prosecutor at Ghaziabad, it later on appointed the respondent no.4 as Special Public Prosecutor to conduct and prosecute the case when it was transferred from Ghaziabad to the Courts at New Delhi. The petitioner has taken several grounds for challenging the appointment of respondent no.4 as Special Public Prosecutor and stated that the respondent no.4 wrote a letter to the Secretary, Chief Minister for soliciting his appointment; that the appointment of respondent no.4 is not in accordance with the provisions of sub Section (8) of Section 24 of the Code as he lacked qualifications of the practice at Bar as an Advocate for a period of ten years and that his appointment was in contravention to the rules and regulations contained in Chapter VII of the U.P. Legal Remembrancer Manual. Para-7.08 of Chapter VII of the aforesaid Manual provides that no one would be eligible for appointment as State counsel after attaining the age of 62 years and the date of birth of respondent no.4 being 23.11.1936 had already attained the aforesaid maximum age of 62 years long before his present appointment under challenge. It is though provided under sub Section (9) of Section 24 of the Code yet no serving officer would be deemed to be in practice as an Advocate. It would be violative to the Advocates Act as well as Article 14 of the Constitution of India. Therefore, the enabling sub Section (9) as aforesaid could not be attracted in the case of present appointment of respondent no.4. The respondent no.4 had been in full time employment of the Central Bureau for Investigation as Legal Advisor/Public Prosecutor and he could not be deemed to be a practicing Advocate within the meaning of sub Section (8) of Section 24 of the Code. The petitioner has thus, contended that the aforesaid appointment of respondent no.4 as Special Public

Prosecutor to conduct the case against the petitioner on behalf of the State of U.P. is wholly arbitrary and has been made on extraneous consideration. It being illegal and against the provisions of Section 24 (8) of the Code, should be quashed and a mandamus commanding the respondents should be issued by the Court that respondent no.4 be not treated as Special Public Prosecutor to appear and conduct the aforesaid criminal case before the Additional Sessions Judge, Sri S.N. Dhingra at Patiyala House Courts, New Delhi.

3. Learned counsel for the petitioner while arguing the matter before us, has in the first place challenged the appointment of respondent no.4 as Special Public Prosecutor in the said murder case on the ground that he does not possess requisite qualifications for such appointment under sub Section (8) of Section 24 of the Code. He is not an Advocate having experience of ten years practice as his enrolment as such with the Bar Council, Delhi was done only in the year 1994 when he laid his office of legal advisor with C.B.I. on his retirement. Learned counsel has also emphasized that the period during which the respondent no.4 worked as Legal Advisor/Public Prosecutor in the C.B.I. could not be counted even with the help of deeming clause of sub Section (9) to be a period spent in practice as an Advocate. The enabling clause of sub Section (9) of Section 24 of the Code would not legally be available in the matter of respondent no.4.

4. On the other hand, learned counsel for the respondents while replying to the submissions made on behalf of the petitioner in the aforesaid context has tried to make the provision of sub Section (9) of Section 24 of the Code threadbare and has stressed that this enabling clause does not go to alter the meaning/definition of word 'Advocate' as has been projected in the Advocates Act. Learned counsel for the petitioner has further emphasized that this sub Section (9) of Section 24 of the Code is also not violative to Article 14 of the Constitution of India.

5. Sub Sections (8) and (9) of Section 24 of the Code are the relevant provisions for the purposes of appointing a person as Special Public Prosecutor by the Central Government or the State Government as the case may be. The provisions of the aforesaid two sub Sections (8) & (9) of Section 24 of the Code are reproduced below :-

"(8). The Central government or the State government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

(9) For the purposes of sub Section (7) and sub Section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate."

6. The provisions of sub Section (9) aforesaid were not available in the Code prior to the Cr.P.C. (Amendment) Act, 1978 (Act No.45 of 1978), which became applicable with effect from 18.12.1978. In

the pre-amendment period sub Section (6) of Section 24 of the Code dealt with such appointment of a Special Public Prosecutor. The said sub Section (6) of the Code was as below :-

"(6) The Central Government or the State Government may appointment, for the purposes of any case or class of cases, an Advocate who has been in practice for not less than ten years, as a Special Public Prosecutor."

7. From the above, we find that prior to 1978 amendment the Central Government or the State Government, for the purposes of any case or class of cases, could appoint a person as Special Public Prosecutor only if he has been in practice for not less than ten years as an Advocate. Such appointment of a person having rendered service as a Public Prosecutor or as an Additional Public Prosecutor or as an Assistant Public Prosecutor or other prosecuting officers etc. was not possible. By virtue of 1978 amendment this enabling clause of sub Section (9) was added and the experience of the persons having been in service as Public Prosecutor etc. was deemed to be an experience of practice as an Advocate. This sub Section however, does not appear to have come in conflict with the provisions of the Advocates Act. It is only with a view of taking benefit of the experience of a person serving as Public Prosecutor etc. for a long drawn period of time, this amendment was introduced and the appointment of such person as Special Public Prosecutor has been facilitated. It is not to the effect to altogether change the definition of Advocate as appearing in the Advocates Act. The Public Prosecutor or Legal Advisor working on full time basis with any department or corporation of the Government does have special experience in the prosecution branch and if by virtue of adding sub Section (9) aforesaid to the Code, the benefit of such experience was sought to be taken by the legislature for prosecuting a special case or group of cases by such persons, the said amendment or addition in the Code could not be taken to have come in conflict either with the provisions of the Advocates Act or with Article 14 of the Constitution of India. This deeming clause of sub Section (9) of Section 24 of the Code also does not confer a serving Public Prosecutor/Legal Advisor etc. a liberty to practice in Courts as an Advocate. The meaning given to the functions of a Public Prosecutor in sub Section (9) as an Advocate, is confined only for the purposes of appointment of such person as Special Public Prosecutor under sub Section (8) of Section 24 of the Code. It has absolutely no other significance as to occasion a conflict between this sub Section (9) and the provisions of the Advocates Act or Article 14 of the Constitution of India.

8. Before 1978 amendment, the emphasis under sub Section (6) of Section 24 of the Code was on the candidate being an Advocate in practice and not in practice as a Government servant. The underlying object in enacting the provisions of sub Section (6) was that only an Advocate of ten years standing and experience at the Bar should be chosen for appointment as a Special Public Prosecutor. It could not then be attributed to the legislature that, when it implied the language 'an Advocate who has been in practice for not less than ten years', it intended that even a full time employee of the Government governed by service rules would also be eligible or

would satisfy the requirement of sub Section (6) of Section 24 of the Code. This intent/view of legislature however, on further consideration by it was not found tenable thus, only the amended Section 24 of the Code has come into existence. After such amendment, the earlier view/intent of the legislature was given a gobye. The period of service of a person as a Public Prosecutor, Additional Public Prosecutor, Assistant Public Prosecutor or other prosecuting officer by whatever name called, has been deemed to be the period during which such person has been in practice as an Advocate. This deeming provision added to the Code being not in any manner in conflict with the provisions of Advocates Act and Article 14 of the Constitution of India, cannot be said to be violative of those provisions. Sub Section (9) of Section 24 of the Code thus, is not liable to be declared ultra virus.

9. The petitioner's learned counsel to support his submission, in the aforesaid context has cited the case law of ***Kumar Padma Prasad Vs. Union of India and others reported in AIR 1992 SC, page 1213 and the case of Satish Kumar Sharma Vs. The Bar Council of Himachal Pradesh reported in JT 2001 (1) SC, page 236.***

10. In Kumar Padma Prasad's case (supra), the Hon'ble Apex Court has elaborated upon the expression 'judicial officer' as used in Article 217 (2) (a) of the Constitution of India and has given its meaning with the help of the expression 'judicial service' as defined under Article 236 (b) of the Constitution of India. But in the present context while deriving meaning of the word 'Advocate' used in sub Section (8) of Section 24 of the Code, we have not to go and borrow the expression and its meaning as defined in Section 2 (a) of the Advocates Act, because the expression finds a deeming provision under sub Section (9) of Section 24 of the Code for the purposes of enabling a person having experience of service as Public Prosecutor etc. for being appointed as Special Public Prosecutor by the Government under sub Section (8) of Section 24 of the Code. Therefore, the principle of law, which is available in the aforesaid case of Kumar Padma Prasad (supra) is of no application in the present facts situation of the case. In Satish Kumar Sharma's case also the Hon'ble Apex Court while dealing with the availability of the benefit of the exception contained in para-2 of Rule 49 of the Bar Council of India Rules, 1975 has held that a person getting fixed salary under the employment of a corporation governed by service rules could not get the benefit of the said exception and his enrolment as an Advocate with the Bar Council is liable for termination. In this case the very enrolment with the Bar Council and entitlement of a full time salaried employee to practice as an Advocate before the Court was under challenge. Under these circumstances, the person under full time employment with a corporation seeking benefit of the exception of Rule 49 aforesaid has been refused that benefit by the Apex Court. It was not in the nature of such a dispute as we are having in the present case. The facts situation of the present case thus, do not attract application of principle of law laid down in Satish Kumar Sharma's case (supra).

11. The respondent no.4 having a long experience of working as Legal Advisor/Public Prosecutor with Central

Buearo of Investigation and after laying down his office actively practicing in the Courts of law as an Advocate, has if been appointed as Special Public Prosecutor under sub Section (8) of Section 24 of the Code, there is no scope to challenge his such appointment on the ground of non eligibility or arbitrariness.

12. Besides the above, the respondent no.4 through his Supplementary Affidavit, has filed several copies of Notifications in Annexures-B & C which go to show that he on many occasions, by the Central Government and the administration of Union Territory of Delhi, was appointed as Special Public Prosecutor under the aforesaid provisions of sub Section (8) of Section 24 of the Code as well as under sub Section (I) of Section II of the Terrorist and Disruptive Activities (Prevention) Act, 1987. These Notifications are of post amendment dates of 1978 when sub Section (9) of Section 24 of the Code had already come into existence. Obviously, these appointments of the respondent no.4 while he was in service and thereafter have been made by the respective Governments with the aid of the enabling clause of sub Section (9) of Section 24 of the Code. Therefore, the present appointment of the respondent no.4 as Special Public Prosecutor under sub Section (8) of Section 24 of the Code, if has been made with the aid of sub Section (9) of Section 24 of the Code, the same does not appear to be arbitrary or illegal. He is having long experience of conducting cases for the prosecution before the Courts in Delhi. His appointment as Special Public Prosecutor by respondent no.1 in any case does not appear to be illegal or irrational.

13. From the side of the petitioner, an argument in respect of arbitrary fixation of remuneration payable to respondent no.4 was advanced and it has been contended that the remuneration made permissible to Sri S.K. Saxena, is extremely exorbitant and unreasonable. The details of remuneration that have been made admissible to Sri S.K. Saxena find place in the draft notification of Greh (Police) Anubhag-3. This notification is part of the record of Law/Home Department of the Government of respondent no.1. On our having summoned the aforesaid record of the appointment of Sri S.K. Saxena, the same has been made available for perusal. The aforesaid notification and the letter of Sri S.K. Saxena dated 6.11.2002 show that the remuneration payable to respondent no.4 has been divided in several heads. The one time fees is the sum of Rs.25,000/- whereas per day fees, clerical charges and junior attending Court is Rs.14,300/-. The conferencing fees for each conference is Rs.2,200/-. This fees is besides the travel and daily allowance, which has been claimed by Sri Saxena towards his remuneration. It appears that the Government of respondent no.1 has consented to such demand of fees of Sri Saxena and it has been duly notified. The per day appearance of respondent no.4 to conduct the trial of the murder case entails an expenditure of about more than Rs.16,000/- besides the one time fees of Rs.25,000/-. This definitely appears to be quite exorbitant and we hereby direct that instead of taxing the Government exchequer so unreasonably the respondent no.1 would reduce per day appearance charge including the clerical charges and the fees of junior of respondent no.4 in the aforesaid Sessions Trial case by Rs.8,000/- from the total of the aforesaid

daily expenditure of Rs.16,000/-. In case, the respondent no.4 expresses his reluctance on agreeing to such term and condition of the reduced remuneration, the respondent no.1 would be at liberty to engage some other suitable counsel to prosecute the trial

14. The record dealing with the appointment of respondent no.4 as Special Public Prosecutor in the aforesaid murder trial of Nitish Khatara also shows that the appointment of Sri Saxena was made in pursuance of an endorsement/direction of Principal Secretary to the Chief Minister. This endorsement was made on the letter of Sri Saxena dated 23.10.2002. It appears that without making any scrutiny as to the suitability of the person for such appointment through the Law Department, the Government Orders dated 24.10.2002 were taken out. It is unusual and we accordingly suggest that the Government should not adopt such method of appointment by ignoring all the norms.

15. However, looking to the facts and circumstances of the present case that the respondent no.4 possess due qualification and experience for his such appointment as Special Public Prosecutor in a sensational murder case, we are not inclined to quash his appointment/Notification dated 26.11.2002 (Annexure-2 to the writ petition) and the writ petition as such having no merits, is hereby dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2003

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

Criminal Misc. Application No. 4729 of 2000

Ashok Chaturvedi, Chairman and others ...Applicants

Versus

State of U.P. and another ...Respondents

Counsel for the Applicants:
Sri S.S. Nigam
Sri Ramesh Sinha

Counsel for the Respondents:
Sri Dilip Gupta
Sri Rajiv Gupta
AGA.

Criminal procedure code-Section 482-bar of second revision-whether application u/s 482 Cr.P.C. maintainable when revision against order of magistrate dismissed-in circumstances of the case-held-yes.

Held: Para 3

Order of the Magistrate taking cognizance of the offence having been dismissed in revision can move this court under section 482 Cr. P .C. Judicial opinion of various High Courts on this aspect is not unanimous.

Code of Criminal Procedure Section 482, Indian Penal Code Section 304-A-petition for quashing of proceeding-order of Magistrate issuing process should show application of judicial mind, though he is not required to give reasons.
1994 (4) SCC 655 referred to.

Held: Para 11

It is true, law does not envisage that the Magistrate should record the reasons of his satisfaction before issuing process, but scrutiny of the order must show that he applied judicial mind to find whether prima-facie case is made out of the complaint or other materials for proceeding against the accused.

case law discussed:

AIR 1977 SC-987
1997 Cr.L.J. 1519
1994 (4) SCC 655
AIR 1992 SC 1815
2002 (6) SCC 670

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

1. Naresh Kumar Shukla (hereinafter referred to as 'the deceased'), a chemical engineer joined as a trainee on 28.4.1996 with M/s. Flex Industries Limited, Noida in the newly created district of Gautam Budh Nagar. He in course of employment in the industry met with an accident resulting in his death. Respondent no.2, father of the deceased filed a complaint before the Chief Judicial Magistrate, Ghaziabad alleging that the petitioners being the officials of the said industry had assigned creation of a plant imported from France and asked the deceased to work over time. After the tragic incident the complainant visited the premises of the industry and came to know that heavy steel roller which was kept at a height of 1.5 meter supported by two wooden stakes on both sides suddenly feel down on the deceased who was sitting on the floor and making some adjustment of the bracket of the roller. The deceased was immediately rushed to a Nur Singh Home where he breathed his last. Further case of the complaint is that on being asked as to how the deceased was asked to sit and work on a small and narrow place, accused Anil Gupta and Mahabir Saran Confessed that the accident took place due to rash and negligent act of all the accused persons and requested to pardon them. The complainant approached the District Magistrate, Ghaziabad and requested the police to enquire into the incident but it was to of no effect. It was thereafter that he moved the court by filing complaint. Learned Magistrate upon examination of the complainant and the witness produced by him took cognizance of the offence under Section 304-A.I.P.C. and Summoned all the accused persons. Thereupon, the accused persons filed a petition to recall the order of cognizance and the same having been rejected, they approached the Sessions Court in revision which also did not yield desired result. Aggrieved by the order of the revisional court, they filed present petition under Section 482 Cr.P.C. seeking quashing of the proceedings in the com[plaint case bearing no.627 of 1996 pending in the court of Chief Judicial Magistrate, Ghaziabad.

2. Sri Gopal S. Chaturvedi, learned Senior Counsel appearing for the petitioner contended that even if the allegations made in the complaint are taken in entirety and on their face value do not make out any offence under Section 304-A I.P.C. and since the deceased was a young engineer and met with tragic death due to accident in the factory, the learned Magistrate made emotional approach to the case and without there being sufficient ground for proceeding against the accused persons took cognizance of the aforesaid offence and issued process for their appearance. It is true, while taking cognizance of the offence, the Magistrate is not required to give reasons, but his order must show that he applied judicial mind to fined if prima-facie case is disclosed from the averments

made in the complaint and the statements of the complainant and his witness if any, for proceeding against the accused. In the case on hand, the impugned order, annexure-4 does not reveal that the learned Magistrate made a judicial approach to the case and was satisfied from the available materials that prima–facie case under Section 304-A I.P.C. is made out. In that view of the matter, it was urged that the criminal complaint being the outcome of anger of the complainant, order of the Magistrate taking cognizance of the offence under Section 304-A I.P.C. and consequent order issuing notice to the accused persons should be quashed.

Per contra, learned counsel appearing for the complainant would strenuously urge that law does not mandate that the Magistrate should pass a detailed order about his satisfaction before taking cognizance of the offence and therefore, the impugned summoning order, annexure-4 which is the based on satisfaction of judicial conscience cannot be scraped or rejected. As to the factual aspect of the case, he submitted that since death of the deceased was as a result of the accident, occurred due to rash or negligent act of the accused persons and at this stage when cognizance of the offence has only been taken, the Court should be loathe to interfere with the impugned order and bring the criminal proceeding to a halt in exercise of inherent power.

3. Before adverting to the arguments advanced by the counsel appearing for the parties, at the outset it is desirable to decide the question, though not raised by the complainant whether the petitioners, whose revision against the order of the Magistrate taking cognizance of the offence having been dismissed in revision can move this court under section 482 Cr. P .C. Judicial opinion of various High Courts on this aspect is not unanimous. Some say that in view of the legislative intention enacting Section 397 (3) second revision in the garb of a petition under Section 482 Cr. P.C. is not maintainable. Others have taken contrary view observing that where the order of the sub-ordinate court is wrong and illegal and if allowed to remain grave injustice would ensue, the Court for the ends of justice should invoke inherent power and quash the said order. Experience shows that sometimes Sessions Judge's order is wrong, illegal and perverse. So, if the said order is not interfered with when challenged in view of the embargo placed by Section 397(3), it will cause irreparable injury to the person aggrieved and consequently justice will be a casualty. The question has been settled at rest by the Supreme Court in the case of **Krishnan Vs Krishnaveni**, AIR 1997 SC 987 = 1997 Cr. L. J. 1519 Where the Court observed thus:

"Ordinarily, when revision has been barred by Section 397 (3) of the Code, a person –accused/complainant–cannot be allowed to take recourse to the revision to the High Court under Section 397 (1) or under inherent powers of the High Court under Section 482 of the Code since it may amount to circumvention of the provisions of Section 397 (3) or Section 397 (2) of the Code. It is seen that the High Court has suo moto power under Section 401 and continuous supervisory jurisdiction under Section 483 of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of

the process of the courts or the required statutory procedure has not been complied with or there is failure of justice of order passed or sentence imposed by the magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensure. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under Section 397(1) read with Section 401 of the Code……"

4. So far the present is concerned, for the reasons to follow I would old that notwithstanding the bar of second revision as envisaged in Section 397 (3), it is a fit case where this Court in exercise of inherent power should upset the order of the Magistrate taking cognizance of the offence under Section 304-A I. P.C. and quash the criminal proceedings.

5. The grievance of the petitioners in the present case is that since the facts narrated in the complaint do not constitute any offence, more so an offence under Section 304-A I.P.C. and this aspect of the matter having not been considered both by the Magistrate as well as the revisional court, this Court would be well within its jurisdiction to consider the same and quash the impugned order consequent criminal proceedings in exercise of inherent power.

6. Inherent powers are in the nature of extra- ordinary power to be used sparingly for achieving the object as mentioned in Section 482 Cr. P.C. It is the settled position of law that such power should be exercised sparingly and in rarest of rare case. On a bare reading of the FIR or the complaint where the Court finds that no offence is made out and continuance of the criminal proceeding will cause unnecessary harassment to the accused, it would be justified to exercise inherent power and bring the proceeding to a close. Reference in this context may be made to a decision of the Supreme Court in the case of **State of Bihar Vs Murad Ali Khan**, 1994 (4) SCC 655 where the Court observed:

"It is trite that jurisdiction under Section 482 Cr. P.C., which saves the inherent power of the High Court, to make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. In exercising that jurisdiction the High Court Should not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. That is the function of the trial Magistrate when the evidence comes before him. Though it is neither possible nor advisable to lay down any inflexible rules to regulate that jurisdiction, one thing, however, appears clear and it is that when the High Court is called upon to exercise this jurisdiction to quash a proceeding at the stage of the Magistrate taking cognizance of an offence the High Court is guided by the allegations, whether those allegations, set out in the complaint or the charge-sheet do not in law constitute or spell out any offence an that resort to criminal proceeding would, in the circumstances, amount to an abuse of the process of the court or not."

7. Keeping in mind the aforesaid dictum of law, it is necessary to elude to the allegations made in the complaint petition. Admittedly, the complainant was not an witness to the incident. As alleged, he alongwith others visited the site where the accident occurred. In paragraph 12 of the complaint petition, it is stated:

"There the complainant and his companions were shown a steel roller which was kept at height of 1.5 meter supported by two wooden stakes on both sides the weight of that roller as mention on is 1.8 tones. There was no blood spot on the site. There was no crack or damage on the floor. The entire site of accident was cleaned and the entire evidence of the accident were removed/washed away the accused persons.

That on the site the accused no. 5 and 7 Mr. Gupta pointed towards the same roller which was kept on wooden stakes and its weight was 1.8 tones. Further Mr. Gupta informed that Naresh was sitting on the floor and making some adjustments relating to mounting of the roller on the left bracket. He said that the bracket on Naresh's left side broke down and pointed his finger towards a broken steel bracket which appeared to have been welded and fabricated out of the solid steel bars. The complainant and his companions notices that the broken bracket had a welded joint which appeared to be a fresh welding. As per Mr. Gupta the body of Late Naresh was crushed by this heavy steel roller which fell down as the left bracket broke down on which this roller was kept…"

8. Even assuming that the aforesaid allegations are true, yet it cannot be said by any stretch of imagination that the accident and consequent death of the deceased was as result of any rash or negligent act of the accused persons. To bring a case within the purview of Section 304-A I.P.C., it must be shown that the act was a rash or negligent. An act would be construed 'rush', if is done without due care or caution. 'Negligent act' means, an act done without exercise of reasonable and proper care and precaution to guard against any injury.

9. In the case on hand, the case as narrated in the complaint does not remotely suggest that the accused person had neglected their duty and failed to take proper care and precaution in the factory premises resulting in the accident. Had the learned Magistrate taken care to fined out from the complaint petition as well as the statement of the complainant as to if a prima-facie offence under Section 304-A I.P.C. is made out, he would have been slow to take cognizance of the said offence and issued process against the accused persons.

10. It is the right of everyone to Bering an offender to justice; equally it is right of every person that he is not unnecessarily harassed by false and frivolous persecution. It cannot be lost sight of that a person passes thought mental agony when asked to face a criminal charge and if the offence is non-bail able, he is sent to prison till bail granted by the court. Besides, long drawn adjudicatory process makes him financially cripple which ultimately affects is in jeopardy, the duty of the court becomes onerous. As has been well said, judicial process should not be an instrument of oppression or needless harassment.

11. Law confers a right on a person wronged either to approach the police or file a complaint in the court seeking legal action the person who violated law. When a complaint is filed, the Magistrate on examining the complainant and his witnesses, if any present, should be satisfied whether there is sufficient ground for proceeding against the person complained of. It is true, law does not envisage that the Magistrate should record the reasons of his satisfaction before issuing process, but scrutiny of the order must show that he applied judicial mind to find whether prima-facie case is made out of the complaint or other materials for proceeding against the accused. In this context reference may be made to a decision of the Supreme Court in the case of **Punjab National Bank Vs. Surendra Prasad Sinha**, AIR 992 SC 1815 where the Court observed---

"There lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for only on satisfying that the law costs liability or creates offence against the juristic person or the person impleaded, there only process would be issued. At that stage the Court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complainant as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime object of criminal justice but it would not be the means to wreak personal vengeance xxxxxxx"

12. Similar view was also taken in the later decision in the case of ***K.M. Mathew vs. K.A. Abraham***, (2002) 6 SCC 670

Coming to the case on hand, the impugned order which is cryptic in nature does not show the required satisfaction of the learned Magistrate while taking cognizance of the offence under Section 304-A I.P.C.

13. Regard being had to the facts and circumstances of the case as discussed above, I am of the considered opinion that there being no case under Section 304-A I.P.C., the order of the Magistrate taking cognizance of the said offence is illegal and unsustainable in law. In such view of the matter, the said order and the consequent criminal proceeding in complaint case no.627 of 1996 are quashed. However, when the complainant has lost his son, a young engineer, which loss cannot be compensated by any means, in my opinion, for doing complete justice, the accused persons, petitioners here-in should pay a sum of rupees five lacs to the complainant as a solace. It is accordingly, so ordered. The amount shall be paid within four weeks hence. In the event, payment is not made within the stipulated time, on approach being made by the complainant, the District Magistrate, Gautam Budh Nagar shall recover the said amount as arrear of land revenue and pay the same to him.

14. The criminal misc. application thus succeeds and is allowed with above observation and direction.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2003

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

Civil Misc. Writ Petition No. 33347 of 2003

Surendra Kumar ...Petitioner
Versus
The State of U.P. & others ...Respondents

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

Counsel for the Respondents:
S.C.

Constitution of India Article 226 Realisation of Goonda Tax by Anti Social elements-no such tax known in the eye of law. Demand of such gunda tax is thus wholly illegal and arbitrary. Directions given to the State Authorities to protect the citizens from such anti social elements.

Held- Para 5

No such tax is known to the law as gunda tax. We have heard of income tax, sales tax, house tax etc. but this is a totally new and illegal phenomenon which has appeared in society, and unless this gunda tax disappears we will hold the Government authorities to task for such illegal demands. Such gunda tax reminds one of the 'protection money' demanded by the Mafia in America.

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

1. This petition discloses an alarming state of affairs prevailing in the State of Uttar Pradesh. It appears that all kinds of ruffians, gundas, hooligans and other anti social elements are at large in our society and are harassing and terrorizing the law abiding citizens. If this trend is not stamped out with an iron hand the situation will get out of control and there will be total lawlessness and jungle raj in the State.

2. The petitioner has alleged that he is a tenant of a shop in Agra City under Police Station Aitmadaula, Agra for which he pays Rs.2000/= per month to the landlord on the basis of registered rent deed vide Annexure-1 to the writ petition. The petitioner carries on the business of jute bags in the aforesaid premises and also resides there.

3. It is alleged in paragraph 6 of the petition that on 2.7.2003 when the petitioner was carrying on his business in the said premises the respondents no. 7 to 18 came to his shop with the common object of realizing gunda tax and demanded a sum of Rs. 1000/= and in case of non-payment of the same threatened to evict him and also make him suffer dire consequences. Since the petitioner did not pay the aforesaid gunda tax as demanded by the respondent no. 7 to 18 they threatened to evict the petitioner forcibly from the premises and hence the petitioner on 2.7.03 went to lodge an FIR but the respondent no.5, the Station House Officer, Police Station Aitmadaula, Agra refused to lodge the FIR and hence the petitioner gave a written complaint dated 3.7.03 to the SSP, Agra vide Annexure-4. It is alleged in paragraph 9 of the writ petition that since the petitioner did not pay the gunda tax as demanded by the respondent no. 7 to 18 they again on 16.7.03 forcibly entered into his rented premises and demanded gunda tax from the petitioner again. The petitioner then sent a complaint by means

of Speed Post to the Chief Minister, U.P. at Lucknow vide Annexure5 to the writ petition. Despite these representations and complaints to the Chief Minister, District Magistrate, SSP, Agra etc. no action was taken against the respondent no. 7 to 18. The respondents No. 7 to 18 again came on 28.7.2003 to the premises of the petitioner and demanded Rs. 3 Lakhs as gunda tax and threatened to kill him and his family members if he did not pay the same. These respondents were armed with pistols, katta, knife, lathi and danda etc. and they forcibly snatched a golden chain of two tolas and one golden ring by pointing pistols on the chest of the petitioner and also snatched a sum of Rs. 3200/= kept in the pocket of his shirt and also abused him. They said they realize gunda tax from all the persons running industries and that the police cannot do anything against them as the Police Station is in their pocket and they also send the weekly gunda tax to the police and as such no proceedings will be initiated against them by the Police. The petitioner again sent a written complaint to the Chief Minister of Uttar Pradesh, Chief Secretary, U.P., Inspector General (Police), Kanpur Region, Kanpur, Deputy Inspector General (Police), Agra Region, Agra, the SSP, Agra SP, Agra the City Magistrate, Agra etc. but to no avail and no action has been taken against the respondent no. 7 to 18 and the lives of the petitioner and his family members are in danger. It is alleged that respondent no. 5 the Station House Officer of Police Station Aitmadaula, Agra is in collusion with the respondent no. 7 to 18.

4. If the aforesaid allegations are correct it shows that an alarming state of affairs is prevailing in the State of Uttar Pradesh which cannot be tolerated any longer by this Court. It is the duty of this Court under Article 226 of the Constitution to uphold the law. If the allegations in the petition are correct it shows that the district authorities in Agra are either deliberately or due to inability failing to uphold the law in district Agra, and are not protecting the citizens.

5. No such tax is known to the law as gunda tax. We have heard of income tax, sales tax, house tax etc. but this is a totally new and illegal phenomenon which has appeared in society, and unless this gunda tax disappears we will hold the Government authorities to task for such illegal demands. Such gunda tax reminds one of the 'protection money' demanded by the Mafia in America.

6. List this petition on 11th August, 2003 before us on which date we have already directed the Principal Home Secretary and the Director General of Police, U.P. to appear before us in another case and they must explain to us as to why law is not being enforced and gunda tax is demanded all over the Uttar Pradesh from the peaceful and law abiding citizens (especially businessmen) and why no action is taken against the criminals, hooligans, and other anti-social elements in the State who by their anti-social activities are not allowing law abiding citizens in the State to live peacefully.

7. Learned standing counsel will send a copy of this order to the Principal Home Secretary, Uttar Pradesh and Director General of Police, U.P. forthwith. If the allegations made in the petition are correct criminal proceedings will be initiated against the respondent no. 7 to 18 and disciplinary action must be taken against the respondent no. 6 the

Station House Officer, Aitmadaula, Agra. Full security and protection must be provided to the petitioner till further orders

Let a copy of this order be issued to learned standing counsel free of charge today.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 961 Of 1985

Babboo Khan ...Petitioner
Versus
The District Judge, Rampur and others ...Respondents

Counsel for the Petitioner:
Sri N.A. Kazmi
Sri Nazar Bokhari

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Findings of fact-interference in- writ jurisdiction-only when such findings are perverse having error of law.

Held- Para 9

Other argument advanced by learned counsel for the petitioner assailing the findings of the prescribed authority as well as of the appellate authority also deserves to be rejected. It is settled that the findings of fact arrived at, are not to be easily interfered with under Article 226 of the Constitution, unless the same are demonstrated to be perverse, or suffers from manifest error of law.

Case law discussed:
AIR 1975 All 315 (FB) relied on
1984 All LJ pg. 1022 referred to

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

1. Heard learned counsel for the petitioner and Shri Nazar Bokhari for the respondents.

2. By means of this writ petition, petitioner has challenged the order passed under Section 4 of U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 in Case No. 20 of 1984 P.S-Kotwali, District-Rampur dated 7th May, 1984. whereby the prescribed authority after hearing the petitioner and State has passed the order of eviction of the petitioner from the premises in question, which is admittedly a public premises. In appeal the appellate authority affirmed the findings of the prescribed authority and directed for eviction of the petitioner from the premises in question.

3. Learned counsel for the petitioner has contended that a perusal of Section 4 of U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 provides that the notice in the manner prescribed should have been served on the petitioner before the proceedings are initiated. Section 4 is reproduced below:-

"4. Issue of notice to show cause against order of eviction.- (1) If the prescribed authority, either of its own motion or on an application or report received on behalf of the State Government or the corporate authority, is of opinion that any persons are in unauthorised occupation of any public premises and that they should be evicted, the prescribed authority shall issue in the manner hereinafter provided a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made.

(2) The notice shall-

(a) specify the grounds on which the order of eviction is proposed to be made; and

(b) require all persons concerned, that is to say, all persons, who are, or may be, in occupation of, or claim interest in, the public premises, to show cause, if any, against the proposed order on or before such date as is specified in the notice, being a date not earlier than ten days from the date of issue thereof.

(3) The prescribed authority shall cause the notice to be served either personally on all those persons concerned or by having it affixed on the outer door or some other conspicuous part of the public premises and in any other manner, provided in the Code of Civil Procedure, 1908.

(4) Where the prescribed authority knows or has reasons to believe that any persons are in occupation of the public premises, then, without prejudice to the provisions of sub-section (3), he shall cause a copy of the notice to be served on every such person by registered post or by delivering or tendering it to that person or in such other manner as may be prescribed**."**

4. Learned counsel for the petitioner relied upon a decision of Division Bench of this Court reported in **1984 All. L.J. page 1022; Bikarama *Versus* IV Additional District Judge, Varanasi and others.** Para 7 and 8 on which learned counsel has placed reliance are quoted below:

"7. Learned counsel appearing for the State of U.P. before the Courts below fairly conceded that the impugned notice issued under S. 4 of the Act was not a valid notice and was not in the prescribed form as it did not disclose the ground upon which it has been issued. Before us however, the learned Standing Counsel contended that the notice, if read as a whole, clearly confirmed to the requirements of S. 4 of the Act.

8. We do not agree. The notice has been quoted above and it is obvious that a vital requirement of S. 4 is missing. The notice does not profess, directly or indirectly, to state the ground upon which the eviction of the petitioner is being sought. In our opinion the provisions of S. 4 are mandatory and a valid notice specifying the grounds on which the order of eviction is proposed to be made is sine qua non for an order of eviction. We do not agree with the learned Standing Counsel that the notice if read as a whole can be construed to be a valid notice under S. 4 of the Act. It does not disclose the grounds on which eviction is sought. It is not in the prescribed form either. The defects invalidate the notice ab initio**."**

5. Much emphasis has been laid on the manner of service of notice as observed by the Division Bench, as in the present case it is not disputed that parties had knowledge of the proceedings and has also contested the proceedings. A Full Bench of this Court consisting of five Judges in a case reported in **AIR 1975 Allahabad 315 (FB); Gyan Singh *Versus* The District Magistrate, Bijnor and others**, has explained the purpose of notice wherein it has been held by full bench that once the party concerned acquires the knowledge of the

proceedings though mandatory, the purpose of notice stood served.

6. Paragraphs 15 and 19 of the aforesaid case are being quoted here-in-below :-

"15. We, however, do not agree with the observations of the learned Judge that the actual service of the notice of the meeting should be proved. It would be sufficient compliance with the provisions of Section 87-A (3) if notice is sent to the members and the members acquire knowledge about the time, date and place of the meeting. The facts involved in Vishwanath Tripathi's case 1968 All WR 114 are different than those available in the present case. The observations of R. S. Pathak, J., that Section 87-A (3) was mandatory in its entirety does not represent correct view for the reasons stated earlier. If notice is sent by registered post and publication of the notice is done, the legal fiction enacted by the legislature would at once come into play and thereupon every members shall be deemed to have received notice even though a member may not have actually received the same. On the material on record of that case, R.S. Pathak, J. held that neither the notice of the meeting was actually served upon one of the petitioners nor the notice was published in any other manner as directed by the District Magistrate, therefore the meeting was not validly constituted. The learned Judge further held that even if the member had knowledge of the meeting he was under no obligation to take notice and for that reason he was not disentitled to relief under Article 226 of the Constitution. We are not in agreement with this view of the learned Judge. As already stated the purpose of sending notice is to give information to the members to attend the meeting convened for the purpose of considering the motion of no-confidence, and once it is established that the member concerned had notice and had acquired knowledge of the date and time of the meeting convened for considering the motion of no-confidence, the purpose for which notice is required to be sent would be fulfilled and the member concerned will not be entitled to any relief from this Court under Article 226 of the Constitution for nullifying the proceedings of the meeting.

19. The President is elected by the members of the Municipal Board in accordance with Section 43 of the Act. A member of the Board or any elector, who is not less than 30 years of age is qualified to be chosen as President of the Board. Thus a non-member may be elected President of the Board. But once an elector is elected President he becomes member of the Board ex-officio under Section 49 of the Act which lays down that the President of a Board if he is not already a member of the Board shall be ex-officio member of the Board. The President presides over the meetings of the Board. All questions which come up before the meeting of the Board are decided by majority of the members at the meeting. Section 92 of the Act lays down that in case of equality of the Board the President of the Board shall have a second or casting Board these provisions clearly indicate that a President is a member of the Board for all purposes even though he may not be an elected member of the Board. Section 87-A (3) enjoins a duty on the District Magistrate to convene a meeting for consideration of the motion of no-confidence against the President. It further lays a duty on him to send notice

of the meeting by registered post to every member of the Board at his place of residence. The District Magistrate therefore must send notice of the meeting to the President also by registered post at his place of residence even though he may not be an elected member. The motion of no-confidence is directed against the President he is the most affected party in the matter. He is entitled to take part in the debate at the meeting and to defend himself. Thus, principles of natural justice require that he should be given notice of the meeting so that he may get an opportunity of defending himself.**"**

7. Here in the present case, it has not been disputed by the petitioner that he had knowledge of the proceedings and he contested the proceedings. This aspect of the matter has not placed before the Division Bench relied by the counsel for the petitioner.

8. In this view of the matter, in view of the Full Bench referred to above, which is binding on me and couple with the fact that the decision of Division Bench relied on by learned counsel for the petitioner does not apply to the facts of the present case. Therefore, this argument deserves to be rejected.

9. The argument having failed, other argument advanced by learned counsel for the petitioner assailing the findings of the prescribed authority as well as of the appellate authority also deserves to be rejected. It is settled that the findings of fact arrived at, are not to be easily interfered with under Article 226 of the Constitution, unless the same are demonstrated to be perverse, or suffers from manifest error of law. That having not been shown, learned counsel lastly argued that this Nazool property, which is under the management of the local body concerned and the local body would not let out the same on a higher rent or premium and petitioner who has also submitted an application for allotment may also be allowed to offer before this Court and if this is the only criteria, his case may also be considered. However, if the respondents are inclined to let out or lease out the property in question for rent, the application of the petitioner may also be considered in accordance with law.

10. In view of what has been stated above, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 3734 of 1985

Sri Deo Narain Misra ...Petitioner
Versus
The Director of Education, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Daya Shanker
Sri K.D. Tripathi
Sri B.B. Jauhari
Sri S.K. Mehrotra
Sri U.N. Khare

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

Constitution of India-Article 226-U.P. State University Act 1977-petitioner appointed clerk in Sanskrit Maha Vidyalaya prior to grant in add- Whether petitioner entitled for payment from

Government fund? Held- appointment not in accordance with the Act and the rules-no approval of concerning authorities-Held not entitled for any relief.

Held- Para 4

Learned counsel for the petitioner has miserably failed to demonstrate that while appointing the petitioner, the procedure prescribed under the Statute has been followed and that the appointment made by the committee of management is ever approved by the authorities, namely, Inspect of Sanskrit Pathshala or the Deputy Director of Education (Sanskrit), the authorities who can perform the statutory function under the Act.

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

1. Heard learned counsel for the parties.

2. The petitioner, who alleges himself to be an employee, by means of this writ petition under Article 226 of the Constitution of India, has challenged the order dated 13th March, 1985, (Annexure '11' to the writ petition), passed by the Deputy Director of Education (Sanskrit), U.P., Allahabad, the opposite part no.2, and is further seeking a mandamus for payment of salary from the State of U.P. under the provisions of the state Universities Act with effect from 12th April, 1982 to 31st March, 1985 and continue to pay future salary till he continues in service. The writ petition was filed in the year 1985 and no interim order was granted.

3. The case set up by the petitioner in the writ petition is that the petitioner was appointed as Clerk by the Managing Committee in Sri Tulsi Smarak Sanskrit Mahavidyalaya, Rajapur, Banda on 1st November, 1981 through its Manager and he was working when the institution was brought on the list of grants-in-aid and was recognized. Therefore, the petitioner is entitled for salary with effect from 12th April, 1982. The order dated 12th April, 1982 is an order which is issued by the State Government that there shall be one post of Clerk in the institution which are recognized by the Government under Clause (a) and, therefore, any appointment to such a post in accordance with the U.P. State Universities Act as far as it is applicable to the institution governed by the U.P. State Universities Act, 1973 and so far as it is applicable to the Sanskrit Pathshala recognized and governed by the statute framed under the Act, shall be paid salary from the State exchequer only when the procedure prescribed under law is followed for appointment and the appointment is approved by the authorities concerned. The aforesaid Government Order which has been relied upon by the petitioner clearly states that no payment shall be made to any person who is appointed and is working contrary to the aforesaid Government Order dated 12th April, 1982. Annexure '2' to the writ petition annexes documents wherein the Selection Committee purports to appoint the petitioner. The Selection Committee has been constituted by the managing committee of the college and this appointment has no statutory force or sanction on the basis whereof petitioner can claim any statutory force or sanction on the basis whereof petitioner can claim any statutory right which can be enforced under Article 226 of the Constitution of India.

4. Learned counsel for the petitioner has miserably failed to demonstrate that while appointing the petitioner, the procedure prescribed under the Statute has been followed and that the appointment made by the committee of management is ever approved by the authorities, namely, Inspect of Sanskrit Pathshala or the Deputy Director of Education (Sanskrit), the authorities who can perform the statutory function under the Act.

5. In this view of the matter and particularly with regard to this assertion that the petitioner though claims for the payment of salary from the State of U.P. but has not impleaded the State of U.P. as one of the respondents in the writ petition, the petitioner is not entitled for any relief and the writ petition deserves to be dismissed.

6. In the result, the writ petition fails and is hereby dismissed. The Interim order, if any, stands vacated. There will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.7.2003

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

Civil Misc. Writ Petition No. 47316 of 2002

Ram Dulare Shukla ...Petitioner
Versus
The Managing Director, U.P. Jal Nigam Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri H.C. Shukla
Counsel for the Respondents:
Sri A.K. Misra
Sri Sabhajeet Yadav

Constitution of India, Article 226-Regularisation & payment of Salary-Equal pay for equal work Daily Wage/Muster roll employees- working in U.P. Jal Nigam as class IV employee for 10 year-Representation for regularization of service-Order by Chief Engineer (Personal) for regularization grant of minimum wages as given to regular employees-Order not approved by State Government Relying on apex Court's decision in Putti Lal's case order of Chief Engineer rescinded with out affording opportunity of hearing to petitioners-held, U.P. Jal Nigam framed Schemes duly approved by State Government for regularization of those employees who had put five years of service-Hence Puttilal's case which relates to regularization rules of State Government, held, not applicable to daily wages/muster roll employees of Jal Nigam-directed to from scheme consistent with best policy for regularization of those muster roll/daily wages employees with five years or more service in department-secondly, daily wages/muster roll employees, held, entitled to minimum of pay scale and allowances as admissible to their regular counterparts- payment was made bonafide, order granting minimum of pay scale and dearness allowance-Hence no recovery can be made-Impugned order dated 22.8.2002 quashed-Equal pay for equal work.

Cases referred:
(2002) UPCBEC 1595
(2001) 2 SCC 62
AIR 1991 SC 420
(1998) 9 SCC 595
SLP (Civil) 14326 of 2001
1979 ALJ 1184
JT 1995 (1) SC 24: 1979 ALJ 184 (DB)
1996 AWC 94

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

1. This petition and other connected petitions have been filed for the relief of a writ of mandamus commanding the

respondents to regularise the service of the petitioners who are languishing in the department in the uncertainty of adhocism for years together.

2. All the petitions may be different in factual aspect but the subject matter of impugnment in this batch of the petition i.e. the order dated 22.8.2002 passed by the Chief Engineer, (Personal), U.P. Jal Nigam, Lucknow is identical by ;which earlier order dated 12.10.2001 passed by managing Director was rescinded on the ground that the earlier order aforesaid granting minimum of the wages at par with regular employees militated against the mandate embodied in the decision of the Apex Court in Civil Appeal No. 3634 of 1995 State of U.P. v. Putti Lal and by an incompetent authority.

3. The factual matrix of the present case in writ petition no. 15617 of 2003 is that the petitioner entered the service on 1.4.1989 as Runner/Chaukidar and in the course of time, he represented to the authorities on several dates seeking regularisation of his service in one of the vacant posts in the department. Ultimately, certain employees invoked the extra ordinary jurisdiction of this Court in Lucknow Bench and pursuant to the directions issued by the Lucknow Bench of this Court, minimum of pay scale to all muster roll employees was granted vide memorandum dated 12.10.2001. Subsequently, on the basis of decision of the Apex Court in Putti Lal, the aforestated office memorandum was rescinded and the muster roll employees were relegated to status quo ante. It is in this back ground that the petitioner has preferred the instant petition for relief of mandamus.

4. Heard learned counsel and perused the materials on record. The learned counsel for the petitioner premised his argument by submitting that the impugned order thereby earlier order granting minimum of the wages admissible to a regular employee was rescinded without affording opportunity of hearing and the petitioners were entitled to hearing. It was submitted by the learned counsel that under the order dated 12.10.2001 issued by the Chief Engineer (Personnel), Uttar Pradesh Jal Nigam, Head Office, Lucknow petitioners were given minimum of the pay scale along with other allowance admissible to the regular employees with effect from 1.10.2001 and that this order was given effect to in respect of all the muster roll employees on the rolls of Jal Nigam since long. It was further submitted that the impugned order has the effect of affecting their salaries and as a consequence thereof their status and livelihood have also come to suffer and without opportunity of hearing on such order could be passed. It was also can vassed that the impugned order has its foundation in three grounds – (1) The judgment of Apex Court in State of U.P. versus Putti Lal[1] by which Apex Court has held that before regularization no employee could be given minimum pay scale and as such the order dated 12.10.2001 was contrary to the terms of the Judgement of Apex Court (2) it has not been issued with prior approval of the State and the competent authority and (3) order dated 12.10.2001 has not been issued in accordance with law and submitted that none of the grounds cited in the impugned order were potent enough to warrant cancellation of earlier office order inasmuch as in State of U.P. versus

[1] (2002) 2 UPLBEC 1595

Putti Lal (supra) the Apex Court had directed to pay minimum of the pay scale to the employees who are working for a long time and are discharging similar functions as regular employees and further that the direction given by the office order dated 12.10.2001 to pay allowance in addition to the minimum of the pay scale received reinforcement from various other decisions of the Apex Court. It was lastly convassed that in order to effectuate the order dated 12.10.2001 the competent authority had sanctioned various funds which was released by the Government and it has no grounding in the fact to say that the order had not received approbation of the competent authority or the State government and as such the order dated 12.10.2001 lacked in validity and the impugned order is vitiated in law.

5. In reply to the same Sri A.K. Misra, learned counsel for opposite Parties relying upon counter affidavits filed in some of the writ petitions including writ petition no. 47316 of 2002 contended that the Jal Nigam was established by the State of Uttar Pradesh under section 3 of the U.P. Water supply and Sewerage Act, 1975 (hereinafter referred to as the Act). It was further contended that sections 8 and 89 of the Act envisaged that the Nigam may appoint such employees as it may consider necessary provided the appointment of such employees shall specify their terms and conditions determined with the approval of the State government as a matter of policy and in case if any question arises whether any matter is or is not a matter as respects which the State government may issue a directions under sub section (1) the decision of the State government shall be final. He further contended that under the policy of the State of Uttar Pradesh, U.P. Jal Nigam framed a scheme to regularise its work charge employees who had completed the span of five years of service in unbroken continuity in .U.P. Jal Nigam on 1.4.1985. The State government accepted this scheme and 2163 posts were further created. Subsequently, on 3.12.1988 2500 posts created to regularise services of daily wage/work charge employees who had completed five years of service in Jal Nigam and the Board in the meeting dated 18.11.1989 created 5918 posts for regularization of daily wage/ muster roll/ work charge employees. Thus, total 10,581 posts were created by the U.P. Jal Nigam for regularization of daily wage/muster roll/work charge employees who have completed five years of service until 31.3.1989. 9642 muster roll/work charge employees service were regularized. Subsequently those persons were also allowed revised pay scale subject to the condition that they fulfill requisite qualification. It has been pointed out that matter is still sub judice. He further contended that the provisions of notification dated 21.12.2001 providing regularization cannot be called in aid for applicability to U.P. Jal Nigam as this Regularisation Rule is intended for application to the daily wages employees of the State Government and not the daily wage employees of U.P. Jal Nigam. The learned counsel further canvassed that the decision in State of U.P. versus Putti Lal (supra) relates to the workers of Forest department and orders passed relating to the Forest department cannot be imported for application on the ground of parity with the employees of U.P. Jal Nigam which is a separate and district entity different from the State government. He

draw a distinction stating that petitioners have been harnessed to work on particular projects run under U.P. Jal Nigam in the work charge establishment and since wages are paid from the funds allocated for a particular project, it cannot be assumed that the work of work charge employee employed for a particular project is of permanent nature and consequently by reason of being a muter roll employee, they are not entitled to get salary at part with the regular employee of the Jal Nigam. Since some of the works allotted to the petitioners, proceeds the submission, include installation of the hand pump, management of drinking water in the pilot districts of U.P. from the U.P. Jal Nigam has now been assigned to the U.P. Gramin Paye Jal Mission (Jal Nidhi) constituted by the State government. Similarly by government order dated 5.1.2002 work of water supply and sanitation mission has been taken over from Jal Nigam and has been entrusted to Swajal Pariyojana Prabandhan Unit, U.P.. Theatre and work of installation of hand pumps in all the 70 districts of Uttar Pradesh was decentralized and entrusted to Gramin Panchayats of the State and 10% work of installation of hand pumps under the Government order dated 7.1.2002 has been entrusted to U.P. State Agro Industrial State Corporation. It is in the back drop of the above submissions learned counsel for opposite Parties propounded that the petitioners are not entitled to be regularized.

6. I have scanned the submissions made across the bar in all its pros and cons. From the facts stated above it is clear that according to stand taken in the counter affidavit of the U.P. Jal Nigam 10,581 posts were created from time to time for regularization of the work charge/muster roll employees out of which only 9642 have been regularized and they are being paid regular pay scales. Certain posts out of the posts created are still vacant with the department. From the perusal of the counter affidavit it is manifestly clear that U.P. Jal Nigam was brought into being to resolve problem of drinking water in small townships below 2000 population under the 8th five year plan while the urban water supply schemes are financed by the State and Central Government. It brooks no dispute that Ganga Action Plan –I and Ganga Action Plan- II are also run by U.P. Jal Nigam and these schemes are perpetual and permanent in nature. Similarly rural drinking water scheme and human resource development area also being run by the U.P. Jal Nigam. All these schemes are of permanent nature.

7. In view of the contention of the learned counsel that drinking water has come to the recognised as fundamental right and further that burgeoning crisis of pollution has added wide dimension to the cumbersome task of providing potable water in the State of U.P., the work of the Jal Nigam is not likely to decrease but would rather increase manifold. It is in the contest of the above contention that I feel called to examine the question of regular appointment of the adhoc employees languishing in a state of uncertainty for years together. In A.P. Pollution Control Board II v. Prof. M.V. Nayudu (Retd.) and others[2], the Apex Court held that the right to access to drinking water is fundamental to life and there is a duty on the state under Article 21 to provide clean drinking water to its citizens. In Subhas

[2] (2001) 2 SCC 62

Kumar vs. State of Bihar[3], the relevant observation of the Apex Court was that the right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. In the prevailing situation, clean and pure drinking water qua the depleting resources and proliferation of population growth has attained the dimension of a challenge and the State too is striving hard and has spared no efforts to fling its all resources in providing clean and pure drinking water. The contention of the learned counsel carries some substance that with depleting resources the resolution of water problem cannot be measured in terms of months or years and it should be taken to be a perennial and continuing process with proiferation of population growth. With pure and clean water being declared as fundamental right, the State is called upon to strain more and more its existing resources to the fullest and in the circumstances it would be day dreaming to expect that the State would not need the services of the existing employees and that they would be surplus with coming to an end the existing project. Therefore, the plea of the U.P. Jal Nigam that the Jal Niam assigns different projects a limited life and duration and limited work and that the appointments are made project wise and to endura for the period the concerned project subsists, is illusory and does not commend to me for acceptance.

8. It admits of no doubt that the U.P. Jal Nigam was established to carry out the scheme to provide clean drinking water to the people residing in Uttar Pradesh. All such schemes whether it is to provide drinking water to the urban population or rural population or formulated as a nodal authority under the Ganga Action Plan-I or Ganga Action Plan-II, converge to one common object of accomplishing the goal of providing clean drinking water to the people of Uttar Pradesh. The argument of Sri A.K. Misra, learned counsel for opposite Parties that the work and the schemes run by the U.P. Jal Nigam are not of permanent nature, in my considered view does not commend itself for acceptance in the perspective of facts stated supra. In fact the work of the U.P. Jal Nigam is, by all reckoning of permanent nature and with burgeoning population and expanding need of the humanity, it is not difficult to visualize that U.P. Jal Nigam is not going to fall short of work/projects and schemes would be available in planty to meet the future needs of the population with crisis of acute water shortage depending with each passing year qua the depleting resources and in the circumstances having regard as fundamental right, U.P. Jal Nigam is under a duty to grapple with the prospective need of the people of the State of U.P. for provision of clean drinking water.

9. The order of 12.10.2001 passed by the Chief Engineer (Personnel), U.P. Jal Nigam providing minimum of the pay scale and other allowances to petitioners who according to the averments made in the petitions are languishing in precarious existence for more than ten years, was rescinded in view of the ratiocination flowing from the judgement in State of U.P. vs. Putti Lal (supra) as well as on the premises that it was not given approbation by the competent authority and the State of Uttar Pradesh. Learned counsel for petitioners placed evidence on

[3] AIR 1991 SC 420

the judgement in State of U.P. versus Putti Lal (supra) in which Apex Court has provided minimum of the pay scale to the employees of the Forest department. The ground for cancellation of the order dated 12.10.2001 that in view of the judgment of Apex Court petitioners are not entitled to get minimum pay scale does not survive. The other reason given in the impugned order that it was not sanctified by approval of the competent authority and the State of Uttar Pradesh also has no grounding in the fact having regard to the fact that the order dated 12.8.2001 was levied in implementation and each and every muster roll employee working in the establishment since long was paid minimum of the pay scale equivalent to the regular employees who are discharging similar functions. More passing bald order by the Chief Engineer (Personnal) of U.P. Jal Nigam will not vivify the contention and put life into the order. It is not disputed that the payment has to be made by the State government and by this reckoning, it will not be difficult to visualise the paper must have been set in motion for go ahead by the competent authority to the State government and after necessary sanction given by the competent authority and approbation accorded by the State government the payment could possibly be made. It admits of no doubt that the petitioners must not have been paid minimum of the pay scale merely on the point of the order passed by the Chief Engineer (Personnel). The opposite Parties have not brought any document to show as to how the actual payments came to be made. In my view this being a matter involving finances, unless the approval comes from the competent authority of U.P. Jal Nigam studded with approbation of the State Government, nor a single shall can be parted with in favour of any person. Moreover, opposite Parties have not dwelt upon this aspect in the counter affidavit as to who is the competent authority in the U.P. Jal Nigam and how the payments were made in compliance of the order of Chief Engineer (Personnel) in the event of absence of approval from the State Government. It would be pre-emptive of the duties of the Court to wander off into this aspects and it is for the authority of the Nigam to consider and decide the same.

10. The second aspect which is very relevant for the purposes of the present case is that all the petitioners have put in more than ten years and they have actually worked in unbroken continuity. Sri A.K. Misra, learned counsel for opposite Parties, has admitted before this Court that all these persons are actually working and they have not been declared surplus. As held supra, the work of U.P. Jal Nigam is of permanent nature and its statutory function is to provide clean drinking water to the citizens of Uttar Pradesh through various projects in the Urban as well as in rural areas. It is also apparent from the counter affidavit that since 1985 up to now the U.P. Jal Nigam has framed a number of schemes for regularization of the muster roll work charge employees, which were subsequently approved by the State government. It is also apparent and admitted in this counter affidavit that 10581 posts were already created out of which more than 939 posts are still vacant and the criteria for regularization in U.P. Zal Nigam under various schemes since very beginning is continuous services for five years. In this perspective U.P. Jal Nigam is enjoined to frame a fresh scheme and create remaining posts

according to their requirements with approval of the State Government to regularize those persons who are working for more than five years approved by the State Government. In the perspective of the facts (supra) it is quite clear that the U.P. Jal Nigam under a policy has in the post framed schemes duly approbated by the State of U.P. for regularization of those employees who had put in five years of services and by this reckoning, the argument of Sri A.K. Misra that putti lal's case which relates to regularization rules of the State Government is not intended for application to the daily wage/muster roll employees of the Jal Nigam does commend to me for acceptance. In the circumstances, direction is rendered necessary that the U.P. Jal Nigam may take requisite steps for framing of fresh scheme consistent with its post policy for regularization of those muster roll /daily wage employees who had completed five years or more service in the department.

11. So far as minimum of the pay scale is concerned, the Apex Court in both the cases cited across the bar held the consistent view that daily wage employees working since long and discharging same work at par with regularly appointed employees are entitled to minimum of the pay scale. The question posed before this court is whether in the light of various decisions of the Apex Court, the petitioners are entitled to other allowances as well or not. In State of Punjab and others v. Devinder Singh and others[4] the Apex Court was seized of the case of daily wage ledger keepers/Ledger clerks on the question whether those daily wage Ledger clerks were entitled to salary and allowances at par with regularly appointed clerks in the department. While setting aside the judgment of the High Court the Apex Court directed as under :

"The direction issued by the High Court in favour of the respondents entitling them to get the salary and allowances as regularly appointed employees is set aside and instead. It is directed that the respondents will be entitled to get the minimum of the pay scale available to the Ledger keepers/ledger clerks with permissible allowances on that basis and the difference between the emoluments already paid to each of the respondents and those payable to them pursuant to the present order will be payable to the respondents for a period of three years prior to the filling of the writ petition and thereafter minimum salary in the time scale of ledger keepers/ledger clerks with appropriate allowances thereon shall be available to the respondents so long they work as daily wage ledger keepers/ledger keepers.

12. At this stage, this Court takes notice of the decision rendered by the Apex Court in Chandra Shekhar Azad University Agra. & Tech. V. Dainik Wetan Bhogi Karamchari Sang and others[5]. The decision of the Apex Court is excerpted below :

"In view of the limited notice that had been issued in this case, the question for our consideration is whether a daily wager, on being directed to be paid at the

[4] (1998) 9 SCC 595

[5] Special Leave to Appeal (Civil) No. 14326 of 2001

minimum off the scale of pay would also be entitled to the dearness allowances.

The judgement of this Court in Dhirendra Chamoli v. State of U.P. (1996) SCC 637, Surendra Singh v. Engineer-in-Chief (1996) 1 SCC 039, UPIT Deptt Contingent Paid Staff Welfare Asso. V. Union of India (1987) supp SCC 668 and Daily Rated Casual Labour v. Union of India (1988) 1 SCC 1221 support the contention that dearness allowances should also be payable to a daily wager.

Mr. Pramod Swarup, learned counsel appearing for the University, however, says that while granting relief of dearness allowances, the financial burden on the State should also be looked into and in support of the case, he placed reliance on the decision of this Court in State of Haryana v. Jasmer Singh (1996) 11 SCC 77) and Daily R.C. Labour, P & T Deptt. V. Union of India (AIR 1987 SC 2342). Having examined the aforesaid decisions relied upon by the learned counsel we are of the view that these decisions are of no application to the point in issue.

We, therefore, see no infirmity with the judgement requiring our interference under Article 136 of the Constitution of India. The Special Leave petitions accordingly stand dismissed.

13. Learned counsel for petitioners further urged that since the order passed by the Chief Engineer (Personnel) was given effect to by the impugned order without affording opportunity of hearing to petitioners, any alternation in the salary would amount to reduction of salary and further no recovery could be made from the petitioners for any money already paid as wages on the basis of the impugned order as petitioners have been paid salary which includes minimum of the pay scale as well as allowances and that cannot be reduced without giving opportunity of hearing. It is settled in law that salary cannot be reduced without giving opportunity of hearing. Reference in the context of proposition may be made to a decision of this Court in Mohan Singh v. Chandrika Bari[6]. It was a case in which state government as well as Inspector General of Police interpreted R. 22 and R. 30 of the Fundamental Rules in petitioner's favour and fixed their salary in the next higher stage and the petitioners continued to draw the same for a considerable period of time. The relevant observation of the Division Bench as contained in para 9 of the said decision is excerpted below :

"…..It was, therefore, not open to the State Government to recover the amount paid to the petitioners merely because some different view was possible on the interpretation of the Rules. It is well settled principle that wages paid to an employee by an employer voluntarily in bona fide manner with out there being any element of fraud or misrepresentation, can not be recovered from the employee subsequently merely on the ground that some mistake of interpretation of rules might have been committed by the employer for which the employee could not be held responsible…."

14. The question posed on the court now is whether any recovery could be made in case payment was made bona fide by the authority concerned ? It is crystal clear that the order is not traceable for its basis to any misrepresentation or fraud or that any fraud was practiced by the petitioners. As a matter of fact, the

[6] 1979 All.L.J. 1184

petitioners have no art or part to play nor is it borne out from the record that the order has its genesis in the misrepresentation or fraud of the parties. Besides, the law is very clear that no recovery could be made from the petitioners unless any misrepresentation or fraud is borne out from the record (see JT 1995 (1) SC 24, 1979, ALJ 184 (DB) and 1996 AWC 94).

15. As a result of foregoing discussions, Impugned order dated 22.8.2002 is quashed and the writ petitions are allowed studed with the following directions.

(1) The U.P. Jal Nigam shall frame requisite ;scheme consistent with its policy as done in the past, for regularisation of Daily wage/muster roll work charge employee who have already completed five years of service in the department for regularisation . For this purpose, they will also create additional posts in addition to the 939 vacant posts created earlier according to their requirements and submit such scheme within two months. The State Government shall pass appropriate orders in accordance with law and communicate its decision within two months from the date of receipt of scheme from the Jal Nigam.

(2) No recovery of any amount paid as salary under the orders of the Opp. Parties shall be made from the petitioners. In view of what has been observed above in the body of this judgment.

(3) No fresh appointment shall be made in U.P. Jal Nigam in class 4 category till all the persons entitled under the scheme mentioned above, are considered for regularisation.

(4) In view of the assertions that all the petitioners are discharging functions at par with similarly situated regular employees, the authorities shall go into the matter and shall pay minimum of the pay scale plus dearness allowances pending regularisation . They shall not be paid any other allowances.

(5) There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.12643 of 1998

Amar Babu Srivastava ...Petitioner
Versus
State of U.P. and others ...Respondents

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

Counsel for the Respondents:
S.C.

Service law-Salary-Junior Division Clerk, N.C.C. at Allahabad-Transferred order of Transfer dt. 22.5.1987 not served on Petitioner-could not joined as Transferred post-admittedly petitioner presented himself on 3.6.1988 for joining at Mirzapur-Since then entitled for salary with all consequential benefits not for period 27.5.1987 to 27.10.1997.

Held- Para 9

The facts narrated above, show that the petitioner was not at fault that the order of transfer dated 22.5.1987 was not served on him and as such he did not join the transferred post of posting at Mirzapur. It is not denied that the petitioner was present himself on 3.6.1988 for joining at Mirzapur, since then he was entitled for the salary and all consequential benefits because he was not permitted to work and as such his salary for the period 27.5.1987 to 27.10.1997 cannot be withheld.

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

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

By means of this writ petition, the petitioner has challenged the order-dated 30.3.1998 by which his salary for the period 27.5.1987 to 27.10.1997 has been withheld.

2. The case of the petitioner is that he was working as Junior Division Clerk, N.C.C. Allahabad and subsequently he was made permanent. By the order-dated 22.5.87 he was transferred from Allahabad to Mirzapur, but the transfer order was not served upon him. Thereafter, the transfer order was published in the Newspaper "Amrit Prabhat" on 31.5.87, which was challenged by means of Writ Petition No.10824 of 1987. The order of transfer was stayed by an interim order dated 24.6.1987.

3. The petitioner thereafter served the certified copy of the interim order on the respondent on 26.6.1987, but he was not permitted to join at Allahabad.

The order of this Court passed in Writ Petition No.10824 of 1987 is as under:-

"Heard Sri S.K.Garg, learned counsel for petitioner and learned Standing Counsel.

Petitioner has challenged the impugned order of transfer Annexure-1 to the petition by which he was transferred from Allahabad to Mirzapur.

Petitioner is a Junior Division Clerk in NCC, which is transferable post, and hence this court cannot interfere in the transfer matter because transfer is an exigency of Government. However, I am informed that the petitioner is not being permitted to join either at Mirzapur or at Allahabad. I direct the authorities concerned to give the petitioner a posting within a month of production of a certified copy of this order before him.

Petition is finally disposed of.

Sd/-M.Katju,J.

24.4.1997."

4. In pursuance of the aforesaid order, the petitioner submitted representations before the respondents on 3.10.1991at Allahabad as well as Mirzapur i.e. the place where he was transferred, but there he was not permitted to join on the ground that his case is pending in the Court.

5. Aggrieved, the petitioner wrote to various authorities vide letters dated 12.3.1989, 3.10.1991, 3.7.1993, 16.1.1995 and 8.4.1997 praying that he may be permitted to join at either of the places i.e. at Allahabad or at Mirzapur. Copies of letters are annexed as Annexure-5 to Annexure-9 to the writ petition.

6. By the order-dated 24.4.1997 this Court had directed the authority concerned to permit the petitioner to join

either at Allahabad or at Mirzapur within one month from the date of the order. The petitioner served the aforesaid order dated 24.4.1997 upon the respondents on 26.4.1997, but no action was taken, hence he filed contempt application no.2201 of 1997. After issuance of the notices in the contempt petition, the petitioner was directed to join his duties at Mirzapur vide order dated 22.10.1997, Annexure-11 to the writ petition. In pursuance thereof the petitioner joined at Mirzapur on 28.10.1997, but the respondents were not paying his salary. He approached this Court by means of Writ Petition No.2673 of 1998, wherein this Court directed the respondents to pay current salary to the petitioner vide order dated 27.1.1998. In so far as the past salary is concerned, the respondents were directed to take decision within a period of 45 days, but they have neither paid the current salary nor the past salary to the petitioner. Aggrieved the petitioner filed Contempt Application No.638 of 1998.

7. In the aforesaid contempt application, notices were issued to the respondents by this Court. After receipt of notices, they have paid the salary to the petitioner on 28.2.1998 for the period 28.10-.1997 to 31.12.1997 and was directed the petitioner to submit his representation for payment of his past salary. In compliance of the order, the petitioner made a detailed representation requesting the authority for payment of his past salary. The representation was also rejected by order-dated 30.3.1998, which is impugned in the writ petition.

8. The counsel for the respondents submits that the respondents have not denied the allegation contained in Para 5 of the writ petition, wherein it has been alleged that the petitioner made a request to permit him to join duty either at Allahabad or at Mirzapur.

9. The facts narrated above, show that the petitioner was not at fault that the order of transfer dated 22.5.1987 was not served on him and as such he did not join the transferred post of posting at Mirzapur. It is not denied that the petitioner was present himself on 3.6.1988 for joining at Mirzapur, since then he was entitled for the salary and all consequential benefits because he was not permitted to work and as such his salary for the period 27.5.1987 to 27.10.1997 cannot be withheld.

10. It appears that the respondents are habitual of not complying the order of this Court only after contempt proceedings are initiated against them.

11. For the reasons stated above, the writ petition is allowed with costs assessed at Rs.1000/- directing the respondents to make payment of the past salary for the period 27.5.1987 to 27.10.1997 with 10% compound interest with half yearly rest, to the petitioner within two months from the date of production of a certified copy of the order. In case respondents 2,3 and 4 fail to make payment to the petitioner within the allowed by this Court, an adverse entry be recorded in their service books.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2003

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

Civil Misc. Writ Petition No. 23333 of 1990

Jai Karan Singh ...Petitioner
Versus
Principal, Sri Singheshwari Inter College, and others ...Respondents

Counsel for the Petitioner:
Sri D.K. Srivastava

Counsel for the Respondents:
Sri S.S. Sharma
S.C.

U.P. Intermediate Education Act, 1921-Regulations 35 and 36- Natural Justice-Dismissal from Service for misconduct of dereliction of duty, disobedience, insubordination and indiscipline-Reinstatement on written apologies-No improvement-Termination of Service-Admittedly no enquiry as per Regulation 35 was conducted-No Inquiry Officer appointed-charge sheet and evidences relied upon with supporting documents was not served not allowed to adduce evidences and cross examine witnesses-No date, time and place of enquiry fixed-No proper opportunity of hearing afforded -Order of Termination as well as approval by D.I.O.S. set aside.

Held-Para 7

However, the enquiry in accordance to the Regulation 35 and 36 of the 'Act' was not properly conducted, no Inquiry Officer namely senior most teacher was appointed and the charge sheet and evidences relied upon with supporting documents was not served and the petitioner was not allowed to adduce the evidences and to cross-examine the witnesses. The date, time and place of the enquiry was not fixed and the opportunity of hearing was not properly afforded to him, therefore, the termination order and the approval of the termination by the District Inspector of Schools is not legally sustainable.

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

1. Heard Sri D. K. Srivastava, learned Counsel for the petitioner and Sri S.S. Sharma, learned Standing Counsel for the State respondent.

2. In this petition the order dated 1.6.1990 dismissing the service of the petitioner by the Principal, Sri Singheshwari Inter College, Tetri Bazar, Siddharthanagar has been challenged.

3. Petitioner was given a charge sheet for unauthorized absence and for coming late several days and for irregularities and disobedience. The principal of the college served a notice to the petitioner and after obtaining his explanation the dismissal order dated 1.6.1990 was passed. According to the petitioner his services were if at all could only be terminated on the basis of disciplinary enquiry conducting under Regulation 35 of Chapter III of the U.P. Intermediate Education Act, 1921 (in short called 'Act'), which was brought on 10.3.1975 by notification No. 7/562-V-8 dated 10.3.1975, according to which for the serious complaints and allegations the Principal of the college was to appoint a senior most teacher as an Inquiry Officer. Regulation 35 of 'Act' reads as below: -

"**35**. On receipt of adverse report regarding complaint or charges of serious nature, the Committee shall appoint the Principal or Headmaster as Enquiry Officer in respect of teachers and other employees (or Manager himself would

enquire into if he has been delegated with the rights under the rules by Committee) and in case of Principal or Head Master a small sub-committee be appointed which will have instructions to present the report as soon as possible.

In respect of Fourth class employees Principal/Headmaster may appoint a senior teacher as Enquiry Officer."

Regulation 36 of 'Act' reads as below: -

"**36.** (1) The grounds on which it is proposed to take action shall be reduced in the form of a definite charge or charges which shall be communicated to the employee charged and which shall be so clear and precise as to give sufficient indication to the charged employee of the facts and circumstances against him. He shall be required within three weeks of the receipt of the charge-sheet to put in a written statement of his defence and to state whether he desired to be heard in person. If he or the inquiring authority so desires, an oral enquiry shall be held in respect of such of the allegations as are not admitted. At that enquiry such oral evidence will be heard as that inquiring authority considers necessary. The person charged shall be entitled to cross-examine the witnesses, to give evidence in person, and to have such witnesses called as he may wish; provided that the enquiring authority conducting the enquiry may for sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the grounds thereof. The inquiring authority conducting the enquiry may also, separately from these proceedings, make his own recommendation regarding the punishment to be imposed on the employee.

(2) Clause (1) shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him.

(3) All or any of the provisions of clause (1) may for sufficient reasons to be recorded in writing be waived where there is difficulty in observing exactly the requirements thereof and those requirements can in the opinion of the inquiring authority be waived without injustice to the person charged."

4. According to the petitioner a proper enquiry by a duly appointed Inquiry Officer in reference to the regulation 35 of the 'Act' was to be made in consonance to the principle of natural justice. Here, the petitioner was charge sheeted by the principal of the said college himself and the enquiry was made by himself as an interested party and after obtaining the explanation the principal himself has passed the dismissal order against the petitioner without affording him opportunity of hearing, therefore, the dismissal order is not legally sustainable.

5. The counter affidavit reveals that the petitioner was suspended on 29.4.1983 and a charge sheet dated 26.7.1983 was served to him on 28.7.1983 in respect of disobedience, indiscipline and for dereliction of duty. The petitioner tendered an unconditional apology with assurance to the principal by his letter dated 28.7.1983 (Annexure-C.A.5 to the counter affidavit) that he shall not make any mistake in future, on such assurance the suspension of the petitioner was revoked and he was reinstated and deployed again in the said college. The petitioner thereafter started committing

same mistakes including gross insubordination and disobedience, therefore, on 18.4.1984 the petitioner was again suspended and charge sheeted and in response to that the petitioner tendered his written apology dated 24.7.1984 (Annexure-C.A.7 to the counter affidavit) and a sympathy was shown keeping in view the written apology and assurance of the petitioner to improve himself and the petitioner was again kept in service, however, the petitioner did not improve and had committed the same blunder of insubordination, indiscipline and dereliction of duty i.e. the misconduct as had been committed by him as such he was third time suspended on 20.11.1985 (Annexure-C.A.8 to the counter affidavit). Third time also a written apology dated 23.1.1986 was tendered by the petitioner and keeping in view his apology on humanitarian consideration the petitioner was kept again in service. Despite his all assurances and written apologies given three times the petitioner did not improve himself and was indulged in same irregularities of disobedience, indiscipline, dereliction of duty and insubordination, therefore, he was called for explanation on 16.10.1989 and was suspended on 19.10.1989 and charge sheeted on 30.3.1990. No explanation was submitted by the petitioner, despite reminder letters given by the principal. The petitioner submitted his explanation dated 5.5.1990, which was not found satisfactory, therefore, the Principal in order to afford opportunity of hearing issued another letter dated 18.5.1990 to the petitioner and the petitioner's service was terminated. According to the respondent the principal was the competent authority to terminate the petitioner, therefore, after affording him opportunity of hearing the service of the petitioner was rightly terminated.

6. The endeavourance has been made on the part of the petitioner to controvert the contents of the counter affidavit and to reiterate the averments of the writ petition.

7. I have heard learned counsel for the parties, I find that undisputedly the petitioner was charge sheeted three times for dereliction of duty, disobedience, insubordination and indiscipline and was placed under suspension and keeping in view the repeated written apologies of the petitioner after showing sympathetic consideration, the petitioner was re-instated and deployed three times, but in the last he did not show any improvement. However, the enquiry in accordance to the Regulation 35 and 36 of the 'Act' was not properly conducted, no Inquiry Officer namely senior most teacher was appointed and the charge sheet and evidences relied upon with supporting documents was not served and the petitioner was not allowed to adduce the evidences and to cross-examine the witnesses. The date, time and place of the enquiry was not fixed and the opportunity of hearing was not properly afforded to him, therefore, the termination order and the approval of the termination by the District Inspector of Schools is not legally sustainable. Therefore, the termination order dated 1.6.1990 and the approval thereof by the District Inspector of Schools are set aside. However, keeping in view the serious charges against the petitioner the petitioner is not to be reinstated and the enquiry therefor has to be conducted under the provisions of Regulation 35 and 36 of the 'Act' by the principal by appointing a senior most teacher of the college as inquiry Officer,

who will give the same charge sheet to the petitioner with supporting documents and evidences to be relied upon and the petitioner shall be under the obligation to receive the same and shall also be under obligation to know the date fixed to give explanation, and avail the opportunity of rendering documents and evidences and to cross examine the witnesses. Therefore, the proper date, time and place for finalization of the enquiry shall be fixed and after affording proper opportunity of hearing the inquiry shall be concluded by the Inquiry Officer. The petitioner is expected to cooperate in the inquiry and shall be in touch to the principal to know the dates and shall not take unnecessary adjournments and shall render all possible co-operations to finalize the enquiry. The enquiry report submitted by the Inquiry Officer, shall be perused and shall be sent to the District Inspector and after approval of the same a proper order shall be passed in respect of the petitioner within six months from the date of production of certified copy of this order to the principal of the said college and to the District Inspector of Schools.

In view of the above observations writ petition is disposed of.

8. Copy of this order be given free of cost to Sri S. S. Sharma, learned Standing Counsel and on payment of usual charges to the learned counsel for the petitioner within one week.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2003

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

Civil Misc. Writ Petition No. 28946 of 2003

Managing Director U.P. Co-Operative Bank and another ...Petitioners
Versus
Chairman, U.P. State Minorities Commission and others ...Respondents

Counsel for the Petitioners:
Sri B.P. Singh
S.C.

Counsel for the Respondents:
Sri R.N. Singh
Sri C.M. Rai
Sri G.K. Singh
Sri A.P. Sahi
S.C.

Constitution of India Article 226-U.P. Commission for minorities Act 1994 Sec. 9 (C)- power of Commission- Order pass attaching Bank Account-Whether the Commission has power to pass such order? Held-'No'

Commission are only recommendatory body-not empowered to pass such order/ Direction.
Held- Para 4
Unfortunately, we find that these bodies are often going beyond their jurisdiction by passing orders staying termination of service of some Government employee passing injunction orders or closing the accounts etc. which is not within their jurisdiction at all. These Commissions should act within their jurisdiction and not do as they release.
Case law:
J.T. 1996 (10) S.C. 287

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

1. The Petitioner has challenged the impugned order dated 8.5.2003 (Annexure-17 to the petition) and the summons dated 4.6.2003 (Annexure-18 to the petition).

Heard learned counsel for the parties.

2. By the order dated 8.5.2003 the Chairman, U.P. State Minorities Commission has directed the U.P. Co-operative Bank, Bareilly to close the disputed account.

3. Learned counsel for the U.P. Minorities Commission Sri G.K. Singh stated that the impugned order has been withdrawn. Hence this petition has become infructuous. However, we with to clarify that the U.P. Minorities Commission, Backward Caste Commission and Scheduled castes Commission are only recommendatory bodies and they can only make recommendations to the Government.

4. Unfortunately, we find that these bodies are often going beyond their jurisdiction by passing orders staying termination of service of some Government employee passing injunction orders or closing the accounts etc. which is not within their jurisdiction at all. These Commissions should act within their jurisdiction and not do as they release.

5. In *All Indian Overseas Bank Scheduled Castes and Scheduled Tribes Employees Welfare Association vs. Union of India, J.T. 1996 10 SC 287.* The Supreme Court observed that the Scheduled Caste Commission has no power of granting injunctions, whether temporary or permanent. The powers of the Minorities Commission are mentioned in Section 9 of the U.P. Commission for Minorities Act, 1994. Section 9 (c) speaks of the power to make recommendations for the effective implementation of safeguards for the protection of the interest of the minorities by the Government.

6. There is no clause is Section 9 which permits the Minorities Commission to pass an order of the kind which has been passed in this case. We therefore direct the Minorities Commission, Scheduled Caste Commission and Backward Caste Commission that they must confine themselves to their jurisdiction and not pass orders beyond their jurisdiction.

7. Let the Registrar General of this Court send a copy of this order to the U.P. Minorities Commission, U.P. Backward Caste Commission and U.P. Scheduled Caste and Scheduled Tribes Commission forthwith. Petition disposed off.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2003

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

Civil Misc. Writ Petition No. 12643 of 2000

Himalay Ayurvedi Medical College and another ...Petitioner
Versus
The Chancellor and others...Respondents

Counsel for the Petitioners:
Sri T.P. Singh
Sri Anupam Kumar
Sri Niraj Tiwari

Sri K.S. Kushwaha
Sri Shashi Nandan
Sri Kirtika Singh
Sri P.S. Baghel
Sri V.M. Zaidi

Counsel for the Respondents:
Sri Neeraj Tripathi
Sri U.N. Sharma
S.C.

(A) Practice & Procedure Interim Order–passed by the Court–Comes to end automatically when final judgment passed–fact that SLP against such interim order dismissed–of no benefit to petitioner.
1992 (4) Sec 401 relied upon.

Held-Para 5

The interim order dated 11.09.2002 automatically came to an end when the judgment dated 13.05.2003 was passed. Hence the petitioner cannot derive and any benefit from the fact that the SLP against the interim order was dismissed by the Supreme Court.

(B) Educational Institution Affiliation–cannot be granted to every institution–each institution has to be considered separately by concerned authority. –High Court cannot pressur of the said authority.

Held: paras 6 and 7.

It is not for this Court to grant affiliation. The relevant authority under the U.P. State Universities Act grant affiliation and this Court cannot usurp the power of the said authority.

We have already mentioned in our judgment that merely because affiliation was granted to other institutions, some with retrospective effect, this does not mean affiliation should also be granted to the petitioner Each. Institution has to be considered separately by the concerned authority and not by this court in the matter of grant of affiliation.
Case law discussed:
1991(3) SCC87; 1992 (4) Sec 401

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

1. This is an application for Review/Recall of our judgment dated 13.05.2003.

2. It has been stated in the application that the Court did not considered various submission of the petitioner in the aforesaid judgment. We do not agree.

3. It has been clearly stated in the aforesaid judgment dated 13.05.2003 that the petitioner was granted affiliation to the Kanpur University only from 01.07.1996 to 30.06.1998.

4. It has been contended that an interim order was passed in this case on 11.09.2002 that the students of the petitioner no. 1 shall be permitted to appear in the examination and their result will be declared. Against that interim order an SLP has been dismissed by the Supreme Court.

5. In our opinion and appeal is a continuation of the original proceedings. The interim order dated 11.09.2002 automatically came to an end when the judgment dated 13.05.2003 was passed. Hence the petitioner cannot derive and any benefit from the fact that the SLP against the interim order was dismissed by the Supreme Court.

6. It is not for this Court to grant affiliation. The relevant authority under the U.P. State Universities Act grant

affiliation and this Court cannot usurp the power of the said authority.

7. We have already mentioned in our judgment that merely because affiliation was granted to other institutions, some with retrospective effect, this does not mean affiliation should also be granted to the petitioner Each. institution has to be considered separately by the concerned authority and not by this court in the matter of grant of affiliation.

8. No Doubt we have held in Committee of Management v. Chancellor in Writ Petition No. (M/B) 5881 of 2002 decided on 11.11.2002 by the Lucknow Bench of this Court that either permanent affiliation should be granted or the application for affiliation should be rejected, but grant of temporary or provisional affiliation is not legal. This however, does not improve the case of the petitioner in any way. It is not for this Court to grant affiliation, as that the function of the concerned authority under the Act.

9. It was entirely the petitioners' fault that it admitted students or continued them before 01.07.1996 and after 30.06.1998. In State of Tamil Nadu V. St. Joseph Teachers Training Institute, 1991 (3) SCC 87 the Supreme Court observed vide paragraph 6:-

"6. The practice of admitting students by unauthorized education institutions and then seeking permission for permitting the students to appear at the examination has been looked with disfavour by this Court. In **N.M.Nageshwaramma v. State of A.P.** this Court observed that if permission was granted to the students of an unrecognized institutions to appear at the examinations, it would amount to encouraging and condoning the establishment of unauthorized institutions. The court declared that the jurisdiction of this Court under Article32 or of the High Court under Article 226 of the Constitution should not be frittered away for such a purpose. In A.P.Christians Medical Educational Society v. Government of A.P. a similar request made of behalf of the institution and the students for permitting them to appear at the examination even though affiliation had not been granted, was rejected by this Court. The Court observed that any direction of the nature sought for permitting the students to appear at the examination without the institution being affiliated or recognized would be in clear transgression of the provision of the Act and the regulations. The court cannot be a party to direct the students to disobey the statute as that would be destructive of the rule of law. The Full Bench noted these decisions and observations and yet it granted relief to the students on humanitarian grounds. Court cannot grant relief to a party on humanitarian grounds contrary to law. Since the students of unrecognized institutions were legally not entitled to appear at the examination held by the Education Department of the government, the High Court acted in violation of law in granting permission to such students for appearing at the public examination. The directions issued by the Full Bench are destructive of the rule of law. Since the Division Bench issued the impugned orders following the judgment of the Full Bench, the impugned orders are not sustainable in law."

10. In Guru Nanak Dev University v. Parminder Kr. Bansal and others 1992

(4) SCC 401the Supreme Court observed:-

"We are afraid that this kind of administration of interlocutory remedies, more guided by sympathy quite often wholly misplaced, does no service to anyone. From the series of orders that keep coming before us in academic matters, we find that loose, ill-conceived sympathy masquerades as interlocutory justice exposing judicial discretion to the criticism of degenerating into private benevolence. This is subversive of academic discipline, or whatever is left of it, leading to serious impasse in academic life. Admissions cannot be ordered without regard to the eligibility of the candidates. Decisions on matters relevant to be taken into account at the interlocutory stage cannot be deferred or decided later when serious complications might ensue from the interim order itself. In the present case, the High Court was apparently moved by sympathy for the candidates than by an accurate assessment of even the prima facie legal position. Such orders cannot be allowed to stand. The court should not embarrass academic authorities by themselves taking over their functions."

11. There is no force in this petitioner and it is rejected.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2003

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

Criminal Appeal No. 2464 of 1980

Gainda Alias Govardhan and Others
...Appellants (In Jail)
Versus
The State ...Opposite Party

Counsel for the Appellants:
Sri G.S. Chaturvedi
Sri R.S. Yadav
Sri P.C. Tewari

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

Criminal Trail–Benefit of doubt–FIR antiedated-infirmities and incongruities in the prosecution" case and evidence–findings of the trail court based on incorrect reading of evidence and grounds which are not tenable -not safe to hold accused appellants guilty of charges leveled against them – appeal allowed –accused acquitted of charges leveled against them.

Held: Para 21 and 22

In view of above infirmities and incongruities in the prosecution case and evidence, it would not be safe to hold any of the accused appellants guilty of the charge leveled against them, and they are entitled to benefit of doubt.

The appeal is allowed and the findings of conviction and sentence recorded against the accused appellants are hereby set aside. The accused are hereby acquitted of the charge leveled against them.

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

1. This is an appeal from the judgment and order dated 30th of October 1980 passed by II Additional sessions Judge, Aligarh in Sessions Trail No. 412 of 1977 State Vs. Genda alias Goverdhan & others convicting the accused appellants under Section 396 Indian Penal Code and sentencing each of them to undergo imprisonment for life there under and accused Sheorab Singh and Fateh Singh under Section 25 of the Arms Act also and sentencing each of them to undergo one year's rigorous imprisonment there under making both the sentences to run concurrently.

2. Co-accused Prahlad was not tried along with Co-accused above named as he was reported having died. Other co-accused who were tried along with the accused above named were acquitted.

3. Relevant facts of the case giving rise to this appeal necessary for disposal of the appeal are being recapitulated as follows: During the night between 13th and 14th of September, 1976 Pyarey Lal was sleeping in the 'baithak' of his house at village Sokhna and his sons Virendra Kumar and Suresh at the chabutra in frond of his house and his sons Virendra Kumar and Suresh at the chabutra in front of his house and other family members in separate apartments inside the house. At about 11:00 p.m. some dacoits entered the house and started plundering the goods. At that time two lanterns were lighted one in the chappar of Pyarey Lal and the other in the Verandah of the house of Keshav adjoining thereto. As the bandits started ransacking the house Smt. Reoti Devi aunt of Virendra Kumar came out of the house and informed Virendra Kumar that there were bandits inside the house. In the meanwhile one of the bandits fired with gun hitting Reoti Devi and sustaining the gunshot injuries she fell down. Immediately Virendra Kumar and his brother Suresh ran towards 'abadi' in the village. On hearing the hue and cry many of the co-villagers namely Shyam Lal, Suraj Singh, Lachchman Prasad, Chattar Singh, Mahavir Prasad and Jwala Prasad rushed to the scene of occurrence. Sujan Singh set fire to the heap of 'karab' lying on the chabutra of Gram Panchayat which emanated sufficient light. Gopal and Jwala Prasad holding licensed firearms fired shots and the bandits also fired. In the meanwhile some police personnel who were on patrol duty also reached there and fired shots. After the rapine the bandits ran away with the looted property. Somehow the co-villagers and the police personnel caught hold of four of the bandits in the millet filed of Pyarey Lal situate nearby and the remaining 5-6 succeeded in making their escape good. On being enquired four persons apprehended told their names as Sheroab Singh, Fateh Singh, Prahlad and Suraj Pal. Sheorab Singh was found in possession of a single barrel gun no. HIM 05373 and five live cartridges, and Prahlad and Fateh Singh each in possession of a countrymade pistol and four live cartridges Suraj Pal was possessed of a lathi. Virendra Kumar alongwith some of the co-villagers and the police personnel taking the four bandits apprehended and the arms and ammunition recovered from them went to the Police Station Hathras Kotwali situate at a distance of some four miles there from and lodged and FIR of the said dacoity with the police (Ext ka 1) and also handed over the four bandits apprehended

and the arms and ammunition recovered from their possession to the police there.

4. The police registered a crime against the four bandits apprehended and seven unknown under Section 395 read with Section 397 IPC and against Sheorab Singh and Fateh Singh under Section 25 of the Arms Act also (Ext Ka 3) HM Jayanti Prasad made entry in the general diary regarding registration of the crime (Ext ka 4). He also prepared memo of the arms and ammunition allegedly recovered from the four bandits apprehended on the spot and handed over to him by virendra Kumar at the police station (Ext Ka 2).

5. It appears that injured Reoti Devi was rushed to Bagla Civil Hospital, Hathras soon after the incident and she died in the Hospital the same night at about 3:40 a.m. ON receiving information at the police station regarding the death of Reoti Devi in the Hospital the police altered the crime under Section 396 IPC (Ext ka 5).

6. Sub-inspector K.S. Dubey to whom investigation of the crime was entrusted went to Bagla Civil Hospital and drew inquest proceedings on the dead body of Reoti Devi and prepared the inquest report (Ext ka 14) and other necessary papers (Exts ka 15 & ka 16) and handed over the dead body in a sealed cover along with necessary papers to CP Ram Sewak and another for being taken for its postmortem.

7. Then the Investigating Officer visited the place of occurrence, inspected the site and prepared its site plan map (Ext ka 27). He also collected ashes of "karab" burnt from the chabutra, inspected the lanterns lighted at the time of dacoity inside the house and prepared their memos (Exts ka 8 & ka 11). He also recorded statements of the witnesses and did other necessary things.

8. Autopsy conducted on the dead body of Reoti Devi by Dr. S.K. Saxena, Medical Officer M.S. Hospital Aligarh on 14th of September 1976 at about 4:00 p.m. revealed multiple ante mortem gunshot wounds. The doctor opined that the death was caused due to shock and hemorrhage as a result of ante mortem gunshot injuries sustained by her. (Ext Ka 21).

9. It appears that accused Genda @ Goverdhan was arrested by the police Stations Hathras Kotwali and Sansni on 26th November 1976 and challaned under Section 399, 402 and 307 IPC and under section 25 of the Arms Act (registered as Crime No. 00 of 1976) at Police Station Sasni. One being inquired by the police Genda @ Goverdhan confessed that he participated in the said dacoity. Since the involvement of accused Genda @ Goverdhan came to light he was made 'baparda' soon after the arrest and taken to police station Sasni where he was kept in the lockup. Accused Genda @ Goverdhan was lodged in District Jail, Aligarh in connection with the said dacoity on 27th of December 1976. He was subjected to test identification proceedings in connection with the said dacoity with murder on 10th January 1976. IN all six witnesses were produced to identify him as a participant in the said dacoity and he was identified as such by four of them namely Virendra Kumar, Hari Singh, Pyarey Lal and Jwala Prasad.

10. After completing the investigation and obtaining necessary sanction of the District Magistrate,

Aligarh to prosecute accused Sheorab Singh, Fateh Singh and Prahlad under Section 25 of the Arms Act the police submitted charge sheets against the accused accordingly.

11. The accused pleaded not guilty denying the alleged occurrence altogether and stating that they had been got implicated in the case falsely on account of enmity and village party factions. Accused Genda @ Goverdhan denied his arrest as alleged by the prosecution stating that the police caught him from his house and took him to the police station and a false case was foisted against him He also stated that the police took his photographs and the police station and he was also shown to the witnesses there. Accused Sheroab Singh stated that accused Fateh Singh happens to be his 'saru', that Fateh Singh along with his brother Mathura Prasad and Suraj Pal had come to his house to attend the function of betrothal ceremony of his son, that the police went to his house and nabbed them from there and took them to the police station. Accused Suraj Pal and Fateh Singh also stated likewise. Accused Suraj Pal also stated that he was possessed of his licensed gun and the police also took his gun.

12. In order to bring the charge home to the accused the prosecution examined Virendra Kumar (PW1), Pyarey Lal (PW3), Sujan Singh (PW5) and Lachhman Prasad (PW6) as eye witnesses of the concurrence. Testimony of the remaining witnesses excepting SI Om prakash, the arresting office (PW11) and PW 18 SI Ram Saran who accompanied him in the police force is more or less of formal nature. PW2 SI Jayanti Prasad, the then HM proved the check report and GD entry regarding registration of the crime made by him. He also proved memo of the arms and ammunition allegedly recovered from the four bandits apprehended on the spot and handed over to him by Virendra Kumar, the first informant. Pw4 constable Ram Sewak is one of the two police officials to whom dead body of Reoti Devi in a sealed cover along with necessary papers was handed over to be taken for its post mortem. PW7 SI Harish Chand who drew inquest proceedings on the dead body of Smt. Reoti has proved the inquest papers. PW10 Dr. S.K. Saxen who conducted autopsy on the dead body of Reoti Devi has proved the post mortem report. PW11 SI Om Prakash who alongwith the police force arrested co-accused Netrapal on 02.11.76 and accused Genda @ Goverdhan alongwith others on 26.11.76 has deposed thereabout. PW12 Radha Mohan, PW13 CP Khen Chand and PW16 SI Ashfaq Ahmad are witnesses relating to idenfitication of looted articles allegedly recovered from co-accused Netrapal. PW14 SI Kripa Shanker is the investigating officer who investigated the crime in main. PW15 Executive Magistrate C D Bhargava conducted identification parade of co-accused Nathu Ram and Devendra. PW17 Rishikesh Sharma, Reader of the court of Executive Magistrate proved identification memo of the idenfitication parade held of accused appellant Genda @ Goverdhan PW 18 SI Ram Saran had accompanied SI Om Prakash (PW11) in the police force arresting co-accused Netrapal. PW8 SI Prem Pal. PW9 SI Bengali Babu, PW19 HC Amar Pal Singh and PW20 constable Biharilal are the witnesses of link evidence.

13. The Accused examined Babu Lal (DW1), Jitendra Singh (DW2) and Dharmendra Swaroop (DW3) in their defence. DW1 Babu Lal, the village Pradhan stated that on hearing the due and cry he also reached the scene of occurrence but by that time the bandits had fled away after ransacking the house, that he did not see any of the bandits there and that he saw Reoti lying injured and Keshav also having received injuries. DW2 Jitendra Singh, Pradhan of village Parsara stated that at about 3-4 a.m. the alleged night the police came to his village and nabbed Sheorab Singh, Mathura Prasad, Fateh Singh and Suraj Pal from the house of Sheorab Singh and took them alongwith the licensed gun of Suraj Pal to the police station. DW3 Dharmendra Swarup, the then Arms Cleark district Etah state that Suraj Pal was license holder of gun no. 05373 since the year 1964 till the time of the alleged occurrence.

14. On an appraisal of the parties evidence and after hearing the parties' counsel learned Additional Session Judge held accused Genda @ Goverdhan, Sheorab Singh, Fateh Singh and Suraj Pal guilty of the charge leveled against them and convicted them accordingly and sentenced thereunder.

Feeling aggrieved by the impugned judgment and order the accused appellants preferred this appeal for redress.

15. None appeared for the appellants though represented on record by Shri G.S. Chaturvedi, Sri R.S. Yadav and Sri P.C. Tewari Advocates. We heard the learned AGA. The appeal is being decided on merits.

16. Factum of the dacoity at the time and place as alleged by the prosecution is not disputed. It is also not disputed that Smt. Reoti Devi sustained grievous injuries at the hands of the bandits in the said dacoity and succumbed to the injuries sustained the same night. The only question for consideration is if the accused appellants participated in the said dacoity and accused appellant Sheorab Singh and Fateh Singh were apprehended on the spot and arms and ammunition were recovered from their possession as alleged by the prosecution.

17. Now taking up the case of accused Genda @ Goverdhan, his case rests on the evidence of two identifying witnesses namely Virendra Kumar (PW1) and Pyarey Lal (PW3). PW1 Virendra Kumar stated in his examination-in-chief that while he was standing along the banquette of 'dodah' standing around his field he saw the bandits running away after ransacking the house in the moon light and in the light of the fire ablaze. At the time his statement was being recorded he also laid hand on accused Gendra standing in the dock stating that he had identified him as such in the identification parade held in the District Jail. But he could not withstand his cross-examination as he stated in his cross-examination that the banquette of 'dodah' where he took shelter was at a distance of about 50-60 paces from the house of Sujan Singh. As stated by PW1 Virendra Kumar house of his uncle Sujan Singh is situate adjacently to his house. He also stated that the police personnel were standing at a distance of some 60-70 paces from his house and at a distance of about 10-15 paces from the place where he alongwith some of the Co-villagers was standing. Hans Gross in his book 'Criminal Investigation' edited by

N.C. Adam, 5th Edition published in the year 1962 at pages 159-160 observed that if the eyesight is normal and the light is good, one is able in broad daylight to recognize a person he has seen only once from a distance of 16 yards. In the instant case the witness had seen the dacoits running away from a distance of 50-60 paces (equal to 125 feet as one pace is taken to be equal to two and a half feet) and hence could not be in a position to mark the features of the dacoits so as to identify them at the identification parade held more than four months after the occurrence. Regarding testimony of PW 3 Pyarey Lal admittedly he remained confined in his 'baithak' through out the time his house was ran sacked he also admitted that his baithak in which he was confined was bolted from outside by the bandits and that it was opened after departure of the bandits from the scene and it was thereafter that he went out of his house. He had no opportunity to see any of the bandits while they were ransacking the house. He himself got frightened as the shots were being fired by the bandits and hence he could not have seen the bandits and mark their features from the window in the 'baithak' while they were running away so as to identify them in the identification proceedings held after four months of the dacoity. He further stated in his deposition that he was about 64 years old and short sighted. In view of above state of evidence the Court finds that the learned Additional Sessions Judge failed to appreciate the evidence of the two identifying witnesses in its true perspective and there is no justification to uphold the conviction of accused Genda @ Goverdhan.

18. Taking the case of accused appellants Fateh Singh, Sheorab Singh and Suraj Pal there is evidence of Virendra Kumar (PW1), Pyarey Lal (PW3) Sujan Singh (PW5) and Lachhman Prasad (PW6). Out of these four witnesses PW6 Lachhman Prasad has not supported the prosecution case against any of the accused appellants as he stated in his examination-in-chief that the alleged night when the bandits were running away four of them were apprehended by some of the co-villagers and the police personnel and the bandits apprehended told their names as Sheorab Singh, Fateh Singh, Prahlad and Suraj Pal; but he could not identify and of them standing in the dock. He stated that the four bandits apprehended and the arms and ammunition recovered from them were handed over the police at the police station; but the prosecution did not care to get his signatures proved on the memo of arms and ammunition allegedly recovered from the four persons apprehended on the spot prepared by the police at the police station. However this witness Lachhman Prasad stated in his cross-examination that he did not remember if the sub-inspector obtained his signatures on any paper as witness.

19. Now remains the testimony of PW1 Virendra Kumar, PW3 Pyarey Lal and PW 5 Sujan Singh. PW1 Virendra Kumar stated in his examination-in-chief that four persons namely Sheorab Singh, Fateh Singh, Prahlad and Suraj Pal were apprehended while fleeing away after ransacking the house and a single barrel gun and five live cartridges were recovered from the possession of Sheorab Singh and one country made pistol and four live cartridges from the possession of each of accused Fateh Singh and Prahlad

and a lathi from the possession of Suraj Pal. However he identified Suraj Pal and Sheorab Singh while standing in the dock correctly, but laid his hand on Mathura Prasad takeing him to be Fateh Singh arrested on the spot. It appears that arms and ammunition allegedly recovered from the four persons apprehended were not got proved by this witness Virendra Kumar (PW1). PW3 Pyarey Lal stated that he was confined in his 'baithak' through out the time his house was ransacked as it was bolted from outside by the bandits and it was after departure of the bandits that the door was opened and it was thereafter that he went out of his house and that he saw the bandits apprehended near the field and by that time the police personnel present there had taken the arms and ammunition allegedly recovered from their possession in their custody. He identified accused Suraj Pal and Sheorab Singh correctly but laid his hand on Mathura Prasad taking him to be Fateh Singh. PW5 Sujan Singh identified accused Sheorab Singh, Fateh Singh and Suraj Pal in the dock but he stated in his cross-examination that he was short sighted and could recognize a well known person in broad daylight from a distance of 3-4 feet only. Hence it is difficult to believe that he would have recognized the bandits allegedly apprehended by the co-villagers on the spot in the night hour and seen by him for the first time so as to identify them more than three and a half years after the dacoity as statement of this witness Sujan Singh (PW5) was recorded on 27.3.80. He also stated that when the bandits were apprehended by the police personnel he reached at that place subsequently and by that time the police personnel had taken possession of arms and ammunition allegedly recovered from the bandits apprehended.

20. Besides it there were some 9-10 bandits in all as PW1 Virendra Kumar stated that while dacoits were fleeing away after ransacking the house four were apprehended on the spot and 5-6 succeeded in making their escape good; but strangely enough no stolen article was recovered from the possession of any of the four bandits allegedly apprehended on the spot. Forthermore, FIR of the dacoity lodged at the police station appears to be ante timed. Because PW3 Pyarey Lal at whose house the dacoity was committed stated that soon after the dacoity he went to the police station to inform the police thereabout and he also told the Inspector at the police station that Smt. Reoti Devi had died in the Hospital, that thereafter he alongwith the inspector went to the village, that when they were going to the village Virendra Kumar met them on the way and that after seeing the dead body of Reoti Devi Virendra Kumar went to the police station. A perusal of the post mortem report goes to show that Smt. Reoti Devi died in the Hospital at about 3:40 a.m. It is true that the fact the Reoti Devi died in the Hospital does not find mention in the FIR; but the fact remains that according PW1 Virendra Kumar he had scribed the report after the dacoity in the village itself. If Virendra Kumar went to the police station to hand over the written report of the dacoity after seeing the dead body of his aunt Reoti Devi in the Hospital apparently the FIR of the occurrence having been lodged at the police station at about 1:30 a.m. becomes ante timed. And if the FIR is shaken then the very basis of the prosecution case stands knocked out. On this score also authenticity of the prosecution case falls

to the ground. Thus findings of the trail court bases on incorrect reading of evidence and ground which are not tenable cannot be upheld.

21. In view of above infirmities and incongruities in the prosecution case and evidence, it would not be safe to hold any of the accused appellants guilty of the charge leveled against them, and they are entitled to benefit of doubt.

22. The appeal is allowed and the findings of conviction and sentence recorded against the accused appellants are hereby set aside. The accused are hereby acquitted of the charge leveled against them. They are on bail. Their bail bonds are hereby discharged.

23. Let a copy of this judgment alongwith record be sent to the lower court incorporating necessary entry in the relevant register and reporting compliance within two months.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2003

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

Civil Misc. Writ Petition No. 14362 of 2003

Krishna Sahkari Avas Samiti Limited
...Petitioner
Versus
District Magistrate, Bareilly and others
...Respondents

Counsel for the Petitioner:
Sri Triloki Nath
Sri K.N. Singh

Counsel for the Respondents:
Sri Manish Goyal
Sri R.P. Goyal
S.C.

U.P. Co-operative Societies Act, 1965, Section 65- Power to appoint receiver– under the Act only the Registrar Cooperative Societiy empowered to supersede-or-suspend the management of society–District Magistrate can not interfere in any manner.

Held Para 9

In our opinion the District Magistrate can not be allowed to do anything he pleases. In a democracy the District Magistrate can exercise only such powers as are granted to him by the law. No power has been given to the District Magistrate under the Co-operative Societies Act to suspend or supersede a society or to appoint a Receiver in respect of a society or to order an enquiry against the society or its officials.

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

Heard the learned counsel for the parties.

1. This writ petition has been filed against the impugned orders of the respondents no. 1,2 and 3 mentioned in the letter dated 21.03.2003 (Annexure-1 to the Writ petition).

We have heard the learned counsel for the parties.

2. The Petitioner is a Housing Cooperative Society registered under the U.P. Cooperative Societies Act (hereinafter referred to as the Act). As stated in paragraph 8 of the writ petition, the term of the elected Committee of

Management of Society is till the year 2005.

3. It is alleged in paragraph 10 of the writ petition that suddenly on 22.03.2003 a letter from the Additional City Magistrate (II) Bareilly addressed to the Secretary of the society was received in the office of the society informing that under the direction of the Minister of Cooperative Department, Government of U.P., the District magistrate, Bareilly has appointed the Additional City Magistrate (II) Bareilly, respondent no. 2 as Receiver of the society and also the conduct an enquiry against the society on some complaint made to him. True copy of the letter dated 21.03.2003 is Annexure no. 1 to the writ petition.

We have seen the letter dated 21.03.2003 which has been challenged in this writ petition.

4. Sri Triloki Nath, the learned counsel for the petitioner has submitted that the order date 21.03.2003 is wholly illegal as the District Magistrate Bareilly and Additional City Magistrate (II), Bareilly have no jurisdiction to pass such an order appointing a Receiver for the society and ordering for an enquiry.

5. Under Section 65 of the U.P. Cooperative Societies Act, 1965, it is the Registrar of co-operative Societies or a person authorized by him on his behalf who can hold an enquiry Under Section 35 of the Act, the Registrar can supersede or suspend the Committee of Management. Under Section 35 (3) of the Act, where the Registrar has superseded the Committee of Management, he may appoint an Administrator.

6. Sri Manish Goel, the learned counsel for the respondent has submitted that under Section 3(2) of the Act the State Government by general or special order can confer on any person all or any of the powers of the Registrar. He has invited our attention to the Notification dated 24.06.1969 published in U.P. Gazette, Part I dated 5th July, 1969. In that notification it is mentioned that the Governor of U.P. has conferred the power of the Registrar under the Act to be exercised as follows:

"*An officer for the time being holding the post of District Magistrate of a District shall exercise the powers of the Registrar under Section 70, 71 and 98 of the Act in respect of the disputes relating to the Constitution of the Committee of Management or election or appointment of any office-bearer or a delegate of a Co-operative Society, other than an apex Co-operative Society, having headquarters within the district.*"

7. Sri Goel has submitted that since the power under Section 98 of the Act has also been conferred on the District Magistrate hence in view of the Section 98(1)(e) of the Act, the District Magistrate can supersede the Committee of Management under Section 35 of the Act and can appoint an Administrator.

In our opinion the submission of Sri Goel is wholly misconceived.

It may be mentioned that Section 3 (2) of the Act states:-

"*The State Government may, for the purpose of this Act, also appoint other persons to assist the Registrar and by general or special order confer on any*

such person all or any of the powers of the Registrar."

8. It may be noted that Section 3 (2) of the Act permits the conferment of any power of the Registrar on any other person. Section 98 (1) of the Act does not deal with the powers of the Registrar at all. It is a provision for an appeal against the order of the Registrar. Hence the Notification dated 24.06.1969 relied on by Sri Manish Goel can only be relatable to Section 98 (2) (b) of the Act which state that if a decision or award was made by a person or authority other than the Registrar then an appeal against that decision will lie to the Registrar. In view of the Notification dated 24.06.1969 read with Section 3 (2) of the Act, this will mean that an appeal will lie to the District Magistrate against an order made by a person or authority other than the Registrar, in view of the above notification. Hence we do not at all agree with the submission of Sri Goel, that the District Magistrate has power to supersede or suspend a society registered under the Co-operative Societies Act or to appoint a Receiver or such society.

9. In our opinion the District Magistrate can not be allowed to do anything he pleases. In a democracy the District Magistrate can exercise only such powers as are granted to him by the law. No power has been given to the District Magistrate under the Co-operative Societies Act to suspend or supersede a society or to appoint a Receiver in respect of a society or to order an enquiry against the society or its officials.

For the reasons given above, the writ petition is allowed the impugned order dated 21.03.2003 is quashed, no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.9.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 8317 of 1998

Mehndi Hussain ...Petitioner
Versus
Presiding Officer, Central Industrial Tribunal-Cum-Labour Court, Kanpur and another ...Respondents

Counsel for the Petitioner:
Sri S.A. Gilani

Counsel for the Respondents:
Sri Vipin Sinha
Sri Navin Sinha
S.C.

Constitution of India Article 226, Labour & Service-backwages or compensation-lies in discretion of Labour Court-interference under Article 226 not proper-

Held- Para 8

In view of the admission of the petitioner himself that he had in his own foolishness submitted a forged School leaving certificate no relief can be granted. The compensation of Rs. 10,000/- awarded to him on the basis of wages in 1972 is sufficient. The question of back wages or compensation lies in the discretion of Labour Court and this Court has no right to intefere as held by Supreme Court in case of M.P. State Electricity Board Vs. Jarina Bee (Smt.) (2003) 6 SCC-141.

Case law discussed:
2003 (6) SCC 141

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

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

This writ petition has been filed challenging the validity and correctness of the award dated 17.3.1997 passed by the Presiding Officer, Central Government Industrial Tribunal-Cum-Labour Court, Kanpur Nagar in Industrial Dispute No. 170 of 1984 (hereinafter called as C.G.I.T.). The petitioner has prayed that compensation of Rs. Ten thousand awarded to him in lieu of reinstatment of service be enhanced to Rs.2.5 lacs.

2. The petitioner, who is an Ex-military person was appointed as Armed Guard on 15.1.1970 on temporary basis at Allahabad Branch of the State Bank of India and subsequently he was selected for the post of Armed Guard and was appointed on substantivee basis on probation in the same branch on 9.7.1971. The contention of the petitioner is that he was charged of having submitted a fabricated and forged certificate on 9.7.1971 allegedly issued by the Principal, R.R.K. Secondary School, Dalipur, District Pratapgarh. His services were terminated w.e.f. 5.2.1972 on this ground. An FIR was lodged under Sections 467,468,420 and 471 IPC against the petitioner. He was chargesheeted and thereafter acquitted by the Chief Judicial Magistrate, Allahabad vide his judgment and order dated 27.3.1979. After acquittal the petitioner approached the Bank for his reinstatement and he was informed that his services were terminated w.e.f. 22.2.1972.

3. The petitioner raised an Industrial Dispute which was referred by the Central Government of India vide its order dated 28.5.1982 for adjudication to the Central Government Industrial Tribunal-Cum-Labour Court, Kanpur where it was registered as Adjudication Case No. 170 of 1984. The Tribunal vide its award dated 22.11.1984 upheld the termination of the workman. The said award was challenged by the workman by means of writ petition no. 1493 of 1985 which was finally decided vide judgment dated 2nd May 1994. The matter was remanded back to the C.G.I.T. After remand the management filed an additonal written statement stating therein that the bank had lost confidence in the workman.

4. Thereafter the Tribunal by the impugned order dated 17.3.97 came to the conclusion that there was no proof that school leaving certificate was forged by workman but as the matter was very old and the concerned workman had also attained the age of superannuation, a sum Rs.10,000/- was awarded by way of compensation in lieu of reinstatement.

5. The compensation of Rs. Ten thousand awarded by the Tribunal as compensation has also been paid to the workman and the award has been implemented. He had already put in 15 years of service in the army and was engaged by the bank under welfare scheme of the army for its discharged employees.

6. From perusal of record it appears that the petitioner had acknowledged that his School Leaving Certificate was forged. This acknowlegement has been made in letter dated 20.12.71 and has been appended as Annexure-CA-4 to the counter affidavit.The relevant extract of

letter dated 20th December, 1971 is as under:

"(2) In this connection, I may add that I do not know about its genuineness as the signature of the Head Master of the institution was neither made before me on the certificate nor I yet recognize the specimen of his signature. I submitted the certificate to the Bank in full confidence of its being genuine and had no intention to defraud the bank. My intention had never been to obtain any appointment in the bank by way of fraudulent methods. I am victim of my own foolishness that I believed the school teacher under the influence of the old established traditions of teachers of the schools, who it appears to had misguided me and sent me a forged certificate, for the reasons best known to him."

7. It appears that the School Leaving Certificate of the petitioner was a fabricated one either by the petitioner himself or by the teacher.His services were terminated before confirmation of his service. He would be deemed to have continued on probation.

8. In view of the admission of the petitioner himself that he had in his own foolishness submitted a forged School leaving certificate no relief can be granted. The compensation of Rs. 10,000/- awarded to him on the basis of wages in 1972 is sufficient. The question of back wages or compensation lies in the discretion of Labour Court and this Court has no right to intefere as held by Supreme Court in case of **M.P. State Electricity Board Vs. Jarina Bee (Smt.) (2003) 6 SCC-141**.

9. For these reasons it is not a fit case for interference under Article 226 of the Constitution of India. The Petition is dismissed. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 17480 of 2000

Radhey Shyam ...Petitioner
Versus
Chief Engineer & another ...Respondents

Counsel for the Petitioner:
Sri R.K. Mishra

Counsel for the Respondents:
S.C.

Service-Transfer/adjustment-of class IV employee-outside the Division-against policy of State Govt.-where class IV employees were already excess of sanctioned posts- the order cancelling petitioner's confirmation already stayed by this Hon'ble Court- which is pending- act respondents faulty- cannot be valued-hence, quashed.

Service-Transfer/adjustment-of class IV employee outside the Division-transfer/adjustment order other class IV employee either stayed or cancelled-impugned order can not sustain-hence, quashed.

Held- Para 10

There is another important factor bearing on the case of the petitioner that he has been adjusted/transferred when adjustment/transfer orders of other class IV employees working in the Allahabad Circle have been either stayed by order dated 5.2.2000 of this Court

passed in Writ Petition No. 7940 of 2000 and Writ Petition No. 7941 of 2000 or cancelled by order dated 31.3.2000 of respondent no. 1 (Annexure-6 to the writ petition). Therefore, the adjustment/transfer order impugned in respect of the petitioner can not be said to be valued.

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

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

2. The petitioner was working in the office of Superintending Engineer, Rural Engineering Service, Allahabad Circle (hereinafter called as R.E.S.) since 1.12.1987 against a substantive post on adhoc basis. He was appointed on 9.1.1991 against a vacant substantive post of peon, a class IV post in the office of Superintending Engineer, R.E.S. and was confirmed on the post vide Order No. 81 dated 27.4.1996 (Annexure No.2 to the writ petition). Five persons namely, Sri Gyan Dutt Kushwaha, Sri Shiv Kumar, Sri Harish Chandra Pal, Sri Virendra Kumar and Sri Raj Kishore Bharti who were appointed in other circle in regular vacancies, were the adhoc appointees. All of them were working as peon/class IV employees and got their transfers from other circles and joined the Allahabad circle of R.E.S. on 16.6.1994, 5.5.1999, 8.5.1999,1.7.1993 and 12.7.1996 respectively. It is alleged that since there were only four sanctioned class IV posts in the Allahabad Circle office of R.E.S. Sri Shiv Kumar, Sri Harish Chandra Pal, Sri Virendra Kumar and Sri Raj Kishore Bharti who were earlier transferred from other circles to Allahabad Circle vide order dated 5.2.2000 passed by respondent no.1 so that there may not be any surplus class IV employees in Allahabad Circle.

3. Aggrieved by their adjustment/transfer order dated 5.2.2000 Sri Virendra Kumar and Sri Raj Kishore Bharti filed Civil Misc. Writ Petition No. 7940 of 2000 and Sri Shiv Kumar and Sri Harish Chandra filed Civil Misc. Writ Petition No. 7941 of 2000 before this Court. By order dated 15.02.2000 the effect and operation of the aforesaid order No. 206 dated 5.2.2000 of respondent no.1 was stayed by this Court.

4. It is further alleged that appointment order dated 9.1.1991 and the confirmation order dated 27.4.1996 in respect of the petitioner was cancelled arbitrarily and without giving opportunity of hearing by order dated 16.3.2000 of respondent no.2 which is as under:

"कार्यालय अधीक्षण अभियन्ता, ग्रामीण अभियंत्रण सेवा, परिमण्डल-इलाहाबाद।

पत्रांकः 933/ग्रा०अ०से०/स्था/व्या०प०/99-2000 दिनांक १६.०३.२०००

कार्यालय-आदेश

श्री राधेश्याम विश्वकर्मा, चपरासी जिनकी नियुक्ति वेतन क्रम ३०५-३६० में अधिशाषी अभियन्ता, ग्रामीण अभियन्त्रण सेवा, प्रखण्ड- वाराणसी के आदेश संख्या सी-२० दिनांक १२-११-८७ द्वारा तदर्थ/अस्थाई रूप से की गयी थी तथा जिनकी विनियमितीकरण हेतु चयन समिति गठित कर अधीक्षण अभियन्ता ग्रामीण अभियंत्रण सेवा, परिमण्डल, इलाहाबाद के आदेश सं०-४६५१ दिनांक ६-१-६१ द्वारा उक्त चयन समिति के संस्तुति के आधार पर चतुर्थ श्रेणी के आवंटित पदों के विरूद्ध आदेश के निर्गत तिथि से नियमित एवं अस्थाई रूप से नियुक्ति किया गया था, के सम्बन्ध में सन्दर्भित आदेश के क्रम में मुख्य अभियन्ता पूर्वी क्षेत्र (ग्रामीण अभियंत्रण सेवा, उ०प्र० लखनऊ के पत्र सं०.४२८२ दिनांक ६-२-२००० के द्वारा निर्देश दिया गया था कि उक्त आदेश शासनादेश सं० १५/१८/८६.व्या.१.१६८६ दिनांक ७-८-८६ द्वारा अधिसूचित) उ०प्र० लोक सेवा आयोग के बाहर पदों पर (द्वितीय संशोधन)

१९८९ के अनुरूप नहीं है। यह नियमावली १-१०-८६ से पूर्व तदर्थ नियुक्त कर्मचारियों के विनियमितिकरण हेतु प्रभावी है।

अतः श्री राधेश्याम विश्वकर्मा, चपरासी के विनियमितिकरण हेतु किया गया आदेश सं०-४९५१ दिनांक ९-१-९१ एतद्द्वारा निरस्त किया जाता है। फलस्वरूप श्री राधेश्याम विश्वकर्मा तदर्थ हो जाते हैं। जिनके कारण श्री विश्वकर्मा, चपरासी को इस कार्यालय के आदेश सं०-८१ दिनांक २७-४-९६ द्वारा जिनका नाम क्रम सं० ४ पर अंकित है का किया गया स्थाईकरण आदेश भी एतद्द्वारा निरस्त किया जाता है।

ह०
अधीक्षण अभियन्ता
ग्रामीण अभियंत्रण सेवा,
परिमण्डल–इलाहाबाद। "

5. Aggrieved by order dated 16.3.2000 the petitioner filed Civil Misc. Writ Petition No. 14662 of 2000 before this Court in which order was stayed by this Court by order dated 29.3.2000.

6. Respondent no. 1 thereafter by the impugned order dated 31.3.2000 cancelled the order of transfer/adjustment dated 5.2.2000 in respect of aforesaid Sri Shiv Kumar and Sri Harish Chandra Pal and the petitioner was adjusted/transferred to Varanasi Circle of Rural Engineering Service inspite of the fact that this Court by its order dated 29.3.2000 had stayed the operation of order dated 16.3.2000 cancelling the confirmation and regular appointment of the petitioner treating the petitioner as adhoc employee.

7. Aggrieved by aforesaid order dated 31.3.2000 the petitioner filed the present writ petition before this Court. The Court by its order dated 11.4.2000 stayed the effect and operation of the aforesaid order dated 31.3.2000 connecting W.P. No.14662 of 2000 with the present Writ Petition. The order dated 31.3.2000 is as under:

"कार्यालय मुख्य अभियंता, ग्रामीण अभियंत्रण सेवा, पूर्वी क्षेत्र उ०प्र० लखनऊ।

पत्रांकः 506/ग्रा०अ०से०/22-स्थ०-2/स्थाना० समायोजन/99-2000 दि०

कार्यालय आदेश

इस कार्यालय के आदेश सं०-206/ग्रा०अ०से०/22-स्था०-2/स्थाना०-समायोजन/99-2000 दि० 5-2-2000 के आंशिक संशोधन में निम्नलिखित चतुर्थ श्रेणी कर्मचारियों का उनके नाम के सम्मुख स्तम्भ 4 में अंकित परिमण्डल में किया गया समायोजन/स्थानान्तरण परिमण्डल स्तर से प्राप्त सूचना को समीक्षा करने एवं प्राप्त प्रतिवेदनों पर सम्यक रूप से विचार करने के उपरान्त निरस्त किया जाता है।

क्र० सं०	नाम	कार्यरत/स्थान	समायोजन/ स्थानान्तरण का स्थान
1	2	3	4
1-	श्री ज्ञान सिंह	प्रखण्ड-इटावा	परि०-फैजाबाद
2-	श्री शिव कुमार	परि०-इलाहाबाद	परि०-वाराणसी
3-	श्री हरिश्चन्द्र पाल	परि०-इलाहाबाद	परि०-वाराणसी

(अरूण कुमार गर्ग)
मुख्य अभियन्ता,
ग्रामीण अभियंत्रण सेवा, पूर्वी क्षेत्र,
उ०प्र० लखनऊ।"

8. It is contended by the counsel for the petitioner Sri R.K. Mishra that the present writ petition is not infructuous because the impugned order dated 31.5.2000 of respondent no. 1, so far as the petitioner is concerned, is not a mere transfer order and even if it could be considered a transfer order for the sake of argument, though not admitted, then a class IV employee like the petitioner could at most be transferred within a Division and not out of the Division in view of the policy of the State Government as contained in letter No. 16/3/80 dated 28.5.1981 which provides that a class IV employee can not normally be transferred out of a district, and, if

necessary, can be transferred within a Division when the posts are available in the Division level cadre. It is stated that the impugned order is an adjustment-cum-transfer order and the fate of the present writ petition is dependent on the success or failure of W.P. No. 14662 of 2000 Radhey Shyam Vishwakarma Vs. Superintending Engineer and another filed by the petitioner before this Court, wherein the order dated 16.3.2000 cancelling the appointment and the subsequent order making the petitioner a confirmed class IV employee in the Allahabad Circle of R.E.S. is under challenge and this Court has stayed the operation of the order dated 16.3.2000 by its order dated 29.3.2000. Therefore, if the aforesaid W.P. No. 14662 of 2000 succeeds and the petitioner will be treated as appointed on regular basis and a confirmed employee against the substantive/vacant post in the Allahabad Circle of R.E.S., and the question of adjustment/transfer of the petitioner will not arise and the impugned order in the present writ petition is liable to be quashed by this Court.

9. It is submitted that the question of adjustment/transfer of peons, class IV employees, working in the Allahabad Circle of R.E.S. arose because the number of class IV employees in the Allahabad Circle were in excess of sanctioned posts which is due to the fault of the respondents because they transferred many class IV employees at their requests from other circles where they had been appointed against vacancies in that circle to Allahabad circle ignoring the fact that whether there was a vacancy or not in the Allahabad Circle.

10. There is another important factor bearing on the case of the petitioner that he has been adjusted/transferred when adjustment/transfer orders of other class IV employees working in the Allahabad Circle have been either stayed by order dated 5.2.2000 of this Court passed in Writ Petition No. 7940 of 2000 and Writ Petition No. 7941 of 2000 or cancelled by order dated 31.3.2000 of respondent no. 1 (Annexure-6 to the writ petition). Therefore, the adjustment/transfer order impugned in respect of the petitioner can not be said to be valued.

11. By order dated 11.4.2000 passed by this Court the respondents were directed to file counter affidavit within two months, but no counter affidavit has been filed even after a lapse of more than two years.

12. Transfer/adjustment order is also against policy decision of transfer dated 28.5.1981. The petitioners are low paid employees and the order impugned will cause prejudice to them hence, such order is liable to be quashed.

13. The writ petition is allowed. The order dated 5.2.2000 is quashed. No order as to cost.
