ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.4.2004

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

Habeas Corpus Writ Petition No. 44823 of 2003

Ram Bharose Yadav ...Petitioner
Versus
District Magistrate, Deoria & others ...Respondents

Counsel for the Petitioner:
Sri J.S. Sengar
Sri A.K.S. Solanki

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

Constitution of India, Article 226- Detention–murder in a public place incident become commotion people ran here and there shop keepers douned their shatter does not cause breach of public order ipso facto- detaining authority by lacked application of mind order quashed.

Held- Para 6

We, therefore, see no force in the contention raised by learned A.G.A. In our opinion, the submission made by learned counsel for the petitioner has sufficient force and is accordingly accepted. From the facts it is evident that while passing the detention order the detaining authority lacked an application of mind to the facts and circumstances brought before him.

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

1. This petition was preferred in challenge to the order of his detention by the petitioner dated 7.7.2003 passed by the District Magistrate, Deoria, Sri Deepak Krishna Verma, the detaining authority.

2. The facts of the case are that an incident of murder of one Gorakh Nath Yadav had occurred in front of his semi-constructed shop where he was sitting on 6.5.2003 at 7.15 p.m. A report of this incident was registered at the concerned police station at the instance of one Ravi Yadav on the same day at 8.30 p.m.

3. In the incident this petitioner along with six more persons allegedly had participated with firearms and bombs. They all came on motorcycles to the above said place where the deceased was sitting along with other persons. The deceased was fired upon and bomb was also hurled on him upon his fall. He died on the spot. The place, where the incident occurred, is claimed to be a public place. A Nursing Home and some shops existed in the vicinity of this place. It is also claimed that the incident caused commotion in the area and the people ran helter-skelter. The shopkeepers too in panic downed their shutters.

4. The only contention raised by learned counsel for the petitioner before us is that the incident simply caused a law and order problem and did not come within the purview of any breach of the public order. It is further stated that when any such incident occurs people normally run away from the place of occurrence and the shopkeepers down their shutters and remains indoors due to fear. The persons, who resides in the locality, also prefers to remain indoor. Therefore, every such incident does not cause breach of the public order ipso facto. Such a situation is dependent upon the expanse of arms of

the disorder, its effect upon even tempo of life of the area. Such facts are not available in this case. The disturbance, if any, was short-lived.

5. Learned A.G.A., in response to the submissions, pointed out following circumstances:
(a) The incident had occurred in a densely populated area and there exists some commercial activities also. It brought to a grinding halt these activities as a consequence to this incident.
(b) Learned A.G.A. also pointed out that the incident has taken place near a petrol pump. There were some construction of a shop going on. The deceased was sitting in front of the said shop.
(c) The assailant's enmity, which finds reference in the First Information Report, was between Satya Prakash son of Kuldip and the deceased.

6. We have given thoughtful consideration to the rival submissions. In our opinion disturbance of this nature in such incidents are common in any area where they take place. There does not appear any disturbance to the public order of some lasting endure. It has no where been stated that the incident caused any *Chakka* jam, etc. organized by the public to show their repugnance to such an occurrence. Public order in itself is a phenomenon, which requires some substantive disturbance in the even tempo of the life of the society. In the region or in whole of the township where such an incident takes place, a temporary disturbance, as a consequence to these incidents, is a normal phenomenon and is most likely to occur. The shorter the life of such disturbance is the lower would be the degree of its potential to disturb the even tempo of the life of the society. This is one serious criterion to differentiate or to draw a wedge between the public order and the law and order. The mere allegation in the General Diary etc. that police force including Circle Officer and S.P. arrived at the spot soon after the occurrence is not sufficient indication of any serious disturbance to the public order. This is a routine and normal practice that senior officers do arrive at the scene of occurrence to supervise the investigation. Therefore, this mere fact does not lead to the conclusion that the incident had any potentiality to disturb the public order or the even tempo of the social life of the concerned area. Nothing serious has been pointed out except the above said fact to disturb the public order. At least no such incident was brought on record otherwise to amplify any such circumstance. We, therefore, see no force in the contention raised by learned A.G.A. In our opinion, the submission made by learned counsel for the petitioner has sufficient force and is accordingly accepted. From the facts it is evident that while passing the detention order the detaining authority lacked an application of mind to the facts and circumstances brought before him.

7. In view of the above said discussion the writ petition is hereby allowed. The detention order passed by the District Magistrate, Deoria, the detaining authority, dated 7.7.2003 (Annexure 'I' to the writ petition) against the petitioner is hereby quashed. The petitioner is in custody. He shall be released forthwith, if not otherwise required to be detained in any other criminal case. There is no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.04.2004

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

Civil Misc. Writ Petition No. 7867 of 2000

Triloki Nath Dwivedi and others
...Petitioner
Versus
District Judge, Basti ...Respondents

Counsel for the Petitioners:
Sri Ravi Kant
Sri S.N. Singh
Sri Shashi Nandan
Sri J.P. Mishra

Counsel for the Respondent:
Sri K.R. Sirohi
Sri Sudhir Agrawal

Constitution of India Article 226-U.P. regularisation of Adhoc appointment (on the post) outside the preview of public service Commission Rules 1979-Petitioners appointed on class III post as adhoc employee prior to 1991, the minimum qualifications for consideration in view of amendment 2001 as indicated in circular letter No. 18 dated 8.5.2002-petitioner held entitled for regularisation against existing vacancies.

Held: Para 19

In view of the above observations it is clear that the appointment should be made at initial stage in accordance with rules. Incumbent must possess the requisite qualification for the post on the date of appointment and if appointment had been made on temporary ad hoc basis, the workman should be permitted to continue for long rather the vacancies should be filled up on permanent basis in accordance with law. If the statutory provision or executive instruction provides for regularisation after completing a particular period only then regularisation is permissible. In special circumstances, Court may give direction to consider the case for regularisation provided continuation on ad hoc basis is so long that it amounts to arbitrariness and provisions of Article 14 are attracted. There must be sanctioned post against which regularisation is sought. At the same time policy of the State enforcing the reservation for particular classes like S.C., S.T., O.B.C etc. and further for women, handicapped and ex-service men cannot be ignored.

Case law:
1991 (1) SCC 28
1993 (6) JT 593
1988 (1) SCR 335
1996 (10) SCC 656
1997 (1) JT 243
AIR 1996 SC 417
1996 (9) SCC 217
AIR 1991 SC 101

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

Heard Sri S. N. Singh, learned counsel for the petitioners and Sri K.R. Sirohi learned counsel for the Judgeship of Basti, respondent.

1. In this petition prayer has been made for quashing the advertisement dated 5.2.2000 issued by the respondent for recruitment to the class III posts of ministerial cadre with further prayer for issuance of mandamus commanding the respondent to treat the petitioners as regular in service on the posts held by them and for payment of salary admissible to the regular employees.

2. The brief facts necessary for adjudication of the writ petition are (i) the petitioners no. 1 and 2 namely Triloki Nath Dwivedi and Santosh Kumar Srivastava were appointed on 19.2.1991 and 1.4.1991 respectively in District

Judgeship of Mirzapur as paid apprentice on ad-hoc basis @ of Rs. 900/- per month and were subsequently transferred to judgeship of Basti and joined there on 20.9.1994 and 13.9.1994 respectively, since then they are working as class III employees and are being paid salary as a regular employees; (ii) Petitioner no. 3 Sri Ajai Kumar Rai was initially appointed as Stenographer (Hindi) in Gorakhpur Judgeship on 5.2.1991 and was transferred to Judgeship of Basti and had joined in Judgeship of Basti on 23.9.1994 and since then he is continuously working; (iii) Petitioner no. 4 Sri Govind Saran Lal and petitioner no. 5 Sri Anuj Kumar were initially appointed on fixed pay of Rs. 950/- per month as Copyist on 9.1.1991 and 3.9.1990 respectively and are working on the same post continuously without any break; (iv) Petitioner no. 6 Sri Sanjay Kumar Sonkar was initially appointed on ad hoc basis on the post of paid apprentice in Lucknow Judgeship on 17.12.1990 and was subsequently transferred to Judgeship of Basti on 12.9.1994 and since then he is regularly working there.

3. According to the petitioners they were appointed in accordance to Rule 269 of General Rules (Civil) which empowers the District Judge to make appointment in emergency. Rule 269 is reproduced as below:

"269. District Judge to be informed when work increases for Copyists - If, in any court, copying work increases so much that the existing staff of copyists cannot cope with it, the head copyists shall at once report to the District Judge, in the case of the court of the District Judge through the Munsarim of that court, and in the case of any other court, through the presiding officer of the court. The District Judge shall ascertain whether any increase of establishment is necessary; and if an increase be necessary in his opinion, he shall report the matter for the orders of the High Court. In urgent cases, the District Judge may employ extra copyists and report to the High Court."

4. According to the petitioners they were appointed by proper selection committee by respective District Judges prior to June, 1991 and at the time of their initial appointment as adhoc they were in possession of required qualifications for appointment to the class III posts, therefore, they are entitled to be considered and treated/appointed as regular employee to the existing class III posts in reference to *U.P. Regularisation of Ad hoc Appointment (on the post outside the purview of Public Service Commission) Rules, 1979* in short called "Rules, 1979" as amended from time to time and in view of the *'Rules, 2001'* which came into effect on 20th December, 2001 i.e. *Uttar Pradesh Regularisation of Ad-hoc Appointments (on posts outside the purview of the Public Service Commission) (Third Amendment) Rules, 2001.* The relevant provisions are given as below :

1.(1) These Rules may be called the Uttar Pradesh Regularisation of Ad-hoc Appointment (On posts outside the Purview of the Public Service Commission) (Third Amendment) Rules, 2001.

(2) They shall come into force at once.

2. In the Uttar Pradesh Regularisation of Ad-hoc Appointments (On posts outside the Purview of the

Public Service commission Rules, 1979 in rule 4 for existing sub rule (1) set out in column 1 below, the sub-rule as set out in column 2 shall be substituted, namely :-

"COLUMN-1

Existing Sub- rule

(i) Any person who-

(i) was directly appointed on ad-hoc basis before January 1, 1977 and is continuing in service as such on the date of commencement of these rules;

(ii) possessed requisite qualifications prescribed for regular appointment as the time of such ad-hoc appointment, and

(iii) has completed or, as the case may be, after he has completed three years service shall be considered for regular appointment in permanent or temporary vacancy, as may be available, on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant rules or orders.

COLUMN-2

Sub-rule as hereby substituted

(i) Any person who-

(i) was directly appointed on ad-hoc basis on or before June 30, 1998 and is continuing in service as such on the date of commencement of the Uttar Pradesh Regularisation of Ad-hoc Appointments (on posts outside the purview of the Public Service Commission) (Third Amendment) Rules, 2001:

(ii) Possessed requisite qualifications prescribed for regular appointment as the time of such adhoc appointment: and

(iii) Has completed or, as the case may be, after he has completed three years service shall be considered for regular appointment in permanent or temporary vacancy, as may be available, on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant rules or orders."

5. According to the petitioners, the earlier 'Rules 1979' was amended by "Rules 2001" and was promulgated for the employees of State of Uttar Pradesh and the same has been adopted by this High Court as indicated in Circular No. 18/ VII b/104/Admin.(D) dated 8.5.2002. When initially this writ petition was filed, the selections to the Class III employees was stayed by an interim order dated 9.5.2000 of this Court.

6. After the exchange of counter and rejoinder affidavits, it was revealed that large number of posts to the class III in the judgeship of Basti is still in existence, however the counter affidavit which preferred in February, 2000 has indicated the difficulty of judgeship of Basti to consider the case of the petitioners for regularisation in absence of any specific rules of regularisation. In absence of any prevailing rules of regularisation the District Judge, Basti was not able to regularise or treat the petitioners as regular employee. Subsequently this Court inquired about the applicability of 'Rules 2001' in the judgeship and High Court and it was fairly indicated on the part of Sri K.R. Sirohi learned counsel appearing for the judgeship of Basti that 'Rules, 2001' has already been adopted by this Court in the year 2002 as indicated above. This Court was pleased to pass an order on 17.9.2003 which reads as below:-

"Heard Sri Sudhir Agrawal, learned counsel for District Judge Basti. None appears on behalf of the petitioners.

An advertisement dated 2.2.2000, was made by District Judge Basti for recruitment to the class III post in the judgeship of Basti. However, the selection to the class III post was stayed by an interim order dated 9.5.2000, passed by this court. Counter affidavit/rejoinder affidavit have been filed. The six petitioners/claimants prayed for regularization and their right of regularization is yet to be adjudicated upon. In this consideration keeping in view the requirement of judgeship of Basti and its functioning the interim order dated 9.5.2000, is modified to the extent that a fresh advertisement shall be published by the district Judge Basti for recruitment to the class III post in the Judgeship of Basti and a selection process may be conducted/made in accordance with the rules and law. Six post of class III, for which the petitioners are claiming, shall not be included in that advertisement till fresh/further order of this court. If the petitioners' claim is found to be justified and the petitioners are given relief in their favour after finalization of the writ petition otherwise against these posts also fresh regular recruitment may be made by the District Judge. The interim order dated 9.5.2000, in respect of the petitioners and six posts is effective upto 21st October 2003, or till any further modification. The liberty is given to the petitioners also to appear in the examination and selection for the recruitment of class III post in the regular post.

List on 21st October, 2003, as a part heard matter before me."

7. At the time of argument it was brought to the notice of this Court that a temporary ban has been imposed by the Chief Justice of this High Court on the administrative side for appointment, promotion to the class IV and class III posts in all the judgeship of districts of State of Uttar Pradesh, in these circumstances, the District Judges have stopped making any recruitment/selection, however such ban of Chief Justice on administrative side has no relevance, and binding effect in the matters being adjudicated before this Court and impediment for obeying a judicial verdict of this Court, if any, as such the apprehension of parties are discarded.

8. The issue of regularisation has been considered by the Supreme Court from time and again and the law has been laid down in very clear terms in the cases, i.e. State of Haryana and others Vs. Piara Singh and others (Supra); Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others, **1991 (1) SCC 28** ; J & K Public Service Commission etc. Vs. Dr. Narinder Mohan and others, **1993 (6) JT 593**; Dr. A. K. Jain Vs. Union of India, **1988 (1) SCR 335**; E.K. Ramakrishnan and others Vs. State of Kerala and others, **1996 (10) SCC 656**; and Ashwani Kumar and others Vs. State of Bihar and others, **1997 (1) JT 243**; and the ratio of all those judgments can be summarized to the extent that the question as to whether the services of certain employees appointed on ad hoc basis should be regularised relates to the condition of service. The power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Article 309 of the Constitution of India or any analogous provision and in the absence of such Rules, under the instructions issued in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights and

statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the Court in such matters is to ensure the Rules of Law and to see that the executive acts fairly and gives a fair deal to its employee consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the Directive Principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. A perusal of the authorities would show that appointments are as a rule to be made in accordance with statutory rules, giving equal opportunity to all the aspirants to apply for the posts and following the prevalent policy of reservation in favour of Scheduled Castes/Scheduled Tribes and other backward classes. Whenever the employees are appointed on ad hoc basis to meet an emergent situation, every effort should be made to replace them by the employees appointed on regular basis in accordance with the relevant rules as expeditiously as possible. Where the appointment on ad hoc basis has continued for long and the State has made rules for regularisation, regularisation has to be considered in accordance with the rules. Where, however, no rules are operative, it is open to the employees to show that they have been dealt with arbitrarily and their weak position has been exploited by keeping them on ad hoc for long spell of time. However, it is a question of fact whether in the given situation, they were treated arbitrarily.

9. In Khagesh Kumar Vs. Inspector General of Registration, U.P. and others, **AIR 1996 SC 417,** the Supreme Court did not issue direction for regularisation of those employees who had been appointed on ad hoc basis or on daily wages after the cut off date, i.e. 1.10.1986 as was mandatory required by the provisions of U.P. Regularisation of Ad hoc Appointment (On posts outside the Purview of the Public Service Commission) Rules, 1979 and those who were not eligible under the said Rules were not given regularisation. The same view has been taken by the Supreme Court in Inspector General of Registration and another Vs. Awadhesh Kumar and others, **1996 (9) SCC 217.** Moreover, the above referred cases further laid down that for the purpose of regularisation, various pre-requisite conditions are to be fulfilled, i.e. the temporary/ ad hoc appointment of the employee should be in consonance with the statutory rules, it should not be a back-door entry. The service record of the petitioner should be satisfactory, the employee should be eligible and/or qualified for the post at the time of his initial appointment. There must be a sanctioned post against which the employee seeks regularisation and on the said sanctioned post, there must be a vacancy. Moreover, regularisation is to be made according to seniority of the temporary/ ad hoc employees. The regularisation should not be in contravention of the State Policy regarding reservation in favour of Scheduled Castes/ Scheduled tribes and other backward classes and other categories for which State has enacted any

Act or framed rules or issued any Government Order etc..

10. Similar view has been taken in Union of India Vs. Vishamber Dutt, **1996 (11) SCC 341:** and State of Uttar Pradesh Vs. U.P. Madhyamik Parishad Kshrimik Sangh, **AIR 1996 SC 708.** In the case of State of Himachal Pradesh Vs. Ashwani Kumar, **1996 (1) SCC 773,** the Apex Court has held that if an employment is under a particular Scheme or the employee is being paid out of the funds of a Scheme, in case the Scheme comes to closure or the funds are not available, the Court has no right to issue direction to regularise the service of such an employee or to continue him on some other project, for the reason that "no vested right is created in a temporary employment."

11. The Court deprecates the practice of making appointments on daily wages without advertising the vacancy or calling the names from Employment Exchange in derogation to the provisions of Articles 14 and 16 of the Constitution and violative of the fundamental rights of other eligible persons of open market.

12. The question of appointment dehors the Rules has been considered by the Supreme Court from time and again and the Court held that such appointments are unenforceable and in executable. It is settled legal proposition that any appointment made dehors the Rules violates the Public Policy enshrined in the rules and, thus, being void, cannot be enforced. (Vide Smt. Ravinder Sharma and another Vs. State of Punjab and others, **(1995) 1 SCC 138;** Smt. Harpal Kaur Chahal Vs. Director, Punjab Instructions, **1995 (Suppl) 4 SCC 706;** State of Madhya Pradesh Vs. Shyama Pardhi, **(1996) 7 SCC 118;** State of Rajasthan Vs. Hitendra Kumar Bhatt, **(1997) 6 SCC 574;** Patna University Vs. Dr. Amita Tiwari, **AIR 1997 SC 3456;** Madhya Pradesh Electricity Board Vs. S.S. Modh and others, **AIR 1997 SC 3464;** Bhagwan Singh Vs. State of Punjab and others, **(1999) 9 SCC 573;** and Chancellor Vs. Shankar Rao and others, **(1999) 6 SCC 255).**

13. Appointment dehors the Rules violates the mandate of the provisions of Articles 14 and 16 of the Constitution as held by the Hon'ble Supreme Court in Delhi Development Horticulture Employees' Union Vs. Delhi Administration, **AIR 1992 Sc 789;** and State of Haryana and others Vs. Piara Singh, **AIR 1992 SC 2130.** In Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and others, **AIR 1991 SC 101,** the Supreme Court recognised the public employment as public property and held that all persons similarly situated have a right to share in it though its enjoyment is subject to the recruitment rules which must be in consonance with the Scheme of the Constitution of India.

14. In Dr. M.A. Haque and others Vs. Union of India and others, **(1993) 2 SCC 213,** the Supreme Court observed as under :

".....We cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and by passing of the Public Service Commissions are permitted, it will open a back-door for illegal recruitment without limit. In fact this Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional

provisions requiring recruitment to the services through the Public Service Commissions. It appears that since this Court has in some cases permitted regularisation of the irregularly recruited employees, some governments and authorities have been increasingly resorted to irregular recruitments. The result had been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidate dictated by various considerations are being recruited as a matter of course."

15. Deprecating the practice of making appointment dehors the Rules by the State or other State instrumentalities in Dr. Arundhati A. Pargaonkar Vs. State of Maharashtra, **AIR 1995 SC 962,** the Court rejected the claim of the petitioner therein for regularisation on the ground of long continuous service observing as under :

"Nor the claim of the appellant, that she having worked as Lecturer without break for 9 years' on the date the advertisement was issued, she should be deemed to have been regularised appears to be well founded. Eligibility and continuous working for howsoever long period should not be permitted to over-reach the law. Requirement of rules of selection….cannot be substituted by humane considerations. Law must take its course."

16. The Supreme Court in State of U.P. and others Vs. U.P. State Law Officers Association and others, **AIR 1994 SC 1654** has observed as under :

"This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the backdoor have to go by the same door….. The fact that they are made by public bodies cannot vest them with additional sanctity. Every appointment made to a public office, howsoever made, is not. There is, therefore, no public interest involved in saving all appointments irrespective of their mode. From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them."

17. Even if there are no Statutory Rules or Bye-laws of the society providing a mode for appointment, the Executive Instructions/Policy adopted by the respondent-society must be there providing for a mode of appointment. Even if no such Executive Instructions/Policy/Guidelines/Circular etc. is in existence then a fair procedure for appointment has to be adopted in consonance with the provisions of Articles 14 and 16 of the Constitution. (Vide Nagpur Improvement Trust Vs. Yadaorao Jagannath Kumbhare, **(1999) 8 SCC 99.**

18. A Constitution Bench of the Supreme Court, in B.R. Kapoor Vs. State of Tamil Nadu, **(2001) 7 SCC 231 (Jayalalitha case)** has observed that it is the duty of the Court to examine whether the incumbent possesses qualification for appointment and the manner in which the appointment came to be made or the procedure adopted was fair, just and reasonable and if not, appointment should be struck down.

19. In view of the above observations it is clear that the appointment should be made at initial

stage in accordance with rules. Incumbent must possess the requisite qualification for the post on the date of appointment and if appointment had been made on temporary ad hoc basis, the workman should be permitted to continue for long rather the vacancies should be filled up on permanent basis in accordance with law. If the statutory provision or executive instruction provides for regularisation after completing a particular period only then regularisation is permissible. In special circumstances, Court may give direction to consider the case for regularisation provided continuation on ad hoc basis is so long that it amounts to arbitrariness and provisions of Article 14 are attracted. There must be sanctioned post against which regularisation is sought. At the same time policy of the State enforcing the reservation for particular classes like S.C., S.T., O.B.C. etc. and further for women, handicapped and ex-service men cannot be ignored.

20. I have heard learned counsel for the parties and perused the contents of the counter affidavit, rejoinder affidavit and supplementary affidavit. Undisputedly large number of vacancies are available for recruitment in the class III/ministerial cadre in the judgeship of Basti and the petitioners were working continuously to the class III posts as ad-hoc employees prior to June, 1991 and were in possession of the minimum qualification for the recruitment to the class III posts/ministerial cadre. Since they were appointed as ad-hoc employees, their cases are to be considered in view of the "Rules, 2001" as adopted by this Court as indicated in Circular Letter no. 18 dated 8.5.2002. Therefore, the petitioners are entitled for regular appointment out of the existing vacancies. No petitioner shall be ignored by virtue of his age on the date of consideration for regularisation if such person was fulfilling age criteria at the initial stage of his appointment on adhoc basis. The cases of petitioners are to be considered forthwith and District Judge, Basti is at liberty to proceed for recruitment and selection to the class III category of posts in judgeship of Basti in view of the interim order dated 17.9.2003 of this Court in reference to the advertisement dated 2.2.2000. It is left to the wisdom and discretion of District Judge, Basti to issue a corrigendum in sequence to earlier advertisement dated 2.2.2000 to incorporate upto-date vacancies and allow fresh applications from the open market and may consider the earlier applicants and their applications and fees irrespective of their present age, provided such applicants intended to participate in selection of 2.2.2000 were within specified age limit. The inter-se seniority of petitioners after being awarded regular status in reference to the newly selected candidates to class III may be resolved in accordance to the prevailing rules and laws. This Court had earlier been pleased to direct by an interim order dated 17.9.2003 directing the District Judge, Basti to proceed for the selection to the class III posts, if necessary by issuing fresh advertisement in sequence to the earlier advertisement dated 2.2.2000 and before that petitioners are to be considered against the six regular existing vacancies and the order of regularisation are to be issued in consonance to the 'Rules, 2001' accordingly.

In view of the above observations, the writ petition is allowed. However no order as to cost.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.4.2004

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 13034 of 2003

Shobh Nath and another ...Petitioners
Versus
District Manager, Food Corporation of India Varanasi, U.P. and others ...Respondents

Counsel for the Petitioners:
Sri R.C. Gupta

Counsel for the Respondents:
Sri M.P. Singh
Sri N.P. Singh
Sri V.K. Agarwal

Constitution of India, Article 226-Appointment on compassionate grounds-one of the family member who seeks voluntary retirement on medical ground or before attaining the age 55 years-in view of circular dated 3.7.96 application filed with in time–delay caused in forwarding the application can not be a ground for regretting the application for appointment.

Held: Para 8

Thus, in my view, the reason for refusing to give appointment to the petitioner, as stated in the impugned order dated 14.6.2002 passed by respondent No. 2 is not tenable. The application of the petitioner No. 2 had been filed within time as he had not attained the age of 55 years on 17.3.1998 when he first applied for voluntary retirement on medical grounds and as such the impugned order rejecting the application on the ground of it being filed beyond the age of 55 years is liable to be quashed. The petitioner No. 1 is entitled to the benefit of the circular dated 3.7.1996 for appointment as handling labour on compassionate grounds in place of his father, petitioner No. 2. As such this writ petition deserves to be allowed.

Case law discussed:
AIR 1997 SC 123
AIR 1996 SC 2226
AIR 1994 SC 2148

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

1. The petitioner is aggrieved by the order dated 14.6.2002 passed by Senior Regional Manager, Food Corporation of India, Lucknow, Respondent no.2, whereby the application of Petitioner no.2 Jai Ram for appointment of his son Shobh Nath, Petitioner no.1, has been rejected. The petitioners have thus prayed for quashing of the aforesaid order dated 14.6.2002 and also for a direction to the Senior Regional Manager, Food Corporation of India, Lucknow, Respondent no.2, to appoint the Petitioner no.1 on the post of Handling Labour (Loader) in accordance with the terms of the Circular dated 3.7.1996 issued by the Food Corporation of India.

2. Having heard Sri R.C. Gupta, learned counsel for the petitioners as well as Sri M.P. Singh, learned counsel appearing for the respondents and on careful perusal of the record and considering the facts and circumstances of this case, in my view, this writ petition deserves to be allowed.

3. The brief facts relevant for the decision of this case are that Petitioner no.2 Jai Ram was working as Handling Labour (Loader) with Food Corporation of India. On 17.3.1998, before attaining the age of 55 years, he filed an application for appointment of his son Shobh Nath, Petitioner no.1, in his place on the basis of

the Circular dated 3.7.1996 issued by the Respondent-Corporation. The right leg of the petitioner no.2 had been fractured and was shortened by 4 cm. and thus he was unable to carry on the work of loading and unloading. The Circular dated 3.7.1996 provides for benefit of appointment on compassionate grounds, only to the employees in handling and labour category, to a family member of the worker who seeks voluntary retirement on medical ground before attaining the age of 55 years. Accordingly, on 17.3.1998 the petitioner no.2 filed an application for appointment of his son in his place, a copy of which has been filed as Annexure-C.A.2 to the counter affidavit filed by the Respondent-Corporation. Along with the said application a medical certificate dated 1.2.1998 issued by the Superintendent of Upgraded Govt. Hospital, Shivpur, Varanasi was also enclosed. Undisputedly on the basis of the said medical certificate the petitioner was allowed to voluntarily retire on medical grounds before attaining the age of 55 years. On 27.3.1998 the Assistant Manager of the Food Corporation of India had forwarded the application of the petitioner No. 2 to the District Manager for consideration. On 22.1.2000 the District Manager forwarded the details wherein it had been stated that the medical fitness certificate of the petitioner was enclosed and the petitioner No. 1, who is the son of petitioner No. 2, was found fit in the performance test report of the committee for appointment on the post of handling labour. It was stated therein that an affidavit of no objection from all major family members of petitioner No. 2 had also been procured. It was admitted that the date of receipt of the application was 17.3.1998. While stating that there was no demerit reported for appointment being given to the petitioner No. 1, the District Manager forwarded the application of the petitioner with the comment that vacancy on the said post existed against the post of petitioner No. 2, Jai Ram.

4. By the impugned order dated 14.6.2002, respondent No. 2 has rejected the application of the petitioner only on the ground that the said Jai Ram, ex-handling labour had obtained medical unfitness certificate on 10.3.2000 from the Chief Medical Officer/Medical Superintendent of Government Upgraded Hospital, Varanasi by which time he had crossed the age limit of 55 years by 1 year and 10 months and hence the application for appointment of his son Shobh Nath on compassionate grounds could not be considered.

5. The petitioner No. 2 was born on 10.5.1943. He attained the age of 55 years on 10.5.1998. In the impugned order also it is mentioned that the said Jai Ram had applied for appointment of his son on compassionate grounds on 17.3.1998, which was well before he attained the age of 55 years. Alongwith the said application the medical unfitness certificate was also enclosed, which was dated 1.2.1998. The said certificate clearly shows that due to fracture there was shortening of his right leg by 4 cm. and he was unable to do the work of handling labour. Admittedly on the basis of the same, the petitioner has already been retired, and as such the respondents cannot now turn around and claim that the said certificate was not valid for granting appointment on compassionate grounds, although it was found to be valid for retiring him on medical grounds. The delay in forwarding and deciding the

application of petitioner No. 2 for appointment of his son on compassionate grounds cannot be attributed to the petitioner. When the initial application had been filed on 17.3.1998, he was well under 55 years of age and the same could not have been rejected merely on technical grounds. If any second medical certificate had been obtained on 10.3.2000, it cannot be said that the petitioner would not be given the benefit of the circular dated 3.7.1996 merely because the said certificate dated 10.3.2000 had been obtained 1 years 10 months after the petitioner No. 2 had crossed the age limit of 55 years, when the earlier medical certificate dated 1.2.1998 was already on record and had also been acted upon. Once the application of the petitioner No. 2 had already been filed and accepted before he attained the age of 55 years, on the basis of which petitioner No. 2 had also been retired, the respondents cannot deny the petitioners the benefit of their own circular dated 3.7.1996, which provides for appointment on compassionate grounds to a family member of the handling labour who retires voluntarily on medical grounds before attaining the age of 55 years.

6. Sri N.P. Singh, learned counsel appearing for the respondents has stated that since there is no vacancy on the post of handling labour with the respondent-Corporation, thus a direction to appoint the petitioner No. 1 on such post on compassionate grounds could not be granted. In support of his contention he has placed reliance on two decisions of the Apex Court rendered in **Hindustan Aeronautics Ltd. Vs. Smt. A.Radhika Thirumalai** AIR 1997 S.C. 123 and **Himachal Road Transport Corporation Vs. Dinesh Kumar** AIR 1996 S.C. 2226. In my view the ratio of the said decisions would not apply to the facts of the present case as the respondents have themselves, while forwarding the application of the petitioner, accepted that the vacancy existed on the post on which the petitioner No.2 Jai Ram was working. As such in the present case it cannot be said that there was no vacancy. Learned counsel for the respondent has also relied upon a decision of the Supreme Court in the case of **Life Insurance Corporation of India Vs. Mrs. Asha Ramchandra Ambekar** AIR 1994 S.C. 2148 which, in my opinion, also does not help the respondents. In the said case the appointment on compassionate grounds was denied on the ground that one member of the deceased family was gainfully employed whereas in the present case there is no such averment that any member of the family of the petitioners was gainfully employed nor is there any such condition in the Circular dated 3.7.1996.

7. Learned counsel for the petitioners has placed reliance on a decision of this Court, in **Writ Petition No. 43714 of 2001 Raj Nath Yadav and another Versus Senior Regional Officer, Food Corporation of India and another** decided on 2.8.2002, wherein, in a similar situation, the Corporation was directed to given appointment, which order has also been affirmed in Special Appeal No. 1029 of 2002.

8. Thus, in my view, the reason for refusing to give appointment to the petitioner, as stated in the impugned order dated 14.6.2002 passed by respondent No. 2 is not tenable. The application of the petitioner No. 2 had been filed within

time as he had not attained the age of 55 years on 17.3.1998 when he first applied for voluntary retirement on medical grounds and as such the impugned order rejecting the application on the ground of it being filed beyond the age of 55 years is liable to be quashed. The petitioner No. 1 is entitled to the benefit of the circular dated 3.7.1996 for appointment as handling labour on compassionate grounds in place of his father, petitioner No. 2. As such this writ petition deserves to be allowed.

9. Accordingly, the impugned order dated 14.6.2002 passed by respondent No. 2 is quashed and the respondents are directed to give appointment to petitioner No. 1 Shobh Nath, son of Jai Ram as Loader, forthwith without any delay. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2004

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

Civil Misc. Writ Petition No. 40501 of 1998

Ashok Kumar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.P. Sahi
Sri G.K. Singh

Counsel for the Respondents:
Sri R.P. Goyal
Sri Manish Goyal
S.C.

Constitution of India Article 226- Principle of Natural justice-Black listing the petitioner from approved list of contractor-without show cause notice-without opportunity of hearing-held-Principle of Natural justice violatived order can not sustained.

Held: Para 5

A show cause notice was required to be given to the person against whom the order for blacklisting is to be passed and in absence of such notice the order of blacklisting would be illegal and in violation of principles of natural justice. Admittedly no notice or opportunity of hearing was given to the petitioner before passing the impugned orders. The argument of learned counsel for the respondents that the respondent would give post decisional hearing to the petitioner cannot be accepted in view of the law laid down by the apex court.

Case law discussed:
AIR 1989 SC 620
AIR 1975 SC 266
2001 (8) SCC 620

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

1. The petitioner is a registered contractor with Nagar Nigam, Aligarh. He took contract for construction of shops in the year 1981. After completion of constructions final payment was made to him in 1987. The State Government got vigilance enquiry conducted against the officers of Nagar Nigam, Aligarh and on the basis of ex-parte enquiry report directed Nagar Nigam, Aligarh on 5.9.1998 to blacklist the petitioner. In pursuance of this direction of the State Government, the Nagar Nigam passed an order on 6.10.1998 blacklisting the petitioner. Both the orders had been challenged in the instant writ petition.

2. We have heard Sri A.P. Sahi learned counsel for the petitioner, learned standing counsel appearing for respondent

no.1 and Sri Manish Goyal learned counsel appearing for respondents no.2 and 3.

3. Sri A.P. Sahi learned counsel for the petitioner has urged that without issuing any show cause notice or giving opportunity of hearing, the petitioner could not be blacklisted. On the other hand Sri Manish Goyal learned counsel appearing for respondents no.2 and 3 has urged that post decisional hearing would be given to the petitioner and the impugned order is liable to be upheld.

4. The question involved in this petition is as to whether before blacklisting a contractor principles of natural justice have to be complied with and opportunity of hearing has to be given to him or not. This question has been settled by the apex court. It has been held in M/s. Erusian Equipment and Chemicals Ltd. v. State of West Bengal and another AIR 1975 SC 266, Raghunath Thakur v. State of Bihar and others AIR 1989 SC 620 and Grosons Pharmaceuticals (P) Ltd. v. State of U.P. (2001) 8 SCC 604 that an order of blacklisting against a contractor results in civil consequences and in such situation the only requirement of law, in absence of statutory rules, was to observe principles of natural justice.

5. A show cause notice was required to be given to the person against whom the order for blacklisting is to be passed and in absence of such notice the order of blacklisting would be illegal and in violation of principles of natural justice. Admittedly no notice or opportunity of hearing was given to the petitioner before passing the impugned orders. The argument of learned counsel for the respondents that the respondent would give post decisional hearing to the petitioner cannot be accepted in view of the law laid down by the apex court.

6. In the result, this writ petition succeeds and is allowed. The orders dated 5.9.1998 and 6.10.1998, passed by the respondents, Annexures-1 and 2 respectively to the writ petition, are quashed. It shall be open to the respondents to pass a fresh order in accordance with law.

The parties shall bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.3.2004

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

Civil Misc. Writ Petition No. 27317 of 2001

Kaloo Ram ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Pandey
Sri A.C. Srivastava

Counsel for the Respondents:
Sri Pradeep Kumar
Sri Saumitra Singh
S.C.

Land Acquisition Act-Sections 11-A and 17-Applicability–By invoking urgency clause under S. 17(1) government takes possession of land- prior to making of award under S. 11 of L.A. Act- Thus owner is divested of land, vested with government- Hence s. 11-A, held, has no application to cases of acquisition under

S. 17 of Land Acquisition Act-where can not take back the possession.

Held: Para 15

In Satendra Prasad Jain and others Vs. State of U.P. AIR 1993 SC 2517 the Supreme Court observed that when Section 17 (1) is applied by invoking the urgency clause, the Government takes possession of the land prior to the making of the award under Section 11, and thereupon the owner is divested of the land, which is vested in the Government. Hence Section 11A has no application to cases of acquisition under Section 17 because the land has already vested in the Government and there is no provision in the Act by which the land vested in the Government can be reverted to the owner, vide Ram Gopal Varshney Vs. State of U.P. 2004(1) AWC 206.

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

1. This bunch of writ petitions listed today is being disposed of by a common judgment.

Heard learned counsel for the parties.

2. The petitioner is challenging the impugned notification under Section 4 read with Section 17 of the Land Acquisition Act, a copy of which is Annexure no. 1 to the writ petition. That notification states that the land in question is being acquired for Planned Industrial Development for Greater NOIDA.

3. In a series of the decisions of the Supreme Court and this Court it has been held that acquisition for planned industrial development is for a public purpose vide **Ajay Krishna Singhal and others Vs. Union of India,** (1996) 10 SCC 721. In the notification it is mentioned that as there is urgency, hence Section 5A is being dispensed with. In view of this recital this Court cannot interfere vide **Bal Krishan Gulati Vs. State of U.P. and others** 1991 AWC 1210, **M/s Garg Farms and others Vs. State of U.P. and others** 1989 AWC 1137. In **Kunwar Lal and others Vs. State of U.P. and others** (1989) 1 UPLBEC 772 and in **Ram Narain Rai Vs. State of U.P.** (1991) AWC 341 it has been held that dispensation of inquiry under Section 5A depends on the subjective satisfaction of the State Government and hence the Court cannot interfere. It has also been held therein that where the declaration has been made by the State Government under section 6 (3) that a particular land is needed for a public purpose, the said declaration shall be conclusive evidence of the fact that it is so needed.

4. In **Baijnath Yadav Vs. State of U.P. and others**, Writ petition no. 12663 of 2002 decided on 19.10.2002 these decisions have been followed.

5. In **Amar Singh and others Vs. State**, Writ petition no. 29031 of 2003, decided on 11.7.2003 the Court has held that even Abadi land can be acquired. The same view was taken in **Manvir Singh Vs. State of U.P.** 2003 (1) AWC 116 and **Horam Singh Vs. State of U.P.** in writ petition no. 24670 of 2003 decided on 2.7.2003.

6. In **Kashi Nath Vs. State of U.P.** 1993 ALJ 154 a Division Bench of this Court following the decision of the Supreme Court in **Bai Malimabu Vs. State of Gujrat**, AIR 1978 SC 515 held that the word 'land' in Section 3 (a) includes the superstructures on the land. Hence Abadi land can be acquired, even if

there are structures thereon, though, of course compensation has to be paid for the same.

7. In **Amar Singh's** case (supra) it has also been held after a detailed discussion that whether to grant exemption from acquisition or not is a purely administrative matter and this Court could not interfere. It was also held therein that directions directing disposal of petitioner's application for exemption should not be issued by the Court as this only results in further delay of the acquisition proceedings for years and years.

8. In **Ram Charittar and others Vs. State of U.P.** Writ petition no. 15586 of 2001 decided on 4.10.2002 a similar view was taken.

9. In **Raghubans Mishra Vs. State of U.P. and others** 1998 (3) AWC 1830 it was held that where inquiry under Section 5A has been dispensed with the requirement of local publication does not apply in view of U.P. Amendment no. 8 of 1974.

10. In **Ghaziabad Development Authority Vs. Jan Kalyan Samiti**, (1996) 2 SCC 365 it has been held that where S. 17 (4) is invoked publication of the notification in local newspapers is not necessary , in view of the U.P. Amendment of the Land Acquisition Act.

11. In some of these petitions, it has been alleged that the acquisition proceedings have lapsed in view of Section 11 a. However, in our opinion, since Section 17 has been invoked and it has been stated in the counter affidavit that possession has been taken, there is no merit in the submission in view of the Division Bench decision in **Mahendra Singh and others Vs. State of U.P. and others**, 2002(2) AWC 1629. After execution of the possession in memo possession of the tenure holder or anyone else is that of unauthorized occupants, vide **Awadh Behari Yadav Vs. State of Bihar,** AIR 1996 SC 122, **Bal Mukund Khatri Educational and Industrial Trust Vs. State of Punjab,** J.T. 1996 (3) SC 60, etc. The acquisition proceedings will not lapse under Section 11 A in this situation, vide **Patharoo Vs. U.P. Avas Evam Vikas Parishad,** 2002 (5) AWC 3665.

12. In **Daya Shanker and others Vs. State of U.P. and others**, 1999(1) AWC 494 it was held that notification under section 6 (3) is conclusive evidence that the land was needed for public purposes.

13. In **First Land Acquisition Collector and others Vs. Nirodhi Prakash Gangoli and another,** (2002) 4 SCC 160 the Supreme Court held that existence of urgency is a matter of subjective satisfaction of the Government. Mere delay on the part of the Government subsequent to its decision to dispense with inquiry under Section 5A by exercising power under Section 17 would not invalidate the decision itself.

14. In **Awadh Bihari Yadav and others Vs. State of Bihar and others** (supra) and **Sita Ram Gope and others Vs. State of Bihar and others**, AIR 1996 SC 122 the Supreme Court held that in case the Government has taken possession of the land in question under Section 17 of the Act it is not open to the Government to withdraw from the

acquisition by issuing notification under Section 48. In such a case Section 11 A of the Act is not attracted and the acquisition proceeding would not lapse even if no award was made within the period prescribed by Section 11 A.

15. In **Satendra Prasad Jain and others Vs. State of U.P.** AIR 1993 SC 2517 the Supreme Court observed that when Section 17 (1) is applied by invoking the urgency clause, the Government takes possession of the land prior to the making of the award under Section 11, and thereupon the owner is divested of the land, which is vested in the Government. Hence Section 11A has no application to cases of acquisition under Section 17 because the land has already vested in the Government and there is no provision in the Act by which the land vested in the Government can be reverted to the owner, vide **Ram Gopal Varshney Vs. State of U.P.** 2004(1) AWC 206.

16. In view of the above, we find no merit in these petitions.

The writ petitions are dismissed and the interim orders, if any, stand vacated.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Second Appeal No.424 of 1989

Sunder Lal ...Plaintiff-Appellant
Versus
Union of India & another ...Respondents

Counsel for the Appellant:
Sri A.B. Saran
Sri Paramatma Rai

Counsel for the Respondents:
Sri Lal Ji Sinha
S.C.

Constitution of India, Article 311 (2)-Railways Act, 1890-S. 139-Removed from Service enquiry-charges found proved Appeal partly allowed-Second appeal-Appellants contention that appointment letter filed by opposite party was not admitted by him so it cannot be taken into consideration-s.139 of Railways Act provides that entries in records on other documents of Railways Administration can be proved either by production of records or by production of copy of entries certified by officer having custody of records-in present case, copy of appointment letter had been certified by Assistant Security Officer himself and said document has been duly proved.

Held: Para

Learned counsel for the appellant further submitted that the appointment letter filed by the opposite party was not admitted by him and therefore, the said document cannot be taken into consideration. This contention of the learned counsel for the appellant is devoid of any merit. Section 139 of the Indian Railways Act 1890 provides that entries in the records or other documents of a Railway Administration can be proved either by the production of the records or other documents or by the production of a copy of the entries certified by the Officer having custody of the records. In the present case copy of the appointment letter, filed by the defendants, had been certified by the Assistant Security Officer himself and the said document has been duly proved.

Case law discussed:
AIR 1993 SC 205

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The plaintiff was appointed as a Rakshak in the Railways vide appointment letter dated 18.3.1966 issued by the Assistant Security Officer. The plaintiff was served with a charge sheet on the basis of which an enquiry was initiated. The inquiry officer in his enquiry report found that the plaintiff was guilty of the charges framed against him. On the basis of the enquiry report, the Assistant Security Officer passed an order dated 12.9.1978 removing the plaintiff from the service. The plaintiff filed an appeal, which was also dismissed by the appellate authority. The plaintiff thereafter, filed a suit for a declaration praying that the order of removal dated 12.9.1978 is illegal, inoperative and void and was hit by Article 311 [1] and [2] of the Constitution of India. The plaintiff also prayed that he should be deemed to be in service with all consequential benefits. The defendant in their written statement contended that the enquiry was held after following the principles of natural justice and all the documents which was asked by the plaintiff were duly supplied and full opportunity was given to the plaintiff to lead evidence. The defendant further submitted that the order passed by the Assistant Security Officer removing the plaintiff in service was validly passed, in asmuch as he was the appointing authority.

2. The trial court after framing the issues dismissed the suit with costs holding that the order passed by the Assistant Security Officer removing the plaintiff from the service was a valid order and that there was no violation of Article 311 [1] and [2] of the Constitution of India.

3. Aggrieved by the dismissal of the suit, the plaintiff filed an appeal before the lower appellate Court, which was partly decreed. The lower appellate Court found that the Assistant Security Officer was the appointing authority and therefore, had validly passed the order of removal of service of the plaintiff. The appellate Court further found that full opportunity of hearing was given to the plaintiff and that there was no violation of the principles of natural justice. The appellate Court, however, found that the departmental appeal of the plaintiff was not decided by the appellate authority by a reasoned order and therefore, directed the appellate authority to pass a reasoned order.

4. Aggrieved by the aforesaid decision of the Court below, the plaintiff has preferred the present second appeal. At time of the admission of the appeal, the following substantial question of law was framed, namely,

"Whether the order of termination was passed by the appointing authority?"

5. I have heard Sri Parmatma Rai, the learned counsel for the appellant and Sri Lal Ji Sinha, the learned counsel appearing on behalf of the opposite parties.

6. Sri Parmatama Rai, the learned counsel for the appellant contended that the plaintiff was appointed by the Chief Security Officer and therefore, the appointing authority, namely, the Chief Security Officer could only remove the plaintiff from the service and, therefore, the order of removal passed by the Assistant Security Officer was invalid and

against the provisions of the rules. The arguments of the learned counsel for the appellant is devoid of any merit.

7. From a perusal of the appointment letter [Paper No.47-C], which has been filed by the defendants before the Court below, it is clear that the appointment letter issued in favour of the plaintiff was issued by the Assistant Security Officer.

8. The contention of the learned counsel for the appellant that the appointment letter was issued by the Chief Security Officer is therefore, incorrect. Since the appointment letter was issued by the Assistant Security Officer, he being the appointing authority was empowered to issue an order of removal of service of the plaintiff. In the present case, the order of removal was passed by the Assistant Security Officer. Thus, I hold that the Assistant Security Officer was the appointing authority of the plaintiff and was empowered to pass an order of removal of service of the plaintiff.

9. Sri Lal Ji Sinha, the learned Senior Counsel for the opposite parties has invited my attention to a judgment of the Supreme Court in **Union of India v. Rajendra Singh reported in AIR 1993 SC 205** wherein the Supreme Court held that the power of appointment of a Rakshak does not vest merely with the Chief Security Officer, but also gives power to the Assistant Security Officer to appoint a Rakshak.

10. Learned counsel for the appellant further submitted that the appointment letter filed by the opposite party was not admitted by him and therefore, the said document cannot be taken into consideration. This contention of the learned counsel for the appellant is devoid of any merit. Section 139 of the Indian Railways Act 1890 provides that entries in the records or other documents of a Railway Administration can be proved either by the production of the records or other documents or by the production of a copy of the entries certified by the Officer having custody of the records. In the present case copy of the appointment letter, filed by the defendants, had been certified by the Assistant Security Officer himself and the said document has been duly proved.

11. In view of the aforesaid, there is no merit in the appeal and is dismissed. In the circumstances of the case, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.3.2004

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

Civil Misc. Writ Petition No. 39749 of 1999

Sri Shiv Lal Pal ...Petitioner
Versus
District Magistrate, Mirzapur and others ...Respondents

Counsel for the Petitioner:
Sri Rahul Sripat
Miss Suman Jaiswal

Counsel for the Respondents:
Sri V.K. Singh
Sri Y.D. Mohan
S.C.

U.P. Gaon Sabha and Bhumi Prabandhak Mandal- Para 60 (2) (Kha)-Grant of lease

fishery right by S.D.M.- jurisdiction- Held, Para 60 (2) (Kha) of Manual employees S.D.O. to grant fishery lease even without consulting Land Management Committee – said para also protects customary rights of irrigation etc. from Ponds.

Held: Para 10 & 12

It is thus clear that paragraph 60(2)(Kha) of the Manual empowers the Sub Divisional Officer to grant fishery lease even without consulting the Land Management committee. In view of the aforesaid legal provisions the first contention of the learned Counsel for the petitioner, that fishery lease can only be granted by the Land Management Committee and respondent no. 2 has not jurisdiction, is liable to be rejected.

The last submission advanced by the learned counsel or the petitioner, that since pond in question is the only source of irrigation and has always been used for the said purpose as such it cannot be leased to be rejected. Paragraph 60(2) (kha) of the manual protects the customary rights of washing cloths, excavation of earth and irrigation etc. from the pond and tank leased out for fishing rights. Thus lease in favour of respondent no. 3 being subject to and without prejudice to the customary rights of irrigation from the pond in not liable to be cancelled, on the ground that it affects the right of irrigation.

Case law discussed:
1997 (3) AWC 1965

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

1. By means of this petition filed under Article 226 of the Constitution of India, the petitioner has prayed for quashing of lease of fishing rights in plot no. 52 area 1.896 hectare situate in village Tendua Kalan District Mirzapur executed in favour of respondent no. 5. The petitioner has also prayed for a writ of mandamus commanding the respondent authorities not to make any allotment of the said pond to any person for any purpose other than irrigation.

2. We have heard Miss Suman Jaiswal, learned counsel for the petitioner and Sri Y.D. Mohan, holding brief of Sri V.K. Singh counsel for the respondent and the learned Standing Counsel.

3. The fishery lease granted to respondent no. 5 has been challenged on the ground that respondent no.2, Sub Divisional Magistrate has no power to jurisdiction to grant any lease , and under the provisions of U.P.Z.A. & L.R. Act the said power is vested only in the Land Management Committee.

4. It has further been contended that lease has been executed by the respondent no. 2 without inviting any tender or following any procedure. The pond in dispute has always been used for irrigation purpose and there being no other source of irrigation the pond could not have been allotted for fishing. It has also been urged that Gaon Sabha passed an unanimous resolution dated 30.8.99 to the effect that pond in question may be kept reserved only for irrigation purposes and may not be allotted to any person.

5. A counter affidavit has been filed on behalf of the respondent no. 5 denying the aforesaid allegations. It has been stated in the counter affidavit that date of auction was well advertised and a large number of persons participated. The respondent was the highest bidder and thus lease was executed in her favour. The fact that pond in question is the only source of irrigation has also been denied in the counter affidavit that a large

number of members of Gaon Panchayat filed affidavits before Sub Divisional Officer, stating therein that there exists no resolution dated 30.8.99 and there is no objection to the settlement of lease rights for fishing in favour of respondent no. 5.

6. Lease of fishing rights in any pond and tank vested in Gaon Sabha is regulated by the Provisions of U.P.Z.A.& L.R. Act (for short the Act) and rules framed there under and various government orders issued on the subject and contained in Paragraph 60 of U.P. Gaon Sabha and Bhumi Prabandhak Manual (for short the manual). The Manual is a compilation of various orders and Directions issued by the State government from time to time under the provisions of the Act and the Rules.

7. Section 126 (1) of the Act empowers the State Government to issue such order and direction to the Land Management Committee relating to its directions of Land Management Committee relating to its function as enumerated under Section 28-B of U.P. Panchayat Raj Act which includes within its ambit the development of fisheries, ponds and tanks. Explanation 1 to Rule 115-B of the Rules provides that directions contained in the Manual shall be deemed to be directions issued in accordance with Rule 115-A.

8. Thus, in view of Section 126 of the Act read with Rule 115-A and 115-B of the Rules, orders and directions issued by the State Government contained in the Manual are statutory in nature and have the force of law. Our view finds support from another Division Bench decision of this Court in the case of Gram panchayat Kanta Guljarpur Unnao Vs. Collector Unnao and others reported in 1997 (3) AWC 1965 wherein, it has been held that the provisions of paragraph 60 of the Gaon Sabha Manual have statutory force.

9. Complete procedure for grant of fishing lease in contained in paragraph 60 (2) (kha) of the Manual as amended from time to time by various government orders and directions issued on the subject. It provides that lease of fishery rights as far as possible, may be settled in camps organized for the purpose at Tehsil level by Sub Divisional Officer in consultation with the Land Management Committee. However, in cases, where either the Land Management Committee is unable to settle fishery lease or the Sub Divisional Officer considers it fit to do so he can grant lease even without any resolution of the Land Management Committee. It is further provided that any customary rights of washing cloths, irrigation, excavation of earth etc from the pond or tank shall continue as usual and settlement of fishing rights shall not in any manner affect such customary rights shall not in any manner affect such customary rights. It also provides that lease deed shall contain a condition that lessee shall not interfere in any such customary rights.

10. It is thus clear that paragraph 60 (2) (Kha) of the Manual empowers the Sub Divisional Officer to grant fishery lease even without consulting the Land Management committee. In view of the aforesaid legal provisions the first contention of the learned Counsel for the petitioner, that fishery lease can only be granted by the Land Management Committee and respondent no. 2 has not jurisdiction, is liable to be rejected.

11. The next contention advanced on behalf of the petitioner pointing out various defects in the procedure adopted by respondent no. 2 in the process of granting lease to the petitioner are factual in nature. No material has been brought on record of the writ petition to substantiate the allegations. The resolution of gaon sabha dated 30.8.99 for keeping the pond reserved for irrigation purpose have not only been denied by the respondent no. 5 in the counter affidavit but affidavit of members of Gram panchayat have also been filed along with counter affidavit stating that the said resolution dated 30.9.99 is farzi and manufactured and as a matter of fact, no such resolution was ever passed. All these are disputed questions of fact which cannot be gone into by us while exercising the powers conferred by Article 226 of the Constitution.

12. The last submission advanced by the learned counsel or the petitioner, that since pond in question is the only source of irrigation and has always been used for the said purpose as such it cannot be leased to be rejected. Paragraph 60(2) (kha) of the manual protects the customary rights of washing cloths, excavation of earth and irrigation etc. from the pond and tank leased out for fishing rights. Thus lease in favour of respondent no. 3 being subject to and without prejudice to the customary rights of irrigation from the pond in not liable to be cancelled, on the ground that it affects the right of irrigation.

13. In view of the aforesaid discussion the reliefs prayed for in the writ petition cannot be granted. The writ petition fails and is accordingly, dismissed.

14. However, in the facts and circumstances, there shall be no order as to cost.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.3.2004

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 11625 of 2004

The Committee of Management and another ...Petitioners
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri Yatindra

Counsel for the Respondents:
Sri I.R. Singh
S.C.

Societies Registration Act, 1860-S. 12-D-Appeal before Commissioner-Maintainability- Grant of renewal and registration of list of management of society by Assistant Registrar- Order set aside in appeal by Commissioner- Writ against-In view of S. 12-D of the Act, no appeal has against order impugned-impugned order passed in appeal by Commissioner held without jurisdiction.

Held: Para 4

Learned counsel appearing on behalf of the petitioner argued that in view of the provisions of Section 12-D of the Societies Registration Act, 1860, no appeal lies against the order impugned in the present writ petition, is wholly without jurisdiction. A perusal of the Section 12-D of the Societies Registration Act, 1860, referred to above, clearly demonstrate that the contention of learned counsel for the petitioners has substance.

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

1. Heard Sri Yatindra, learned counsel appearing on behalf of the petitioners and the learned Standing Counsel, who has accepted notice on behalf of Respondents 1 and 2 as well as Sri Indra Raj Singh, learned counsel for the Respondent no. 3.

2. The Petitioners, by means of present writ petition under Article 226 of the Constitution of India, have challenged the order dated 3rd March, 2003, passed by the Commissioner, Varanasi Division, Varanasi, copy whereof is appended as Annexure 16 to the writ petition, whereby the Commissioner purporting to act under Section 12-D of the Societies Registration Act, 1860, as amended in the State of U.P., set aside the order dated 4th April 2002, passed by Assistant Registrar, Firms, Societies and Chits, Varanasi Region, Varanasi by which the Assistant Registrar has granted renewal and registered the list of the management of society produced before him.

3. Learned counsel appearing on behalf of the petitioners in support of his contention relied upon the provision of Section 12-D of the Societies Registration Act, 1860, which is reproduced below:

"12-D. Registrar's power to cancel registration in certain circumstances…..(1) Notwithstanding anything contained in this Act, the Registrar may, by order in writing, cancel the registration of any society on any of the following grounds-

(a) that the registration of the society or of its name or change of name (is) contrary to the provisions of this Act, or of any other law for the time being in force.

(b) that its activities or proposed activities have been or are or will be subversive of the objects of the society or opposed to public policy.

(c) that the registration or the certificate of renewal has been obtained by misrepresentation or fraud.

Provided that no order of cancellation of registration of any society shall be passed until the society has been given a reasonable opportunity of altering its name or object or of showing cause against the action proposed to be taken in regard to it.

(2) An appeal against an order made under sub section (1) may be preferred to the Commissioner of the Division in whose jurisdiction the Headquarter to the society lies, within one month from the ate of communication of such order.

(3) The decision of the Commissioner under Sub section (2) shall be final and shall not be called in question in any court."

4. Learned counsel appearing on behalf of the petitioner argued that in view of the provisions of Section 12-D of the Societies Registration Act, 1860, no appeal lies against the order impugned in the present writ petition, is wholly without jurisdiction. A perusal of the Section 12-D of the Societies Registration Act, 1860, referred to above, clearly demonstrate that the contention of learned counsel for the petitioners has substance.

5. Since it is agreed between the parties that in the present controversy pure questions of law are involved, therefore there is no need to invite any counter affidavit and the matter be decided finally.

6. In view of what has been stated above, without entering into the merits of otherwise of this case, this writ petition succeeds and is allowed. The impugned order dated 3rd March, 2004, Annexure-16 to the writ petition is quashed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2004

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

Civil Misc. Writ Petition No. 3891 of 2004

Virendra Singh Pal ...Petitioner
Versus
Judge, Small Causes Court, Kanpur Nagar, and others ...Respondents

Counsel for the Petitioner:
Sri Sankatha Rai
Sri Dr. Vinod Kumar Rai
Sri Vijay Kumar Rai

Counsel for the Respondents:
S.C.

Code of Civil Procedure, 1908-Section 47-U.P. Provincial Small Causes Courts Act-S.17-Suit for eviction and arrears of rent-Exparte decree-Restoration application dismissed-Execution-objection denying plaintiffs title as already acquired by KDA-Rejection by JSCC-Revision dismissed-petition questioning Court's jurisdiction to pass decree-sought to be executed on basis of material brought on record only in execution proceeding consisting of pleas taken by K.D.A. in earlier suit-petitioner cannot assert that on basis of material on record before trial Court till passing of exparte decree can be said to be nullity on without jurisdiction-Held, petitioner cannot be permitted to challenge decree on ground of nullity in execution proceedings on basis of material brought on record for first time in execution proceedings itself.

Held: Para 10

In the instant case the tenant-petitioner is questioning the jurisdiction of the Court to pass the decree which is sought to be executed on the basis of material brought on record only in execution proceedings consisting of pleas taken by K.D.A. in the earlier suit. Neither the petitioner has asserted nor he can assert that on the basis of material on record before the trial court till the date of passing of the ex-parte decree, the decree can be said to be nullity or without jurisdiction. Petitioner in view of the aforesaid authority of the Supreme Court cannot be permitted to challenge the decree on the ground that it was nullity in execution proceedings on the basis of material brought on record for the first time in the execution proceedings itself by him.

Case law discussed:
AIR 1972 SC 1371
AIR 1994 SC 853
AIR 1996 SC 1819
2003 ACJ 1966
(2004) 1 AWC 6
(2004) 1 AWC 247
(1990) 1 SCC 193
AIR 1997 SC 122
AIR 2002 SC 569 & 665
AIR 1998 SC 2549
AIR 1970 SC 1475

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

1. This is tenant's writ petition. Landlord respondent filed a suit for eviction against the tenant petitioner being SCC Suit No. 360 of 1996 on the

file of JSCC Kanpur Nagar. According to the plaint of the said suit provisions of U.P. Act No. 13 of 1972 were not applicable to the shop in dispute; defendant was the tenant of the shop in dispute on behalf of the plaintiff at the rate of Rs. 450/- per month; the tenant had taken the shop on rent for five years which period had expired and that tenant had not paid the rent for more than four months inspite of notice dated 18.10.1995. The tenant had not appeared in the suit hence it was decreed exparte on 14.5.1999 by JSCC, Kanpur Nagar. The suit was filed on 21.8.1996. Prior to filing of the aforesaid suit for ejectment plaintiff had filed another Regular Suit No. 524 of 1996 against Kanpur Development Authority and tenant Veerendra Singh Pal who was also defendant in the suit for ejectment. The suit was dismissed in default. The case of the petitioner is that in the suit for ejectment no notice or summons was served upon him. The petitioner on 16.8.2001 filed restoration application for setting aside the exparte decree and judgment dated 14.5.1999 alongwith an application u/s 17 PSCC Act for permission to furnish security instead of depositing of decreetal amount in cash. The application to furnish security was rejected on the same date i.e. on 16.8.2001 and the petitioner was directed to deposit the decreetal amount in cash by 18.8.2001. Execution application had already been filed by the plaintiff respondent. In the said execution application the petitioner on 17.8.2001 filed objection u/s 47 C.P.C. which was supplemented by supplementary objection dated 27.10.2001. The main thrust of the petitioner in his objection in execution application was that the plaintiff was not owner of the shop in dispute as the same had already been acquired by Kanpur Development Authority. In the said objections reliance was placed upon the defence taken by the Kanpur Development Authority in O.S. No. 524 of 1996 and on the documents filed by the Kanpur Development Authority in the said suit. One of the objections was that the decree was bad to the extent of nullity for non-impleadment of Kanpur Development Authority. The objections were rejected by JSCC, Kanpur Nagar on 4.12.2003 (execution application and the objections were numbered as Case No. 65/74/99) Against the said order dated 4.12.2003 the petitioner filed revision being SCC Revision No. 101/2003. The said revision was dismissed in limine by District Judge, Kanpur Nagar on 19.12.2003. This writ petition is directed against the aforesaid order rejecting the objections of the petitioner in execution.

2. In para 28 (ii) of the writ petition it has been mentioned that the restoration application of the petitioner was dismissed by JSCC, Kanpur Nagar for want of compliance of provisions of Section 17 of PSCC Act. In the instant writ petition prayer for quashing plaint of SCC Suit No. 360/96, orders dated 4.12.2003,14.5.1999,16.8.2001 and 19.12.2003 has been made.

3. The solitary argument of the learned counsel for the petitioner is that the exparte decree passed by JSCC dated 14.9.1990 is without jurisdiction, hence it could be questioned and set aside in execution proceedings also. Learned counsel for the petitioner has placed reliance upon the following authorities:

1. AIR 1972 SC 1371,
2. AIR 1994 SC 853,
3. AIR 1996 SC 1819,
4. 2003 ACJ 1966,

5. 2004 (1) AWC 6 and
6. 2004(1) AWC 247.

4. This question has been dealt with in detail in 1990(1) SCC 193 which is a judgment by three Hon'ble Judges and has been referred to in AIR 1996 SC 1819 (supra). In this regard reference can also be made to AIR 1997 SC 122.

5. The question of dispossession of landlord by paramount title holder has been discussed in two recent authorities of Supreme Court reported in AIR 2002 SC 569 and 665. In the latter authority (O.P. Gupta Versus R.B. Goel), it has been held that firstly evidence to that affect must property be brought on record by the tenant. In the said case during pendency of appeal the said fact was stated in an affidavit filed by the tenant in appeal. Written Statement was not got amended. The Supreme Court held that the said plea could not be considered. Similarly in the instant case the tenant did not file any written statement taking the said plea. In fact tenant did not pursue his restoration application. He cannot therefore be permitted to raise this objection in execution. In the aforesaid authority of Supreme Court (O.P. Gupta Versus R.B. Goel) it was also held that unless there was an order of resumption and forfeiture passed by the Development Authority against the landlord, the plea of dispossession by paramount titleholder could not be successfully taken by the tenant.

6. In the aforesaid earlier authority of the Supreme Court (Vashu Deo Versus Bal Kishan) three principles have been laid down for application of plea of dispossession by paramount titleholder:-

(i) The party evicting must have a good and present title to the property.
(ii) The tenant must have quitted or directly attorned to the paramount titleholder against his will.
(iii) Either the landlord must be willing or be a consenting party to such direct attornment by his tenant to the paramount titleholder or there must be an event, such as a change in law or passing of decree by a competent court, which would dispense with the need of consent or willingness on the part of the landlord and so bind him as would enable the tenant handing over possession or attorning in favour of the paramount title holder directly, or in other words the paramount title holder must be armed with such legal process for eviction as can not be lawfully resisted (para 12).

In the instant case none of the aforesaid conditions is satisfied.

7. Even otherwise JSCC while deciding suit for eviction filed by alleged landlord against his alleged tenant has got full jurisdiction to decide the question of title incidentally for the purposes of the decision of the suit (it is another matter that said decision may not operate or res judicata in regular suit based upon title.) In this regard reference may be made to AIR 1998 SC 2549. It can not therefore be said that the order of the JSCC decreeing the suit was without jurisdiction and nullity regarding title of the plaintiff respondent for the purpose of deciding the suit for eviction. Objection u/s 47 of CPC on the basis that the landlord had no title or JSCC had no jurisdiction to decide question of title is not maintainable.

8. Objections u/s 47 CPC on the ground of decree being nullity as having been passed by court having no

jurisdiction can be permitted to be raised only in rarest of rare cases. It can not be permitted to be used as second inning of litigation. Even if all the allegations made by the tenant are taken to be correct still it cannot be said that the JSCC while deciding the suit had no jurisdiction to decide the said points and objections.

9. In V.D. Modi Vs. R.A. Rahman, A.I.R. 1970 S.C. 1475 it has been held in para-7:-

"When the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction."

10. In the instant case the tenant-petitioner is questioning the jurisdiction of the Court to pass the decree which is sought to be executed on the basis of material brought on record only in execution proceedings consisting of pleas taken by K.D.A. in the earlier suit. Neither the petitioner has asserted nor he can assert that on the basis of material on record before the trial court till the date of passing of the ex-parte decree, the decree can be said to be nullity or without jurisdiction. Petitioner in view of the aforesaid authority of the Supreme Court cannot be permitted to challenge the decree on the ground that it was nullity in execution proceedings on the basis of material brought on record for the first time in the execution proceedings itself by him.

Accordingly, there is no merit in this petition and it is dismissed.

11. The tenant petitioner is granted three months time to vacate provided that within one month from today he files an under taking before JSCC to the affect that on or before the expiry of the aforesaid period of three months he will willingly vacate and hand over the possession of the property in dispute to the landlord.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD

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

Civil Misc. Writ Petition No. 2594 of 2002

Sukhveer and others ...Petitioners
Versus
State of U.P. through Collector, Gautambudh Nagar and others ...Respondents

Counsel for the Petitioners:
Sri Pankaj Mithal

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

Land Acquisition Act-Ss. 4, 6 and 11-A-Land acquisition-Notification under S. 6 issued after one year from publication of notification under S.4-Held, invalid-Possession of land also not taken-Land in question not vested with NOIDA-Further

no award made till date-held, proceedings lapsed under S. 11-A.

Held: Para 7

In paragraph 4 it is stated that the petitioners are still in the possession of the land in dispute and the land has not vested in NOIDA. Till now the award has not been made and hence proceedings have lapsed under Section 11-A. The notification under Section 4 was last published on 31.10.1994 whereas the notification under Section 6 was published on 10.11.1995 i.e. after one year of the notification under Section 4. Hence it is invalid.

Case law discussed:

C.M.W.P.No. 27317 of 2001, decided on 5.3.2004

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

1. This writ petition has been filed for a mandamus declaring the land acquisition proceedings in pursuance of the notification dated 25.2.1994 and 10.11.1995 as having lapsed by virtue of Section 11-A of the Land Acquisition Act. It has also been prayed that the respondents be directed not to interfere with the petitioners possession over the land in dispute.

Heard learned counsel for the parties.

2. The petitioners claimed to be recorded as tenure holders of the khasra plots as stated in paragraphs 2 and 3 of the writ petition and they claimed to be in actual physical possession. On the request of the New Okhla Industrial Development Authority (NOIDA) a notification was issued under Section 4 of the Land Acquisition Act on 25.2.1994 vide Annexure 2 to the writ petition. A perusal of this notification shows that the land was being acquired for the planned industrial development in district Ghaziabad through NOIDA and there was urgency and Section 17 of the Act was invoked.

3. It is alleged in paragraph 9 of the writ petition that the notification was never pasted at any conspicuous place in the locality nor announced by beat of drums. Thereafter notification under Section 6 was issued on 10.11.1995 vide Annexure 3 to the writ petition.

4. In paragraph 13 of the writ petition it is alleged that the notification under Section 4 was last alleged to be published on 31.10.1994. Hence there can be no valid publication under Section 6 after 31.10.1995. Hence it is alleged that the publication of the notification under Section 6 either on 3.7.1997 or on 4.7.1997 was invalid.

5. In paragraph 18 and 19 of the writ petition it is alleged that the proceedings have lapsed in view of Section 11-A of the Land Acquisition Act since no award was made within two years of the publication of declaration under Section 6. It is alleged that the land never vested in the State as possession was not taken over within the said period of two years. It is alleged in paragraph 21 that the very fact that no steps were taken to take possession shows that there was no urgency in the matter. For the first time on 12.11.2001 the Collector, Gautambudh Nagar offered 80% of the estimated compensation under Section 17 (3-A). True copy of the notice dated 12.11.2001 is Annexure 4 to the writ petition. It is alleged that from the above notice dated 12.11.2001 it is clear that the respondents had not taken possession of the land in dispute till 12.11.2001. It is alleged in

paragraph 25 of the writ petition that after issuing notice dated 12.11.2001 the officers and employees of the NOIDA visited the site on 2.1.2002 and threatened to dispossess the petitioners and demolish their constructions. In paragraph 27 of the writ petition it is stated that the petitioners made enquiries and came to know that the respondents are alleged to have obtained possession of the acquired land vide possession memo dated 28.6.1999 and 29.6.1999 vide Annexure 6 and 7 to the writ petition. It is alleged in paragraph 28 of the writ petition that these documents are manipulated. In paragraph 29 of the writ petition it is alleged that there was no publication of the declaration issued under Section 6 made on 4.7.1997. The said declaration was not published in the newspaper nor pasted on the notice Board at any convenient place at the locality nor proclaimed by beat of drums. It is alleged that the possession memos dated 28.6.1999 and 29.6.1999 are merely orders of the A.D.M. (Land Acquisition), district Gautambudh Nagar directing the sub-ordinate staff to take possession of the acquired land. However, it is alleged that there is no document to show that the possession was actually taken over and handed over to NOIDA. In paragraph 38 it is alleged that nether any award under Section 11 was made nor any valid vesting in the State under Section 16 took place. Hence the acquisition proceedings have lapsed. In paragraph 45 of the writ petition it is alleged that the declaration under Section 6 was issued on 10.11.1995 and therefore the period of two years for making the award or taking possession expired much before the alleged possession memo dated 28.6.1999 and 29.6.1999. It is alleged in paragraph 49 of the writ petition that no compensation was offered or tendered to the petitioners under Section 17 (3-A).

6. A counter affidavit has been filed by NOIDA and we have perused the same. In paragraph 4 of the same it is stated that the notification under Section 4/17 dated 28.1.1994 was published in the Gazette on 25.2.1994, and the notification under Section 6/17 was issued on 10.11.1995. The Possession of the land was taken by the NOIDA on 28.6.1999 and at present this is part of Sector 43 of NOIDA which is a fully developed area. True copy of the notification and possession letters are Annexures C.A. 1, C.A. 2 and C.A. 3 to the counter affidavit. In paragraph 5 it is stated that the possession has been legally taken over by the respondents. In paragraph 8 it is stated that the declaration was made in the local newspapers as well as the mode prescribed under the Act. In paragraph 21 it is stated that as soon as the acquisition proceeding was completed NOIDA was given physical possession of the land in dispute. It is alleged that during the entire acquisition proceeding no legal objection was raised regarding the land in dispute. NOIDA has deposed 80% compensation with the concerned authority. The possession was taken over on 28.6.1999 and it is borne out from the possession letter. Once possession of the land has been taken over it has vested free from all encumbrances. The land was urgently required for the planned industrial development of NOIDA.

7. A rejoinder affidavit has been filed and we have perused the same. In paragraph 3 of the same it is alleged that the newspapers, 'Dainik Atha', 'Dainik Bharat', 'Dainik Bechain Bharat' and 'Dainik Navin Vishwamanav' in which

the notification was published are no newspapers at all. They do not have wide circulation. Hence the publication in these newspapers is no information to the public at all. It is denied that the substance of the notification was published in the locality either by beat of drums or by pasting it on the notice board. The document showing the local publication has been manufactured for the purpose of this notification. Notification under Section 6 was also not published in wider circulated newspapers. The possession of the land was not legally taken either on 28.6.1999 or on 29.6.1999. In paragraph 4 it is stated that the petitioners are still in the possession of the land in dispute and the land has not vested in NOIDA. Till now the award has not been made and hence proceedings have lapsed under Section 11-A. The notification under Section 4 was last published on 31.10.1994 whereas the notification under Section 6 was published on 10.11.1995 i.e. after one year of the notification under Section 4. Hence it is invalid.

8. On the facts of the case we find no merit in this petition. In **Kaloo Ram Vs. State of U.P. and others**, Civil Misc. Writ Petition No. 27317 of 2001 decided on 5.3.2004 the points which have been pressed in this petition have all been considered in great detail and have been rejected. The entire case law on all the points is mentioned in **Kaloo Ram's case** (supra). The effect of U.P. Act No. 8 of 1974 amending the Land Acquisition Act as interpreted by the Supreme Court and this Court has also been considered therein. Hence in view of the judgment in Kaloo Ram's case (Supra) this petition is dismissed. Interim order if any is vacated.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE POONAM SRIVASTAVA, J.

Civil Misc. Writ Petition No. 3004 of 2002

Dr. (Mrs.) Anita Sahai ...Petitioner
Versus
Director of Income Tax (Investigation) Kanpur and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Garg
Sri R.S. Agarwal
Sri Siddharth Pathak
Sri Dhruv Agarwal

Counsel for the Respondents:
C.S.C.

Income Tax Act-Ss.132 read with S.281 B-Search and seizure-Warrant-Legality-'Reason to believe' even if existed prior to issuance of warrant of authorization, held-an illegal warrant of authorization, since relevant material taken into consideration by Director/Commissions-subsequent to issuance of warrant of authorization-Hence search and seizure, held, illegal-Moreover prohibitory orders under S. 132 (3) read with S.281-B of the Act expired on 27.2.2003 and no extension is on record-Hence entire seizure and restraint order relating to Bank accounts in question, become infructuous-direction issued to release forthwith.

Held: Paras 27, 43 & 45

It is well settled that before taking any action under section 132 of the Act the condition precedent which must exist should be information in possession of Director of Income Tax which gives him reason to believe that a person is in possession of some article, jewellery,

bullion money which represents wholly or partly his income which was not disclosed or would not be disclosed. If the aforesaid condition is missing the Commissioner or Director of Investigation will have no jurisdiction to issue the warrant of authorization under section 132(1).

In our opinion the reason to believe must exist and must be taken into consideration by the Director/ Commissioner at the time of issuing of warrant of authorization. If the reason to believe comes into existence later i.e. after issuance of warrant of authorization, then in our opinion the warrant of authorization and entire search and seizure will be illegal even if the material on the basis of which the Director formed his opinion that there was reason to believe existed prior to issuance of warrant of authorization. In the present case even assuming that there existed relevant material prior to issuance of warrant of authorization which could have led the Commissioner to form his reason to believe under Section 132, it is an illegal warrant of authorization since the aforesaid material was taken into consideration by the Director/Commissioner, subsequent to the issuance of the warrant of authorization.

In view of the above facts the search and seizure in question is illegal and is liable to be quashed. We also find that the prohibitory orders under section 132 (3) read with section 281 B of the Act expired on 27.2.2003 and no extension is on the record. Hence the entire seizure and restraint order relating to the Bank accounts in question have become infructuous and they are directed to be released forthwith.

Case law discussed:

(1956) 29 ITR 390
(1976) 3 SCC 757
(1983) 139 ITR 1043
(1988) 170 ITR 592
(2003) 260 ITR 249
(2003) 264 ITR 28
(2003) 264 ITR 472
(1976) 104 ITR 389
(1969) 71 ITR 550 (566)
(1978) 1 SCC 405
(1997) 224 ITR 614
(1988) 170 ITR 592
(1988) 171 (St) 47
(1992) 194 ITR 32
(2000) 242 ITR 302 (Delhi)

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

Heard learned counsel for the parties.

1. The petitioners in both the aforesaid petitions are husband and wife and are both Doctors. Dr. Mrs. Anita Sahai is a Gynecologist running a maternity center by the name of Manavi Women Clinic and Maternity Centre at B-237, Sector 19, NOIDA. Dr. Sharad B. Sahai her husband is qualified Radiologist and is running a diagnostic center in the name and style of Transmed Diagnostics at A-769, Sector 19, NOIDA, which is also the residence of both the petitioners.

2. The petitioners have challenged the validity of the warrant of authorization under section 132(1) of the Income Tax Act and the initiation of block assessment proceedings, by issue of notice under section 158 BC of the Act by respondent No. 5, and continuation thereof by the respondent no.6 by issue of notice dated 26.10.2002 under section 142(1) of the Act.

3. The facts of the case are that on 19th March, 2002 at about 8.00 a.m. the respondents authorities their officers, servants and agents in purported exercise of the powers under section 132(1) of the Income Tax Act started search at the aforesaid premises of the petitioners as stated in paragraph 7 of the petition. It is

alleged in paragraph 7 of the petition that the aforesaid premises have been disclosed in the returns of the petitioners year after year.

4. In paragraph 8 of the petition it is mentioned that during the course of simultaneous search operation at the aforesaid premises the following valuables were found: -

a) Household jewellery valued at Rs.1.15 lakhs
b) Cash amounting to Rs.2.19 lakhs

5. Panchnama was prepared for the same by the authorized officers at the conclusion of the search on 20th March, 2002 at 3.00 a.m. In terms of the Panchnama cash of Rs.1.50 lakhs was seized. No valuable were seized from the premises B-237, Sector 19, NOIDA as nothing was found there except certain documents and patients records which were seized, in terms of the second Panchnama. True copies of the Panchnama are Annexure-4 and Annexure-5 respectively.

6. It is alleged in paragraph 4 of the petition that the petitioner Dr. Mrs. Anita Sahai has been carrying on her profession in the Clinic namely Manvi Women Clinic & Maternity Centre at B-237, Sector 19, NOIDA and has been regularly assessed to tax. She filed her latest return for assessment year 2001-02 with ITO Ward–I, NOIDA. For assessment year 2002-03 she made payment of advance tax in three installments prior to the date of the search. She had purchased property No. 759, Sector 19, NOIDA on 9.7.99 and the investment in the purchase of the property was disclosed in the relevant balance sheets accompanying her Income Tax Return for assessment years 2000-2001 and 2001-2002 vide Annexure-I and II to the writ petition.

7. The petitioner's husband Dr. Sharad B. Sahai who is petitioner in writ petition No. 3005 of 2002 is also a medical practitioner who resigned from CGHS in the year 1996 where he was working as Professor at that time. He has been assessed to tax regularly and his returns for assessment year 2001-2002 had been filed before the commencement of the search operation. For assessment year 2002-2003 he had paid three installments of advance tax. As his professional receipts were within the purview of section 44 AB of the Income Tax Act his return for that year was duly accompanied by the audited balance sheet and profit and loss account and the tax audit report under section 44 AB vide Annexure-III to the writ petition.

8. It is alleged in paragraph 9 of the petition that the cash found at the time of search was fully explainable being: -

a) Rs.1,84,000/= cash balance available with the petitioner and her husband out of professional receipts and
b) Rs.35,000/= belonging to Ms. Sharda Saxena aged aunt of the petitioner's husband who has been living there for quite sometime.

Despite this cash of Rs. 1.50 lakhs was seized.

9. In paragraph 10 of the petition it is alleged that from the Panchnama it appears that the warrant of authorization under section 132 to carry out the search was issued by the Joint Director of Income Tax (Investigation), Meerut who was present at the time of the search. Locker No.18 with Oriental Bank of Commerce, Sector 27, NOIDA standing

in the joint names of the petitioners was subjected to prohibitory under section 132 (3) of the Act on 19.3.2002. The said Locker was opened on 23.3.2002 and cash amounting to Rs. 5 lakhs and some house hold jewellery was seized vide Panchnama dated 23.3.2002 Annexure-VI to the writ petition. It is alleged in paragraph 12 of the petition that the cash found in the locker was part of the withdrawals made by the petitioner Dr. Mrs. Anita Sahai to the extent of Rs. 1.50 lakhs and of Dr. Sharad B. Sahai to the extent of Rs. 3.50 lakhs from their professional receipts. It is alleged that the same being disclosed assets no seizure could have been done in respect of them.

10. It is alleged in paragraph 13 of the petition that with the commencement of search operation on 19.3.2002 the authorized officer issued prohibitory orders under section 132 (3) in relation to various bank accounts belonging to Dr. Mrs. Anita Sahai as mentioned in paragraph 13 of the petition.

11. It is alleged in paragraph 14.01 that at the conclusion of the search the authorized officers in a most unusual behaviour called some person purporting to be the Valuation Officer who made a wild estimate of Rs.25 lakhs in relation to the property at A-759, Sector 19, NOIDA. It is alleged that the petitioners were exhausted after a gruesome strain of nearly 19 hours of search and seizure action during which they were even not allowed to sleep. Dr.Sharad B.Sahai was made to surrender a sum of Rs.10 lakhs as his undisclosed income and the petitioner was made to agree to such surrender. True copies of the statements are Annexure-VII and VIII to the writ petition. It is alleged in paragraph 15 of the writ petition that the entire search and seizure operation was illegal. The warrant of authorization stated to have been issued by the Director of Income Tax, Kanpur was dated 19.3.2002. It is alleged that the said authority while sitting at Kanpur could not possibly have issued the aforesaid warrant of authorization, as the search operation commenced at 8 a.m. the same day.

12. Moreover it is alleged in paragraph 16 of the petition that none of the three conditions mentioned in section 132 (1) of the Act have been fulfilled. It is alleged in paragraph 17 of the writ petition that there existed no material which could lead to the formation of reason to believe that any of the three conditions mentioned in section 132(1) of the Act had been fulfilled. It is alleged that there did not exist any material which could lead to formation of reason to believe that any asset owned and possessed by the petitioner was not, or would not be disclosed in due course.

13. In paragraph 23 of the petition it is alleged that the Joint Director of Income Tax (Investigation), respondent no.3 who is the authority stated to have issued the warrant of authorization did not have any power to issue such warrant. It is alleged that the Joint Director had not been empowered by the Central Board of Direct Taxes for this purpose vide paragraph 24 of the writ petition. Hence it is alleged that the entire search and seizure was illegal.

14. The petitioner made a representation dated 6.7.2002 vide Annexure-14 to the writ petition to the Director of Income Tax (Investigation), Kanpur objecting to the validity of the

search and requesting that the satisfaction note recorded prior to the issue of warrant of authorization be supplied to the petitioner so that the petitioner can examine the alleged material on the basis of which the warrant under section 132 was issued.

15. In paragraph 33 of the petition the petitioner that stated that she had objected to the transfer of jurisdiction from NOIDA to Meerut. The petitioners have also challenged the continuation of the block assessment proceedings and the notice dated 26.10.2002 issued by the respondent no.5 under section 142(1) of the Act.

The respondents have filed a counter affidavit.

In paragraph 3 of the same it has been stated that valid warrant of authorization under section 132 (1) were issued by the respondent no.1 and 3 and block assessment proceedings were validly initiated. In paragraph 5 of the same it is stated that the petitioner had not fully disclosed her income from the medical profession. In this connection a letter of the Joint Director of Income Tax, Meerut to the Director of Income Tax, Kanpur dated 11.6.2002 is Annexure-1 to the counter affidavit. It is alleged that the statement on oath of the petitioner was recorded at the time of the search and she admitted that two OPD registers are being maintained in respect of the patients for the same period. In one register on the same date the numbers of patients are more while on the same date in the other register the number of patients has been shown less. On 2.4.2001 the receipts of OPD patients in one register was shown as Rs.2,350/= while the receipts on the same date in the other register was shown only as Rs. 680/=. True copy of the statement of the petitioner Dr.Smt. Anita Sahai is Annexure-IA to the counter affidavit.

16. In paragraph 6 of the counter affidavit it is stated that the petitioner filed a reply dated 29.4.2002 before the Additional Director (Investigation), Ghaziabad stating that the property at A-759 Sector-19, NOIDA was purchased on 9.7.99 in the joint names of the petitioners for Rs.21, 40,000/= and later on further construction was done. The source of the investment in this property was stated to be taxable income/past saving/loans. It is alleged that the petitioner has not filed the copy of the purchase deed, not given the details of the amounts and sources of investment. Thus the petitioner failed to substantiate the investment in this property by documentary evidence. Dr. Mrs. Anita Sahai has declared investment of Rs.16, 79,300/= vide Annexure-2 to the counter affidavit. It is alleged that total investment on the purchase of the property is admitted to be Rs.21, 15,000/= while the disclosed investment is only Rs.16, 79,300/=. On 19.3.2002 Dr. Sharad B. Sahai in his preliminary statement alleged that the third floor of the house was constructed upto April, 2000 and investment of Rs.9 lakhs had been made thereon. It is alleged that the property at A.759, Sector –19, NOIDA was not fully disclosed in the return of Dr. Mrs. Anita Sahai.

17. Regarding the property No.B-237, Sector–19, NOIDA Dr. Sharad B. Sahai has declared the value of the house to be Rs.6, 21,667/= as on 1.4.97 in his income tax return. However, the petitioner has not supplied copy of the

purchase deed and details of year wise investment made on the constructions. It is alleged that the building at B-237 Sector-19, NOIDA is a three storeyed building with basement and this property exclusively belongs to Dr. Sharad B. Sahai for the use of his wife running her Clinic. Hence the fair market value of rent is assessable in the hand of Dr. Sharad B.Sahai. Hence it is alleged that his income has not been fully or truly declared.

18. In paragraph 11 it is denied that the petitioner has explained the source of cash of Rs.5 lakhs kept in the locker.

In paragraph 14 of the counter affidavit it is alleged that the petitioner has made surrender of his income/investment of his own free will without any force or compulsion by the search party. The search and seizure operation was legal and valid. In paragraph 16 it is denied that there existed no information on the basis of which the warrant could be issued.

19. In paragraph 20 of the counter affidavit it is stated that the original warrants of authorization were issued by the Director of Income Tax (Investigation), Kanpur in respect of premises No. 1-759, Sector-19, NOIDA and B-237, Sector-19, NOIDA. The Joint Director of Income Tax (Investigation), Meerut has issued consequential warrant of authorization only in respect of two lockers as per law. It is settled that the CBDT vide Notification dated 11.10.90 has empowered all the Dy. Director of Income Tax (Investigation) to perform the function of the Director. The Dy. Director of Income Tax (Investigation) have been designated as Joint Director of Income Tax (Investigation) w.e.f. 1.10.98. Hence the Joint Director has power to issue the warrant of authorization.

20. It is alleged by the respondents that as per his preliminary statement Dr. Sharad B.Sahai in reply to question No.8 stated that only cash of Rs.40, 000/= to 50,000/= was available at the residence at the time of the search. This statement was found to be incorrect as cash amounting to Rs.2.19 lakhs was found at the residence. In paragraph 20 of the counter affidavit it is stated that the petitioner had deliberately not mentioned in the writ petition that surrender of Rs. 10 lakhs was made at the time of search.

21. A rejoinder affidavit has also been filed and we have perused the same.

22. Learned counsel for the petitioner Sri Dhruv Agarwal had submitted that there was no reason to believe for initiating action under section 132(1) of the Act. This is evident from the fact that after the search and seizure operation was over the respondents in exercise of powers under section 131(1) A issued summons on 4.4.2002 and 6.5.2002 to the petitioner.

23. Section 131(1A) states: -

"(1A) If the Director General or Director or Joint Director or Assistant Director or Deputy Director, or the authorized officer referred to in sub-section (1) of section 132 before he takes action under clauses (i) to (v) of that sub-section, has reason to suspect that any income has been concealed, or is likely to be concealed, by any person or class of persons, within his jurisdiction, then, for the purposes of making any enquiry or

investigation relating thereto, it shall be competent for him to exercise the powers conferred under sub-section (1) on the income tax authorities referred to in that sub-section, notwithstanding that no proceedings with respect to such person or class of persons are pending before him or any other income tax authority."

24. Learned counsel for the petitioner has submitted that a perusal of section 131(IA) shows that notice can be issued thereunder only before the authorized officer takes action under section 132(1) of the Act. He submits that section 131(1A) consists of two conditions which are required to be fulfilled before any action is taken under section 132 (1). These conditions are: -
a) the Assessing officer has reason to suspect that any income has been concealed or is likely to be concealed and
b) he can make the enquiry before he takes action under clauses (i to v) of section 132(1).

25. Learned counsel for the petitioner has submitted that while section 131 (1A) uses the expression **'reason to suspect'**, section 132(1) uses the expression **'reason to believe'**. Reason to believe stands on a higher footing than reason to suspect, as held by the Constitution bench of the Supreme Court in **M.C.T. Muthiath and others v. The Commissioner of Income Tax, Madras and others (1956) 29 ITR 390. Similarly in ITO v. Lakhmani Mewal Das (1976) 3 SCC 757 (vide paragraph 12)** the Supreme Court held that the words used in section 147/148 of the Income Tax Act are reason to believe and not reason to suspect.

26. We are of the opinion that the submission of the learned counsel for the petitioner is correct. The respondents in their counter affidavit have stated that it was the respondent no.4 who had sent the material to respondent no.1 on the basis of which respondent no.1 had recorded his satisfaction under section 132(1). It is respondent no.4 himself who had issued summons under section 131(1A) of the Act after the search. As such there could not possibly be any material, which can be the basis of having reason to believe in respondent no.1. The very fact that respondents issued notices under section 131 (1A) after the search and seizure operation under section 132 of the Act goes to show that there was neither reason to believe nor material before the Authorizing officer on the basis of which he could issue a warrant under section 132 of the Act.

27. It is well settled that before taking any action under section 132 of the Act the condition precedent which must exist should be information in possession of Director of Income Tax which gives him reason to believe that a person is in possession of some article, jewellery, bullion money which represents wholly or partly his income which was not disclosed or would not be disclosed. If the aforesaid condition is missing the Commissioner or Director of Investigation will have no jurisdiction to issue the warrant of authorization under section 132 (1) vide **Ganga Prasad Maheshwari v. CIT Allahabad (1983) 139 ITR 1043; Nand Lal Tahiliani v. CIT (1988) 170 ITR 592; Dr. Sushil Rastogi v. Director of Income Tax Investigations (2003) 260 ITR 249; Ravi Iron Industries v. Director of Investigation (2003) 264 ITR 28 and Smt. Kavita Agrawal v.**

Director of Investigation (2003) 264 ITR 472.

28. It is submitted by learned counsel for the petitioner that a perusal of Section 132(1) would show that the scheme of section 132 of the Act postulates that the mind has to be applied by two officers at two different stages i.e.
i) firstly by the Director of Investigation or the Commissioner while issuing a warrant of search on the basis of his reason to believe that any person is in possession of any jewellery, ornaments or money etc. which are believed to be an undisclosed property; and
ii) Secondly by the authorized officer when during the search any particular jewellery, ornaments or money is found can be reasonably believed to be an undisclosed property.

29. Since the authorized officer has to form an opinion before seizing the particular ornaments he will necessarily have to investigate the matter. In the present case it appears that no such investigation has been done by the authorized officer at the time of seizure and indiscriminate seizure has been made by it contrary to the guidelines of the CBDT etc.

30. Learned counsel for the petitioner has relied on the decisions in **Om Prakash Jindal v. Union of India (1976) 104 ITR 389; Balwant Singh & others v. R.D. Shah, Director of Inspection (1969) 71 ITR 550 (566).**

31. In the present case it appears that there has been an indiscriminate seizure without any application of mind in as much as all the books of accounts which were duly reflected in the balance sheet, income tax returns, patient case records which are required for medico legal cases purposes, computers and other professionally related documents and articles have been seized by the department.

32. The respondents are trying to justify the seizure on the basis of post search materials, which in our opinion cannot be legally done. It is a well-established law as laid down by the Supreme Court of India that the order originally passed cannot be improved by way of affidavits vide **Mohinder Singh Gill v. The Chief Election Commissioner (1978) 1 SCC 405.**

33. Learned counsel for the petitioner has relied on several decisions of the Supreme Court and this court in support of his submission that the action of the respondents was illegal.

In **CIT v. Vindhya Metal Corporation (1997) 224 ITR 614,** the Supreme Court observed (page 618) :

"Mere unexplained possession of the amount, without anything more, could hardly be said to constitute information which could be treated as sufficient by a reasonable person, leading to an inference that it was income which would not have been disclosed by the person in possession for purposes of the Acts."

34. In **Dr. Nand Lal Tahiliani v. CIT (1988) 170 ITR 592,** the Allahabad High Court held that the averments of information under section 132 must be in good faith and there must be rational relation between the information and the material and reasonable belief. Mere rumour of roaring practice and charging of high rate of fee and living in a posh

house, in the absence of any other material, could not be construed as constituting information in consequence of which the director could have reason to believe that the petitioner had not disclosed his income or would not disclose it.

35. The search and consequent actions of the Department were therefore held to be illegal. The Supreme Court dismissed the S.L.P. against this judgment (see (1988) 171 (St.) 47).

36. In **L.R. Gupta v. Union of India (1992) 194 ITR 32,** it was held by the Delhi High Court that the expression "information" must be something more than a mere rumour or a gossip or a hunch. There must be some material, which can be regarded as information, which must exist on the file on the basis of which the authorizing officer can have reason to believe that action under section 132 is called for. It was also observed (therein) : "……an assessee is under no obligation to disclose in his return of income all the moneys which are received by him which do not partake of the character of income or income liable to tax. If an assessee receives, admittedly, a gift from a relation or earns agricultural income, which is not subject to tax, then he would not be liable to show the receipt of that money in his income tax return. Non-disclosure of the same would not attract the provisions of Section 132 (1)(c). It may be that the opinion of the assessee that the receipt of such amount is not taxable may be incorrect and, in law, the same may be taxable, but where the Department is aware of the existence of such an asset or the receipt of such an income by the assessee, then the Department may be fully justified in issuing a notice under Section 148 of the Act, but no action can be taken under Section 132 (1)(c)….."

37. In **Ajit Jain vs. Union of India (2000) 242 ITR 302 (Delhi),** it was observed (vide page 311): "the mere fact that the petitioner was in possession of the said amount could not straightaway lead to the inference that it was his undisclosed income….. The intimation simplicitor by the CBI that the money was found in the possession of the petitioner, which, according to the CBI, was undisclosed, in our view, without something more, did not constitute information within the meaning of Section 132 so as to induce a belief that the cash represented the petitioner's income which has not been or would not be disclosed. A bare intimation by the police or for that matter by any person, without something more, cannot be considered sufficient for action under Section 132 of the Act, for it would be giving naked powers to the authorities to order search against any person and prone to be abused. This cannot be permitted in a society governed by rule of law. Even assuming that the said amount was not reflected in the books of account of the company as claimed by the petitioner, the mere possession of the said amount by the petitioner could hardly be said to constitute information which could be treated as sufficient by a reasonable person, leading to an inference that it was income which has not been or would not have been disclosed by him for the purposes of the Act, particularly when the petitioner as well as the company, of which he was claiming to be the managing director, were regular assessees with the Income Tax Department."

38. In our opinion these decisions squarely apply to the facts of the present case. It seems to us that the Department has only acted on rumours. The petitioners are admittedly leading doctors in Noida having a huge practice as is evident from Annexures I, II and III to the petition. They were regularly assessed to tax and had filed income tax returns upto date (vide para 17 to the petition).

39. In paras 17 and 18 of the writ petition it has been clearly stated that there existed no material before the Director which could lead to the formation of reason to believe under Section 132 (1) for issuance of the warrant of authorization.

40. In para 16 of the counter affidavit it is stated that the Additional Director of Income-tax (investigation), Ghaziabad and the Joint Director of Income-tax (investigation), Meerut have brought material on record and they are made an analysis which shows that the petitioner and his wife have been concealing their income in the income-tax returns and were in possession of undisclosed assets. We are of the opinion that the aforesaid averment is very vague. When a positive everment is made in the writ petition that there were no material which could lead to formation of reason to believe in the Director for issuance of warrant of authorization under Section 132 the respondents must in their counter affidavit give specific details as to what particular facts and material were taken into consideration by the Director which led to formation of reason to believe under Section 132. This material must be taken into consideration by the Director at the time when he issues warrant of authorization under Section 132. If the Director considers this material after issuance of warrant of authorization it will be illegal, even if the material existed earlier. In the present case there is nothing to show that any relevant material was considered by the Director at the time of issuing the impugned warrant of authorization which led to formation of reason to believe that petitioners had undisclosed assets or undisclosed income.

41. No doubt para 16 of the counter affidavit has mentioned that the Director has recorded satisfaction note on 26.2.2002 but the said note has not been annexed to the counter affidavit, and we are unaware of its contents. The case was heard on many dates but yet the respondents have not filed copy of the alleged satisfaction note dated 26.2.2002 and hence no reliance can be placed on the same.

42. It may be mentioned that search and seizure cannot be a fishing expedition. Before search is authorized the Director must on the relevant material have reason to believe that the assessee has not or would not disclose his income.

43. In our opinion the reason to believe must exist and must be taken into consideration by the Director/Commissioner at the time of issuing of warrant of authorization. If the reason to believe comes into existence later i.e. after issuance of warrant of authorization, then in our opinion the warrant of authorization and entire search and seizure will be illegal even if the material on the basis of which the Director formed his opinion that there was reason to believe existed prior to issuance of warrant of authorization. In the present case even assuming that there existed

relevant material prior to issuance of warrant of authorization which could have led the Commissioner to form his reason to believe under Section 132, it is an illegal warrant of authorization since the aforesaid material was taken into consideration by the Director/Commissioner, subsequent to the issuance of the warrant of authorization.

44. The decision of this Court in **Dr. Nand Lal Tahiliani vs. CIT (1988) 170 ITR 592,** squarely applies to the facts of the present case.

The aforesaid decision has been affirmed by the Supreme Court.

45. In view of the above facts the search and seizure in question is illegal and is liable to be quashed. We also find that the prohibitory orders under section 132 (3) read with section 281 B of the Act expired on 27.2.2003 and no extension is on the record. Hence the entire seizure and restraint order relating to the Bank accounts in question have become infructuous and they are directed to be released forthwith.

46. It is not necessary for us in the circumstances to decide the additional point raised by the petitioners challenging the transfer of the case from NOIDA to Meerut.

Both these petitions are therefore **allowed.**

47. The warrants of authorization and all proceedings subsequent thereto are quashed. The cash and other articles and books seized from the petitioners shall be returned to them forthwith. Respondents are directed not to proceed with the notice dated 9.5.2002 and 26.10.2002.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.3.2004

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

Civil Misc. Writ Petition No. 52305 of 2000

Laxmi Narain Jagdish Saran Kanya Inter College, Moradabad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan

Counsel for the Respondents:
Sri N.C. Rajvanshi
Sri Ajit Kumar
Sri R.D. Gupta
Sri M.K. Rajvanshi

Land Acquisition Act- Ss.41 and 48(1)- Notifications under Ss. 4 and 6 State government satisfied that petitioner institution required a play ground for its students-Thereafter petitioner company entered into an agreement under S. 41- cost while issuing impugned order not afforded opportunity of hearing held illegal-petitioner is beneficiaries hence before withdrawal of acquisition-held, arbitrary and illegal-Acquisition for a public purpose-Possession for play ground given by forthwith.

Held- Paras 11 &16

Admittedly the State Government on being satisfied that the petitioner institution required a playground for its students issued a notification under Section 4 of the Act and thereafter after consideration of the objections issued a declaration dated 22.3.1983 under

Section 6 of the Act after recording its satisfaction that the land is needed for a company, namely, Laxmi Narain Jagdish Saran Shiksha Samiti for playground of the college. Thereafter the petitioners also entered into an agreement under Section 41 of the Act and the entire cost of acquisition were also borne by the petitioners. The State Government while issuing the impugned order has not afforded any opportunity of hearing to the petitioners which is clearly illegal inasmuch as the petitioner being beneficiaries were entitled to be heard before the withdrawal of the acquisition as it has to suffer substantial loss.

In the present case it is not disputed that the society is a company as defined in the Land Acquisition Act. Hence in view of the aforesaid decisions we are of the opinion that the impugned order was clearly arbitrary and illegal. The institution is a girls institution and in our opinion every educational institution should have a playground because there should be a healthy mind in a healthy body. Sport activities are an essential component of every educational institution because students should develop in a balanced manner and this requires sports activities also. Unfortunately in our country women have been suppressed for centuries but now the time has come when their potential must be liberated and they must be given good education. In our opinion good education includes some sports activity also. In every educational institution a playground for sports e.g. badminton, volleyball, Basketball, table tennis, tennis, etc. is a must so that the students can enjoy in schools while pursuing their studies. Hence in our opinion the acquisition was clearly for a public purpose and possession of the playground should have been given forthwith to the institution but for a long period it has been delayed.

Case law discussed:

AIR 1998 SC 1608
AIR 1998 SC 477
AIR 2001 SC 437

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

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

Heard learned counsel for the parties.

2. Writ petition no. 52305 of 2000 has been filed by the petitioner college through one Sri Ram Veer Singh, who claimed to be the Manager of the said college. By means of that petition the petitioner has challenged the impugned order dated 26.7.2000/4.8.2000 (Annexure 14 to the writ petition) by which a notification was issued under Section 48 (1) of the Land Acquisition Act releasing the land in question from acquisition under the Act.

3. The petitioner is an Intermediate College imparting education to girls students up to intermediate level in Moradabad city. Since the institution did not have a play ground for its students it approached the State Government for acquiring a land for that purpose. Hence a notification under Section 4 of the Land Acquisition Act was published in the official gazette on 29.3.1980. After disposing of the objections under Section 5-A the State Government issued a declaration under Section 6 vide Annexure 1 to the Writ petition.

4. It may be mentioned that the petitioner college is run by a society which is a company under Section 3 (e) of the Act. Hence the land acquisition proceedings for acquiring the land for the purpose of playground was taken in accordance with the procedure prescribed in Part VII of the Act. The society and the State Government entered into an agreement under Section 41 of the Act

which was published in the official gazette dated 21.3.1983 copy of which is Annexure 2 to the writ petition. The Special Land Acquisition Officer, Moradabad gave an award dated 23.8.1986 determining the amount of compensation payable to the tenure holders vide Annexure 3 to the writ petition. Against that award a reference under Section 18 is pending.

5. After the award of the Special Land Acquisition Officer the petitioner wrote several letters to the concerned authorities requesting them to take steps to handover the possession of the land in question to the petitioner vide Annexure 4 to 7 of the writ petition. However, it appears that in view of an injunction in civil suit no. 700 of 1986 Nathua vs. State of U.P. in favour of the tenure holder in the civil court possession could not be handed over to the petitioner. It is alleged in paragraph 14 of the writ petition that Kanhaiya Lal, son of deceased Nathua, tenure holder, submitted an application to the State Government for releasing the property from acquisition and on that application a letter dated 7.10.1998 was issued by the State Government to the Director of Education for his comments vide Annexure 8 to the writ petition. The District Magistrate also submitted his report on 3.11.1998 vide Annexure 10 to the writ petition.

6. In paragraph 18 and 19 of the writ petition it is stated that a Minister of State was interested in getting the property released from acquisition vide Annexure 1 to the writ petition. All of a sudden the impugned order dated 26.7.2000/4.8.2000 has been passed releasing the property from acquisition.

7. It is alleged that the impugned order is wholly illegal. It is alleged that the State Government had initiated proceedings for acquisition after being fully satisfied that the disputed land was required by the petitioner for the purpose of playground for a girls school which was for public purpose, and now arbitrarily it has taken a contrary view. The petitioner has already deposited the requisite amount towards the acquisition charges as far back as on 10.11.1979, and the State Government has also entered into an agreement under Section 41 on 18.2.1983 which was published in the official gazette. The State Government has acted arbitrarily without cogent reasons in issuing the impugned notification. It is alleged that the petitioner being an educational institution still requires a playground for the students. It is alleged that the impugned order does not disclosed any reason.

8. In writ petition no. 52305 of 2000 a counter affidavit has been filed on behalf of respondent no. 3, Kanhaiya Lal and we have perused the same. In paragraph 3 (d) it is alleged that the Manager of the college, Sri Ram Veer Singh in his letter dated 18.1.1999 addressed to the Special Land Acquisition Officer, Moradabad copy of which is Annexure CA 4 has stated that the property is not in the possession of the institution and for this reason there is no justification for utilizing the same.

9. In writ petition no. 26898 of 2001, which is the connected writ petition, it has been stated in paragraph 14 and 15 of that writ petition that the committee of management was illegally taken over by Kamal Chandra Agarwal by putting up a totally forged and false

management of the institution of which Kamal Chandra Agarwal himself became the President and made Sri Ram Veer Singh as Manager. The said forged committee was created in 1998 and several petitions are pending regarding the dispute about the committee of management. It is alleged in paragraph 15 of writ petition no. 26898 of 2001 that Sri Kamal Chandra Agarwal manipulated the entire proceedings for de-acquisition of the land and for this purpose he got a letter dated 18.1.1999 issued by Sri Ram Veer Singh copy of which is Annexure CA 4 to the writ petition no. 52305 of 2000 and Annexure 6 to the writ petition no. 26898 of 2001. In paragraph 16 of the writ petition no. 26898 of 2001 it is alleged that when petition no. 1 came to know about the facts he wrote a letter dated 22.6.1999 objecting to the proceedings for de-notification. True copy of the letter dated 22.6.1999 is Annexure 7. The petitioner also gave a similar representation to other authorities e.g. Joint Director of Education, Moradabad vide Annexure 8. the petitioner in writ petition no. 26898 of 2001 also wrote several letters to other authorities for taking possession of the land in question. However, despite all this the impugned order of release has been passed. It is alleged in paragraph 23 that the conduct of Sri Kamal Chandra Agarwal was to grab the said land by some means. The tenure holder has allegedly executed a registered agreement to sell the land in favour of Sri Kamal Chandra Agarwal on 15.9.1986 and has also executed a registered Power of Attorney in his favour vide paragraph 30 of writ petition no. 52305 of 2000.

10. We have carefully perused the affidavits in these petitions and we are of the opinion that these petitions deserve to be allowed.

11. Admittedly the State Government on being satisfied that the petitioner institution required a playground for its students issued a notification under Section 4 of the Act and thereafter after consideration of the objections issued a declaration dated 22.3.1983 under Section 6 of the Act after recording its satisfaction that the land is needed for a company, namely, Laxmi Narain Jagdish Saran Shiksha Samiti for playground of the college. Thereafter the petitioners also entered into an agreement under Section 41 of the Act and the entire cost of acquisition were also borne by the petitioners. The State Government while issuing the impugned order has not afforded any opportunity of hearing to the petitioners which is clearly illegal inasmuch as the petitioner being beneficiaries were entitled to be heard before the withdrawal of the acquisition as it has to suffer substantial loss.

12. In ***Larsen and Toubro Ltd. vs. State of Gujrat*** *AIR 1998 SC 1608* the Supreme Court held that where the acquisition is for a company then opportunity of hearing and reasons have to be given by the State Government. In the present case the impugned order does not disclose any good reason. All it says is that the land is not needed in the public interest, which is neither here nor there. In para 30 of writ petition no. 26898 of 2001 it is alleged that the land is still required for the Girls College as it has no playground.

13. In para 26 of writ petition no. 26898 of 2001 it has been alleged that the impugned order of de-notification was

passed without giving opportunity of hearing to the petitioner. This allegation is not seriously disputed.

14. In ***Amarnath Ashram Trust Society vs. Governor of U.P.*** *AIR 1998 SC 477* the Supreme Court held that withdrawal of land acquisition proceeding by the State Government after the agreement between a company and State Government was executed and Section 6 notification was issued was arbitrary and illegal.

15. In ***State Government Houseless Harijan Employees Association Vs. State of Karnataka*** *AIR 2001 SC 437* also a similar view has been taken.

16. In the present case it is not disputed that the society is a company as defined in the Land Acquisition Act. Hence in view of the aforesaid decisions we are of the opinion that the impugned order was clearly arbitrary and illegal. The institution is a girls institution and in our opinion every educational institution should have a playground because there should be a healthy mind in a healthy body. Sport activities are an essential component of every educational institution because students should develop in a balanced manner and this requires sports activities also. Unfortunately in our country women have been suppressed for centuries but now the time has come when their potential must be liberated and they must be given good education. In our opinion good education includes some sports activity also. In every educational institution a playground for sports e.g. badminton, volleyball, Basketball, table tennis, tennis, etc. is a must so that the students can enjoy in schools while pursuing their studies. Hence in our opinion the acquisition was clearly for a public purpose and possession of the playground should have been given forthwith to the institution but for a long period it has been delayed.

17. We, therefore, direct that the possession of the land shall be given forthwith to the petitioner institution so that the playground is available for the girls school immediately. We may also mention that the suit which was filed to prevent taking over possession was to our mind wholly malafide and frivolous and in fact not maintainable. The suit proceedings are hence quashed. We further deprecate the attitude of Kamal Chandra Agarwal respondent no. 4 in writ petition no. 52305 of 2000 who got an agreement and power of attorney signed in his favour from the tenure holder. We are satisfied that it was he who was behind the release proceeding for his mischievous ends. The letter of Ram Veer Singh dated 18.1.1999 Annexure CA 4 was clearly motivated and at any event it cannot be treated to mean that the college should not have a playground. In para 30 of writ petition no. 26898 of 2001 it is alleged that the college still needs a playground as it has none.

18. The petitions are allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2004

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

Civil Misc. Contempt Petition No.673 of 1993

Naresh Chandra Kapoor ...Petitioner
Versus
O.P.S.Malik and another ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri K.M. Dayal
Sri P.N. Saxena
Sri L.M. Singh
Sri Atul Dayal
Sri A.K. Gupta
Sri S.C. Dwivedi

Counsel for the Respondents:
Sri K.S. Singh
Sri S.M.A. Kazmi
Sri U.M. Sharma
S.C.

Contempt of Courts Act, 1971-Sections 12 and 20-Writ Petition-Order summoning respondents No. 1 personally before court-Application for contempt of Court disobedience and violation of stay order-Application for recall of summoning order on ground that, since writ petition finally dismissed-Held, one can not escape the consequences of disobedience and violation of interim orders-Committed by them prior to dismissal of writ petition-plea bar under S. 20 of Contempt of Courts, not applicable.

Held: Paras 21 & 29

Applying the principle laid down by the Hon'ble Supreme Court to the facts of the present case I find that the in the present case the proceedings for contempt commenced when the petitioner filed the present application/petition on 8th April, 1993 and, therefore, the bar of Section 20 of the Act is not applicable.

Thus, in view of the settled proposition that one cannot escape the consequences of disobedience and violation of interim orders committed by them prior to the dismissal of the writ petition, the argument of Sri Sharma that since the writ petition has finally dismissed the notices could not have been issued is misplaced. If the argument of Sri Sharma is accepted then it would be subversive of the Rule of Law of Law and would seriously erode the majesty and dignity of the Courts. There cannot be any dispute that after the dismissal of the writ petition no benefit can be derived from the interim order as it stands merged but the position for action being taken for the alleged disobedience/violation of the interim orders prior to the dismissal/final orders being passed in the proceeding stands on a different footing.

Case law discussed:
1991 (2) AWC 881
AIR 1975 SC 2057
(1992) 3 SCC 1
1997 (1) AWC 453
JT 2001 (6) SC 330
AIR 1997 SC 1240
1994 (Supp) 2 SCC 641
AIR 1999 SC 2140
JT 2001 (1) SC 123
AIR 1956 All 258
1991 Karn.L.J. 352
1952 (2) All.E.R. 567

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

1. Before deciding the present application for recall of the order dated 14.5.2002 passed by this Court issuing Notice to O.P.S. Malik, it is necessary to state the facts giving rise to the application filed for contempt and the proceedings taken by this Court.

2. Naresh Chandra Kapoor, hereinafter referred to as the petitioner, who has filed the present petition under Section 12 of the Contempt of Courts Act, 1971, hereinafter referred to as the Act, for the alleged violation and disobedience of the order dated 16th March, 1993 passed by this Court in Civil Misc. Writ Petition no. Nil of 1993 (Naresh Chandra Kapoor v. Smt. Sayeeda Farooqui and others, is the landlord and owner of House no.12/24 Hastings Road (Nyaya Marg), Allahabad. He had filed a Small Causes Court Suit being SCC Suit no.19 of 1982 for ejectment of Smt. Sayeeda Farooqui and others. It was decreed by the Additional District Judge, Allahabad on 27th April, 1985. Smt. Sayeeda Farooqui filed Revision no.325 of 1985 before this Court. The petitioner also filed an application under Section 21 (1)(a) of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 before the Prescribed Authority which was registered as Case No.113 of 1983 for release of the premises on the ground of bona fide requirement. It is alleged that during the pendency of the revision Smt. Sayeeda Farooqui and another person were on a look out to pass on illegal possession of the premises to third persons and contacted O.P.S. Malik, opposite party no.1. He moved an application for allotment. While the application for allotment was pending the petitioner apprehended that the Prescribed Authority may allot the premises in favour of the opposite party no.1 as he was an I.P.S. Officer and was holding a very high position in the district being the D.I.G, C.R.P.F., Allahabad. The petitioner also apprehended that the Prescribed Authority is colluding with the opposite party no.1. He approached this Court by filing Civil Misc. Writ Petition no. Nil of 1993 in which this Court passed the following order on 16th march, 1993:-

"Heard the learned counsel for the petitioner.

It is asserted that in the facts and circumstances of the present case, specially considering the ratio of the decision of this court in the case of B.D. Seth vs. Vth Additional city Magistrate and others, reported in 1988 (2) A.R.C. 442, no vacancy could have been deemed to come into existence so as to confer jurisdiction on the Rent Control & Eviction Officer to proceed under section 16 of the Act. It is further asserted that the date fixed in the case was preponed without any notice to the petitioner.

Apart from the normal mode of Service, the petitioner shall serve the respondents no.1, 2 and 4 out of Court, for which purpose, if the requisite steps taken by 22nd March, 1993, the office shall handover necessary notices etc., to the learned counsel for the petitioner. The notices issued shall indicate that the writ petition shall be listed for admission on 19th April, 1993 by which date the said respondents may file a counter affidavit.

An affidavit of service shall be filed within 15 days.

List this petition for admission on 19th April, 1993.

In the meanwhile, the further proceedings consequent upon the order dated 20.2.1993 as well as the order dated 12.3.1993 shall remain stayed till 19th April, 1993."

3. It is alleged by the petitioner that when he along with one of his sons went to serve a certified copy of the order dated 16th march, 1993 passed by this Court upon O.P.S. Malik, opposite party no.1 and S.N. Pandey, Prescribed Authority, opposite party no.2 at the residence, the opposite party no.1 was present at the residence of opposite party No.2 in Collectorate compound. The opposite party No.1 took the order and after seeing the same he returned it back to the petitioner with abusive language to the petitioner as well as the Hon'ble Judges of this Court. The words which were said to have been uttered by O.P.S. Malik and as alleged by the petitioner are being reproduced below:-

"MAIN YEH BUNGALOW CHHODUNGA NAHIN CHAHE JO BHI MUJHE ISAKE LIYE KARNA PADE HIGH COURT KE JUDGE SALE TO ANDHEY HAIN STAY ORDER DENA UNAKE LIYE MAJAK HAI KISAKE KHILAPH ORDER DEY RAHE HAIN YEH BHI NAHIN DEKHATE YEHAN SE BHAG JAO NAHIN TO SALE ANDER KAR DUNGA"

4. The opposite party no.2 returned the order after seeing the same and told the petitioner to file the same in Court on the next date. It is also alleged that O.P.S. Malik has also threatened on telephone with dire consequences not only to the petitioner but to his entire family and also abused him. It is also alleged that on 17th March, 1993 when the petitioner went to the Court of the Rent Control & Eviction Officer to serve certified copy of the order on 16th March, 1993 passed by this Court, S.N. Pandey, opposite party no.2 did not come to Court on that date at all. On 18th March, 1993 the petitioner went to serve the copy of the notices, writ petition, etc. upon O.P.S. Malik, opposite party no.1 along with two Advocate witnesses but the opposite party no.1 refused to accept the notices and copies of the writ petition and application and returned it back to the petitioner. He also entered into the possession of the premises with the help of S.N. Pandey, opposite party no.2. It is also alleged that S.N. Pandey opposite party no.2 passed by this Court under the pressure of O.P.S. Malik, opposite party no.1 allotted the premises in favour of O.P.S.Malik, opposite party no.1 secretly without giving any hearing to the petitioner. Thus, both the opposite parties have violated the orders passed by this Court on 16th March, 1993 and have intentionally disobeyed the said order, thus, have committed contempt of this Court. In view of theses allegations, the petitioner had approached this Court by filing an application under Section 12 of the Act for taking action against the opposite parties for committing contempt. This Court vide order dated 9th April, 1993 directed the opposite party no.2, S.N. Pandey, to appear in person with record. The order passed on 9th April, 1993 is reproduced below:-

"Opposite party no.2 Sri S.N. Pandey is directed to appear in person before this Court and is further directed to place the entire record relating to premises No.12/24, Nyaya Marg, Allahabad involved in Case No.100/92 on 27.4.1993. Office is directed to send the notice immediately to the C.J.M. Allahabad for the opposite party and the C.J.M. Allahabad is further directed to serve the notices of this case on Sri S.N. Pandey through the District Magistrate, Allahabad

to secure his presence before this court on 27.4.1993.

This case shall remain tied up to me."

5. Thereafter on 27th April, 1993 the Court passed the following order:-

"List this petition on 4th May, 1993. Sri S.N. Pandey will again appear on that date. The record will remain under sealed cover with the Court.

Learned counsel appearing on behalf of Sri Pandey has desired to obtain a photo copy of the order sheet of the record of Case No.100 of 1992 which is to be kept of in sealed cover. The Registrar is directed to arrange to give a photo copy of the order sheet of Case No.100 of 1992 to Sri Pandey within 48 hours."

6. On 4th May, 1993 the Court directed the opposite party no.2 to place before the Court the daily cause list register and the diary of the cause list maintained by his Reader containing list of case that were fixed on 11th, 12th, 16th and 19th March, 1993. The case was fixed for 5th May, 1993 on which date the Court passed the following order:-

Sri S.N. Pandey, has appeared before me and has stated that there is only one daily cause list register maintained in his office. There is no other diary etc. maintained by his Reader regarding the cause list of cases. The daily cause list register was produced before me, as directed by order dated 4.5.1993.

The Registrar is directed to obtain photo copy of the daily cause list register for the dates 11.3.1993, 12.3.1993, 13.3.1993, 14.3.1993, 15.3.1993, (which has been over written as 16.3.1993), 16.3.1993 (which has been over written as 17.3.1993) and 18.3.1993 which appears to be earlier written as 17.3.1993. After photocopy are obtained the original register may be returned to Sri Pandey. The Photo copy of the same be kept on record under the signatures of the Registrar.

In case the Registrar receives any application for issuance of copy of register, the same may be issued from the original to the respective applicant.

The opposite party no.2 has prayed for and is granted seven days time to file his reply to the affidavit file din support of the Contempt application.

List on 14.5.1993. On that Sri S.N. Pandey is directed to appear before me."

7. It appears that the opposite party no.2 filed a special Appeal being Special Appeal no.306 of 1993 in which the Court vide order dated 10th May, 1993 had stayed further proceedings. In view of the stay order passed in the Special Appeal, the proceedings remained stayed. The Division Bench had passed the following orders:-

"Shri Umesh Narain Sharma, learned counsel for the appellant has brought to our notice the fact that the writ petition giving rise the contempt application was dismissed on 4th May, 1993 and thereafter an application was made by the applicant in the contempt application praying that the proceeding in the contempt case may be stayed. The learned contempt Judge allowed the applicant time to file counter-affidavit and directed

the contemnor to appear before the contempt Judge, on 14th May, 1993. In the circumstances we direct that further proceeding in the contempt application shall remain stayed.

List on 17th May, 1993.

Learned counsel for the respondent has prayed that record of the contempt case should be available to the Hon. Contempt Judge when the case is next listed on 14th May, 1993.

Since the case is listed before the Hon contempt Judge on 14th May, 1993 it is obvious that the record shall be produced before the Hon contempt Judge.

The appellant need not appear in person in the contempt proceedings till further orders of this court."

The Division Bench thereafter on 18th May, 1993 dismissed the Special Appeal.

8. After about 21 months of the dismissal of the Special Appeal the Registry put a note on 29th February, 1997 for placing the case before the Court. It is not clear as to whether the case was listed before the Court or not as there is nothing on the order sheet. However, there is another note on the order sheet of 19th January, 2001 for putting up the case before the Court. It appears that the Registry did not place the case before the Court as the said note has been followed by the subsequent dates 1st February, 2001 and 5th February, 2001. However vide order dated 12th March, 2001 the records of Civil Revision no.105 of 1993 and 106 of 1993 which were called for by this Court were directed to remitted back to the office of the District Judge, Allahabad. The matter was again placed before the Court on a note submitted by the Registry on 2nd May, 2001 on the order sheet regarding compliance of the order dated 12th March, 2001. The compliance was noted by the Court vide order dated 17th May, 2001 and the case directed to be listed in the 3rd week of July, 2001. It appears that either the case was not listed before the Court or for one reason or the other it was not taken up by the Court as there is nothing on the order sheet. On an application being moved by the petitioner on 19th March, 2002 for taking action against the opposite party for committing contempt, which application was directed to be listed with previous papers vide order dated 21st March, 2002, the case was listed before the Court on 14th May, 2002. As notice has not been issued to either of the opposite parties and there were serious allegations made in the petition, which was duly supported by an affidavit, the Court vide order dated 14th May, 2002 issued notices to both the opposite parties. The Court had passed the following order:-

"It has been stated by Shri S.C. Dwivedi learned counsel for the petitioner that the special Appeal No.306 of 1993 which was filed against the order dated 27.4.1993 passed by the learned Single Judge, wherein notice has been issued to the opposite party no.2 directing him to appear in person, has been dismissed on 18.5.1995. A copy of the order is contained in annexure 2 to the affidavit of the petitioner filed in support of the Application No.53854 of 2002.

Let notice be issued to the opposite no.2.

Serious allegations have made in paragraph 18 of the affidavit filed in support of the contempt petition against the opposite party no.1 which have reiterated in para 19 of the affidavit of the petitioner.

In this view of the matter, let notice be issued to the opposite party No.1 also.

Notice shall be sent to the Director General of Police to be served upon Shri O.P.S. Malik wherever is posted presently. The notice shall communicate that the case will be taken up on 2.7.2002.

The opposite parties no.1 and 2 shall appear in person on 2.7.2002.

List the matter on 2.7.2002."

9. Both the opposite parties preferred Special Appeals against the order dated 14th May, 2002 being Special Appeals no.168 and 169 of 2002 in which the Special Appeal Bench was not inclined to proceed with the appeals and disposed of the same vide order dated 2nd July, 2002. On 2nd July, 2002 the opposite party no.2 S.N. Pandey personally appeared before the Court. An application for exemption of personal appearance as also for recall of the order dated 14th May, 2002 was filed by the opposite party no.1 O.P.S. Malik. In the application for exemption it was stated that he is presently posted as I.G. Border Security Force at Rajasthan-Gujarat Frontier (Border) and seeing the tense situation on Indo-Pak Border there has been a standing order to all officers posted at the Boarder not to leave station and area at any cost. Considering the grounds given by the O.P.S. Malik, opposite party no.1, the Court vide order dated 2nd July, 2002 had exempted his personal appearance on that date and for future dates. The following order was passed by the Court on 2nd July, 2002:-

"Pursuant to the order dated 14.5.2002 S.N. Pandey O.P. No.2 is personally present in Court today. However, O.P. No.1 is not personally present today as he is posted as I.G. Border Security Force, Rajasthan. His personal appearance for today and future dates is exempted. Sri S.C. Dwivedi prays for and is allowed ten days for filing a reply.

List on 26.7.2002.

O.P. No.2 shall appear personally on the said date."

10. Thereafter the case was listed several times but could not be taken up for one reason or the other, mainly, on the request of the learned counsel for the opposite party no.1.

11. Under the Rules of the Court, the application for recall of an order is placed before the same Judge, if available, who has passed the said order and therefore the application for recall has been placed before me.

12. I have heard Sri U.N. Sharma, learned Senior Counsel on behalf of the opposite party no.1 and S/Sri P.N. Saxena and Ashok Khare, learned Senior Counsels assisted by Sri S.C. Dwivedi on behalf of the petitioner on the application for recalling the order dated 14th May, 2002.

13. Sri U.N. Sharma learned Senior Counsel sought recalling of the order

dated 14th May, 2002 passed by this Court on the following grounds:-

1. The Court cannot initiate any proceedings for contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed as, according to him, the alleged violation/disobedience of the order dated 16th March, 1993 is said to have been committed on 16th April, 1993 and 18th April, 1993 and a period of more than one year had expired since then. This Court had issued notices to the opposite party no.1 only on 14th May, 2002 i.e. after about nine years and, therefore, it is hit by Section 20 of the Act.

2. The order dated 16th March, 1993 passed in Civil Misc. Writ Petition no. Nil of 1993 has merged in the final order dated 4th May, 1993 when the writ petition itself had been dismissed by this Court and, therefore, the opposite party no.1 cannot be proceeded for the alleged violation/disobedience of the order dated 16th March, 1993 which no longer exists after 4th May, 1993.

14. He relied upon the decision of this Court in the case of **Smt. Shanti Kunwar Chaudhary v. Committee of Management, Vidyawati Darbari Girls Inter College, Allahabad and another, 1991(2) AWC 881**, wherein this court has held that an order passed in pursuance of or on the basis of any order or direction issued by the court in writ petition, falls automatically with the dismissal of the writ petition.

15. He further relied upon a decision of the Hon'ble Supreme Court in the case of **M/s. Mahabir Jute Mills Ltd. v. Shibban Lal**, AIR 1975 SC 2057 wherein it was held that an order of reference made by the State Government under the Industrial Disputes Act on the basis of an order passed in writ petition falls automatically with the dismissal of the writ petition and it is not even necessary for making a prayer for quashing of such an order of reference.

16. He further referred to the decision of the Hon'ble Supreme Court in the case of **Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association CSI Cinod Secretariat, Madras**, (1992) 3 SCC 1 wherein the Hon'ble Supreme Court has held that staying of the operation of an order would mean that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.

17. He further relied upon a decision of this court in the case of **Indra Bahadur v. State of U.P. through its Collector and another, 1997 (1) AWC 453** wherein this Court has held that even where the writ petition is withdrawn the effect is that the interim order passed in earlier petition stood merged in the final order and the order of appointment of the petitioner on a Class III post in pursuance of the earlier order passed by this Court stood nullified.

18. Sri P.N. Saxena and Sri Ashok Khare, learned Senior Counsels on behalf of the petitioner submitted that for the alleged violation and disobedience of the order dated 16th March, 1993 passed by this Court in Civil Misc. Writ Petition no. Nil of 1993, the petitioner had approached this Court by filing the petition on 8th

April, 1993. It came up before the Court on 9th April, 1993 in which the Court had passed an order directing S.N. Pandey, opposite party no.2 to appear in person along with the records. They submitted that under Section 20 of the Act, the time limit for initiation of the proceedings for contempt has been fixed as one year. According to them, initiation of the proceedings and taking of the cognizance are two different things. They submitted that as the proceedings were initiated by filing of the petition, the limitation prescribed under Section 20 of the Act was not attracted. They relied upon a decision of the Supreme Court in the case of **Pallav Seth v. Custodian & Ors., JT 2001 (6) SC 330**, wherein the Hon'ble Supreme Court has held that filing of a petition drawing attention of the Court for taking cognizance of the contempt would be initiating the proceeding for contempt and the subsequent action taken thereon of refusal or issuance of a notice or punishment are only steps following or succeeding to such initiation. They further submitted that all the persons and the parties are obliged to follow the interim orders passed by a Court of law and they cannot disobey the same merely on the ground that final orders have not been passed or the matter is still pending before the Court for adjudication. They further submitted that contempt proceedings can be initiated for disobedience/violation of the interim orders passed by a Court of law even where the petition is ultimately dismissed. They relied upon a decision of the Hon'ble Supreme Court in the case of **Tayabhai M. Bagasarwalla and another v. Hind Rubber Industries Pvt. Ltd., etc., AIR 1997 SC 1240**.

19. Sri U.N. Sharma, learned Senior Counsel submitted that when this Court on 9th April, 1993 had directed the opposite party no.2 to appear in person, it was presumed that Court did not find any good grounds for issuance of notice and taking action against the opposite party no.1 and, therefore, appears to have confined the contempt proceeding against opposite party no.2 alone.

20. Having heard the learned counsel for the parties I find that the petitioner has alleged the violation/disobedience of the order dated 16th March, 1993 passed by this Court in Civil Misc. Writ Petition no. Nil of 1993. The opposite parties are said to have violated/disobeyed the orders dated 16th March, 1993 and 18th March, 1993. The present petition was filed in the Registry on 8th April, 1993 i.e. within a month. It came up before the Court on 9th April, 1993 when the Court directed the opposite party no.2, S.N. Pandey, who was the Prescribed Authority at that time, to appear before the Court along with certain records. Notices had not been issued to either of the opposite parties. The Hon'ble Supreme Court in the case of Pallav Seth (supra) has held that proceedings for civil contempt normally commence with a person aggrieved bringing to the notice of the Court the willful disobedience of any judgment, decree, order etc. which could amount to the commission of the offence. The attention of the Court is drawn to such a contempt being committed only by a person filing an application in that behalf. In other words, unless a Court was to take a suo motu action, the proceeding under the Act would normally commence with the filing of an application drawing to the attention of the Court to the contempt having been committed. When the judicial procedure requires an application being filed either before the

court or consent being sought by a person from the Advocate-General or a Law Officer it must logically follow that proceeding for contempt are initiated when the applications are made.

The Hon'ble Supreme Court further held as follows:-

"40. In other words, the beginning of the action prescribed for taking cognizance of criminal contempt under Section 15 would be initiating the proceedings for contempt and the subsequent action taken thereon of refusal or issuance of a notice or punishment thereafter are only steps following or succeeding to such initiation. Similarly, in the case of a civil contempt filing of an application drawing the attention of the court is necessary for further steps to be taken under the Contempt of Courts Act, 1971.

41. On of the principles underlying the law of limitation is that a litigant must act diligently and not sleep over its rights. In this background such an interpretation should be placed on Section 20 of the Act which does not lead to an anomalous result causing hardship to the party who may have acted with utmost diligence and because of the inaction on the part of the Court a contemner cannot be made to suffer. Interpreting the Section in the manner canvassed by Mr. Venugopal would mean that the court would be rendered powerless to punish even though it may be fully convinced of the blatant nature of a contempt having been committed and the same having been brought to the notice of the court soon after the committal of the contempt and within the period of one year of the same. Section 20, therefore, has to be construed in a manner which would avoid such an anomaly and hardship both as regards the litigant as also by placing a pointless fetter on the part of the court to punish for its contempt. An interpretation of Section 20, like the one canvassed by the appellant, which would render the constitutional power of the courts nugatory in taking action for contempt evening cases of gross contempt, successfully hidden for a period of one year by practicing fraud by the contemner would render Section 20 as liable to be regarded as being in conflict with Article 129 and/or Article 215. Such a rigid interpretation must therefore be avoided.

42. The decision in Om Prakash Jaiswal's case (supra), to the effect that initiation of proceedings under Section 20 can only be said to have occurred when the court formed the prima facie opinion that contempt has been committed and issued notice to the contemner to show cause why it should not be punished, is taking too narrow a view of Section 20 which does not seem to be warranted and is not only going to cause hardship but would perpetrate injustice. A provision like Section 20 has to be interpreted having regard to the realities of the situation. For instance, in a case where a contempt of a subordinate court is committed a report is prepared whether on an application to court or otherwise, and reference made by the subordinate court to the High Court can take further action under Section 15. In the process, more often than not, a period of one year elapses. If the interpretation of Section 20 put in Om Prakash Jaiswal's case (supra) is correct, it would mean that notwithstanding both the subordinate court and the High Court being prima facie satisfied that contempt has been committed the High Court would

become powerless to take any action. On the other hand, if the filing of an application before the subordinate court or the High Court making of a reference by a subordinate court on its own motion or the filing an application before an Advocate-General for permission to initiate contempt proceedings is regarded as initiation by the court for the purposes of Section 20, then such an interpretation would not impinge on or stultify the power of the High Court to punish for contempt which power, Director of Education hors the Contempt of Courts Act, 1971 is enshrined in Article 215 of the Constitution. Such an interpretation of Section 20 would harmonise that Section with the powers of the courts to punish for contempt which is recognized by the Constitution."

21. Applying the principle laid down by the Hon'ble Supreme Court to the facts of the present case I find that the in the present case the proceedings for contempt commenced when the petitioner filed the present application/petition on 8th April, 1993 and, therefore, the bar of Section 20 of the Act is not applicable.

22. So far as to whether the Court could take cognizance and issue notices to the opposite parties for the alleged violation/disobedience of the order dated 16th March, 1993, which was an interim order and the writ petition in which the said order had been passed had been finally dismissed by this Court is concerned, it may be mentioned here that it is well settled that an order even though interim in nature is binding till it is set aside by a competent Court and it cannot be ignored on the ground that the Court which passed the order had no jurisdiction to pass the same. Any disobedience and violation of the interim orders can expose the person alleged to be disobeying/violating the order for action under the Act. In the case of **Ravi S. Naik v. Union of India**, 1994 (Suppl) 2 SCC 641 the Hon'ble Supreme Court has held as follows:-

"In the absence of an authoritative pronouncement by this Court the stay order passed by the High Court could not be ignored by the Speaker on the view that his order could not be subject matter of Court proceedings and his decision was final. It is settled law that an order, even though interim in nature, is binding still it is set aside by a competent Court and it cannot be ignored on the ground that the Court which passed the order had no jurisdiction to pass the same. Moreover the stay order was passed by the High Court which is a superior court of Record and in the case of a superior Court of Record, it is for the Court to consider whether any matter falls within its jurisdiction or not. Unlike a Court of limited jurisdiction, the superior court is entitled to determine for itself questions about its own jurisdiction.(See: Special Reference No.1 of 1964: (1965(1) SCR 413 at p.499: AIR 1965 SC 745 at p.789)."

23. In the cases of **K.S. Villasa v. M/s. Ladies Corner and another**, AIR 1999 SC 2140 and **Madan Lal Gupta v. Ravinder Kumar**, JT 2001 (1) SC 123, the Hon'ble Supreme Court has held that if an interim order is intentionally violated or disobeyed action can be taken under the provisions of the Act.

24. In the case of **State of U.P. v. Ratan Shukla**, AIR 1956 All 258 this Court has held that it is not the law that a

Court dealing with a mater which is beyond its jurisdiction can be contemned with impunity or that the liability of a person to be punished for contempt of a court depends upon whether the court was acting within its jurisdiction at the time when it is alleged to have been contemned the opposite party. This Court has held as follows:-

"That fact that Shri S.M. Ifrahim had no jurisdiction to hear the appeals, however, does not mean that no contempt could be committed of him. So long as he was seized of the appeals, no contempt could be committed of him.

It is not the law that a Court dealing with a matter which is beyond its jurisdiction can be contemned with impunity or that the liability of a person to be punished for contempt of a court depends upon whether the court was acting within its jurisdiction at the time when it is alleged to have been contemned the opposite party, therefore, cannot claim that he is not guilty of contempt because Shri S.M. Ifrahim had no jurisdiction to decide the appeals."

25. In **D.M. Samyulla v. Commissioner, Corporation of the City of Bangalore**, 1991 Karnataka Law Journal 352, the Karnataka High Court stated the law in the following terms, with reference to the decision of the Court of Appeal in **Hadkinson v. Hadkinson,** (1952 (2) All ER 567): "the principle laid down in the said decision is, a party who knows an order, whether it is null or valid, regular or irregular, cannot be permitted to disobey it and it would be dangerous to allow the party to decide as to whether an order was null or valid or whether it was regular or irregular."

26. In **Hadkinson v. Hadkinson**, (1952) 2 All ER 567 the Court of Appeal held:

"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottemnham, L.C. said in Chuck v. Cremer, (1846) 1 Co-op Temp Cott 205 (342).

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it..... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid---- whether it was regular or irregular, that they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.'

27. Such being the nature of this obligation, two consequences will in general follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the Court by such a

person will be entertained until he has purged himself of his contempt."

28. Approving the view taken by this Court in the case of **State of U.P. v. Ratan Shukla**,(supra) and of the Karnataka High Court in the case of **D.M. Samyulla** (supra) the Hon'ble Supreme Court in the case of **Tayabbhai M. Bagasarwalla and another v. Hind Rubber Industries Pvt. Ltd.,** etc., AIR 1997 SC 1240 has held that where the interim orders have been flouted and disobeyed when they were in force and ultimately it has held that the Civil Court has no jurisdiction to entertain the suit, the interim orders made therein do not become non est and the persons can be punished for their violation/disobedience. The Hon'ble Supreme Court held as follows:-

"...Ultimately, no doubt, High Court has found that the Civil Court had no jurisdiction to entertain the suit but all this took about six years. Can it be said that orders passed by the Civil Court and the High Court during this period of six years were all non est and that it is open to the defendant to flout them merrily, without fear of any consequence. Admittedly, this could not be done until the High Court's decision on the question of jurisdiction. The question is whether the said decision of the High Court means that no person can be punished for flouting or disobeying the interim/interlocutory orders while they were in force, i.e., for violations and disobedience committed prior to the decision of the High Court on the question of jurisdiction. Holding that by virtue of the said decision of the High Court (on the question of jurisdiction), no one can be punished thereafter for disobedience or violation of the interim orders committed prior to the said decision of the High Court, would indeed be subversive of rule of law and would seriously erode the dignity and the authority of the Courts. We must repeat that this is not even a case where a suit was filed in wrong Court knowingly or only with a view to snatch an interim order. As pointed out hereinabove, the suit was filed in the Civil Court bona fide. We are of the opinion that in such a case the defendants cannot escape the consequences of their disobedience and violation of the interim injunction committed by them prior to the High Court's decision on the question of jurisdiction."

29. Thus, in view of the settled proposition that one cannot escape the consequences of disobedience and violation of interim orders committed by them prior to the dismissal of the writ petition, the argument of Sri Sharma that since the writ petition has finally dismissed the notices could not have been issued is misplaced. If the argument of Sri Sharma is accepted then it would be subversive of the Rule of Law of Law and would seriously erode the majesty and dignity of the Courts. There cannot be any dispute that after the dismissal of the writ petition no benefit can be derived from the interim order as it stands merged but the position for action being taken for the alleged disobedience/violation of the interim orders prior to the dismissal/final orders being passed in the proceeding stands on a different footing.

30. In view of the forgoing discussion, I do not find any good ground for recalling the order dated 14th May, 2002. The application for recall is, therefore, rejected.

31. As about 10 years are shortly going to expire and the proceedings are only at the stage just after issue of Notice, the opposite parties be directed to appear personally before the Court on 24th February, 2004. List this case before the appropriate Bench on 24th February, 2004.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2004

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 29882 of 1995

Ram Bahadur Alias Laxmi Prasad
...Petitioner
Versus
Collector, Hamirpur and others
...Respondents

Counsel for the Petitioner:
Sri N.B. Nigam

Counsel for the Respondents:
Sri L.S. Srivastava
Sri S.K. Singh
Sri B.R. Singh
S.C.

U.P. Imposition of Ceiling on Land Holdings Act, 1960-Ss. 10 (2) and 14-Code of Civil Procedure, 1908-S.11-Writ Petition-Maintainability-Successive Writ Petition-Abuse of process of Court-Principles of Constructive resjudicata-Applicability-Writ petition-held, not maintainable-Once petitioner had failed in his action against original orders cannot be permitted to challenge consequential action-held, barred by principles of constrictive res-judicata.

Held: Para 20 & 25

It is needless to point out that dispossession of the petitioner was only a consequential action on the orders passed by the Prescribed Authority and the Commissioner declaring the land of the petitioner as surplus. Once the petitioner had failed in his action again the original orders, he cannot be permitted to challenge the consequential action taken thereto. As a matter of fact, the writ petition was only an attempt to reopen the chapter, which has been closed with the dismissal of the earlier writ petition filed by the petitioner by couching the relief in different words. The petitioner was not justified in filing the present writ petition. This writ petition was barred by the principles of constructive res judicata as explained by the Hon'ble Supreme Court in Gurbux Vs. Bhure Lal AIR 1964 SC 1810; Gurdasji & Company Vs. State of Maisoor AIR 1975 SC 813; Commissioner of Income Tax Vs. T.P. Kumaran 1996(10) SCC 561. This writ petition, as a matter of fact, was legally not maintainable and deserves to be dismissed.

Reference is made to the provisions of Section 14 of the U.P. Consolidation of Holdings Act, which only provides for an opportunity to be afforded to the tenure holder to give his choice before any land is taken as surplus. The said section does contemplate that if the choice is not exercised by the tenure holder, the authorities, under the U.P. Imposition of Ceiling on Land Holdings Act, shall remain silent and would not declare certain plots of the tenure holders as surplus. In the facts of the case it is apparently clear that the petitioner was afforded opportunity to exercise his choice, which he deliberately did not do so and as such the Prescribed Authority was justified in declaring the chak no. 81 (now plot no. 362) as surplus.

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard Sri N.B. Nigam on behalf of the petitioner and Sri S.K. Singh

counsel on behalf of the respondent nos. 5 to 17 as well as standing counsel on behalf of the respondent nos. 1 to 4.

2. This writ petition is an example of abuse of process of the court by a person filing successive writ petitions and obstructing the allotment of surplus land to poor persons for whose interest the U.P. Imposition of Ceiling on Land Holdings Act was enacted. This Court is deeply shocked with the manner in which successive writ petitions have been filed before this court and interim orders obtained time and again.

3. The relevant fact for decision of the writ petition are that proceedings under Section 10(2) were initiated against the petitioner under the U.P. Imposition of Ceiling on Land Holdings Act, 1960 as early as in the year 1975.

4. The petitioner filed objections. The objections were considered and the Prescribed Authority by means of the order dated 15th June, 1976 declared 22.5 Acres as surplus in terms of irrigated land. Against the said order of the Prescribed Authority, the petitioner filed an appeal before the District Judge, Hamirpur, being appeal no. 523 of 1976.

5. On 11th November, 1976 the appeal was allowed and the Appellate Authority reduced the area of surplus land to 11.2 Acres in terms of irrigated land. Against the said order the petitioner filed writ petition no. 1025 of 1977 (First writ petition), which was allowed by this Court on 4th September, 1978 and the matter was remanded to the District Judge for reconsideration of the appeal filed by the petitioner.

6. On remand the District Judge by means of the order dated 16th December, 1979 allowed the appeal and reduced the area of the surplus land to 7.82 Acres. Despite the aforesaid order having been passed, the petitioner does not claims to have exercised any choice in respect of the land to be taken as surplus.

7. The Prescribed Authority, subsequent to order dated 16th December, 1979, passed an order on 11th March, 1980 directing that Chak No. 81, which belonged to petitioner be declared surplus.

8. On an application being filed by the petitioner, the order dated 11th March, 1980 was recalled by the Prescribed Authority on the ground that the same was an ex parte order. The Prescribed Authority, after recalling the order dated 11th March, 1980, passed an order on 26th February, 1981 and required the Lekhpal to submit his comment with regards to choice submitted by the petitioner. From the said order, which has been enclosed as Annexure-1 to the writ petition, it is apparently clear that the petitioner had already exercised his choice inasmuch as the order reads as follows:-

एक पक्षीय आदेश दिनांक ११.३.८० को निरस्त किया जाता है। खातेदार के विकल्प पर तहसीलदार महोवा से दिनांक २७.३.८१ तक आख्या मांगी जावे। जिस पर खातेदार उसी दिन अपना पक्ष प्रस्तुत कर सकता है।

9. The petitioner had exercised his choice on 20th March, 1980. It is, thus, clear that the petitioner had exercised the choice prior to the passing of the order dated 26th February, 1981.

10. The Prescribed Authority thereafter by means of the order dated 18.4.1981, after obtaining the report from

the Tehsildar, rejected the choice exercised by the petitioner and directed that Chak No. 81, total area 7.82 Acres irrigated, be declared as surplus.

11. Against the aforesaid order of the Prescribed Authority, petitioner (as stated in paragraph 4 of the writ petition) had filed appeal no. 12 of 1981. It is further alleged in the said paragraph that the said appeal was dismissed by the District Judge on 24.8.1981. However, liberty was given to the petitioner to exercise fresh choice of plot other than the choice which has been earlier exercised by the petitioner by means of application dated 20.3.1980.

12. Against the said order of the District Judge, the petitioner filed writ petition no. 14117 of 1981 (Second Writ Petition) and again succeeded in obtaining an ex parte order. This writ petition has been dismissed by this Court on 19th October, 1984. However, the order passed by this Court has not been brought on record. Similarly the order dated 24.8.1981 passed by the District Judge in appeal has also not been brought on record.

13. Against the order dated 19th October, 1984 it is claimed that the petitioner had filed Special Leave Petition before the Hon'ble Supreme Court. The number of said Special Leave Petition is 15259 of 1985. It has not been stated as to when the Special Leave Petition was filed and dismissed. In the writ petition it has not been mentioned as to whether the Special Leave Petition was entertained by the Hon'ble Supreme Court or not and as to whether at any point of time any interim order was granted by the Hon'ble Supreme Court. The date of dismissal of the appeal has also been concealed in the writ petition.

14. From the record it is apparent that the petitioner in order to install the proceedings before the Prescribed Authority made an other application that possession of land in question be not taken as special leave petition is pending. This court is unable to see how this application could be filed specifically when there was no interim order in the special leave petition. Thus, there is deliberate attempt on the part of the petitioner to avoid dispossession from the surplus land on one pretext or other.

15. On the basis of his application, requiring the Prescribed Authority not to take possession of the surplus land despite the writ petition and the special leave petition have been dismissed, the petitioner started second innings of litigation. He filed appeal before the Commissioner against the order of the Prescribed Authority dated 12.4.1988, whereby the Prescribed Authority has rejected his application for not to dispossess the petitioner as specials leave petition of the petitioner was said to be pending. There is no provision under the U.P. Imposition of Ceiling on Land Holdings Act under which said appeal could be filed by the petitioner. The Commissioner also rejected his appeal on 12th September, 1988

16. The said order of the Commissioner has also not been brought on record for the reasons best known to petitioner. Against the said order of the Commissioner, the petitioner filed a writ petition no. 12732 of 1989 (Third Writ Petition) and again succeeded in obtaining

ex parte stay order, whereby his dispossession was stayed.

17. Surprisingly, after more than 5 years the petitioner got the aforesaid writ petition no. 12732 of 1989 dismissed as not pressed.

18. With the dismissal of the writ petition the entire objections raised by the petitioner with regard to his dispossession from the land in question stood adjudicated between the parties before this Court. Now it is not open to petitioner to raise any issue with regards to the surplus land specifically chak no. 81, which was converted into plot no. 363 (for reference paragraph 13 of the writ petition) after consolidation.

19. The petitioner, in order to further install his dispossession, now initiated third innings and filed the present writ petition no. 29882 of 1995 (fourth petition). In this writ petition also the petitioner obtained an ex parte interim order whereby his dispossession has been stayed. The petitioner is enjoining the benefit of the said interim order for last more than 9 years. The reliefs prayed for in this writ petition are as follows:-

"(i) issue a suitable writ, order or direction in the nature of a writ of mandamus directing the respondents not to dispossess the petitioner from the disputed land otherwise in accordance with law and not to interfere with the possession of the petitioner in any way.

(ii) issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case, and to-

(iii) award cost of the petition to the petitioner."

20. It is surprising that no order whatsoever has been challenged in the writ petition. This Court fail to understand how the petitioner can ask for writ of mandamus restraining the respondents from dispossessing the petitioner from surplus land once he had himself withdrawn his earlier writ petition no. 12732 of 1989 referred to above. It is needless to point out that dispossession of the petitioner was only a consequential action on the orders passed by the Prescribed Authority and the Commissioner declaring the land of the petitioner as surplus. Once the petitioner had failed in his action again the original orders, he cannot be permitted to challenge the consequential action taken thereto. As a matter of fact, the writ petition was only an attempt to reopen the chapter, which has been closed with the dismissal of the earlier writ petition filed by the petitioner by couching the relief in different words. The petitioner was not justified in filing the present writ petition. This writ petition was barred by the principles of constructive *res judicata* as explained by the Hon'ble Supreme Court in **Gurbux Vs. Bhure Lal** *AIR 1964 SC 1810;* **Gurdasji & Company Vs. State of Maisoor** *AIR 1975 SC 813;* **Commissioner of Income Tax Vs. T.P. Kumaran** *1996(10) SCC 561.* This writ petition, as a matter of fact, was legally not maintainable and deserves to be dismissed.

21. The petitioner, against the order of Prescribed Authority dated 23rd April, 1988 whereby plot no. 362 was earmarked as surplus land to be allotted to the persons entitled to the same, filed an application dated 20th November, 1990 under Section 27(4) of the Act before the Commissioner and obtained an ex parte

interim order again on 28th November, 1990. The Commissioner has rejected the application on 30th November, 1995, against which the petitioner had filed the writ petition no. 8473 of 1996 (fifth petition) challenging the allotment of the surplus land made in favour of respondent nos. 5 to 17 who were admittedly the persons entitled to allotment of the surplus land in accordance with the provisions of U.P. Imposition of Ceiling on Land Holdings Act. This writ petition is not legally maintainable in view of the earlier writ petition filed by the petitioner, referred to above, as also in view of the dismissal of his writ petition no. 29882 of 1995. The allotment of land is only consequential action. Any infirmity or illegality in the procedure of allotment, as alleged by the petitioner, cannot be a concern of the petitioner as he is neither an applicant for allotment of the land nor has any right or interest in the allotment of the surplus land. It is apparent that the petitioner has filed this writ petition only to complicate the issue before this Court and some how for other prolong the pendency of the writ petition by getting writ petition no. 8473 of 1996 connected with the writ petition no. 29882 of 1995.

22. From the facts, which have been stated above, it is apparently clear that the ceiling of the petitioner was declared finally on 16th December, 1979 and for last more than 25 years the petitioner, by series of litigations and writ petitions has remained in possession over the surplus land. As already noticed above, the proceedings initiated by the petitioner subsequent to dismissal of his special leave petition by the Hon'ble Supreme Court, were totally unfounded and without authority of law. The petitioner for last 20 years by initiating uncalled for proceedings and by filing successive writ petitions has succeeded in installing the purpose for which U.P. Imposition of Ceiling on Land Holdings Act has been enacted. The conduct of the petitioner is highly unsatisfactory and disentitles him to any relief under Article 226 of the Constitution of India.

23. However, contention raised on behalf of the petitioner may be considered. It is stated by the counsel appearing on behalf of the petitioner that here is a lacuna in Section 14 of the U.P. Imposition of Ceiling on Land Holdings Act inasmuch as the said section does not take into consideration the order which are passed under Section 12 of the U.P. Imposition of Ceiling on Land Holdings Act after objections are filed by the tenure holder. The said contention raised on behalf of the petitioner is totally misconceived and it is a clear case of misreading of section 14. Further, admittedly, the petitioner had filed an appeal under Section 13 of the U.P. Imposition of Ceiling on Land Holdings Act against the order of the Prescribed Authority. The ceiling limit of the petitioner was finally determined under the appellate order. Section 14 specifically take care of the order passed under Section 13 and for possession of the surplus land being taken thereafter. In such circumstances, the petitioner could not have raised the issue which has been submitted on his behest as referred to above.

24. It is further contended on behalf of the petitioner that there is no order of the Prescribed Authority declaring chak no. 81 (now plot no. 362) as surplus. It is contended that the order, whereby chak no. 81 was declared as surplus dated

11.3.1980 had been recalled by the Prescribed Authority by means of the order dated 25.2.1981 and thereafter the petitioner was permitted to exercise his fresh choice under order of the District Judge passed in appeal no. 12 of 1981. The said contention raised by the petitioner appears to be attractive on the face of it. However, in legal scrutiny same is found hollow. It has not been disputed by the petitioner that both the District Judge as well as Prescribed Authority by means of his order dated 20.3.1980 had given an option to petitioner to exercise a fresh choice other than one which had been exercised by him by means of his application dated 20.3.1980. The writ petition is completely silent as to what was done by the petitioner in that regard. The petitioner has not informed this Court as to whether the fresh choice was exercised by him or not subsequent to the order of the District Judge dated 24.8.1988 and subsequent to the dismissal of his writ petition as well as the special leave petition against the same. If the petitioner himself has not decided to exercise a fresh choice despite liberty being granted by the authorities as well as this Court, the petitioner cannot be permitted to turn around and seek this remedy in writ petition. There is no illegality in taking possession over the chak no. 81 which was subsequently converted into plot no. 362. The petitioner cannot be permitted to approach this Court for the relief to permit him to exercise a fresh choice in respect of surplus land as petitioner has not exercised his choice despite opportunity earlier.

25. Reference is made to the provisions of Section 14 of the U.P. Consolidation of Holdings Act, which only provides for an opportunity to be afforded to the tenure holder to give his choice before any land is taken as surplus. The said section does contemplate that if the choice is not exercised by the tenure holder, the authorities, under the U.P. Imposition of Ceiling on Land Holdings Act, shall remain silent and would not declare certain plots of the tenure holders as surplus. In the facts of the case it is apparently clear that the petitioner was afforded opportunity to exercise his choice, which he deliberately did not do so and as such the Prescribed Authority was justified in declaring the chak no. 81 (now plot no. 362) as surplus.

26. From the fact, which have been stated above, this Court has no doubt that the petitioner has misused the process of this Court and he has retained possession, by filing successive applications and writ petitions, of the land which was declared surplus as early in the year 1979.

27. In such circumstances, the petitioner must necessarily be required to pay cost for the aforesaid attempt made by him. This Court feels that Rs. 40,000/- is fair and sufficient to be fixed as exemplary cost. The amount of cost should be deposited by the petitioner with the District Magistrate, Hamirpur within one month from today. Failing which the District Magistrate shall recover the said amount from the petitioner as arrears of land revenue and shall report compliance to this Court. The money so realized would be transmitted to Legal Aid Services Authority High Court, Allahabad for being used as an assistance to poor litigants.

28. With these directions, the writ petition is dismissed. Interim order, if any, stands vacated.

29. The copy of this order be issued to Sri Piyush Shukla, standing counsel, for being communicated to the District Magistrate, Hamirpur.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.2.2004

BEFORE
THE HON'BLE S.P. SRIVASTAVA, J.
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 4220 of 2004

Abdus Salam @ A. Salam ...Petitioner
Versus
Election Commission of India and another ...Respondents

Counsel for the Petitioner:
Sri S.G. Hasnain

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

Representation of Peoples Act, 1951- Ss. 10-A and 11- Natural Justice- Order by Election Commission disqualifying for 3 years-categorical finding that inspite of notice no explanation furnished- Applications by petitioner for removal of disqualification giving full facts and his version detail- rejection of applications caused no prejudice to petitioner- No personal hearing or opportunity required- Writ dismissed.

Held- Para 14,15 & 17

We are clearly of the opinion that the duty to hear does not necessarily mean affording of personal hearing or audience and an aggrieved party may be heard orally or through the medium of written representation ensuring that no prejudice is caused.

Considering the peculiar facts and circumstances of the present case, we are clearly of the view that the impugned order cannot be held to be vitiated in law on account of its having been passed in violation of principles of natural justice, as claimed and further that an effective opportunity had been afforded to the petitioner.

It should not be lost sight of that for considering the question of violation of principles of natural justice, all that has to be seen is, as to whether the concerned authority had acted in a fair manner. There is nothing rigid or mechanical about the principles of natural justice. Whenever, there is a reference to the rules of natural justice, it signifies that the principle and procedure which are to be applied have to be such which in any particular set of circumstances, are right, just and fair.

Case Law discussed:
AIR 1966 SC 671
AIR 1967 SC 1398
1994 Supp.(2) SCC 463
1957 SCR 1151: AIR 1957 SC 648

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

1. Heard the learned counsel for the petitioner.

2. The learned standing counsel representing the respondents who has put in appearance at this stage on advance notice has also been heard.

3. The petitioner is aggrieved by the order of the Election Tribunal dated 7.1.2003 whereby exercising the jurisdiction as envisaged under Section 10-A of the Representation of the People Act, 1951 the petitioner was disqualified

for a period of three years. In the order dated 7.1.2003 the Tribunal has recorded a categorical finding that inspite of notice the petitioner had not furnished any explanation.

4. The fact that the petitioner had not submitted any explanation is not disputed. Further the correctness of the recitals contained in the order dated 7.1.2003 passed by the Election Commission is also not disputed. However, after passing of the order dated 7.1.2003, the petitioner moved an application under Section 11 of the aforesaid Act seeking removal of the disqualification imposed under order dated 7.1.2003. In this connection the petitioner has filed copies of the applications dated 6.2.2003, 25.7.2003 and 6.10.2003. In the application filed under Section 11 of the Act, which was supported by an affidavit, the petitioner had set forth his grievances in detail.

5. The Election Commission after considering the applications rejected the same vide the impugned order dated 20th October, 2003.

6. The only submission urged and pressed by the learned counsel for the petitioner in support of this writ petition is that the petitioner had not been afforded any personal hearing.

7. Learned counsel for the petitioner has strenuously urged that the respondent –authority has acted in a manifestly illegal manner in passing the impugned order without giving the petitioner an opportunity of being heard.

8. In the aforesaid connection, it has further been urged that it was incumbent upon the respondent–authority to afford an opportunity of personal hearing to the petitioner before taking a decision on his application filed under Section 11 of the Representation of People Act. Since the respondent–authority had not afforded any personal hearing to the petitioner, it is urged that the impugned order disposing of the application is vitiated in law and is not at all sustainable.

9. The question as to whether hearing necessarily involved affording of opportunity of personal hearing or opportunity to give written submissions/representation setting forth the version of the aggrieved party is substantial compliance of affording of opportunity of hearing has been the subject matter of various decisions of the Apex Court.

10. In its decision in the case of Madhya Pradesh Industries Ltd. Vs. Union of India AIR 1966 SC 671, the Apex Court had observed that it is no doubt the principle of natural justice that a quasi judicial Tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him. However, it was further observed that such an opportunity need not necessarily be by personal hearing. It can be by written representation. It was further observed that whether the said opportunity should be by a written representation or by personal hearing depends upon the facts of each case and ordinarily it is in the discretion of the Tribunal.

11. In its decision in the case of The State of Assam Vs. The Gauhati Municipal Board, Gauhati, AIR 1967 SC

1398, the decision of the High Court that omission to give an opportunity of oral hearing violated the principles of natural justice was reversed by the Apex Court holding that the opportunity to submit an explanation was sufficient.

12. In another decision in the case of State Bank of Patiala Vs. Mahendra Kumar Singhal 1994 Supp.(2) SCC 463 the Apex Court had indicated that no rule could be brought to its notice, which required the appellant to grant a personal hearing. It was further indicated that the rule of natural justice does not necessarily in all cases confer a right of audience, as indicated in the earlier decision of the Apex Court in the case of F.N. Roy V. Collector of Customs, Calcutta, 1957 SCR 1151: (AIR 1957 SC 648). In its decision in this case, the Apex Court had observed that there is no rule of natural justice that at every stage, a person is entitled to a personal hearing.

13. In the present case the petitioner had given his version and the facts in support of his case in detail in his application filed under Section 11 of the Representation of People Act. The petitioner, in the circumstances, could not be held to be prejudiced at all.

14. We are clearly of the opinion that the duty to hear does not necessarily mean affording of personal hearing or audience and an aggrieved party may be heard orally or through the medium of written representation ensuring that no prejudice is caused.

15. Considering the peculiar facts and circumstances of the present case, we are clearly of the view that the impugned order cannot be held to be vitiated in law on account of its having been passed in violation of principles of natural justice, as claimed and further that an effective opportunity had been afforded to the petitioner.

16. The contention of the learned counsel for the petitioner, referred to here in above, is totally devoid of any merit and is not at all acceptable.

17. It should not be lost sight of that for considering the question of violation of principles of natural justice, all that has to be seen is, as to whether the concerned authority had acted in a fair manner. There is nothing rigid or mechanical about the principles of natural justice. Whenever, there is a reference to the rules of natural justice, it signifies that the principle and procedure which are to be applied have to be such which in any particular set of circumstances, are right, just and fair.

18. Natural justice, in fact, refers to fair play in action. It is a concept which has succeeded in keeping the arbitrary action within the limits of preserving the rule of law. But with all the religious rigidity with which it should be observed, since it is ultimately weighed in balance of fairness, the Courts have been circumspect in extending it to situations where it would cause more injustice than justice.

19. Taking into consideration the facts and circumstances as brought on the record, in their totality no ground has been made out for any interference by this Court while exercising the extraordinary jurisdiction as envisaged under Article 226 of the Constitution of India.

This writ petition accordingly fails and is dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2004

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

Civil Misc. Writ Petition No.35180 of 1997

Tej Prakash Jaiswal and another ...Petitioners
Versus
Mukhya Nagar Adhikari, Nagar Nigam, Allahabad and others ...Respondents

Counsel for the Petitioners:
Sri R.G. Padia
Sri Prakash Padia
Sri Shesh Kumar

Counsel for the Respondents:
Sri S.D. Kautilya
Sri Dinesh Dwivedi
S.C.

Service Law-Regularisation Appointment as Clerk on daily wages-Achieved proficiency of 25 W.P.M. in typing at that stage-Selection Committee after acknowledging. This fact recommended for regularisation-appointed as clerk-Regularisation also done-At later stage condition of 25 w.p.m. in typing was not necessary to be imposed afresh in performance, experience, merits and recommendation of Selection Committee-Impugned order set aside-Petitioners to be treated as regular employees-Their termination on ground of not achieving typing test of 25 w.p.m. in Hindi and change in service condition, held, illegal.

Held: Para 6

I have heard learned counsel for the petitioner, I find that petitioners were earlier appointed as daily wagers and had achieved the proficiency of 25 w.p.m. at that stage and the selection committee after acknowledging this fact recommended the cases of petitioners and the petitioners were given appointment of as a clerk i.e. since they were above Intermediate and were having proficiency in 25 w.p.m. typing. Keeping in view the recommendations of the selection committee they were regularised also. Now at later stage a condition of 25 w.p.m. in typing was not necessary to be imposed afresh in the regularisation order as the regularisation was only made keeping in view of the performance experience merits and the recommendation of the selection committee. In view of the above observations I find that the decision of Ved Prak Sagar (supra) as referred by respondents is not applicable in the present facts and circumstance and in view of the above observation the order dated 7.10.1997 is not legally sustainable, therefore, it is set aside and the petitioner are to be treated as regular employee and their termination on the ground of not achieving the typing test of 25 w.p.m. in Hindi on the ground of change in service condition of the petitioner is illegal not justifiable. In view of the above the writ petition is allowed. No order as to cost.

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

Heard Dr. R.G. Padia, learned Senior Advocate for the petitioners and Sri S.D. Kautilya, learned counsel for the respondents.

1. In this petition prayer has been made to quash the order dated 7.10.1997 (Annexure-8 to the writ petition) whereby the services of the petitioners were terminated as they could not achieve in the prescribed proficiency Hindi Typing test.

2. The petitioner, petitioner no. 1 was B.Com. and petitioner no.2 was B.A. and both were appointed as Daily wagers in Nagar Nigam on 1.9.1988 and 28.9.1988 respectively as a clerk as a daily wage employee and have rendered service. The petitioners were required to appear in Hindi Typing Test where petitioner no.1 had 25 w.p.m. (words per minute speed) and petitioner no.2 had 30 w.p.m. as acknowledged by the respondent authorities therefore, on the recommendation of the selection committee and on the basis of marks achieved, they were declared successful. The petitioners were regularised by an order dated 20.3.1997 (Annexure-7 to the writ petition). However, afresh condition was imposed in this order dated 20.3.1997 whereby they were to be show their performance by achieving typing parameter of 25 w.p.m. It appears that on the basis of subsequent typing test the petitioners could not achieve the required target, therefore, the regularisation order was cancelled and they were directed to work as daily wagers .

3. According to the learned counsel for the petitioners in their earlier appointment as daily wager they had already achieved the minimum typing requirement and proficiency and since their main work was not typing however, the selection committee had acknowledged their proficiency in typing and on its recommendation, their services were regularised on their experience and merits and after regularisation in view of the fresh condition they are not supposed to achieve again a prescribed condition and the petitioners were regularised and for not achieving certain standard in typing test, the status of petitioners was changed without any rhyme or reason arbitrarily more so against the principle of natural justice in view of the judgment 2002 (1) Selected Allahabad Cases -483 Smt. Anju Tiwari vs. District Magistrate/Collector, Etawah. However, according to the learned counsel for the respondent the case of Smt. Anju Tiwari is not applicable in the facts and circumstances of present case as Smt. Anju Tiwari was appointed on the compassionate ground under U.P. Recruitment of Dependants of Government Servants (Dying in Harness) Rules 1974 where imposition of fresh condition for achieving by an executive officer by subsequent order by the writ petition was not held justified and the action of the respondents was declare illegal.

4. According to learned counsel for the respondent Sri S.D. Kautilya the relevant rules for recruitment to the post of Clerk and in view of the order March 1, 1963 published in extraordinary Gazette Government of Uttar Pradesh Nagar Mahapalika Services (Designations, Scales of pay, Qualification, Conveyance Allowances and methods of Recruitment) Order, 1963 the candidate for recruitment as a clerk was required to possess High School certificate or equivalent examination certificate and 25 w.p.m. proficiency in Hindi typing and knowledge of English Typing also as additional qualification which at subsequent stage was enhanced and the minimum requirement was Intermediate with a minimum typing speed of 25 w.p.m. in Hindi. According to learned counsel for the respondent the petitioners might have been tested earlier and achieved typing text more than 25 w.p.m. in Hindi, however was not found to have achieved the minimum requirement of 25

w.p.m. at subsequent stage. For this purpose learned counsel for the respondent has relied {(1994) 3 UPLBEC-1963 (Ved Prakash Sagar and others Vs U.P. Financial Corporation and another) } where the services of the writ petitioners were terminated for not achieving 40 w.p.m of typing as a condition provided in the terms of appointment embodied in pursuance to the advertisement in recruitment as such the termination of the writ petitioners were found justifiable.

5. According to learned counsel for the petitioner the decision of this court (Single Judge) in Ved Prakash Sagar (supra) was passed as the writ petitioners were the typist, and their main work was typing, and they were expected to maintain certain standard of typing as an essential condition required in service as such verdict of Ved Prakash (supra) is not referable and applicable in the present case as writ petitioner was appointed as clerk whose main work was not of typist only and the proficiency in typing is additional need.

6. I have heard learned counsel for the petitioner, I find that petitioners were earlier appointed as daily wagers and had achieved the proficiency of 25 w.p.m. at that stage and the selection committee after acknowledging this fact recommended the cases of petitioners and the petitioners were given appointment of as a clerk i.e. since they were above Intermediate and were having proficiency in 25 w.p.m. typing. Keeping in view the recommendations of the selection committee they were regularised also. Now at later stage a condition of 25 w.p.m. in typing was not necessary to be imposed afresh in the regularisation order as the regularisation was only made keeping in view of the performance experience merits and the recommendation of the selection committee. In view of the above observations I find that the decision of Ved Prak Sagar (supra) as referred by respondents is not applicable in the present facts and circumstance and in view of the above observation the order dated 7.10.1997 is not legally sustainable, therefore, it is set aside and the petitioner are to be treated as regular employee and their termination on the ground of not achieving the typing test of 25 w.p.m. in Hindi on the ground of change in service condition of the petitioner is illegal not justifiable. In view of the above the writ petition is allowed. No order as to cost.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE MRS. P. SRIVASTAVA, J.

Civil Misc. Application/Petition No. 844 of 2004

Chandra Prakash Ojha ...Petitioner
Versus
The District Judge, Bareilly and others ...Respondents

Counsel for the Petitioner:
Sri Pranav Ojha

Counsel for the Respondents:
S.C.

Code of Civil Procedure, 1908-O. 17 R.1- Adjournment-not more than three to be granted in a suit Adjournment of a case can not be claimed as a matter of right.

Held: Para 5

It may be mentioned that under Order 17, Rule 1 C.P.C. it is specifically provided that no adjournment shall be granted more than three times during hearings of suits. In our opinion even these 3 adjournments cannot be claimed as of right, as adjournment is in the discretion of the Court, and cannot be claimed as of right.

Case law discussed:
(2003) 2 SCC 45

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

1. This petition furnishes a typical instance of the alarming state of affairs prevailing in the subordinate judiciary in this State.

2. The petitioner had filed an application under Section 263 of the Succession Act praying for cancellation of the order granting probate. In this case altogether 90 dates were fixed by the District Judge and A.D.J., Bareilly, out of which 43 dates were fixed for final hearing. In our opinion this reveals gross negligence and utter callousness on the part of the subordinate courts. Cases are supposed to be disposed off expeditiously, but it appears that many Judges harass the litigant public by granting adjournments again and again. Whenever the litigant goes to court he finds that another date has been fixed. In the present case 90 dates have been fixed and yet the case has not proceeded. Annexure-3 to the affidavit in support of this application is copy of the order sheet showing the orders passed on these 90 dates. Many of these orders show that the case was adjourned because the lawyers were on strike.

3. We have also been informed that in many district courts certain lawyers do not allow the Court to function. Many district court function only 60-65 days in a year. Some members of the bar are habitual of disturbing the functioning of the Court.

4. We have also been informed that often on the mere statement of some members of the bar that no adverse order should be passed the cases are adjourned without any good reason.

5. It may be mentioned that under Order 17, Rule 1 C.P.C. it is specifically provided that no adjournment shall be granted more than three times during hearings of suits. In our opinion even these 3 adjournments cannot be claimed as of right, as adjournment is in the discretion of the Court, and cannot be claimed as of right.

6. In our opinion this state of affairs cannot be tolerated any further. The judiciary exists for serving the public, and not for serving lawyers or Judges. The judiciary is accountable to the public, and it is the duty of the Courts to decide cases expeditiously.

7. We therefore dispose off this petition with the direction to the court concerned to decide the application under Section 263 of the Act within two months from the date of production of a certified copy of this order before him in accordance with law, failing which disciplinary action will be taken against the Judge concerned.

8. The Registrar General of this Court will communicate this order to the District Judge, Bareilly forthwith and also to all the District Judges in the State of U.P., who shall in turn communicate it to all the judicial officers in their district.

The Registrar General shall also communicate copy of this order to all Presidents and Secretaries of District Bar Associations in the State, and to the Chairman, U.P. Bar Council.

9. We warn all the officers of the subordinate judiciary that disciplinary action shall be taken against those Judges who are avoiding expeditious disposal of cases, and who grant adjournments lightly and unnecessarily. The public is fed up with the delays in deciding cases, and will not tolerate continuation of this state of affairs.

10. We further direct that judicial officers shall not adjourn cases merely because the lawyers are abstaining from work or are on strike. The Supreme Court has held that it is illegal for lawyers to go on strike, vide ***Ex-Capt. Harish Uppal v. Union of India, (2003) 2 SCC 45***. We therefore direct that judges in the subordinate judiciary will pass orders in the cases fixed before them even in the absence of lawyers (unless the case has been adjourned by the Court for some good and strong reason on a lawyers application), and if the lawyers obstruct the functioning of the Court the District Judge will call the police to stop this. The people of the State are fed up of lawyers strikes, and in our opinion, rightly so. Enough is enough.

11. List this case again before us on 16.3.2004 by which time compliance report shall be sent to this Court by the District Judge, Bareilly and other District Judges in the State. While we have disposed off this petition it shall be listed again before us so that we can monitor compliance of the directions given by us.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2004

BEFORE
THE HON'BLE M. KATJU, J
THE HON'BLE MRS. POONAM SRIVASTAVA, J.

Special Appeal No. 329 of 1998

Jalal Ahmad ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri P.K. Dwivedi

Counsel for the Respondents:
Sri B.P. Srivastava
Sri Vashistha Tiwari
Sri H.R. Mishra, S.C.
S.C.

Constitution of India-Article 226- Writ Jurisdiction-scope-Judicial review of administrative decision-Interference only in case of arbitrariness-No interference with finding of fact-Writ lies where there is error of law apparent on face of record.

Held: Paras 4,5 & 6

It is well settled that a writ lies when there is error of law apparent on the face of the record. In writ jurisdiction this Court cannot interfere with findings of fact. Whether there was corruption or favouritism was a question of fact and the learned Single Judge should not have interfered with the findings of fact in this connection.

The Court cannot sit in appeal over administrative decisions. It can only interfere when there is arbitrariness in the Wednesbury sense. The modern trend points to judicial restraint with respect to administrative decisions.

Case law discussed:
JT 1996 (6) SC 515
JT 1996 (8) SC 510
2000 (1) AWC 726
AIR 1996 SC 11
W.P.52499 of 2002, decided on 11.12.2003

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

1. Heard learned counsel for the appellant.

2. This special appeal has been filed against the impugned judgment of the learned Single Judge dated 15.4.1998. The facts of the case are that the U.P. Government took a policy decision to provide employment to Urdu knowing persons by absorbing them on the post of Urdu translators in various Departments of the State. In the month of August, 1984, 5061 posts were sanctioned in the various Departments of the State. It was stipulated that one post each in all the offices of departmental heads both at divisional and district level were to be filled in by such Urdu translators.

In pursuance of that policy the District Magistrate, Deoria initiated proceedings for recruitment of Urdu translators. The posts were advertised and a written test was held on 25.12.1994 and a select list of 58 candidates was published on 12.1.1995. From that list certain persons were appointed in different departments, e.g. in police, education, etc. In appears that certain complaints of corruption and favoritism in the selection process were made to the State Government and the State Government by order dated 20.06.1995 directed the District Magistrate to make an enquiry regarding the complaints. The District Magistrate entrusted the enquiry to the S.D.O., Salempur, Deoria for making enquiries. On the basis of the enquiry report the District Magistrate wrote a letter dated 12.7.1995 to the State Government and on that basis the State Government cancelled the examination on 7.8.1995.

3. Aggrieved by the aforesaid order a writ petition was filed in this Court which allowed by the impugned judgment.

4. The learned Single Judge has observed that there was no evidence of corruption or favourtism. In our opinion the learned Single Judge has erred in law by making this observation. The learned Single Judge while disposing off the writ petition should not have interfered with the findings of the fact in the enquiry report. It is well settled that a writ lies when there is error of law apparent on the face of the record. In writ jurisdiction this Court cannot interfere with findings of fact. Whether there was corruption or favouritism was a question of fact and the learned Single Judge should not have interfered with the findings of fact in this connection.

5. We are fortified by the decisions o the Supreme Court in Biswa Ranjan Sahoo vs. Sushanta Kumar J.T. 1996 (6) SC 515, Hanuman Prasad vs. Union of India, J.T. 1996 (8) SC 510, etc. and the Division Bench decision of this Court in P.K. Rai vs. L.I.C. of India 2000 (1) AWC 776. In Tata Cellular vs. Union of India AIR 1996 SC 11 the scope of judicial review of administrative decisions has been considered in great detail and it has been held that the Court cannot sit in appeal over administrative decisions. It can only interfere when there is arbitrariness in the Wednesbury sense.

The modern trend points to judicial restraint with respect to administrative decisions.

6. The same view has been taken in another division bench decision Civil Misc. Writ Petition No. 52499 of 2002 Pushpak Jyoti vs. State of U.P. and others decided on 11.12.2003.

7. For the reasons given above this petition is allowed. The impugned judgment dated 15.4.1998 is set aside.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2004

BEFORE
TE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No.33472 of 2002

U.P. State Sugar Corporation Ltd. Unit Saharanpur, through its General Manager ...Petitioner

Versus

District Judge, Saharanpur and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Srivastava
Sri Y.K. Srivastava

Counsel for the Respondents:
Sri S.K. Pandey

Civil Procedure Code-O. IX R.13- Exparte decease-setting aside of-Application for Condonation of delay restoration application duly supported with affidavit-Medical Certificate showing that officer looking after case suffered heart attack-This fact not denied by plaintiff-No reason to disbelieve medical certificate-Held, Trial Court as well as appellate Court committed gross error law in rejecting restoration application.

Held: Para 9

The fact whether defendant's counsel was informed was denied in the affidavit supporting the delay condonation application. There was no reason to disbelieve the medical certificates. The fact that the officer looking after the case had suffered a heart attack and could not pursue the matter, was not denied. In the circumstances, I find that both the Trial Court as well as the Appellate Court committed gross error in law, in rejecting the restoration application.

Case Law Discussed:
(2001) 6 SCC 176
(1998) 7 SCC 123

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

1. Heard Sri R.K. Srivastava for petitioner and Sri S.K. Pandey for respondents.

2. This writ petition arises out of orders passed by Additional Civil Judge (Junior Division) Saharanpur in Misc. Case No. 4A/2000 rejecting petitioner's application to set aside ex parte decree dated 10.1.2000 in Original Suit No.215 of 1989 between Mukkha Vs. General Manager, U.P. State Sugar Corporation, Saharanpur and others; and the order of District Judge, Saharanpur dated 29.4.2002 in Misc. Civil Appeal No.39 of 2002 dismissing the appeal against the order of the Trial Court.

3. Brief facts, giving rise to this writ petition, are that the plaintiff filed a Original Suit No.215/1989 for dispossession of defendants from suit land in Chak No. 136 Gata No.252. It was alleged that the defendant forcibly entered and started digging on 10.11.1989 and that on 16.3.1990 they constructed 6 feet wall, and fitted angle iron and barbed wire

over the wall. The plaintiffs claimed that the defendant Sugar Mill is continuing in wrongful possession, and also claimed damages.

4. A written statement was filed by the defendant. The Trial Court fixed the matter on 12.1.1998 for disposal of Commissioner's report. The defendant remained absent on that date, and thereafter, inspite of information sent to counsel for the defendant, Sri Basant Singh to appear on 12.2.1998. No one appeared on that date. The Suit was decreed ex-parte on 20.5.1998. The defendants filed an application on 13.1.2000 for setting aside ex-parte decree alongwith an application for condonation of delay. The application was filed after about twenty months with the explanation that Sri S. T. Khan, who was looking after the case for the defendant - Corporation had suffered a heart attack. He could not come to the Court and was not aware of the subsequent proceedings. A medical certificate was filed in support of the explanation.

5. The Trial Court found that the medical certificate was of the year 1999; the counsel for the defendant was given information after which several dates were fixed but no one appeared on behalf of defendant. The Trial Court did not accept the explanation for delay as well as the absence on the dates fixed in the matter and rejected the application. The Appellate Court has found that the medical certificates relate to the month of March 1999, and held that the findings arrived at by the Trial Court were not perverse to call for any interference, and consequently rejected the Appeal.

6. Sri R.K. Srivastava, counsel for petitioner states that the Corporation had set up a valid defence in the written statement. It is stated in paragraph 17 of the written statement that the U.P. State Cement Corporation is a body corporate, and has not been impleaded as party respondents. The entire land towards west of Khasra No.252, of Gaon Sabha Bidwai was acquired and that a boundary wall has been constructed on the western dol, and on the eastern dol of Gaon Sabha Bidwai of Khasra No.252. The boundary wall towards north and south were constructed. The constructions towards western side were left out for which foundation was dug and now the entire boundary wall has been constructed. In paragraph-18, it was denied that any part of Khasra No.252 was included in the land covered by the boundary wall. The extension has been made on the land acquired for the Lord Krishna Sugar Mill of the Corporation.

7. The written statement goes to show that the defendant had a triable case. In the application for setting aside ex-party decree supported by application for condonation of delay, it was stated that the Court had fixed 21.1.1998 for objections on the survey report. On 21.1.1998, the Court directed the plaintiffs to inform the defendant's counsel of the next date fixed on 12.2.1998. The counsel Sri Basant Singh was not given any information and that he could not inform the next date to the defendants. On 12.2.1998 not only the report was confirmed ex-parte, a date was fixed for ex parte hearing on 20.5.1998. In the meantime Sri S.T. Khan, who was looking after the case for Corporation suffered a heart attack and was under treatment at Saharanpur and thereafter at Lucknow. He could not obtain further

information of the case. The defendant came to know about the ex-parte decree on 10.1.2000, when the plaintiff came to the establishment of the defendant alongwith Court Amin for removing the constructions. The file was thereafter inspected and an application with condonation of delay was filed on 12.1.2000.

8. In **M.K. Prasad Vs. P. Arumugam (2001) 6 SCC 176**, the Supreme Court held that the expression 'sufficient cause' in Section 5 of the Limitation Act must receive liberal construction so as to advance substantial justice, and that generally delays are to be condoned in the interest of justice, unless gross negligence, and deliberate inaction or lack of bona fides is imputable to the party seeking condonation of delay. The law of Limitation has been enacted to serve the interest of justice and not to defeat it. The Supreme Court followed its earlier decision in **N. Balakrishnan V. M. Krishnamurthy (1998) 7 SCC 123** in observing that the acceptability of explanation for the delay is the sole criterion and that length of delay is not relevant. In the absence of anything showing mala fide or deliberate delay as a dilatory tactics, the court should normally condone the delay. However, in such a case the court should also keep in mind the litigation expenses incurred or to be incurred by the opposite party and should compensate him accordingly. It was also observed in para-9 in N. Balakrishanan' case that the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammeled by the conclusion of the lower court. In M.K. Prasad's case, the defendant came to know about the decree passed in 1997 only when he received the notice of execution proceedings. The application for setting aside ex-party decree which was rejected on the ground of long delay of 554 days. The revision was dismissed by the High Court. The Supreme Court found that the defendant should have been more vigilant, but his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property conceded to be valuable. It was held that while deciding application for setting aside ex parte decree the court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. The inconvenience caused to the respondents for delay on account of the appellant being absent from the court in this case can be compensated by awarding appropriate and exemplary costs.

9. In the present case, the Corporation took a defence that the disputed land was acquired, and is not part of Khasra No.252. Northern and southern wall enclosing the acquired land was constructed and that the Corporation constructed the western wall without encroaching upon the plaintiffs land. In this matter the survey commissioner's report could have established whether there was any encroachment on the spot. The defence was required to be considered, and that valuable property which was claimed to be acquired, was involved in the matter. The defendant had offered reasonably bonafide explanation for the absence on the date fixed and the delay in filing the application. The Trial Court erred in law and in exercise of its jurisdiction in rejecting the application only on the ground that the counsel for the defendant was informed, but was not

present on that date and that the medical certificates were of the year 1999. The fact whether defendant's counsel was informed was denied in the affidavit supporting the delay condonation application. There was no reason to disbelieve the medical certificates. The fact that the officer looking after the case had suffered a heart attack and could not pursue the matter, was not denied. In the circumstances, I find that both the Trial Court as well as the Appellate Court committed gross error in law, in rejecting the restoration application. The plaintiff, however, must have incurred expenses in execution proceedings, and that in the facts and circumstances, I find that costs of Rs.10,000/- will serve the interest of justice.

10. The writ petition is allowed. The impugned orders dated 1.3.2002 passed by Civil Judge (Junior Division) Saharanpur in Misc. Case No.4A/2000 and order dated 29.4.2002 passed by District Judge, Saharanpur in the Misc. Civil Appeal No.39/2002 are set aside. The petitioner's application for condonation of delay and setting aside the ex parte decree stand allowed, subject to payment of exemplary cost of Rs.10,000/- to be paid by the defendants corporation to the plaintiffs by depositing in trial court within six weeks from delivering of this judgment. In case the cost are not deposited in trial court with the time fixed, the ex parte decree passed against petitioner shall stand revived. The plaintiff shall be entitled to withdraw the costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 178 of 2003

M/s V.K. Packaging Industries ...Petitioner
Versus
Tax Recovery Officer and others
...Respondents

Counsel for the Petitioner:
Sri Govind Saran

Counsel for the Respondents:
Sri Bharat Ji Agarwal

Income Tax Act-Ss. 226 (3), 143 (3)-demand Notice S. 226 (3)-Validity-Doctrine of merger-Assessment order dt. 15.3.2000 on basis of which impugned demand notice was issued merged into order of CIT (Appeals)-Whose order in turn merged into order of Income Tax Appellate Tribunal-ITAT set aside order of CIT (Appeals) on ground that assessing officer as well as CIT (Appeals) had not given copies of accounts of third parties-Hence issue of demand notice in pursuance of assessment order dt. 15.3.2000 and realization of sum thereunder held, illegal-Petitioner, held, entitled to restitution of amount of tax realized under assessment order dt. 15.3.2000.

Held: Paras 27,28,29 & 31

In these circumstances we fail to understand how any demand could be issued against the petitioner and how any sum could have been realized from the petitioner in pursuance of the assessment order dated 15.3.2000 when the said assessment order dated 15.3.2000 has in fact ceased to exist. Merely because the Tribunal has

remanded the matter to the CIT (Appeals) it does not follow that the assessment order dated 15.3.2000 has revived. Consequently we are of the opinion that the impugned notice under Section 226 (3) of the Income Tax Act was wholly illegal as there was be no valid demand against the petitioner.

In our opinion the petitioner is entitled to restitution in respect of any amount of tax realized in pursuance of the assessment order dated 15.3.2000. It is well settled that when a decree or order is set aside or modified in appeal it is the duty of the Court to grant restitution.

On the facts and circumstances of the case we quash the notice under Section 226 (3) and the recovery made in pursuance of the impugned notice under 226 (3) of the Income Tax Act. Any amount realized from the petitioner in pursuance of the notice under Section 226 (3) and the assessment order dated 15.3.2000 shall be refunded to him forthwith with interest at 12% per annum from the date of realization to the date of refund. The refund must be made within a month from the date of production of copy of this order before the authority concerned.

Before parting with the case we would like to state that we cannot appreciate this practice of the Income Tax Department of hurriedly passing assessment orders shortly before the limitation period is about to expire and justifying this practice by saying that there was shortage of time and hence it was impossible to verify the facts properly, and hence the additions were being made. It is of common knowledge that when the limitation for making an assessment is about to expire (usually on 31st March) there is a sudden rush and scramble to complete the assessments. If this practice is countenanced the citizens of the country will be put to great harassment as exorbitant demands can be made against them merely by saying that there was shortage of time and hence additions were being made for this reason without verifying the facts correctly. It is the duty of the department to make a correct assessment and not to make an excessive assessment merely on the ground of shortage of time.

Case law discussed:

(1983) 143 ITR 765
(2001) 250 ITR 193
(2001) 162 Taxation 649
84 ITR 222
AIR 2000 SC 2587
1967 ALJ 1054
AIR 2003 SC 4482
AIR 1985 SC 39

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

1. This writ petition has been filed for a writ of certiorari to quash the impugned notice under Section 226 (3) of the Income Tax Act vide Annexure-5 to the writ petition. The petitioner has also prayed for a mandamus directing the respondent no. 1 to refund the amount recovered under the notice under Section 226 (3) with interest. The petitioner has also prayed for a direction to respondent no. 1 to refund Rs. 75,000/- deposited by the petitioner with interest and has also prayed that respondent no. 3 be directed to decide the appeal of the petitioner on merits expeditiously.

2. Heard learned counsel for the parties.

3. The petitioner is a registered partnership firm which is doing the business of manufacture of Corrugated boxes/Card Board boxes. The relevant A.Y is 1997-98 and in this year the petitioner filed a return on 31.10.1997 disclosing income of Rs. 27,374.28 paise. The petitioner has alleged that it has maintained regular and proper books of

account in the ordinary and regular course of business.

4. The petitioner appeared before the Assessing Officer/Income Tax Officer ward no. 5, Allahabad and the Assessing Officer by his order dated 15.3.2000 determined the petitioner's income at Rs.7,40,750/-. True copy of the assessment order dated 15.3.2000 is Annexure-1 to the writ petition. This assessment was made under Section 143(3) of the Income Tax Act.

5. It is alleged in para 7 of the petition that during the course of the hearing the Assessing Officer issued notices under Section 133 (6) of the Income Tax Act to M/s Shiv Datt and Sons, M/s K. Lal and Company and M/s Shakumbhari Pulp and Paper Mills Ltd., apart from other parties. It is alleged that these notices were issued only for obtaining copies of accounts of the petitioner's firm from the books of the above three respective parties in compliance to the notices under Section 133(6) of the Act. The parties sent copies of the accounts to the Assessing Officer, and on the basis of those copies of accounts additions were made in the hands of the petitioner on the allegation that there are differences in the accounts. Those differences were added in the hands of the petitioner as undisclosed income. The major additions were of Rs. 4,25,000 and Rs. 50,080. The addition of Rs. 4,25,000 was made on the allegation that payment of the said amount was made by M/s Shakumbari Paper & Pulp Mills, but no entries were recorded in the petitioner's books, though the entries were recorded in the books of Shakumbari Paper & Pulp Mills. The other additions were also on similar ground.

6. It is alleged in para 8 of the petition that the copies of the said accounts of the aforesaid three parties were not supplied to the petitioner, nor were the parties summoned, nor were the books examined, and instead the additions were made simply on the basis of these copies of the accounts. In fact the Assessing Officer himself admitted in the assessment order dated 15.3.2000 in para 6 that due to shortage of time it was impossible to verify the facts properly and hence the additions were made.

7. Against the assessment order the petitioner filed an appeal before the C.I.T. (Appeals). The appellate authority fixed the hearing on various dates, but it is alleged that copies of the accounts were not supplied to the petitioner despite repeated requests in writing as well as orally. Copy of the application filed by the petitioner before the appellate authority praying for supplying of these documents is Annexure-2 to the petition. The petitioner stated before the Assessing Officer as well as the C.I.T. (Appeals) that the records were misplaced somewhere by the Chartered Accountant and therefore the petitioner was helpless in conducting the appeal. However the C.I.T. (Appeals) decided the appeal by the ex-parte order dated 30.4.2002. True copy of the said order is Annexure-3 to the writ petition.

8. Thereafter a second appeal was filed by the petitioner before the Tribunal on 28.5.2002 which was decided on 30.12.2002 vide annexure 4. The Tribunal by its order dated 30.12.2002 set aside the order of the C.I.T. (Appeals) and remanded the matter back to the C.I.T. (Appeals) with certain directions as stated in para 5 of this order. The main direction

of the Tribunal was that the party should be provided copies with the accounts of the third parties and the matter should be decided after considering each and every ground taken by the petitioner. True copy of the order of the Tribunal dated 30.12.2002 is Annexure-4 to the petition. The appeal is now pending before the C.I.T. (Appeals)

9. In the meantime the respondent no. 1, the Tax Recovery Officer, issued notices under Section 226 (3) for realization of the demand assessed by the Assessing Officer. True copy of this notice issued to various parties is Annexure-5 to the writ petition.

10. It is alleged in para 15 of the petition that due to the notice under Section 226 (3) issued to Saraiya Distillery Limited, Gorakhpur by the respondent no. 1 the Saraiya Distillery Ltd., Gorakhpur has deducted Rs. two lacs from the account of the petitioner and has deposited the same with the Income Tax Department vide Annexure-6 to the petition. The Saraiya Distillery Ltd. has also withheld the payment which is due to the petitioner on supply of the packaging materials to them on the ground of notice under Section 226 (3). Thus huge amount of the petitioner has been detained by Saraiya Distillery Ltd, Gorakhpur because of the notice under Section 226 (3) of the Income Tax Act which is said to have adversely affected the business of the petitioner.

11. It is alleged in para 16 of the petition that the petitioner had already deposited Rs. 75,000/- with the Income Tax Department on account of the demand for A.Y. 1997-98. Copy of three challans of deposits of Rs. 75,000/- is Annexure-7. During the pendency of the appeal the petitioner gave an application to the Tax Recovery Officer requesting to revoke the order passed under Section 226 (3). The petitioner deposited Rs.75,000/- in three instalments.

12. However, the T.R.O. has again initiated proceeding under Section 226 (3) and consequently on receiving the notice the Saraiya Distillery Ltd., Gorakhpur had deducted Rs. two lacs from the account of the petitioner and has deposited the same with the Income Tax Department.

13. It is alleged in para 18 of the petition that due to illegal proceedings under Section 226 (3) initiated by the T.R.O. the petitioner is facing great hardship as it will not get the payment for its supply of packaging materials from its customers. These customers are taking the supply of package materials for running the business. The petitioner needs the money for the supply for keeping its regular turnover of the business. It is alleged that since the incoming of the money for the supplied materials has been stopped due to notice under Section 226 (3) of the Income Tax Act the petitioner is in great financial crisis and is on the verge of closure.

14. It is alleged that the demand under Section 226 (3) is illegal and is based on illegal assessment. The Assessing Officer has himself stated in the assessment order that due to shortage of time it was impossible to verify the facts properly and therefore he made major additions. He has also stated that the difference of Rs. 4,25,000/- which has been stated to have been paid by the assessee to other parties could not be verified due to shortage of time.

15. For the same assessment year a notice under Section 148 of the Income Tax Act was issued by the ITO Ward No. 5 Allahabad. The petitioner gave a letter to the Joint Commissioner of Income Tax, Allahabad requesting him to withdraw the demand against the petitioner for A.Y. 1997-98. In that letter the petitioner stated that when a notice is issued under Section 148 then the order dated 15.3.2000 should remain under abeyance and hence the demand should be withdrawn. True copy of the letter dated 22.10.2001 is Annexure-8 to the writ petition.

16. The petitioner relied on the decision of this Court reported in *Saran Engineering Co. Ltd. v. CIT, (1983) 143 ITR p. 765* in which it was observed:

"Once reassessment proceedings are started the earlier order ceased to exist, and the ITO starts the assessment proceedings a fresh."

The ratio of this decision has been affirmed by the Supreme Court in *I.T.O. v. K.L. Srihari (2001) 250 ITR 193.*

On the basis of the said decision it is alleged in para 22 of the petition that since notice under Section 148 has been issued the assessment order dated 15.3.2000 has become non existent, and hence the Income Tax Department cannot make any demand on the basis of the assessment order dated 15.3.2002. True copy of the notice under Section 148 is Annexure-9 to the writ petition.

17. It is alleged in para 23 of the petition that Saraiya Distillery Ltd., Gorakhpur has deducted Rs. 2 lacs from the petitioner's account on the basis of the illegal notice under Section 226 (3) and has also detained other payments from the petitioner for supplying packaging material on the basis of illegal notices under Section 226 (3) of the Income Tax Act which is adversely affecting the business of the petitioner.

18. A counter affidavit has been filed on behalf of the respondents and we have perused the same.

19. It is alleged in para 8 of the counter affidavit that the original assessment order is good and effective till it is substituted by a reassessment order. Mere issuance of notice under Section 148 does not effect the validity of the original assessment order.

20. It is alleged in para 9 of the counter affidavit that the respondent no. 1 has rightly issued the notice under Section 226 (3) as no stay order has been passed by the CIT (Appeals) in the appeal pending before it.

21. In para 10 of the counter affidavit it is alleged that the petitioner was duly supplied the relevant documents as required by him on 2.9.2002.

A rejoinder affidavit has also been filed.

22. In para 4 thereof it is stated that there is no statutory provision for filing an appeal/objection against the impugned order of the C.I.T. (Appeals), and hence there is no alternative remedy.

23. Learned counsel for the petitioner has relied on the decision of this Court in *Kanhaiya Lal v. CIT (2001) 162 Taxation 649* and the decision of the Punjab and Haryana High Court in

Chiranjit Steel Rolling Mills v. CIT 84 ITR 222 for the proposition that where the copies of the third party's account are not supplied to the petitioner the assessment order is illegal.

24. Learned counsel for the petitioner has also submitted that the petitioner filed a stay application along with his appeal but there was no CIT (Appeals) for hearing the appeal for a long time. The financial condition of the petitioner was bad and the firm has become sick, and hence it was wholly arbitrary and illegal to attach the petitioner property.

25. From the facts mentioned above it appears that the assessment order dated 15.3.2000 (Annexure-1 to the writ petition) on the basis of which the impugned notice under Section 226 (3) was issued merged into the order of the CIT (Appeals) dated 30.4.2002, copy of which is Annexure-3 to the writ petition, and the aforesaid order of the CIT (Appeals) in turn merged into the order of the Income Tax Appellate Tribunal dated 30.12.2002, copy of which is Annexure-4 to the writ petition. A perusal of the order of the Tribunal dated 30.12.2002 shows that the Tribunal has set-aside the order of the CIT (Appeals) on the ground that the Assessing Officer as well as the CIT (Appeals) had not given copies of the accounts of the third party to the petitioner.

26. Thus under the doctrine of merger the orders of the Assessing Officer dated 15.3.2000 and the CIT (Appeals) dated 30.4.2002 have both merged into the order of the Tribunal dated 30.12.2002. Hence the orders of the Assessing Officer dated 15.3.2000 and the CIT (Appeals) dated 30.4.2002 ceased to exist after the order of the Tribunal dated 30.12.2002.

In *Kunhayammed v. State of Kerala, AIR 2000 SC 2587 (vide para 12) the* Supreme Court observed:-

"Once the superior Court has disposed of the lis before it either way– whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior Court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the Court, tribunal or the authority below."

Similarly, in *Raj Singh v. Board of Revenue, 1967 ALJ 1054 this* Court observed:-

"It is well settled that the decree of the trial Court merges in that of the appellate Court. The effect of merger is that in the eye of law it dies a civil death. The trial Court's decree loses its identity."

27. In these circumstances we fail to understand how any demand could be issued against the petitioner and how any sum could have been realized from the petitioner in pursuance of the assessment order dated 15.3.2000 when the said assessment order dated 15.3.2000 has in fact ceased to exist. Merely because the Tribunal has remanded the matter to the CIT (Appeals) it does not follow that the assessment order dated 15.3.2000 has revived. Consequently we are of the opinion that the impugned notice under Section 226 (3) of the Income Tax Act was wholly illegal as there was be no valid demand against the petitioner.

28. In our opinion the petitioner is entitled to restitution in respect of any amount of tax realized in pursuance of the assessment order dated 15.3.2000. It is well settled that when a decree or order is set aside or modified in appeal it is the duty of the Court to grant restitution.

In *South Eastern Coalfields Ltd. v. State of M.P., AIR 2003 S.C. 4482* the Supreme Court observed:-

"The word 'restitution' in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the Court or in direct consequence of a decree or order (See *Zafar Khan & Ors. V. Board of Revenue, U.P. & Ors. AIR 1985 SC 39).*

The Principle of restitution has been statutorily recognized in S. 144 of the Code of Civil Procedure, 1908. Section 144 of the C.P.C. speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it."

29. On the facts and circumstances of the case we quash the notice under Section 226 (3) and the recovery made in pursuance of the impugned notice under 226 (3) of the Income Tax Act. Any amount realized from the petitioner in pursuance of the notice under Section 226 (3) and the assessment order dated 15.3.2000 shall be refunded to him forthwith with interest at 12% per annum from the date of realization to the date of refund. The refund must be made within a month from the date of production of copy of this order before the authority concerned.

We hope and trust that the appeal pending before the CIT (Appeals) in pursuance of the remand order of the Tribunal will be decided expeditiously by the said authority.

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

31. Before parting with the case we would like to state that we cannot appreciate this practice of the Income Tax Department of hurriedly passing assessment orders shortly before the limitation period is about to expire and justifying this practice by saying that there was shortage of time and hence it was impossible to verify the facts properly, and hence the additions were being made. It is of common knowledge that when the limitation for making an assessment is about to expire (usually on 31st March) there is a sudden rush and scramble to complete the assessments. If this practice is countenanced the citizens of the country will be put to great harassment as exorbitant demands can be made against them merely by saying that there was shortage of time and hence

additions were being made for this reason without verifying the facts correctly. It is the duty of the department to make a correct assessment and not to make an excessive assessment merely on the ground of shortage of time.

32. No doubt the department has to assess and collect the correct tax, but for this purpose it should devise and set up a rational scheme in accordance with law. It should certainly not make assessments hurriedly merely by saying that there is shortage of time, (as often happens), thus putting the citizens to great harassment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE MRS. POONAM SRIVASTAVA, J.

Civil Misc. Writ Petition No. 30048 of 2001

Ram Pal @ Rampa ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ramesh Upadhyaya
Sri M.P. Yadav

Counsel for the Respondents:
Sri V. Pratap
Sri A. Mishra
Sri C.B. Singh
S.C.

U.P. Minor Minerals (Concession) Rules 1963-Rr. 9, 9-A and 23-Grant of mining lease on preferential basis-Validity-Rule 9-A-declared ultra vires-S. 15 of MMRD Act by Full Bench-ban imposed by State Government in grant of lease-By virtue of Government Order dated 13.6.2001 lease ban in renewal of lease granted prior to 27.3.2001 lifted-Clause (3) of G.O. permitted renewal of leases of even those lease holders who were granted leases on preferential basis-Renewal of lease granted to respondent no. 4-Writ challenging G.O. dated 13.2.2001 and Order dated 25.4.2001 passed by concerned authority Respondent No. 4 in his Counter Affidavit claimed his renewal only on basis of order of status quo of Apex Court, whereas Division Bench in Katwaru's case has clarified position-As such respondent no. 4 has no right to continue lease on basis of Order dated 25.4.2001-Held, State Government still has power to grant mining lease under Rule 9 and 23-Therefore, Order dated 25.4.2001 and renewal of lease on basis of G.O. dated 13.6.2001 in favour of such persons who were granted mining lease on preferential basis under R. 9-A quashed.

Held: Paras 10 & 11

A perusal of the counter affidavit filed by Ganga Dayal, respondent no. 4 will show that he claimed his renewal only on the basis of the order of status- quo of the Apex Court, whereas the Division Bench in the case of Katwaru (Supra) has clearly clarified the position and as such the contesting respondent has no right to continue the lease on the basis of order dated 25.4.2001. The order has not been defended by the Standing Counsel in his counter affidavit. The only stand taken in paragraph 2 of the counter affidavit is relating to the Government orders dated 30.3.2001/4.4.2001 whereby all the District Magistrates were stopped from granting mining lease.

The provisions of Rule 9 and Rule 23 of the Rules of 1963 are still available to the State Government to grant mining lease as and when it is necessary. In the circumstances, the orders dated 25.4.2001 and the renewal of the lease on the basis of Government Circular dated 13.6.2001 in favour of such persons who were granted mining lease

on preferential basis under Rule 9-A are quashed. The writ petition is allowed. There shall be no order as to cost.

Case law discussed:
2002 (46) ALR 475

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

1. Heard learned counsel for the parties.

2. The writ petition has been filed challenging the Circular dated 13.6.2001 issued by the State of U.P. through Secretary Industrial Development Government of U.P. and order dated 25.4.2001 (Annexure 4 to the writ petition) whereby the A.D.M., Fatehpur had renewed the licence in favour of the contesting respondent no. 4 granting lease on preferential basis.

3. Counter and rejoinder affidavits have been exchanged between the parties and are on record.

4. The petitioner has challenged the orders on the ground that Rule 9-A has been held to be ultra-vires by a Full Bench of this Court in Writ Petition No. 256 (MB) 1997, Ram Chandra Vs. State of U.P. and others connected writ petitions, and hence no mining lease can be granted by the respondents under the U.P. Minor Minerals (Concession) Rules, 1963.

5. Rule 9-A of the U.P. Minor Minerals (Concession) Rules, 1963 was inserted by the 20th Amendment Rules, 1994, whereby preferential right was granted to certain socially and educationally backward castes for excavating sand etc. The Full Bench quashed the aforesaid rule rejecting the contention of the State of U.P. that the Rules were effected to serve the cause of social order for the promotion of welfare of the people as contained in Article 39 of the Constitution of India. It was observed by the Full Bench that the M.M.R.D. Act pertaining to conservation of minerals and production/explitation of the minerals can not be ignored. The observation of the Full Bench was that the Government can not under Clause (b) of Article 39 issue an order, as has been done by the State Government in conflict with the Full Bench decision is Annexure-1 to the petition. The Full Bench held that Rules 9A and 53A are irrational, arbitrary, unreasonable and discriminatory.

6. The contesting private respondents were granted mining lease on preferential basis under Rule 9-A of the U.P. Minor Minerals (Concession) Rules 1963. However, after the decision by the Full Bench, a ban was imposed by the State Government in granting lease under the Rules. By virtue of Government Order dated 13.6.2001, the State Government realized certain difficulties and lifted the ban in the renewal of the leases granted prior to 27.3.2001. The Government Order in its Clause 3 has clearly granted permission for renewal of the licence even to such lease holders who were granted lease on preferential basis under Rule 9-A of the Rules, and finally the authority concerned renewed the lease in favour of Ganga Dayal, respondent no. 4 vide order dated 25.4.2001 which is also under challenge. The present writ petition was filed challenging the Government order dated 13.2.2001 and consequential order dated 25.4.2001 passed by the concerned authority. An interim order was passed by this Court staying the two orders which are still operating in the present writ petition.

7. It is relevant to point out that a new development had taken place during the pendency of the writ petition. An application was moved allegedly on behalf of the petitioner for withdrawing the writ petition as not pressed and an order was passed on 8.2.2002 dismissing the petition as not pressed. Subsequently on a recall application the Division Bench of Hon'ble B.K. Roy and Hon. D.R. Chaudhary, JJ. dismissed the Civil Misc. Recall Application No. 3538 of 2002 on 5.4.2002. Aggrieved, petitioner approached the Apex Court challenging the orders dated 8.2.2002 and 5.4.2002. The Apex Court set aside the two orders and remanded the case for decision on merit. Hence the present writ petition is being decided finally.

8. The stand of the State Government is that the Government order dated 13.6.2001 was issued on account of the reason that despite the Full Bench holding that no lease can be granted on a preferential basis under Rule 9 –A as it has been held to be ultra vires yet the Full Bench had not stopped the respondent renewal of the lease s granted earlier. In Clause 3 of the Government order it has specifically been stat ed that the lease which has already been granted earlier, can be renewed and there is no restriction in renewal of such lease granted prior on 27.3.2001. As a result of the Government order dated 13.6.2001, the order dated 25.4.2001 was passed in favour of Ganga Dayal son of Burail, respondent no. 4.

9. A Division Bench of this Court in Civil Misc. Writ Petition No. 44196 of 2001 reported in **2002 (46) ALR 475, Katwaru Vs. Special Secretary Industrial**, has considered the question and legality of the renewal of the such lease which was granted earlier on preferential basis under Rule 9-A of the Rules. The Division Bench clearly held that since Rule 9-A of the Rules. The Division Bench clearly held that since Rule 9-A has been struck down in favour of one who had got a mining lease on preferential basis under Rule 9-A of the Rules such person can not claim renewal of his lease under Rule 6-A. The order of the supreme Court to maintain status-quo in the S.L.P. granted against the decision of the Full Bench will in no way benefit such claimants who claim renewal on preferential basis. The effect of the order of status-quo will only be limited to the extent that any one who had been granted lease under Rule 9-A of the Rules or granted renewal under Rule 9-A at the time when the order of the status-quo was passed, would continue to have the right to excavate the minerals even after expiry of the lease on renewal. The order maintaining status-quo does not mean that lessee could continue to excavate the minerals till the expiry of the lease. Paragraph 5 of the judgement of the Katwaru (supra) is as under :

"*The petitioner claimed preferential right for grant of a mining lease under Rule 9-A of the Rules as he belongs to a caste which is enumerated in explanation appended to sub- rule 1 thereof. He was granted a mining lease on a preferential basis on 24.10.1998 for a period of 3 years. The period of his lease expired on 23.10.2001. Prior to the expiry of the lease, expired on 23.102001. Prior to the expiry of the lease, the Full Bench of this Court by the judgment and order dated 27.3.2001 struck down Rule 9-A of the Rules as being violative of the Constitution of India and the provisions of Mines and Mineral (Regulation and*

Development) Act 1957. In view of this decision, the petitioner cannot claim any preferential right to get a mining lease. Rule 6-A of the Rules no doubt provides for renewal of a mining lease but the effect of renewal of a mining lease which had been granted on preferential basis would be that a right acquired under Rule 9-A on preferential basis would be perpetuated or get a fresh lease of life for a further period of 3 years. The copy of the order passed by the District Officer on 1.10.2001 shows that the renewal had been granted on the same terms and conditions on which the original lease had been granted and in addition some other conditions of minor nature has been imposed. The effect of the renewal would be that the mining are would continue to be operated by a person on the basis of ka preferential right as provided under Rule 9-A of the Rules has disappeared after the decision of the Full Bench on 27.3.2001 when the said provision was declined to be ultra vires. Therefore, any one who had got a mining lease on preferential basis under Rule 9-A of the Rules cannot claim renewal of his lease under Rule 6-A after the decision of the Full Bench."

10. A perusal of the counter affidavit filed by Ganga Dayal, respondent no. 4 will show that he claimed his renewal only on the basis of the order of status-quo of the Apex Court, whereas the Division Bench in the case of Katwaru (Supra) has clearly clarified the position and as such the contesting respondent has no right to continue the lease on the basis of order dated 25.4.2001. The order has not been defended by the Standing Counsel in his counter affidavit. The only stand taken in paragraph 2 of the counter affidavit is relating to the Government orders dated 30.3.2001/4.4.2001 whereby all the District Magistrates were stopped from granting mining lease.

11. The provisions of Rule 9 and Rule 23 of the Rules of 1963 are still available to the State Government to grant mining lease as and when it is necessary. In the circumstances, the orders dated 25.4.2001 and the renewal of the lease on the basis of Government Circular dated 13.6.2001 in favour of such persons who were granted mining lease on preferential basis under Rule 9-A are quashed. The writ petition is allowed. There shall be no order as to cost.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.3.2004

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

Civil Misc. Writ Petition No. 1898 of 1982

M/s Geep Industrial Syndicate Ltd.
...Petitioner
Versus
The Cess Officer, U.P. and others
...Respondents

Counsel for the Petitioner:
Sri S.P. Gupta
Sri Vijai Ratan Agarwal
Sri Vevek Ratan
Sri N. Lal

Counsel for the Respondents:
Sri Dr. H.N. Tripathi
Sri S.L. Srivastava, S.S.C.
S.C.

Water (Prevention and Control of Pollution) Cess Act, 1977-Schedule I-Applicability- Liability to pay water cess-Petitioner producing torches, batteries

(dry cells) and miniature lamps, which come under electrical or light electrical industry-electrical industry not mentioned in schedule I-Held, petitioner's is not covered under Act hence not liable to pay any cess- on water consumed by it.

Held: Paras 6 & 7

On the basis of the aforesaid decisions of the apex court it is clear that it is not the raw material or the ingredients used by an industry in the manufacturing process, but it is the final product that is relevant for the purpose of tax under the Act. In common parlance torch is considered to be a source of light and not a metal. The petitioner is producing torches, batteries (dry cells) and miniature lamps which come under the electrical or light electrical industry but electrical industry does not find mention in Schedule I. Since the electrical industry has not been mentioned in Schedule I, the petitioner's industry is not covered by the Act and is not liable to pay any cess on the water consumed by it.

The petitioner also manufactures batteries (dry cells) by using chemicals as raw material but entirely a different commodity is produced which in common parlance is known as battery and not chemical, therefore, it is not covered in Schedule I of the Act. We hold that it is not the raw material or ingredients used by the industry that would determine the nature of industry. It is the end product as understood in common parlance that would be the decisive factor in coming to the conclusion about the nature of industry. The products manufactured by the petitioner industry would fall in light electrical industry and would not fall in Schedule I of the Act. The petitioner is not liable to pay any cess on the water consumed by it.

Case law discussed:

1947 ALJ 41

(2000) 9 SCC 68

AIR 1992 SC 224

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

1. The petitioner is a public limited company carrying on business of manufacturing and marketing of batteries (dry cells), miniature lamps and torches. It has two industrial establishments. In one establishment torches and miniature lamps and in the other batteries (dry cells) are manufactured. The petitioner received a notice dated 27.12.1979 from the Cess Officer to submit a return regarding quantity of water consumed for every calendar month with effect from 1.4.1978 and pay cess to the Board. On 5.1.1980 the petitioner submitted his reply that his industry is not covered under Schedule I of the Water (Prevention and Control of Pollution) Cess Act, 1977 (in brief the Act). The Cess Officer on 15.1.1980 wrote to the petitioner to furnish the details of raw materials used and products manufactured in the factory of the petitioner. Before the petitioner could furnish the details he received two assessment orders passed by the Cess Officer on 4.2.1980 in Cess No. 57/11 and 33/17 for the period April 1978 to December, 1979. Thereafter, on 8.2.1980 the petitioner furnished details and returned both the assessment orders with the request to the Cess Officer that he should first ascertain whether the petitioner's industry is covered by the Act or not.

2. The Cess Officer on 15.2.1980 held that the petitioner's industry was covered under entries 1,2 and 7 of Schedule I of the Act as it processes ferrous or non-ferrous metals and chemicals to manufacture its products. He

also passed two revised assessment orders no. 96/10 and 52/17 for April, 1978 to September, 1978 and October, 1978 to December, 1978. The petitioner challenged the order dated 15.2.1980 under section 13 of the Act before the Appellate Committee which dismissed the appeal on 13.11.1981 and affirmed the order passed by the Cess Officer. Both the orders dated 15.2.1980 and 13.11.1981 have been challenged by the petitioner in this writ petition.

3. Sri Vijai Ratan Agarwal learned senior counsel assisted by Sri Vivek Ratan for the petitioner, urged that the petitioner is not engaged in any of the industries as mentioned in Schedule I of the Act and is not liable to pay any water cess. He further urged that in Schedule I of Industries (Development and Regulation) Act, 1951 the petitioner's industry is listed under the heading 'electrical equipment'. In the 'Handbook of Indigenous Manufacturers' published by Directorate General of Technical Development the industry of the petitioner has been placed under the heading 'Light Electrical Industries'. He urged that the petitioner's industry is not ferrous or non-ferrous metals or chemicals industry and no metallurgical operation is carried on in the industry of the petitioner nor any metal is manufactured. The petitioner purchases metals from the market in whatever form it is needed for the manufacturing of torches. He urged that no chemical is manufactured. Therefore, the orders passed by the Cess Officer and appellate committee are illegal and liable to be quashed.

4. On the other hand, Dr. H.N. Tripathi learned counsel appearing for respondents no.1 and 2 has urged that the metal is purchased and is processed in the industry of the petitioner and thereafter torches are made by processing the metal. Therefore, the industry of the petitioner would be covered under Item No. 15 of Schedule I of the Act. The petitioner also manufactures batteries (dry cells) with chemical process, therefore, the petitioner's industry would be covered under entry nos. 1, 2 and 7 of Schedule I of the Act and as such he is liable to pay the cess on the water consumed by the petitioner. In support of his argument he placed reliance on the Division Bench decision of this court in **M/s Agra Engineering Industries Artoni v. Union of India and another, 1987 All. L. J. 41.**

5. The question is whether the petitioner's industry which processes the metal and by giving it shape manufactures torch cases is an industry covered under Schedule I of the Act. In the Schedule I the electrical industry or light electrical industries do not find place. If the petitioner purchases metal from the market and gives only shape to it and makes flashlight cases, this processing does not change the nature of the metal but in common parlance it would be understood as torch or flashlight case and not metal. The apex court in **M/s Saraswati Sugar Mills v. Haryana Sate Board and others** AIR 1992 SC 224 while considering entry no. 15 of Schedule I of the Act, has held that in manufacture if some thing is brought into existence which is different from that originally existed in the sense that the thing produced, by itself is a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article. If the end product

produced by the industry is not mentioned in the Schedule I, then it will not be liable to cess tax under the Act. In order to bring an industry within any of the entries in Schedule I it has to be seen what is the end product produced by that industry. This decision has been followed by the apex court in **Britannia Industries Ltd. V. T.N. Pollution Control Board and another,** (2000) 9 SCC 68 wherein the appellant before the apex court manufactured biscuits, bread and cakes. It used wheat flour, milk powder, sugar and vanaspati. The appellant's industry was assessed to cess under entry 15 of Schedule I. The authorities under the Act held that the appellant used ingredients wheat, sugar and vanaspati which were vegetables while milk powder was an animal product and by mixing and processing these biscuits etc. were manufactured. The apex court held that wheat flour which was used by the appellant in the manufacture of biscuits, bread and cakes is not a vegetable product. Wheat in common parlance, is not understood to be a vegetable. Milk powder can be said to be the result of processing of an animal product, namely, milk, but it cannot be said to be an animal product. They are utilised as ingredients for manufacturing altogether a different product, biscuit, bread and cakes. Therefore, it was held that the industry of the appellant was not covered by Schedule I of the Act.

6. On the basis of the aforesaid decisions of the apex court it is clear that it is not the raw material or the ingredients used by an industry in the manufacturing process, but it is the final product that is relevant for the purpose of tax under the Act. In common parlance torch is considered to be a source of light and not a metal. The petitioner is producing torches, batteries (dry cells) and miniature lamps which come under the electrical or light electrical industry but electrical industry does not find mention in Schedule I. Since the electrical industry has not been mentioned in Schedule I, the petitioner's industry is not covered by the Act and is not liable to pay any cess on the water consumed by it.

7. In view of the aforesaid decisions of the apex court we find that the division Bench decision of this court in Agra Engineering Industry (supra) is no longer a good law. The petitioner also manufactures batteries (dry cells) by using chemicals as raw material but entirely a different commodity is produced which in common parlance is known as battery and not chemical, therefore, it is not covered in Schedule I of the Act. We hold that it is not the raw material or ingredients used by the industry that would determine the nature of industry. It is the end product as understood in common parlance that would be the decisive factor in coming to the conclusion about the nature of industry. The products manufactured by the petitioner industry would fall in light electrical industry and would not fall in Schedule I of the Act. The petitioner is not liable to pay any cess on the water consumed by it. The petitioner had deposited cess under the interim order dated 4.5.1982, therefore, he is entitled for refund.

8. Since the petitioner succeeds on the first point it is not necessary to consider other arguments raised by the learned counsel for the petitioner.

9. In the result the writ petition succeeds and is allowed. The orders dated 15.2.1980 passed by the Cess Officer and order dated 13.11.1981 passed by the appellate committee, annexures- 4 and 7 respectively to the writ petition are quashed. The petitioner shall be entitled for refund of the amount deposited under the interim order of this court. The respondents shall refund the entire amount within three months from the date a certified copy of this order is produced before the respondent no.1.

10. Parties shall bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2004

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

Civil Misc. Writ Petition No.38020 of 1998

Babu Ram and others ...Petitioner
Versus
Special Judge/A.D.J., Bijnor and others ...Respondents

Counsel for the Petitioner:
Sri N.K. Srivastava
Sri Neeraj Agrawal
Sri K.M. Dayal

Counsel for the Respondents:
Sri M.K. Gupta
S.C.

(A) <u>Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972- Ss. 30 (6) and 20 (4)</u>- Suit by landlord for ejectment and arrears of rent on ground of default and retrial alteration-After refusal of money order by landlord the tenant was not in arrears of rent-Hence entitled to deposit under S. 30-Deposit of rent by tenant under S. 30 on 19.9.1991 and 3.1.1992-Even though ejectment suit was filed on 29.8.1991, tenant was not aware of same-Hence said deposits amount to payment of rent to landlord under S. 30 (6)-Tenant not held defaulter-Not required to deposit same again under S. 20 (4).

(B) U.P. Urban Building (Regulation of Letting Rent & Eviction) Act S-20 (2)(c)- Secondly, contractions by erecting angle irons and concrete pillars admitted by tenant-Also construction by placing finished on pillars amount to statural alteration within S. 20 (2) (c)- Finding that said constructions blocker the shop in question and disfigured the same-Hence suit by landlord-Liable to be decreed.

Held: Para 8,9 & 12

In view of the above Full bench pronouncement after the refusal of money order by landlord on 23.8.1991 rent was in arrears but the tenant was not in arrears of rent.

The matter may be looked from another angle also. Rent sent through money order was refused by the landlord on 23.8.1991 hence tenant was entitled to deposit the same under Section 30. The tenant deposited the rent under Section 30 on 19.9.1991 and 3.1.1992. Even though suit for ejectment had been filed prior to 19.9.1991 (i.e. on 29.8.1991) however, tenant was not aware of the filing of suit for ejectment hence deposits made by him under Section 30 on 19.9.1991 and 3.1.1992 amount to payment to the landlord under section 30(6) of the Act. The tenant was not therefore a defaulter regarding that rent and not required to deposit the same again under Section 20(4) of the Act.

The tenant admitted and the courts below found that tenant had made some constructions by erecting iron angles and concrete pillars. The trial court has also recorded a finding that the tenant on the

chabutra in front of the shop had constructed a wooden shop and after constructing a chabutra in the path way had covered it by tin shed, which was placed upon concrete pillars and angle irons. Constructing a wooden shop or placing a tin on the existing walls may not amount to such changes as are mentioned in section 20(2)(c) of the Act. However constructing concrete pillars and placing tin shed thereupon does amount to such structural change. Finding has been recorded that the changes affected and constructions made by the tenant have blocked the shop in dispute and path way has also been narrowed. The constructions therefore disfigured the shop in dispute. In this regard reference may be made to 1988(2) ARC 243 (S.C). In the said authority tin shed had been fixed on pucca pillars.

Case law discussed:

1968 AWR 167 (All) (FB)
2000 (1) ARC 653
1988 (2) ARC 243 (SC)
1990 (1) ARC 114
1991 (1) ARC 557

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

1. This is tenant's writ petition arising out of suit (S.C.C. Suit No.6 of 1991) filed by landlord-respondent against him for ejectment from the tenanted accommodation and for recovery of arrears of rent and damages for use and occupation. The ejectment was sought on the ground of default and material alteration. The suit was decreed and revision of the tenant was dismissed against which tenant-petitioner filed writ petition No.38691 of 1996. The said writ petition was allowed on 3.12.1996 and the matter was remanded to J.S.C.C. to decide as to whether deposits made by the tenant under Section-30 of U.P. Act no.13 of 1972 (hereinafter referred to as the Act) were validly made or not and whether constructions and alterations made by tenant disfigured the building and diminished its value and utility. After remand J.S.C.C., Bijnor again decreed the suit on 2.4.1997. Revision filed against the same being Revision No.25 of 1997 has also been dismissed on 15.10.1998 by Special Judge/Additional District Judge, Bijnor hence this writ petition.

2. According to the plaint rate of rent is Rs.50/- per month and apart from that tenant is also liable to pay house tax and water tax at the rate of 17.5% per annum. Regarding rate of rent there is no dispute. In the plaint it was stated that rent had not been paid since May, 1978 and that inspite of notice of termination of tenancy and demanding the rent dated 18.7.1991 served upon the tenant on 19.7.1991 the same was not paid to the landlord within a month from the date of receipt of notice. The tenant sent the rent through money order dated 23.8.1991, which was refused by the landlord on the ground that it was sent after one month from the date of receipt of notice. The tenant in order to bring the money order of arrears of rent sent by him within the period of one month of receipt of notice tried to stretch and contract both the ends of the same at the belated stage of the case. First the tenant tried to assert that he received the notice on 24.7.1991 and not 19.7.1991. Thereafter, tenant sought to adduce some money order coupon dated 7.8.1991 through additional evidence in revision after remand by the High Court which was rejected by the revisional court. In my opinion the courts below have rightly held that the notice was served on 19.7.1991 and not 24.7.1991 and money order was sent by the tenant on 23.8.1991 and not 7.8.1991. There is, therefore, no error in the finding

recorded by the courts below that the arrears of rent were sent through money order by the tenant to the landlord after one month from the date of receipt of notice.

3. The tenant deposited rent from May 1978 till October 1979 in SCC suit No. 123 of 1978, which had earlier been filed by the landlord. It is also admitted to the landlord and conceded by learned counsel for the landlord that the money order for Rs. 771.25 sent by the tenant was accepted by the landlord on 7.4.1984. This included rent from January to March 1984. The rest of the amount was probably sent towards arrears of taxes. The landlord in his notice demanded the rent with effect from May 1978. The landlord included even the rent deposited in earlier suit (SCC suit NO. 123 of 1978) and the amount, which had been received by him through money order on 7.4.1984 in the said notice. However, in view of full bench authority reported in 2000(1) A.R.C 653, wrong demand of rent in notice does not render the notice invalid.

4. The tenant deposited the rent under Section 30 of the Act thrice. The first case was registered as Misc. Case No.43 of 1980, second as Misc. Case No.8 of 1985 and the third as Misc. Case No.66 of 1991. It is the deposit under the third case which was mainly challenged by the landlord as being invalid. In-fact J.S.C.C. after remand from the High Court considered only the deposit made under Section 30 of the Act in the third case and held the same to be invalid. Regarding deposits under the first two misc. cases no discussion was made by the trial court in its judgment. The revisional court has held the deposits under the first two misc. cases also to be invalid.

5. As far as the third deposit in Misc. Case No.66 of 1991 is concerned it is un-disputed that the rent from 1.7.1990 to 30.9.1991 was deposited on 19.9.1991 and the rent from 1.10.1991 to 31.3.1992 was deposited on 3.1.1992. Meanwhile, the suit giving rise to the instant writ petition had been filed on 29.8.1991. The summons of the suit had not been served upon the tenant until 3.1.1992 when he deposited the rent from October 1991 to March, 1992 under Section 30 in Misc. Case No.66 of 1991. After service of summons of the suit the tenant deposited the amount of tax and costs etc in the suit on 29.2.1992 after adjusting the amounts deposited by him as rent under Section 30 of the Act. There is no dispute that if the amounts deposited by the tenant in Misc. Cases under Section 30 of the Act are taken to be valid deposit then the tenant can not be termed as defaulter or atleast he will be entitled to the benefit of Section 20 (4) of the Act. The argument of the learned counsel for landlord that interest was not deposited is not tenable as u/s 20 (4) of the Act only arrears of tax, costs and counsel's fees was deposited and not rent as it had already been deposited u/s 30 of the Act.

6. In my opinion after refusal of the rent by landlord sent through money order dated 23.8.1991 the tenant was entitled to deposit the same under Section 30 of the Act even though he remitted the rent through money order after one month from the date of receipt of notice. Even after expiry of one month's period from the receipt of notice liability to pay rent continued. If the landlord refused the rent after expiry of period of one month from

the receipt of notice he lost his right to file suit for ejectment on the ground of default. In this regard reference may be made to A.I.R. 2002 S.C. 562. In this authority Supreme Court has held that if the rent is accepted by the landlord even after expiry of period of notice then he cannot file suit for ejectment, as on the date of suit tenant is not defaulter.

7. The effect of refusal of money order by landlord of arrears of rent sent by tenant was considered in a Full Bench of this Court reported in *Indrasani Vs. Din Ilahi 1968 A.W.R. 167 (Full Bench).* In the Full Bench decision of *Gorkaran Singh Vs. Ist A.D.J., Hardoi reported in 2000 (1) A.R.C. 653* the earlier Full Bench decision in Indrasani's case has been approved and in para-18 of the latter Full Bench the following passages from the earlier Full bench have been quoted:-

"A tenant can be said to be in arrears of rent only when by non performance of his legal obligations he has deprived the lessor of the benefit of the accrued rent."……."We may point out that there is a clear distinction between a case in which the tenant is in arrears of rent and a case in the rent is in arrears. In the former case arrears of rent are the consequence of the default committed by the tenant in paying rent, in the latter case the arrears of rent may be due to causes attributable to be improper conduct of the landlord in refusing to accept rent lawfully tendered to him. Where such is the case and arrears of rent are due to reasons beyond the control of the tenant, the Courts will give a beneficial construction to the provisions of the Act keeping in view aims and objects to fulfill which it was enacted."

8. In view of the above Full bench pronouncement after the refusal of money order by landlord on 23.8.1991 rent was in arrears but the tenant was not in arrears of rent.

9. The matter may be looked from another angle also. Rent sent through money order was refused by the landlord on 23.8.1991 hence tenant was entitled to deposit the same under Section 30. The tenant deposited the rent under Section 30 on 19.9.1991 and 3.1.1992. Even though suit for ejectment had been filed prior to 19.9.1991 (i.e. on 29.8.1991) however, tenant was not aware of the filing of suit for ejectment hence deposits made by him under Section 30 on 19.9.1991 and 3.1.1992 amount to payment to the landlord under section 30 (6) of the Act. The tenant was not therefore a defaulter regarding that rent and not required to deposit the same again under Section 20(4) of the Act.

10. The revisional court further held that the deposits made by the tenant in first two Misc. cases under section 30 of the Act (Misc. case No. 43 of 1980 and Misc. case No. 8 of 1985) were also not valid. As the trial court had not considered the said question hence it was proper for the revisional court to remand the matter to the trial court to consider the validity of deposit made in both the aforesaid Misc. cases. However, no useful purpose will be served by remanding the matter on this account to the trial court as in my opinion the suit was liable to be decreed on the ground of constructions made by the tenant in the building as discussed hereinafter.

11. The tenant admitted and the courts below found that tenant had made

some constructions by erecting iron angles and concrete pillars. The trial court has also recorded a finding that the tenant on the chabutra in front of the shop had constructed a wooden shop and after constructing a chabutra in the path way had covered it by tin shed, which was placed upon concrete pillars and angle irons. Constructing a wooden shop or placing a tin on the existing walls may not amount to such changes as are mentioned in section 20(2)(c) of the Act. However constructing concrete pillars and placing tin shed thereupon does amount to such structural change. Finding has been recorded that the changes affected and constructions made by the tenant have blocked the shop in dispute and path way has also been narrowed. The constructions therefore disfigured the shop in dispute. In this regard reference may be made to 1988 (2) ARC 243 (S.C). In the said authority tin shed had been fixed on pucca pillars.

12. Accordingly I hold that the suit of the plaintiff landlord was liable to be decreed on the ground mentioned in section 20(2)(c) of U.P. Act No.13 of 1972.

13. The authorities reported in 1990 (1) ARC 114 and 1991(1)ARC 557 regarding material alteration have not taken into consideration the authority of the Supreme Court reported in 1988 (2) ARC 243 (supra). The facts in the authority reported in 1990(2) ARC 460 were different from the facts of the instant case. In the said authority construction was supported on poles embedded in ground. In the said authority concrete pillars had not been constructed.

14. Various authorities have been cited by both the sides regarding validity of deposit u/s 30 of the Act. In all these authorities it has been held that it is only valid deposit, which can amount to payment to landlord.

15. Accordingly writ petition is dismissed.

16. However tenant petitioner is granted time till 15.9.2004 to vacate provided that within one month from today he files an undertaking before the prescribed authority to the effect that on or before 15.9.2004 he will willingly vacate and handover the possession of the property in dispute to the landlord. Within one month from today tenant petitioner shall also pay all the arrears of rent due till 15.9.2004 after adjusting the amount already deposited by him.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2004

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

Civil Misc. Writ Petition No. 3947 of 1996

Nand Kishore and others ...Petitioner
Versus
Deputy Director of Consolidation, Basti and others ...Respondents

Counsel for the Petitioners:
Sri Tripathi B.G. Bhai
Sri Ram Sagar Chaudhery
Sri P.C. Singh

Counsel for the Respondents:
Sri P.N. Singh
Sri A.K. Singh
Sri U.N. Pandey
S.C.

U.P. Consolidation of Holdings Act-Ss. 19 and 20--Allotment of Chaks-Two chaks proposed for allotment by A.C.O. objection by petitioners-allowed-Entire land allotted at one chak by C.O.- On appeal judgment of Consolidation Officer reversed and petitioners given three Chak by Settlement Officer Consolidation-plea that judgment of Settlement Officer was exparte-Restoration and revision filed by petitioners dismissed-writ challenging judgments of DDC and SOC-High Court's jurisdiction under Article 226 is limited-DDC considered Convenience of Opposite parties-But failed to consider inconvenience and hardships of the petitioners-matter remitted back for fresh examination in light of rival claims/pleadings in accordance with law.

Held: Para 7

Deputy Director of Consolidation has mentioned the convenience of the opposite parties but at the same time it is clear that he has not considered the inconvenience and the hardship which is being claimed by the petitioners and thus this court is satisfied that matter needs fresh examination by the revisional court in the light of the rival claim/pleadings. It is to made clear that this court has not examined and expressed any opinion in respect to correctness or otherwise about the claim of either of the parties and thus it is pen for the revisional court to take appropriate decision in accordance with law, keeping in mind the equity between the parties.

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

1. By means of this writ petition petitioners have challenged the judgment of the Deputy Director of Consolidation dated 30.9.95 (Annexure-9 to the writ petition) and that of the Settlement Officer Consolidation dated 31.10.94 and 18.7.95 (Annexures 6 and 7 respectively).

2. For the purpose of disposal of the writ petition, it will be useful to summarize the facts. Proceedings are under Section 19 of the U.P. Consolidation of Holdings Act which is in respect to adjustment of chaks between the chak holders. Petitioners are chak holder No. 113 whereas respondent No. 3 is chak holder No. 281 and respondent No. 4 to 6 are chak holder No. 280 which was allotted to them at the stage of Assistant Consolidation Officer. At the initial stage petitioners were given two chaks i.e. 1st on plot No. 282 etc. and second on plot No. 442 etc. Against the proposed allotment petitioners filed objection with the claim that their second chak be abolished and entire land be given on/near plot No. 282. Consolidation Officer allowed petitioners objection. On filing appeal by opposite party judgment of the Consolidation Officer was reversed and petitioners were given three chaks. On the plea that the judgment of the Settlement Officer Consolidation was ex-parte, restoration was filed by the petitioners which was also dismissed and thereafter revision filed by the petitioners also met to the same fate and thus all the three judgments of the Deputy Director of Consolidation and Settlement Officer Consolidation are under challenge before this court.

3. Submission of the learned counsel for the petitioner is that petitioners claim for grant of one chak on plot NO. 282 which happens to be their largest part of holdings was allowed by the Consolidation Officer in the light of the consent given by the Rajkali w/o Shitla Prasad who was mainly affected by that adjustment on account of which petitioners chak became one, but the Settlement Officer Consolidation without

assigning any reason has disturbed the adjustment as made by the Consolidation Officer on account of which number of chak of the petitioners became three. Submission is that respondents have not filed any objection against the proposed allotment by the Assistant Consolidation Officer and it is only on the petitioner's objection change have taken place and thus in any view of the matter petitioner's position cannot be made more verse, as it stood at the stage of Assistant Consolidation Officer. They were having two chaks to which there was no objection by anybody and now they have been allowed three chaks by the order of Settlement Officer Consolidation which on the facts cannot be justified. It is further submitted that order of the Settlement Officer Consolidation was in gross violation of principle of natural justice which is clear from the order sheet itself as no notices were ever issued/served on the petitioners. Submission is that the Deputy Director of Consolidation has also dismissed the revision without considering petitioner's inconvenience/grievance and the hardship just by simply stating the inconvenience of the opposite parties. Lastly, it is argued that in plot No. 282 petitioners are having their boring and thus they will be deprived of their irrigation facility. On these score prayer for interference in the impugned orders have been made.

4. Learned counsel for the respondents, in response to the aforesaid, submitted that all the three chaks of the petitioners are on their original holding as has been held by the Deputy Director of Consolidation and therefore, no prejudice can be said to have caused to the petitioners by the impugned adjustment. The argument is that averment in respect to the boring in plot No. 282 is after thought and it has been taken for the first time in the writ petition and it is to strengthen the claim the boring has been installed after filing of the writ petition and report in this connection has been managed and thus on this score submission is that petitioners cannot claim any advantage. Submission is that in the matter of adjustment of chaks on technical ground no interference is required unless parties are able to prove prejudice on account of impugned arrangement.

5. In view of arguments of both sides pleadings and the materials which are available before this court including the judgments of all the three courts have been examined.

6. There cannot be any quarrel with the preposition that in the matter of adjustment of chaks scope of interference by this court is limited. There also cannot be two views that in the matter of adjustment both sides in no case can be found to be satisfied as on acceptance of the claim of one party the other side is to remain dis-satisfied and thus in that situation convenience and hardship of the parties has to be comparatively weighed. It is to be seen that by accepting a particular set of claim, how other side is placed. The balance is to be maintained in making the adjustment. Needless to say that adjustment of chak has great importance to the chak holders as on its finality parties are to remain contended with the particular piece of land at a particular place for all the times to come and thus if for various kind of hardship i.e. (i) chak not being near irrigation facility (ii) number of chak having been increased (iii) land not being of good

quality etc. parties will remain sufferer for ever. On a close look to the plight of the poor farmer in the village it becomes apparent that in small holding some of the tenure holders by growing vegetables or by limited means of irrigation are able to produce the crops to maintain their families and thus if the land allotted in their chak is not convenient for their purpose or number of chaks are increased without any lawful justification and for various other alike reasons if the Chak holder is not happy then that is to be rectified by the court. Certain broad norms have been provided for adjustment of chaks under Section 19 of the U.P.C.H. Act. The main thrust of Section 19 of the Act appears to be that (i) the land allotted to the tenure holder should not differ from the area of his original holding by more than twenty five per cent. (ii) every tenure holder as far as possible be allotted a compact area at the place where he holds the largest part of his holdings. (iii) tenure holder should not be allotted more than three chaks except with the approval in writing, of the Deputy Director of Consolidation (iv) Every tenure holder as far as possible be allotted plot on which his private source of irrigation or any other improvement is in existence (v) every tenure holder be allotted as far as possible the chaks in conformity with the process of rectangulation. The intention of providing norms/guidelines regulating adjustment of chak appears to be that consolidation authorities may not be able to act in arbitrary manner and at the same time interest of tenure holder is protected. The use of words "as far as possible" at various places in Section 19 of the Act has been interpreted by this court in several cases and it has been ruled that guidelines are to be followed unless it is not possible to follow them in a particular situation of the case. It is in this backdrop the writ petitions coming to this court against the orders arising out of chak proceedings are to be dealt with. Of course, so far the power of scrutiny by this court is concerned that is not confined within the ambit of guidelines so provided in Section 19 of the U.P.C.H. Act as this court while exercising the equity jurisdiction can always balance the equity in particular set of fact and therefore, it is in each individual case on its particular fact balance of convenience and equity between the parties is to be balanced.

7. So far the case in hand is concerned, admittedly at the stage of Assistant Consolidation Officer petitioners were given two chaks i.e,. one on plot No. 282 etc. and other on plot no. 442 etc. Against the proposed adjustment by the Assistant Consolidation Officer respondents did not file any objection. It is only the petitioners who filed objection before the Consolidation Officer claiming only one chak on plot No. 282 etc. For accepting the petitioners claim one Rajkali w/o Shitla Prasad whose plot was to be affected gave her consent as has been recorded on 23.7.1994 (Annexure-3 to the writ petition) upon which Consolidation Officer made many chaks and made their chak to be one in number. Respondents filed appeal. Order sheet on the record demonstrates that on 21.9.94 there is order for registration of the appeal and thereafter there is order sheet dated 28.10.94 which states that arguments have been heard at Assistant Consolidation Officer office and then 31.10.94 was fixed for orders. There is no mention in the order sheet for issuance of the notice to the opposite parties. There is nothing on the record to demonstrate that how and in what manner respondents in the appeal

were noticed and served and whether they engaged any counsel. The order of the Settlement Officer Consolidation by which appeal of the respondents was allowed on its examination also do not appear to contain any reason whatsoever for making drastic changes in the chak of the petitioners. No reason has been assigned for making chak of the petitioners to be three in number from two. In the event petitioners would not have filed objection before the Consolidation Officer number of their chaks would have remained as two as nobody either objected against the proposal of the chak in favour of the petitioners at the stage of Assistant Consolidation Officer or has otherwise claimed any change and thus increase in the number of chak of the petitioners as three from two which was originally proposed by the Assistant Consolidation Officer appears to be without any reason and without any claim in that respect by the opposite parties. Of course the tenure holders can be allotted chaks but if the number of chak of tenure holder can be minimized and it remains as two or one in number then that is always to facilitate Chak holder in farming and will be convenient in every respect. This is the very purpose of allotment of chak proceedings as in this process various plots of the tenure holders which are if spread here and there they are consolidated and they are made compact at the place where the tenure holder holds largest part of his holdings, as is clear from the provisions as are contained in Section 19 (1)(e) of the U.P.C.H. Act. Thus in the event Consolidation Officer by accepting petitioners claim of allotment of one compact chak on plot NO. 282 in the light of the consent given by Rajkali reduced the number of chak of the petitioners from two to one, it was obligatory on the part of the Settlement Officer Consolidation to have assigned cogent reasons to unsettle that arrangement. Material before this court and the judgment of the Settlement Officer Consolidation makes it clear that reversal of the adjustment, as made by the Consolidation Officer was neither made after an opportunity in any manner to the petitioners nor any reason has been assigned for doing the same. Deputy Director of Consolidation, of course, has stated in his judgment that opposite parties on acceptance of the petitioners claim will not be having their chaks on their original holding but at the same time it is clear that opposite parties have not filed any objection before the Consolidation Officer in respect to their grievance, if any, and therefore, for making position of the petitioners more verses than it was at the stage of the Assistant Consolidation Officer it is clear that neither Settlement Officer Consolidation nor Deputy Director of Consolidation has mentioned any ground and thus the matter needs deeper attention. There appears to be a dispute regarding existence of the boring in plot No. 282, as claimed by the petitioners in para 2 of the writ petition and in certain documents as has been filed before this court, but as the impugned judgment has been found to be faulty on other grounds it will be for the Deputy Director of Consolidation to examine the disputed question of fact about existence of the boring in plot NO. 282 in the light of the rival claim/pleadings. ON the fact of the present case for the reasons indicated above, this court is satisfied that two chaks as was proposed by the Assistant Consolidation Officer, which was reduced to one in number by the Consolidation

Officer with the consent of the Rajkali was cancelled by the Settlement Officer Consolidation and was made three in number without assigning any reason whatsoever and without any notice/opportunity to the petitioners on account of which petitioners apparently suffered serious prejudice. Deputy Director of Consolidation has mentioned the convenience of the opposite parties but at the same time it is clear that he has not considered the inconvenience and the hardship which is being claimed by the petitioners and thus this court is satisfied that matter needs fresh examination by the revisional court in the light of the rival claim/pleadings. It is to made clear that this court has not examined and expressed any opinion in respect to correctness or otherwise about the claim of either of the parties and thus it is open for the revisional court to take appropriate decision in accordance with law, keeping in mind the equity between the parties.

8. Accordingly, for the reasons recorded above this writ petition succeeds and is allowed. The impugned judgments of the Deputy Director of Consolidation dated 30.9.95 (Annexure-9 to the writ petition) and that of the Settlement Officer Consolidation dated 31.10.94 and 18.7.95 (Annexures 6 and 7 respectively to the writ petition) are hereby quashed. The matter is send back to the revisional court for fresh decision, preferably without a period of three months from the date of receipt of certified copy of this order by either of the parties, without allowing any unwarranted adjournment to them.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 4.3.2004

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 38675 of 2003

Rajesh Kumar ...Petitioner
Versus
I.I.T., Kanpur and others ...Respondents

Counsel for the Petitioner:

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

Constitution of India, Article 226-Principles of Natural Justice-Violation of–Incident of threatening inmates of hostel of HBTI by petitioners-Students of IIT Kanpur-Investigation made by SSAC-which recommended termination of academic programme of petitioners-Director of IIT-Kanpur being Chairman of Academic Senate of Institute, impugned order accepting recommendation-In a matter in which educational carrier of six students involved, institution not follow basic principles of natural justice-None of supply charges–No evidence/statement recorded in presence of accused, nor any evidence produced before High Court to show as to how they were involved-Petitioners amongst others called to narrate incidents-No witness produced before them, nor they were confronted with any allegation of participation incident-No opportunity given to defend themselves-Findings highly vague, uncertain and of general nature-Apologies not amounting admission-Allegation, do not call for harsh punishment-Authorities failed to adopt reformative approach i.e. deterrence ideology- Impugned orders quashed.

Held–Paras 17 & 25

I have gone through the whole record. It is clear that in a matter in which educational career of six students was involved, the institute did not follow even the basic principles of natural justice. None of the petitioners was informed of the allegations or charges against him. No evidence /statement of any witness was recorded in presence of the accused nor any evidence was produced before this court to show as to how the petitioners were involved and what was the actual participation in the incident. It appears that the petitioners were called amongst others to narrate the incidents. It was only investigation. No witness was produced before them nor they were confronted with any allegation of participation in the incident of 30/31 January, 2003. They were never asked to explain their conduct. It was but necessary that they should have been given opportunity to defend themselves. The findings as quoted above show that they are highly vague, uncertain and of very general in nature, and unconnected with the aforesaid incident of 30/31 January, 2003. The respondents in their counter affidavit have filed copies of 'apologies' of the petitioners in which they assured keeping good behaviour in future, so that they may complete their studies. These apologies have been tendered after the punishment was awarded. Naturally these apologies must have been tendered in the hope that they will be allowed to continue their studies and do not amount to any admission of their guilt in the background of this case. The allegations made are not such which will call for such a harsh punishment.

In the background of law laid down by the Apex Court on penology aforesaid the facts of this case show that not only there has been gross violation of fair play and principles of natural justice but great injustice has been done to the petitioners who have been awarded inappropriate sentence/punishment and the authorities have miserably failed to adopt corrective approach i.e. deterrence ideology.

Case law discussed:

(1999) 5 SCC1
AIR 1998 SC 3164
(2000) 7 SCC 529
2002(2) ESC 450
(1991) 2 SCC 716 (Pr. 29)
AIR SCW 6429
AIR 1991 SC 1463

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

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

2. These two writ petitions have been filed challenging the orders passed by the Senate Student Affairs Committee, hereinafter called as SSAC, and Chairman Senate of the Indian Institute of Technology, Kanpur, hereinafter referred as "Institute' launching the academic programme of the petitioners by order dated 4.2.2003. The aforesaid order was confirmed by the Chairman Senate of the Institute by order dated 7.8.2003.

3. The Institute imparts education in various engineering course. Petitioners are students of the said institute. The course in the institute is of 10 semesters. Petitioner Rajesh Kumar was admitted in M.Sc. (Integrated) in the year 1989 with Roll No. 98249. The petitioner cleared IX (nine) semesters in first attempt and was studying in final semester.

4. On 30/31 January, 2003 an incident is said to have taken place in which it is alleged that Rajesh Kumar along with his some friends entered the hostel of HBTI in two cars at about 1.30 am and threatened some inmates there. It is further alleged that some shots were fired in the air by the students of IIT

Kanpur which has tarnished the image of the institute. An 'investigation' is said to have made by SSAC, which recommended termination of academic programme of the petitioner, the Director IIT-Kanpur who is also Chairman of Academic Senate of the institute who passed the impugned order dated 4.2.2003 accepting the recommendation.

5. It is said in the affidavit that SSAC is a committee which comprises not only of the Dean of Student Affairs but has come students and warden of students hall.

6. The counsel for the petitioners submits that neither any charge sheet nor any Articles of charges were served on the petitioners at any point of time either by SSAC or by the Chairman Senate of the Institute before taking action. It is alleged that the petitioners were called by the SSAC to appear before it on 3rd February, 2003. The Committee recorded the statement of some students including the petitioners, alleged to be connected with this incident of 3.2.2003 at HBTI. Statement of any person was not taken kin their presence. All the persons were called one by one. The petitioners were not allowed to cross-examine nor were called to give their defence. They were not given any opportunity of hearing. The committee submitted its report of investigation recommending that the petitioners be expelled from the institute. The report of the committee is annexure CA-2 to the counter affidavit.

7. A perusal of the report shows that in this meeting 13 members were present. According to the report the incident was narrated by the Chairman in which several students are said to have participated. The Committee noted in the report that some scuffle is said to have taken place between the provocators and the inmates of the HBTI hostel and on receipt of information, the matter was reported to the authorities to 'find out the facts of the incident'. On the basis of queries from some of the students and others it was found that some inmates of C-Bot wing of Hall-1 including the petitioner were 'involved in frequent consumption of alcoholic liquor, socializing with female friends and providing shelter to some outsiders, and that some students namely Nitin Sirohi of Hall-1 (of C-Bot) gave shelter to one of his cousins and a friend, who were allegedly studying at Kanpur. Apart from that some student leader from a local college having allegiance with a particular political party was a frequent vistor to Mr. Rajesh Kumar and Mr. Nitin Sirohi.

8. Neither any notice or charge sheet was given to the petitioners nor they were given opportunity to explain allegations made against them nor any witness was examined in their presence or opportunity to defend was allowed. Only the Chairman narrated the incident and the facts gathered by him. He himself was not a witness to the incident.

9. It is submitted by the counsel for the petitioners that the narration of facts heard from others is no evidence. The chairman was not a witness of any incident. Vague allegations have been made and believed to be true and findings have been recorded without applying mind to facts alleged blindly in the name of defamation of institute. No evidence of any alleged offence was produced or ingredient of any offence proved. No body is said to have received any injury

nor damage to any property is alleged to have been caused.

10. The finding of the committee against Rajesh Kumar is as under :

"Mr. Rajesh Kumar (Roll No. 98292): He was having nexus with undesirable elements and harboured the main accused of the incident in his room. He was also actively involved in the incident, that occurred in HBTI Hostelk which tarnished the image of the Institute. For the offences committed by Mr. Rajesh Kumar, the SSAC recommends immediate termination of Mr. Rajesh Kumar from the academic programme of the Institute."

The finding of the Committee against Nitin Sirohi is as under :

"Mr. Nitin Sirohi (Roll No. 98249): He was actively involved in giving shelter to his cousin namely Shri Ankur Bana and one of his friends namely Sri Abhishek Sirohi, both outsiders, in his own room and regularly taking them to the mess for dining. He was also found having nexus with undesirable elements. He could have avoided the whole incident had he reported to the authority for preventive measures well in time. For the commission and omission committed Mr. Nitin Sirohi, the SSAC recommends immediate termination of Mr. Nitin Sirohi from the academic programme of the Institute. "

11. The findings of the committee also show that similar allegations were found proved against several other students namely, Mr. Phanki Karthik, K.K. Singh, Mallik Subharao, A.K. Somasi and Naval Malhotra.

12. The committee recommended dropping of four students from current academic semester and serving a written warning to last students to deter from such acts in future.

13. The counsel for the petitioners contends that termination of the academic programme is a serious matter which will have permanent effect through-out life of the petitioners and instead of an engineer, the institute will produce a criminals. Out of ten semester was left. The counsel for the petitioner submits that such a type of punishment is very harsh and can not be given without any proof or affording an opportunity of hearing and defence.

14. It is further submitted that one of the charges is harbouring the main accused. The word 'harbouring ' has legal connotation. It means supplying shelter. If a criminal entered the room of petitioners how it amounts to harbouring. There is no allegation that the petitioners 'supplied' shelter. Similarly other allegations have been made in vagest possible language which are so general in nature that they can not be controverted except by general denial.

15. The respondents have also referred to the case of **Ashok Kumar Rana Versus Principal Madan Mohan Malviya Engineering College**. A perusal of this judgment shows that before taking disciplinary action notice and opportunity was given by the disciplinary authority of the college to the petitioners of that writ petition.

16. It was held in para 9 that the extent and nature of opportunity which is to be given in the mater of indiscipline of a student in educational institution varies

from case to case. The object of giving education to student varies with various disciplines in life and action is necessary in case of discipline. It was further held that the Court can not at all interfere with the decisions of the authorities.

17. I have gone through the whole record. It is clear that in a matter in which educational career of six students was involved, the institute did not follow even the basic principles of natural justice. None of the petitioners was informed of the allegations or charges against him. No evidence/statement of any witness was recorded in presence of the accused nor any evidence was produced before this court to show as to how the petitioners were involved and what was the actual participation in the incident. It appears that the petitioners were called amongst others to narrate the incidents. It was only investigation. No witness was produced before them nor they were confronted with any allegation of participation in the incident of 30/31 January, 2003. They were never asked to explain their conduct. It was but necessary that they should have been given opportunity to defend themselves. The findings as quoted above show that they are highly vague, uncertain and of very general in nature, and unconnected with the aforesaid incident of 30/31 January, 2003. The respondents in their counter affidavit have filed copies of 'apologies' of the petitioners in which they assured keeping good behaviour in future, so that they may complete their studies. These apologies have been tendered after the punishment was awarded. Naturally these apologies must have been tendered in the hope that they will be allowed to continue their studies and do not amount to any admission of their guilt in the background of this case. The allegations made are not such which will call for such a harsh punishment.

18. The law on penology is undergoing change all over the world. There are three types of punishments.

(i) The first is the traditional i.e. punitive approach. It proceeds on the basis that punishment should act as a deterrent not only to the offender but should set an example to others.

(ii) The second is theratuic approach which aims to curbs criminal tendencies which are product of deceased psychology and

(iii) The third is reformative approach giving chance to reform and become a good citizen in the larger interest of society considering the background and circumstances of particular case.

19. In the first category notorious offenders against the society are to be visited with severe punishment. In the second category rationalization of punishment aims at curing criminal tendencies and the punishment is given to satisfy the requirement of law, taking the circumstances in which the offence was committed and in the third category those case fall in which there is chance of reformation of the offender so that he can be made a "good citizen" beneficial to the society.

20. The Supreme Court in **Jai Kumar Vs. State of M.P. 1999 (5) SCC page 1** held as under:

"Justice is supreme and justice ought to be beneficial for the society so that the society is placed in a better-off situation.

Law courts exist for the society and ought to rise up to the occasion to do the needful in the matter, and as such ought to act in a manner so as to subserve the basic requirement of the society. It is a requirement of the society and the law must respond to its need. The greatest virtue of law is its flexibility and its adaptability, it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day. In the present-day society, crime is now considered a social problem and by reason therefore a tremendous change even conceptually is being seen in the legal horizon so far as the punishment is concerned.

One school of thought on this score propagates that the function of the law court is that of a social reformer and as such in its endeavour to act as such the question of a deterring punishment would not arise since the society would otherwise be further prone to such violent acts or activities by reason of the fact that with the advancement of the age the mental frame of boys of tender age also go on changing and in the event of any arrogance being developed or a sense of revenge creeping into the society, the society would perish to the detriment of its people. The other school, however, has expressly recorded and rather emphatically that unless the severest of the severe punishments are inflicted on an offender (obviously) depending upon the nature of the crime) the society would perish.

The law Courts as a matter of fact have been rather consistent in the approach that a reasonable proportion has to be maintained between the seriousness of crime and the punishment. While it is true that a sentence disproportionately severe ought not to be passed but that does not even clothe the law courts with an option to award the sentence which would be manifestly inadequate having due regard to the nature of the offence since an inadequate sentence would fail to produce a deterrent effect on the society at large. Punishments are awarded not because of the fact that it has to be an eye for an eye or a tooth for a tooth, rather having its due impact on the society while undue harshness is not required but inadequate punishment may lead to sufferance of the community at large."

21. Again in **AIR 1998 SC3164 State of Gujrat and another Versus Hon'ble High Court of Gujrat, Hon'ble Thomes, J.** laid down as under:

"Reformation should hence be the dominant objective of a punishment and during incarceration every effort should be made to recreate the good man out of convicted prisoner. Thus, reformation and rehabilitation of a prisoner are of great public policy. They serve a public purpose."

22. The counsel for the respondents have laid down great emphasis in his argument that the petitioners have failed to show that any prejudice being caused by not giving them notice, charges or following of any other principles of natural justice. He insists that no opportunity was required to be given and the enquiry from the petitioners by the committee was sufficient, compliance of principles of natural justice. He has relied upon the case of **Aligarh Muslim University Vs. Mansoor Ali 2000 (7) SCC 529** and the case of **Dr. Satendra Singh 2002 (2) ESC page 450 (All.D.B.).** There is no dispute about the legal

position that unless prejudice is shown mere breach of principles of natural justice is not enough to invalidate an order. In the instant case, the position is quite different. The petitioners were not even informed about the allegations against them, nor were they informed about what was their conduct for which enquiry was being conducted. They were not even were warned that enquiry proceedings would be used against them. By what evidence the Institute took the guilt proved is not known. They were never given any opportunity to defend themselves. No reason has been given by the committee except narration of the incident by the Chairman. This is in fact no enquiry or decision in the eyes of law. Question of prejudice is writ large on the face of record. The aforesaid two cases are therefore, not applicable to the facts and circumstances of this case.

23. The Court has undoubtedly the power to intervene to correct any error in complying with the Rules and Regulations. The counsel also relied upon the case of Apex Court in **Maharasthra State Board of Secondary and Higher Secondary Education Versus S.S. Gandhi 1991 (2) SCC 716** para 29 of the judgment of the Apex Court laid down thus:

"29…… While it is open to the High Court to interfere with the order of the quasi-judicial authority, if its is not supported by any evidence or if the order is passed in contravention of the statutory provisions of the law or in violation of the principle of natural justice, the court has no jurisdiction to quash the order merely on the ground that the evidence available on the record is insufficient or inadequate or on the ground that different view could possibly be taken on the evidence available on record. The Examination Committee has jurisdiction to take decision in the matter of use of unfair means not only on direct evidence but also on probabilities and circumstantial evidence. There is no scope for importing the principles of criminal trial while considering the probative value of probabilities and circumstantial evidence. The Examination Committee is not bound by technical rules of evidence and procedure as are applicable to courts. We respectfully agree with the ratio."

The Supreme Court in a recent case reported in **AIR Supreme Court Weekly 6429 State of Karnataka Vs. Puttaraja** it has been held that:

"Undoubtedly, there is a cross-culture conflict where living law must find answer to the new challenges and the Courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner stone of the edifice or "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be—as it should be – a decisive reflection of social consciousness of society". Therefore in operating the sentencing system, law should adopt the corrective machinery or the deterrence ideology based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the

manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used, the indelible impact on the victim and his family and all other attending circumstances are relevant facts which would enter into the area of consideration.

Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not lend endure under such serious threats. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.

24. This position was illuminatingly stated by this Court in **Sevaka Perumal etc. vs. State of Tamil Nadu (AIR 1991 SC 1463)** in which it has been held that:

"The criminal law adheres in general to the principal of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime yet in practice sentences are determined largely by the other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence.

Proportion between crime and punishment is a goal respected in principal, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity in now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times on account of misplaced sympathies to the perpetrator of crime leaving the victim or his family into oblivion. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is though then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the gravity of the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in **Dannis Councle MCG Dautha v. State of Callifornia, 402 US 183:28 LD2d 711**, that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any

basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitable distinguished.

The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Court would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women like the case at hand, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact and serious repercussions on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse to time or considerations personal to the accused only in respect of such offence will be resultwise counter productive in the long run and against societal interest which needs to be cared for and strengthened by the required string of deterrence inbuilt in the sentencing system."

25. In the background of law laid down by the Apex Court on penology aforesaid the facts of this case show that not only there has been gross violation of fair play and principles of natural justice but great injustice has been done to the petitioners who have been awarded inappropriate sentence/punishment and the authorities have miserably failed to adopt corrective approach i.e. deterrence ideology.

26. The respondents have filed affidavit of Dean of Student Affairs and Ex-officio Chairman SSAC. In para 3 of this affidavit it is stated that "before this incident "General ambience of indiscipline of inmates of Hall-1 (C-Bot Wing)" was very alarming. It is further stated in the same paragraph that the deponent was well aware of the wrong doings of Mr. Nitin Sirohi and Mr. Rajesh Kumar and also the impact it was having on the psyche of others students and in particular, inmates of Hall-1, inasmuch as harbouring unsocial elements in the hostel. It touched frightening peak when the students come to know about the involvement of Mr. Rajesh Kumar and Mr. Abhishek Sirohi (brother of Mr. Nitin Sirohi), alongwith other outsider and unsocial elements in the incident of 30/31.1.2003 that took place in the hostel of HBTI. It is also stated in para 4 that the Dean was well aware of the wrong doings of the petitioners and it is also the fact that "he did not take any action". This shows that the authorities/respondents were and are themselves responsible for encouraging indiscipline in the Institute. They did not perform their duties as teacher, guide and Dean of Student welfare.

27. Having given anxious thought I feel that punishment awarded to the petitioners is highly disproportionate and drastic to the allegations made against him and reformative approach is against in this case.

28. Thus, it is clear that the petitioners have not only been treated unfairly but they have also been discriminated as 2 students have been awarded only warning for same or similar incident. These students have already lost more than 1 year of their life and career which they would have completed by now. This is sufficient punishment. These students have already given undertaking not to repeat any such act in future. They have no criminal history and must have been good students to find admission in I.I.T. Kanpur. The Court is duty bound to see that the punishment awarded is appropriate to the offence and where there are chances of reformation, particularly, in cases of students, the Court must give chance to such students to reform their life and to become a good citizen of the country. Therefore, keeping in view the rights of the victims i.e. students and the fact that they have lost one year of their career appears to be sufficient punishment. They would be passing out immediately after examination of last semester. The punishment of termination of their academic session is too harsh and is highly disproportionate. I am, therefore, of the opinion that in the facts and circumstances of this case a chance to reform should be given to the petitioners and they be permitted to complete their career in the Institute.

29. For these reasons the writ petition is allowed. The respondents are directed to allow the petitioners to complete their studies. The impugned orders dated 7.3.2003, 7.8.2003 and letter/order dated 31.3.2003 are quashed.

No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.3.2004

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 8826 of 2004

Prem Singh ...Petitioner

Versus

District Magistrate/District Deputy Director of Consolidation and others ...Respondents

Counsel for the Petitioner:
Smt. Anita Tripathi

Counsel for the Respondents:
S.C.

U.P. Consolidation of Holdings Act, 1953 and 5(2) Secs. 19-A-U.P. Zamindari Abolition and Land Reforms Act, 1950-Ss. 195 and 197- Scope- Allotment proceedings under Ss. 195 and 197 of ZA and LR Act are not affected by S. 5(2) of U.P. Consolidation of Holdings Act- S. 19-A (2) only an enabling provision which enables ACO, while preparing Consolidation Scheme, to make allotment of a Gaon Sabha land after determining its valuation-S. 19-A(2) does not prohibit allotment proceedings under Ss. 195 and 197 of U.P. Z.A. & L.R. Act.

Held: Para 5 & 6

The allotment proceedings under Section 195 and 197 of U.P. Zamindari Abolition & Land Reforms Act do not come under any of the proceedings as contemplated by Section 5 (2). The proceedings for allotment are neither proceedings for correction of records nor proceedings for declaration of rights or interest or for declaration or adjudication of any other right in regard to which the proceedings can and ought to have been taken under the U.P. Consolidation of Holdings Act.

Thus the proceedings under Sections 195 and 197 of the U.P. Zamindari Abolition & Land Reforms Act are not affected by Section 5 (2) of the U.P. Consolidation of Holdings Act. The submission of counsel for the petitioner that during the pendency of the consolidation proceedings allotment cannot take place is without any substance.

The provision under Section 19-A (2) of the Act is only enabling provision which enables the Assistant Consolidation Officer while preparing Consolidation Scheme to make allotment of a Gaon Sabha land after determining its valuation but the said provision cannot be read creating any prohibition to the allotment proceedings contemplated under Section 195 and 197 U.P. Zamindari Abolition & Land Reforms Act. Section 19-A also do not help the petitioner in any manner in support of his submission that during the pendency of consolidation proceedings the allotment cannot take place.

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

1. Heard counsel for the petitioner.

2. By this writ petition the petitioner has prayed for quashing the order dated 4.12.2003 passed by the Collector, Agra. A writ of mandamus has also been sought praying for a direction to the respondents not to allot the land of Gram Panchayat to any other person till the finality of consolidation scheme.

3. Petitioner's case is that the village is under consolidation operation. The petitioner had come up before this Court earlier by filing writ petition No. 38387 of 2003 praying that the respondents be directed not to allot any land during the pendency of the revision before the Deputy Director of Consolidation. This Court by order dated 23.8.2003 disposed of the writ petition which order is being quoted below:-

Heard counsel for the petitioners and learned standing counsel.

By this writ petition, the petitioners have prayed for a writ of mandamus commanding the respondents not to allot any land to any person during the pendency of the revisions before the Deputy Director of Consolidation

In paragraph-5 of the writ petition petitioners have stated that revisions of the petitioners are pending before the Deputy Director of Consolidation.

In view of the fact that petitioners themselves have stated in the writ petition that their revisions are pending before the Deputy Director of Consolidation, it is open to the petitioners to move application in the pending revisions. No mandamus in this writ petition can be issued directing that land should not be allotted to any person. If so advised, the petitioners may move appropriate application in pending revisions.

The writ petition is disposed of with the aforesaid observation."

4. Petitioner has filed an application before the Collector, Agra on administrative side praying that in pursuance of the order dated 23.8.2003 no allotment of house /agricultural land be made during the hearing of the revision before the Deputy Director of Consolidation. The Collector vide impugned order dated 4.12.2003 has dismissed the said application. The Collector has further observed that it will be open to the petitioner Prem Singh to

file an application in the pending revision before the Deputy Director of Consolidation. The counsel for the petitioner challenging the order contended that in view of Section 5 and Section 19A(2) of the U.P. Consolidation of Holdings Act, 1953 no allotment proceedings under the U.P. Zamindari Abolition & Land Reforms Act, 1953 under Sections 195 and 197 can be undertaken. Reliance has been placed by the counsel for the petitioner on Section 5(2) of the U.P. Consolidation of Holdings Act which is extracted below :-

*"5.**Effect of (notification under Section 4(2))***

(1)……..

(2) Upon the said publication of the notification under sub-section (2) of Section 4, the following further consequences shall ensue in the area to which the notification relates, namely_____

(a) every proceeding for the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the court or authority before whom such suit or proceedings is pending, stand abated:

Provided that no such order shall be passed without giving to the parties notice by post or in any other manner and after giving them an opportunity of being heard:

Provided further that on the issue of a notification under sub-section (1) of Section 6 in respect of the said area or part therefore, every such order in relation to the land lying in such area or part as the case may be, shall stand vacated;

(b) such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said suits or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of this Act and the rules made thereunder.

(Explanation I For the purposes of sub-section (2), a proceeding under the U.P. Imposition of Ceiling on Land Holdings Act, 1960 or an uncontested proceeding under Sections 134 to 137 of the U.P. Zamindari Abolition & Land Reforms Act 1950, shall not be deemed to be a proceeding in respect of declaration of rights or interest, in any land.)"

Section 5 (2) provide for the consequence which ensue upon the publication of the notification under sub-section (2) of Section 4. The proceedings which are contemplated to be abated under Section 5(2)(a) are ;

(i) every proceedings for correction of records;
(ii) every suit and proceedings in respect of declaration of rights or interest in any land laying in the area;
(iii) or for a declaration or adjudication of any other right in regard to which the proceedings can and ought to have been taken under this Act.

5. The allotment proceedings under Section 195 and 197 of U.P. Zamindari Abolition & Land Reforms Act do not come under any of the proceedings as contemplated by Section 5 (2). The proceedings for allotment are neither proceedings for correction of records nor proceedings for declaration of rights or interest or for declaration or adjudication of any other right in regard to which the proceedings can and ought to have been taken under the U.P. Consolidation of Holdings Act. Thus the proceedings under Sections 195 and 197 of the U.P. Zamindari Abolition & Land Reforms Act are not affected by Section 5 (2) of the U.P. Consolidation of Holdings Act. The submission of counsel for the petitioner that during the pendency of the consolidation proceedings allotment cannot take place is without any substance.

6. The next provision relied by the counsel for the petitioner is 19-A (2) of the U.P. Consolidation of Holdings Act which is quoted as below:-

"**19-A Preparation of provisional Consolidation Scheme by the Assistant Consolidation Officer,** _____ (1) The Assistant Consolidation Officer shall in consultation with the Consolidation Committee, prepare in the form prescribed a provisional Consolidation Scheme for the unit.

(2) Notwithstanding anything contained in this Act, the U.P. Zamindari Abolition & Land Reforms Act, 1950, or any other law for the time being in force, it shall be lawful for the Assistant Consolidation Officer, where in his opinion it is necessary or expedient so to do, to allot to a tenure-holder, after determining its valuation, any land vested in the Gaon Sabha, or any other local authority, as a result of notification issued under Section 117 or 117-A of the U.P. Zamindari Abolition & Land Reforms Act, 1950:

Provided that where any such land is used for a public purpose, it shall be allotted only after the Assistant Consolidation Officer has declared in writing that it is proposed to transfer the rights of the public as well as of all individuals in or over that land to any other land specified in the declaration and earmarked for that purpose in the provisional Consolidation Scheme."

Sub-section (2) of Section 19-A on which reliance has been placed by the counsel for the petitioner itself provides that it shall be lawful for the Assistant Consolidation Officer, where in his opinion it is necessary or expedient so to do, to allot to a tenure-holder after determining its valuation, any land vested in the Gaon Sabha or any other local authority. The provision under Section 19-A (2) of the Act is only enabling provision which enables the Assistant Consolidation Officer while preparing Consolidation Scheme to make allotment of a Gaon Sabha land after determining its valuation but the said provision cannot be read creating any prohibition to the allotment proceedings contemplated under Section 195 and 197 U.P. Zamindari Abolition & Land Reforms Act. Section 19-A also do not help the petitioner in any manner in support of his submission that during the pendency of consolidation proceedings the allotment cannot take place.

7. This Court vide its order dated 23.8.2003 as extracted above only observed that if so advised the petitioners may move appropriate application in pending revision before the Deputy Director of Consolidation. The said order do not entitled the petitioner to approach the Collector by moving an application on administrative side praying for stay of entire allotment proceedings. The Collector has rightly observed in the impugned order that it will be open to the petitioner to move an application in the pending revision as per judgment of this Court dated 23.8.2003. No error has been committed by the Collector in rejecting the application. The order dated 4.12.2003 does not suffer from any error warranting interference by this Court under Article 226 of Constitution of India.

8. The writ petition lacks merit and is dismissed summarily.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2004

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

Writ Petition No. 26414 of 2003

Hajari Lal Sahu ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.N. Yadav

Counsel for the Respondents:
S.C.

Indian Stamp Act-Sec.47-A-U.P. Stamp (Valuation of property) Rules, 1997-Rr. 3,4 and 5-Natural Justice-Market Value-Assessment Agricultural land situated between two villages-Payment of stamp duty by after assessing valuation thereof in accordance with law-Proceedings under S.47-A initiated by S.D.O. upon complaint of third person-orders passed without affording any opportunity of hearing-Impugned order demanding additional Stamp duty on basis of Note 2 of guidelines formulated by D.M. determining valuation of certain land and presuming agricultural land calculated as per sq. meter highly discriminatory and arbitrary-S.D.O. proceeded on report of Sub-Registrar without any inquiry finding based on any verifiable evidence-held impugned order liable to be quashed.

Held: Para 12

From a bare perusal of the impugned order, it would transpire that the S.D.O. concerned proceeded to pass the impugned order merely on being so directed on the complaint of one Kishan Lal Sahu and on the basis of report dated 24.4.1999 submitted by the Deputy Registrar II and no proper enquiry was made nor it appears from the record that there was any material direct, circumstantial or even intrinsic evidence on the basis of which a reasonable belief could be formed that the instrument has been undervalued in observance of Rules 3 and 4 of the Stamp Rules and Section 47 A of the Stamp Act. The authority concerned appears to have heavily relied upon Note-2 of the impugned order and on a punctilious reading of the Note-2, proceeded to pass the impugned order in utter disregard of the mandate contained in Rules 4 (1) (a) (i) to (iv) or 5 of the Stamp Rules, 1997 in which condition precedent was the proximity of land to road, market, bus station railway station, factories, educational institutions, hospitals and government offices, classification of soil and availability irrigation facility etc. It would also appear that the S.D.O. concerned proceeded on the report of Sub Registrar without making enquiry and recording of finding based on any verifiable evidence.

By this reckoning, the impugned order is liable to be quashed as it has been passed without affording fair opportunity of hearing to the petitioner and also that his opinion based on the report of Sub Registrar without there being any other verifiable evidence, material direct, circumstantial or even intrinsic evidence to form a reasonable belief. In view of the above, Note-2 of the order dated 3.8.1997 is also held to be not consistent with the Act and the Rules and being in antagonism with the provisions of Rules 3 and 4 of the U.P. Stamp (Valuation of Property) Rules, 1997 besides being arbitrary and discriminatory, is unsustainable.
Case law discussed:

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

1. Petitioner has assailed the order dated 20th Dec 1999 passed by Stamp authority Kaushambhi and also the revisional order passed in revision preferred against the said order dated 3.6.2003.

2. Facts forming background to the challenge are that petitioner purchased plot no. 117 admeasuring 11 Biswa 19/25 Dhoor situated in village Jodhlilwar Pargana and Tahsil Chail district Kaushambhi and plot no.330 admeasuring 3 Biswas, 9,1/10 Dhoor situated in village Faridpur Sulempur Pargana and Tahsil Chail District Kaushambhi from One Kishan Lal resident of Sulempur. From a perusal of the record, it is clear that Kishan Lal sold off his entire share in the land in dispute and petitioner paid stamp duty after assessing valuation thereof in accordance with law.

3. From a perusal of the report of Lekhpal it is clear that the land in dispute are situated on the boundaries of two villages. It is also not disputed that one of the village, namely, Jodhlilwar is a non-residential village (Ger Chiragi) and further that the land in dispute is an agricultural plot and the same could not be utilised for purposes other than agricultural purposes. Proceedings under section 47-A were initiated against the petitioner by the S.D.O. Chail District Kaushambhi as a sequel to application dated 19.11.1998 made by one Kundan Lal Sahu and consequent direction made to the S.D.O. Chail by the Addl. District Magistrate (F. & R.) Kaushambi which culminated in passing of the impugned order dated 20.12.1999. The impugned order has its grounding in the facts that the District Magistrate had already pegged valuation of the agricultural plots situated in the village as contained in the order dated 3.8.97 made under the U.P. Stamp (Valuation of Property) Rules, 1997, (In Short the 'Stamp Rules, 1997') and that according to Note (2) of the Order, in case agricultural land is not transferred in favour of a co-tenure holder or a person having adjoining agricultural plot shall be valued on the basis of per square meter in the same manner as is done as regards the land situated in Urban Area, semi-urban Area and the Rural Area. A direction was issued by the Stamp authority to pay additional stamp duty of Rs. 18000/- in addition to what was already paid within 15 days. A recall application filed by the petitioner was rejected on the ground that both the plots did not adjoin each other and are situated at the distance of 16 Lathas. A revision preferred before the Addl. Commissioner under section 56 of the Indian Stamp Act was rejected.

4. Learned counsel for the petitioner urged that in the facts and circumstances of the case, where admittedly, one of the

village being a non-residential village and plots in question being agricultural plots which could not be used for residential or any other purposes, the impugned order demanding additional stamp duty on the basis of Note No. (2) of the guidelines formulated by the District Magistrate determining the valuation of certain land and presuming agricultural land to be calculated on the basis of per square meter is highly arbitrary and that the District Magistrate has wrongly fixed the principles of valuation in arbitrary manner, which is contrary to Rules 3 and 4 and 5 of the Rules 1997, apart from being discriminatory and arbitrary. He further urged that Note (2) specifically makes it clear that in case sale deed is executed in favour of a co-tenure holder or a person whose plot adjoins the plot, the same shall be treated as agricultural plots but direction that in case sale deed is executed in favour of third person it shall be calculated on the basis of per square meter at par with urban, semi-urban or rural property is highly unreasonable and discriminatory. The learned counsel further submitted that acting on the complaint, the stamp authority hastened to issue notice demanding additional stamp duty without allowing the petitioner to have his say and without affording opportunity of hearing to him**. Per contra**, learned Standing counsel, contended that the order passed by the District Magistrate dated 3.5.1997 determining valuation of different properties in districts for the purposes of transfer under the U.P. Stamp Rules, 1997 was rightly passed in accordance with the provisions of U.P. Stamp (Valuation of Property) Rules 1997 and Note (2) of the said order was justified having been made in accordance with law. It was further contended that the impugned order of fixing valuation of the property in dispute and the demand of additional stamp duty on the basis of the same was rightly made in accordance with law and in consequence, it was canvassed, the order is liable to be affirmed and writ petition deserves to be dismissed.

5. Before scanning the rival contentions made across the bar, it is essential to scan Note-2 of the guidelines prepared and furnished to Sub Registrar as envisaged in Rule 3 (vii) of the Stamp Rules by the District Magistrate, Kaushambhi. Note 2 as contained in the guidelines is excerpted below:

"Sahkhatedar Ya Chauhaddi Ke Khatedar Se Bhinna Kisi Ek Byakti Ke Paksha Me Antarit Hone Wali Krishi Bhumi Ki Prati Vargmeter Daren Nagariye, Ardh Nagariye va Gramin Kshetra Mein 500 Varg Meter Tak Ki Dar Kramshe 700, 500 Va 300 Rupiye Tatha 501 Se 1500 Varg Meter Tak Kramshe 200, 125 Va 100 Rupiye Hogi."

The learned counsel for the petitioner canvassed that there is nothing in Rules 3 and 4 which may be eloquent of the fact that the District Magistrate was invested with the power to fix different valuation of the one and the same property in case the property is not transferred in favour of a co-tenant or a person whose land adjoins the land transferred. Rule 3 (1) (a) (i) to (vii) being germane to the controversy are excerpted below for ready reference.

"3. Facts to be set forth in an instrument. In case of an instrument relating to immovable property chargeable with an ad valorem duty, the following particulars shall also be fully and truly stated in the

instrument in addition to the market value of the property;-
(1) In case of land:
(a) included in the holding of a tenure holder, as defined in the law relating to land tenures:-
(i) the khasra number and area of each plot forming part of the subject matter of the instrument;
(ii) whether irrigated or un-irrigated and if irrigated, the source of irrigation;
if under cultivation whether do-fasali or otherwise;
(iii) land revenue or rent whether exempted or not and payable by such tenure holder;
(iv) classification of soil, supported in case of instruments exceeding twenty thousand rupees in value, by the certified copies, or extracts from the relevant revenue records issued in accordance with law;
(v) location (whether lies in an urban area, semi-urban area, or country side); and
(vi) minimum value fixed by the Collector of the district;"

(vii) Similarly, Rule 4 (1) (a) (i) to iv) being rules in point are also quoted below for edification;

"4. Fixation of minimum rate for valuation of land, construction value of non-commercial building and minimum rate of rent and commercial building.- (1) The Collector of the district shall biennially, as far as possible in the month of August, fix the minimum value per acre/per square meter of land, the minimum value per square metre of construction of non-commercial building and the minimum monthly rent per square metre of commercial building, situated in different parts of the district taking into consideration the following facts-

(a) in case of land-
(i) classification of soil;
(ii) availability irrigation facility;
(iii) proximity to road, market, bus-station, railway station, factories, educational institutions, hospitals and government offices; and
(iv) location with reference to its situation in urban area, semi-urban area or countryside."

6. It would transpire from a perusal of the above Rules that only relevant consideration for fixing of valuation is the classification of soil, availability of irrigation facility, proximity to the road, market, bus station, railway station, factory educational institution, hospital and government offices and location with reference to its situation in urban area, semi urban area or countryside. In the present case, it bears no dispute that the land in question lies on the boundaries of two villages i.e. villages Jodhlilwar and Faridpur Sulempur Pargana and Tahsil Chail District Kaushambhi out of which village Jodhlilwar is a non residential (Ger Chiragi) village. It has not been refuted in the counter affidavit that the land in dispute is being used or could be used for agricultural purposes only and not for residential or commercial purposes and that the land lies between the boundaries of the two villages far away from Abadi. In the light of the above admitted position, Note–2 contained in the order dated 3.8.1997 postulating that in case an agricultural land is transferred in favour of a person other than co-tenant or to a person whose property adjoins the plot, the same shall be fixed on a higher valuation as per square metre at par with

situation of property as in semi-urban area or the countryside cannot be said to be consistent with the provisions of the Stamp Rules. The logic behind Note-2 appears to be that in case the property is transferred by a person in favour of a co-tenant or in favour of a person whose property adjoins the plot, he can use the transferred property in a better away and for those transferees, the land may have higher valuation for better use but it does not visualize the position in relation to a person who has purchased the land and he happens to be neither a co-tenure holder nor is a person whose land adjoins the land in dispute cannot use in a better way. In the above conspectus, the order passed by the District Magistrate fixing valuation of such agricultural plots calculating it on the basis of per square meter valuation fixed in the said order suffers from patent arbitrariness particularly when the materials on record do not point to the factum that the land was used for residential, commercial or for any other use but is being used for agricultural purposes. As stated supra, the relevant consideration contained in Rule 4 are the classification of soil, availability of irrigation facility, proximity to the road, market, bus station, railway station, factory educational institution, hospital and government offices and location with reference to its situation in urban area, semi urban area or countryside. It would appear that no such consideration was taken into reckoning while fixing the valuation of the agricultural land, which was not transferred in favour of a co-tenant or a person whose land adjoins the transferred land. The only reason assigned in the impugned order for fixing higher valuation of the land is that both the plots lie at a distance of 16 metres and as the same did not adjoin the property in favour of a co-tenant, the agricultural land was valued taking into reckoning the valuation per square metre and also considering it an urban or semi-urban property. This consideration, in my firm view, for transfer in favour of a co-tenant or a person whose land adjoins the sold off property is not a relevant factor within the meaning of Rule 3 or Rule 4 of the U.P. Stamp (Valuation of Property) Rules 1997. Even otherwise on merits also, fixing higher valuation of a land which was not transferred in favour of a co-tenant or a person whose land adjoins the sold off property errs on the side of arbitrariness particularly when there is no material conspicuous on record to manifest that the land was used for residential, commercial or for any other use but is being used for agricultural purposes only and also that the land is situated on the boundaries of the two villages and one of the villages is non-residential village and that there is no residential area in and around the land in question and therefore, Note-2 added to the order is highly arbitrary and not attuned to the letter and spirit of the relevant Rules and therefore, the order impugned cannot be sustained in law. The distillate of what has been discussed above is that the land which was sold off in favour of a person who is not a co-tenant or whose land does not adjoin the property sold off, and if there is no material on record matching any of the consideration contained in Rule 4 is liable to be valued accordingly and not in terms of circle rate as contained in the Note-2 of the order dated 3.8.1997 and such person is liable to pay stamp duty on the basis of valuation not calculated per square metre, which was made in favour of any other person whether he is a co-tenant or owns an adjoining plot/property and a person

liable to pay stamp duty on the basis of the same. Regard being had to the fact that petitioner has purchased the entire share of a co-tenant and not a single inch of land was left out in the share, the stamp duty paid by the petitioner is held to be sufficient being in consonance with the U.P. Stamp Rules, 1997.

7. Yet another aspect which the learned counsel forcefully argued is that the S.D.O. concerned did not afford fair opportunity of hearing nor conducted any enquiry in terms of phrase "reason to believe" as contained in Section 47 A of the Stamp Act and merely acting on the complaint and direction of the Addl. District Magistrate (F & R) passed the impugned order. He further submitted that the Stamp Act and the Rules prescribed due procedure for enquiry but the S.D.O. passed the impugned order without material, direct, substantial and there being no intrinsic evidence which could be said to be the basis for his reasonable belief that there was any valid basis vis-à-vis rules 3 and 4 of the Stamp Rules. In connection with this proposition, section 47 A may be quoted below:

"47-A. Instruments of Conveyance etc. if under-valued, how to be dealt with.- (1) If the market value of any property which is the subject of any instrument of conveyance, exchange, gift settlement, award, or trust, as set forth in such instrument is less than even the minimum value determined in accordance with any rules made under this Act, the registering officer appointed under the Indian Registration Act, 1908, shall refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon.

(2) Without prejudice to the provisions of sub-section (1), if such registering officer while registering any instrument of conveyance, exchange, gift, settlement award or trust, has reason to believe that the market value of the property which is the subject of conveyance, exchange, gift settlement, award or trust, has not been truly set forth in the instrument, he may, a after registering such instrument, refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon.

(3) On receipt of a reference under sub-section (1) or sub-section (2) the Collector shall after giving the parties a reasonable opportunity of being heard and after holding an inquiry in such manner as may be prescribed by rules made under this Act, determine the market value of property which is the subject of conveyance, exchange, gift, settlement, award or trust and the duty as aforesaid. The difference, if any, in the amount of duty shall be payable by the person liable to pay the duty."

8. Now the question arises whether S.D.O. Chail was justified in acting on order dated 3.8.1997 in which is contained Note 2 oblivious of requirements of Rule 3 and 4 and Section 47 A of the Stamp Act. Section 47 A (2) of the Stamp Act prescribes that if such Registering Officer has reason to believe that the market value of the property has not been truly set forth in the instrument, he may refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon. Likewise, Section 47 A (3) envisages that on reference, Collector shall after giving the parties reasonable opportunity of being herd and after holding enquiry in such manner as may be

prescribed by the Rules, determine the market value of property. In connection with the proposition that Phrase "reason to believe" is a sine qua non for section 47 A (2), it is settled position that sub-section (2) of Section 47-A is the condition precedent o making of a reference to the Collector under sub Section (2). The phrase "reason to believe" came up for judicial exposition in I.T.O. v. Lakhmani Mewal Das[1]. It was a case relating to a dispute under Income Tax Act. The Apex Court was considering Section 147 (a) of the Income Tax Act, 1961 and it was held that the words in the statute are "reasons to believe" and not "reason to suspect". It was also held that the expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the Court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and not extraneous or irrelevant for the purpose of the section. In **Duncans Industrial Ltd. Kanpur. V. State of U.P. and others[2],** Hon. S.R.Singh, J. (As he then was) explained the significance of the phrase "reason to believe" as under:

"The term 'reason to believe' occurring in sub-section (2) of Section 47 A spells out that Registering Officer, must have some material direct, circumstantial or even intrinsic evidence on the basis of which, he may come to a reasonable belief that the market value of the property has not been truly set forth in the instrument. In other words, the belief must be that of the honest and reasonable person based upon reasonable grounds…."

The learned single Judge further observed in the self-same decision as under:

"Formulation of the requisite belief under section 47 A of the Stamp At is not a matter of purely subjective satisfaction….It is thus patent that it would be matter of objective satisfaction of the Registering Authority to reach a reasonable belief that the value or consideration of the property which is the subject matter of transfer, has not been truly set forth.

Section 340 A of the U.P. Stamp Rules, 1942 and also the U.P. Stamp (Valuation of Property) Rules, 1997 framed under the Stamp Act, 1899, the Collector is empowered to frame guidelines for land valuation and supply the same to the District Registrar for guidance. The guidelines so framed are prima facie opinion of the Collector based on certain factors but in case Registering Officer is of the opinion that valuation of the property is not the same or that it may be higher or lower qua the guidelines, it may refer the matter to the Stamp Collector to consider and decide the matter in accordance with law. The guidelines are not conclusive or binding but it is simply a tentative opinion based on certain consideration inasmuch as the valuation may differ from village to village, place to place and case to case due to various factors coming into consideration including situation of the locality, the market value of the locality prevailing on the date of registration etc. and by this reckoning, the guidelines supplied by the

[1] AIR 1976 SC 1753
[2] 1997 (3) AWC 1928

District Magistrate is not conclusive proof for the purpose of valuation of property. In **Collector of Nilgiris at Ootacamund v. M/S Mahavir Plantations Pvt. Ltd.[3],** the Madras High Court while dealing with the valuation guidelines held as under:

"These guidelines were avowedly intended merely to assist the Sub-Registrars to find out, prima facie, whether the market value set out in the instruments had been set forth correctly. The guidelines were not intended as a substitute for market value or to foreclose the inquiry by the Collector which he is under a duty to make under section 47 A of the Act when once a reference comes to him from the registering authority. The Collector, under Section 47 A cannot shirk his responsibility of determining the market value by adopting the guidelines nor can he fix the market value without proper materials and evidence to support it. The very idea of an inquiry contemplated by Section 47 A and the detailed procedure prescribed in the relevant rules goes to show that the Collector's finding must be verifiable by evidence. The valuation guidelines prepared by the Revenue officials at the instance of the Board of Revenue were not prepared on the basis of any open hearing of the parties concerned, or of any documents with a view to eliciting the market value of the properties concerned. They were based on data gathered broadly with reference to classification of land, grouping of lands and the like. This being so, the Collector acting under Section 47 A cannot regard the guidelines valuation as the last word on the subject of market value. To do so would be to surrender his statutory obligation to determining market value on the basis of evidence, which is a judicial or a quasi-judicial function which he has to perform. To adopt figures prepared at the instance of the Board of Revenue in the valuation guidelines which are merely a compilation of data by subordinate officials of an administrative authority on the basis of administrative action would be dangerous, because they offer no guarantee of truth or correctness of the data, not being susceptible to check or verification by a judicial or quasi judicial process of evaluation of evidence."

9. The aforesaid view also receives countenance from the following observations rendered in **Ramesh Chand Bansal v. District Magistrate[4] by the Apex Court.** The observation of the Apex Court runs as under:

"Reading Section 47 A with the aforesaid Rule 340 A it is clear that the circle rate fixed by the Collector is not final but is only a prima facie determination of rate of an area concerned only to give guidance to the Registering Authority to test prima facie whether the instrument has properly described the value of the property.

The Apex Court further observed:

"The circle rate does not take away the right of such person to show that the property in question is correctly valued as he gets an opportunity in case of under-valuation to prove it before the Collector after reference is made. This also marks the dividing line for the exercise of power between the Registering Authority and the Collector. In case the valuation in the

[3] AIR 1982 Madras 138

[4] 1999 (90) SC 499

instrument is same as recorded in the circle rate or is truly described it could be registered by Registering Authority but in case it is under-valued in terms of sub section (1) or sub-section (2) it has to be referred and decided by the Collector. Thus, the circle rate, as aforesaid, is merely guideline and is also indicative of division of exercise of power between the Registering Authority and the Collector."

10. The guidelines value received focus of the Apex Court in R. Sai Bharathi v. J. Jayalalitha[5] as well and in para 23 of the decision, it was observed that guidelines value has relevance only in the context of section 47 A of the Indian Stamp Act. It was further quipped that the guideline value is a rate fixed by authorities under the Stamp Act for purposes of determining the true market value of the property disclosed in an instrument requiring payment of stamp duty and in quintessence it was observed that "Thus the guidelines value fixed is not final but only a prima facie rate prevailing in an area. It is not open to the registering authority as well as the person seeking registration to prove the actual market value of property. The authorities cannot regard the guidelines valuation as the last word on the subject of market value." The aforestated stand point of the Apex Court also proves the point that the Stamp Authority in the instant case erred in law in giving religious reverence to the guidelines furnished by the District Magistrate Kaushambhi.

11. As urged by the learned counsel for the petitioner, no enquiry was held and no reasonable opportunity of hearing was afforded to the petitioner and further that the impugned order was passed without following the principles of natural justice. It was further canvassed that the orders of the Stamp Collector were passed on the only ground that in case, two sale deeds had been executed considering the area of both the villages, it would be calculated as residential and as such the petitioner has purposely not registered sale deed separately with intention to avoid payment of correct stamp duty. From a perusal of the impugned order, it is clear that both the authorities have neither applied mind to the relevant factors as contained in Rule 405 of the relevant Rules, 1997 nor the documents filed by the petitioner to show that the property was actually being used other than for agricultural property. The Stamp collector has erred in passing the impugned order on the ground that the property is straddling over the boundaries of two villages and area of agricultural plot is such and under the guidelines the assessment could be made on the basis of per square meter and not as agricultural land. It is settled position in law that at the time of registration, if registering authority is of the opinion that stamp duty was not properly paid and valuation was not made it may refer the same as required under section 47-A of the Stamp Act. As stated supra, the proceeding did not commence on the basis of any reference made by the Registering officer but on the basis of complaint made by one Kishan Lal Sahu. It transpires that the Registering officer did not find any deficiency in valuation or payment of stamp duty at the time of registration or even thereafter nor did he make any reference as envisaged in the Rules. Besides, it has not been pointed out by the learned Standing Counsel that the registration of two plots situated in two

[5] 2003 AIR SCW 6349

different villages in one instrument by one owner is prohibited under law. My attention has not been drawn to any such law that in case registration was made by an owner for his property situated in two villages, it will lead to any illegality. Once it is not forbidden by any law, it is permissible and it cannot be called in question merely on the basis of Note-2 which itself has been held not consistent with the provisions of the Stamp Rules and the Act.

12. In the light of the above, I would revert to scan the impugned order again. From a bare perusal of the impugned order, it would transpire that the S.D.O. concerned proceeded to pass the impugned order merely on being so directed on the complaint of one Kishan Lal Sahu and on the basis of report dated 24.4.1999 submitted by the Deputy Registrar II and no proper enquiry was made nor it appears from the record that there was any material direct, circumstantial or even intrinsic evidence on the basis of which a reasonable belief could be formed that the instrument has been undervalued in observance of Rules 3 and 4 of the Stamp Rules and Section 47 A of the Stamp Act. The authority concerned appears to have heavily relied upon Note-2 of the impugned order and on a punctilious reading of the Note-2, proceeded to pass the impugned order in utter disregard of the mandate contained in Rules 4 (1) (a) (i) to (iv) or 5 of the Stamp Rules, 1997 in which condition precedent was the proximity of land to road, market, bus station railway station, factories, educational institutions, hospitals and government offices, classification of soil and availability irrigation facility etc. It would also appear that the S.D.O. concerned proceeded on the report of Sub Registrar without making enquiry and recording of finding based on any verifiable evidence. By this reckoning, the impugned order is liable to be quashed as it has been passed without affording fair opportunity of hearing to the petitioner and also that his opinion based on the report of Sub Registrar without there being any other verifiable evidence, material direct, circumstantial or even intrinsic evidence to form a reasonable belief. In view of the above, Note-2 of the order dated 3.8.1997 is also held to be not consistent with the Act and the Rules and being in antagonism with the provisions of Rules 3 and 4 of the U.P. Stamp (Valuation of Property) Rules, 1997 besides being arbitrary and discriminatory, is unsustainable.

13. As a result of foregoing discussion, the petition succeeds and is allowed and the impugned orders dated 20.12.1999 and 3.6.2002 and the Note-2 contained in the order-dated 3.8.1997 are quashed. In consequence, it is held that stamp duty paid by the petitioner was sufficient. In the facts and circumstances of the case, there would be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 10.3.2004

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

Civil Misc. Writ Petition No. 52064 of 2003

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

Counsel for the Petitioner:
Sri R.C. Sinha

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

Constitution of India- Articles 226 and 300 A–read with Land Acquisition Act- Ss 4 and 6- Acquisition of land by State- Non payment of compensation even after award due to pancity of funds-violative of Article 300 A-Direction issued that either land must be returned to petitioner by forthwith or compensation awarded should be paid to petitioner or petitioner and other tenure holder within two months example cost of Rs.100000/- awarded.

Held- Para 7

We therefore direct that either the possession of land must be returned forthwith to the petitioner or else the compensation awarded by the Land Acquisition Act in the award in question dated 24.1.2002 shall be paid in full to the petitioner and other tenure holders within two months from today. Apart from that the State Government shall also pay exemplary cost of Rs. 1,00000/- to the petitioner for its high handedness, and this amount shall also be paid within two months to the petitioner.

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

1. Heard learned counsel for the parties.

2. In case after case, which is coming up of before us, we find that a citizen's land has been acquired or simply taken over without paying him compensation. This is highly improper, and in fact violative of Article 300A of the Constitution.

3. In the present case the petitioner is a farmer whose land was acquired under the Land Acquisition Act and an award was given on 24.2.2002, but it is alleged that as yet the compensation has not been paid vide para 10 of the petition.

4. The compensation awarded is Rs. 36,93,260.85 paise calculated upto August, 2002. Nothing has been paid to the petitioner as yet although land acquisition proceedings started in 1999. It is alleged in para 12 of the petition that possession was illegally taken about 22 years ago.

5. In the counter affidavit filed by the Assistant Engineer on behalf of the respondents it is stated in para 6 that in pursuance of the award dated 24.1.2001 an amount of Rs. 5,50000/- has been deposited with the S.L.A.O., Mathura for payment of the compensation to the tenure holder whose land was acquired but due to paucity of fund the remaining amount could not be paid by the Irrigation Department, and representations have been made to the State Govt. in this connection. Even this amount of Rs.5.50 lacs has not been paid to the petitioner, and he has been made to run from ----- to post.

6. In our opinion the excuse that the respondent has paucity of funds cannot be accepted. If land is to be acquired then prompt compensation must be paid. The State Govt. is expected to set high standards of fairness, but we find in case after case coming up before us that either the compensation is not paid for the land which is acquired, or else possession is taken without even following the procedure in the Land Acquisition Act,

i.e. without issuing notification under Sections 4 or 6.

7. We therefore direct that either the possession of land must be returned forthwith to the petitioner or else the compensation awarded by the Land Acquisition Act in the award in question dated 24.1.2002 shall be paid in full to the petitioner and other tenure holders within two months from today. Apart from that the State Government shall also pay exemplary cost of Rs. 1,00000/- to the petitioner for its high handedness, and this amount shall also be paid within two months to the petitioner.

8. With the above observation this petition is allowed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.03.2004

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

First Appeal No. 879 of 1995

New Okhla Industrial Development Authority ...Appellant
Versus
Deshraj and others ...Respondents

Counsel for the Appellant:
Sri U.S. Awasthi
Sri Ajay Kumar Misra
Sri Ashwani Kumar Misra

Counsel for the Respondents:
Sri Subhashish Banerji
Sri Raj Singh
Sri Akilesh Singh

Land Acquisition Act-Ss. 4, 6 and 17 (4)-Acquisition of land-Award-Determination of Compensation-SLAO determined compensation on basis of sale deed in respect of plat of neighbouring village-Reference Court enhanced compensation by relying on award of another village-Potentialities of land were different-Held, award on sale transactions of other villages should not ordinarily be relied upon-Moreover exemplars of small plots of land should not be taken into consideration when a large area of land is being acquired.

Held: Para 10 & 11

Thus the settled position in law appears to be that the award or sale transaction of other villages should not ordinarily be relied upon.

Moreover it is well settled that exemplars of small plots of land should not be taken into consideration when a large area of land is being acquired

Case law discussed:
AIR 1992 SC 666
(1998) 8 SCC 136
JT 1997 (4) SC 112
1995 HVD (1) P.191 (Pr. 11,17)
F.A. No. 522 of 1993, decided on 26.2.2004

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

1. This appeal under Section 54 of the Land Acquisition Act and the connected appeals are being disposed off by a common judgment.

2. Heard learned counsel for the parties.

First Appeal No. 879 of 95 has been filed against the judgment and decree dated 23.11.1993 passed by the IX Additional District Judge, Ghaziabad in LAR No. 511 of 1990.

3. We have carefully perused the impugned judgment. By the judgment and

decree dated 23.11.1993 37 references under Section 18 of the Land Acquisition Act had been disposed off. The total area of the land acquired was 184.19 bighas i.e. 115.562 acres. The date of notification under Section 4 (1) as last published was 27.4.1988. The date of notification under Section 4 (1) as last published was 27.4.1988. The date of notification under Section 6 read with Section 17 (4) is 6.7.1988. The date of taking over possession of the land in dispute was 28.3.1990 and the date of the award of the S.L.A.O is 17.8.1990.

4. Eight sale deeds were executed in the last three years in respect of the village in question i.e. Village Parthala Khanjarpur, NOIDA, Ghaziabad. The highest rate at which these 8 sale deeds were executed was Rs.7.83 per sq. yard. However, the S.L.A.O. determined compensation on the basis of the sale deed dated 22.7.1987 in respect of khasra no. 643 of 504 sq. yards in respect of neighbouring village Sorakha at the rate of Rs.30.75 per sq. yard. This sale deed was in respect of a plot of an area of 504 sq. yard of village Sorakha.

5. The reference court found that there existed no sale exemplar filed by the claimants which could be held to be comparable in nature, time and proximity justifying enhancement and hence it rightly rejected all the sale exemplars. However, the reference court enhanced the compensation to Rs.72/- per sq. yard by relying on the award of another village Makanpur which was not even the neighbouring village and the potentialities of the land were different.

6. In our opinion the court below erred in relying on the award in respect of village Manakpur which is not even the neighbouring village when the sale deed of that very village i.e. village Partala Khanjarpur for which the acquisition in question was made was available.

7. In Spl. Tehsildar, Land Acquisition vs. Smt. A Mangala Gowri, AIR 1992 SC 666, the Supreme Court held that in determining the market value of the land reliance should not be placed on the award of some other land. The same view was taken in Kanwar Singh vs. Union of India, 1998 (8 SCC 136).

8. In our opinion the judgment of the court below is patently illegal as it relied on an award of a different village which was not even a neighbouring village vide Jai Prakash vs. Union of India, JT 1997 (4) SC 112.

9. Thus the settled position in law appears to be that the award or sale transaction of other villages and sale transaction in respect of other villages should be ignored.

10. Thus the settled position in law appears to be that the award or sale transaction of other villages should not ordinarily be relied upon.

11. Moreover it is well settled that exemplars of small plots of land should not be taken into consideration when a large area of land is being acquired vide Krishi Utpadan Mandi Samiti vs. Khushi Ram, First Appeal No. 522 of 1993 decided on 26.2.2004. In the aforesaid decision relevant decisions of the Supreme Court have also been referred.

12. For the reasons given above the appeal is allowed. The impugned

judgment of the court below dated 23.11.1993 is set aside and the matter is remanded back to the court below for a fresh decision in accordance with law.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.3.2004

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 10541 of 1990

Sansthapak Mandal, G.B. Pant Degree College and another ...Petitioners
Versus
The Assistant Registrar, Firm, Societies & Chits Gorakhpur & others ...Respondents

Counsel for the Petitioners:
Sri V.B. Singh
Sri P.S. Baghel
Sri S.K. Sharma

Counsel for the Respondents:
Sri Dr. R.G. Padia
Sri Prakash Padia
Sri S.P. Singh
Sri D.S.N. Tripathi
Sri P.N. Tripathi
Sri P.C. Srivastava
Sri Dinesh Dwivedi
S.C.

Societies Registration Act-S.-25- Death of founder President of Society-Dispute as to President ship of Sansthapak Mandal of Society-Appointment of respondent no. 2 as President of Society-Writ Petition challenging appointment-Held, dispute with regard to election-question of President of Sanshthapak Mandal must be decided by Prescribed Authority under S.25 of the Act-Direction issued to Assistant Registrar to refer dispute to Prescribed Authority.

Held: Para 32

In such, circumstances, the dispute with regard to the election on the post of President of the Sansthapak Mandal should necessarily be decided by the Prescribed Authority under Section 25 of the Societies Registration Act and Assistant Registrar is directed to refer the said dispute for adjudication to the Prescribed Authority within a period of one month from the date a certified copy of this order is produced before him and the Prescribed Authority in turn shall decide the dispute within four months thereafter, after affording opportunity of hearing to the parties

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard Sri P.S. Baghel on behalf of the petitioner, Dr. R.G. Padia, Senior Advocate, assisted by Sri P. Padia, Sri D.S.N. Tripathi and Sri P.C. Srivastava on behalf of the respondent Anil Kumar Upadhyaya in both the writ petitions.

2. The dispute giving rise to this case has a checkered history. The relevant fact for decision of dispute are as follows:-

3. One Sri Bateshwar Nath Upadhyaya was the founder President of the society registered by name of Sansthapak Mandal, duly registered under the Societies Registration Act. There was absolutely no dispute with regard to the office bearer of the said society till the life time of Sri Bateshwar Nath Upathdyaya, who was life President of the society, expired in the year, 1986. On death of Sri Upadhyaya, the petitioner Sri Arun Kumar Upadhyaya, who claims himself to be one of the life member of the society, has set up his claim as President of the society. On the other hand Sri Anil Kumar Upadhyaya respondent no. 2 claims that in accordance with the registered bye laws

of the society, under Clause 1D, he was appointed as member to fill the vacancy caused due to death of his father in the Sansthapak Mandal and because of his such appointment he automatically became the President of the Society.

4. The Assistant Registrar, Basti issued a letter dated 20.11.1987 wherein he recognized Sri Anil Kumar Upadhyaya as President of the Sansthapak Mandal. Against the said order of the Assistant Registrar a writ petition no. 23943 of 1987 was filed by Arun Kumar Upadhyaya before this Court. The writ petition was disposed of by this Court after holding that the document dated 20 November, 1987 was only a letter seeking information and the Assistant Registrar was directed by this Court to decide the matter afresh in accordance with law.

5. Surprisingly the Assistant Registrar, despite the aforesaid order of this Court, passed another order on 9th August, 1988 holding therein that earlier letter dated 20th November, 1987 was an order and the said order has been passed rightly recognizing Sri Anil Kumar Upadhyaya as the President of the Society.

6. Against the order dated 9th August, 1988 the present writ petitioner filed writ petition no. 12034 of 1988. The said writ petition was allowed by the Division Bench and the matter was remanded to the Assistant Registrar to decide the dispute afresh after hearing the parties strictly in compliance of the order of this Court dated 28th April, 1988 referred to above.

7. The Assistant Registrar thereafter passed another order dated 9th August, 1988 whereby he again struck to his earlier order dated 28th April, 1987 and held that he had rightly recognized Sri Anil Kumar Upadhyay as the President after the death of Sri Bateshwar Nath Upadhyaya.

8. Against the aforesaid order of the Assistant Registrar the present writ petitioner filed the writ petition no. nil of 1988, which was decided by this Court on 4th October, 1988 itself. The Court after quashing the order dated 9th August, 1988 directed that the matter be decided afresh by an Assistant Registrar other than one who had passed the order dated 9th August, 1988 after nomination from the Registrar. The Assistant Registrar was further directed as follows:-

"In the result this petition succeeds and is allowed. A direction is issued to the Registrar to nominate any other Assistant Registrar than the Assistant Registrar who had decided the dispute, to examine the matter afresh and in case he comes to the conclusion that the dispute relates to election of Committee of Management or continuance of office bearers than he should refer the case to the Prescribed Authority and if he comes to the conclusion that it was not a matter of substitution of Bateshwar Nath Upadhyasya then he could be decide as to who amongst the petitioner and opposite party no. 3 was substituted by an election to be the President of the Society. It should be decided after hearing both the parties. The Registrar shall appoint another Assistant Registrar within a period of two weeks from the date a copy of his order is produced before him. A copy of this shall be produced before him within two weeks from today. The

Assistant Registrar shall decide the dispute within two months thereafter."

9. Against the aforesaid order of the Division Bench a special leave petition no. 1290 of 1988 was filed before the Hon'ble Supreme Court of India which was dismissed by the Hon'ble Supreme Court on 27.7.1999 and it was provided that the Assistant Registrar shall decide the question afresh as per the direction of the High Court.

10. In compliance of the order of this Court referred to above, the dispute was referred to Assistant Registrar Gorakhpur. The Assistant Registrar, Gorakhpur per order dated 29th January, 1990 has held that the controversy involved was with regard to substitution of member in place of Bateshwar Nath Upadhyaya and since Anil Kumar Upadhyaya was held to have been substituted in place of his father, he automatically became the President of the Sansthapak Mandal.

11. In such circumstances, it is held by the Assistant Registrar that there is no question of any dispute being referred to the Prescribed Authority under Section 25 of the Societies Registration Act and he has decided the matter himself in the light of the observations of the judgment of the Division Bench referred to above, in stead of referring the matter to the Prescribed Authority under Section 25 of the Societies Registration Act. Hence the present writ petition.

12. On behalf of the petitioner it has been contended by Sri P.S. Baghel that the order passed by the Assistant Registrar is totally misconceived and is based on misreading of the provisions of Clause 1D of the bye laws. It is stated that the Clause 1D of the registered bye laws remained unamended. Because of the misreading of the provisions of Clause 3D of the bye laws, the Assistant Registrar has misdirected himself in recording the finding that because of substitution of Sri Anil Kumar Upadhyaya as member in the Sansthapak Mandal in place of his father Sri Bateshwar Nath Upadhyaya, he automatically became the President of the Sansthapak Mandal. It is also contended that the finding recorded by the Assistant Registrar with regards to question marked as 'Gha' that Anil Kumar Upadhyaya alone was eligible member for being substituted in place of his father and there after the question of substitution of Vinod Kumar Upadhyaya (grandson of late Bateshwar Nath Upadhyaya) does not arise, is based on misreading of the judgment of this Court specifically in the paragraph reproduced in the order of the Assistant Registrar itself.

13. On behalf of the respondent it has been submitted by Dr. R.G. Padia that Clause 1C of the bye laws/memorandum of association cannot be altered in view of the provisions of Section 4(a) read with Section 12(b) of the Societies Registration Act. It is further contended that unless and until the change in the memorandum is registered with the Registrar in view of the provisions of Section 12 (b)(2) of the Societies Registration Act, the petitioner Arun Kumar, who was not one of the life member of the Sansthapak Mandal, can never claim to be elected as President of the society nor his claim, as such, could be entertained by the Assistant Registrar.

14. It is contended that so far as the appointment of Sri Anil Kumar Upadhyaya, in place of his father

Bateshwar Nath Upadhyaya is concerned, the same has gone uncontested and no one has challenged the order of the Assistant Registrar and it is not open to the petitioner Arun Kumar to challenge the said finding and he cannot claim appointment in place of his father Bateshwar Nath Upadhyaya. Lastly it is contended that clause 1D of the Memorandum of Association/bye laws necessarily contemplates appointment to the office of the nominated person against the office which was held by the deceased member. Meaning thereby that on death of Sri Bateshwar Nath Upadhyaya, who was the President of the society, if the nomination of Anil Kumar Upadhyaya as member is accepted to be legal, it automatically means that Anil Kumar Upadhyaya has been appointed President of the society. In support of the contention it is stated that there is no other provision for election to the post of any office bearer in the bye laws of the society.

15. Sri P.C. Srivastava, who appears on behalf of Anil Kumar Upadhyaya has contended that the bye laws which have been enclosed along with the writ petition are not registered bye laws of the Sansthapak Mandal and the bye laws which have been filed as Annexure CA-2 to his counter affidavit are the true bye laws and in the said bye laws the name of the petitioner is not mentioned as one of the life member. Secondly he cannot claim any right of election to the office of President of the society.

16. After hearing counsel for the parties and after going through the records of the writ petitions, this Court is satisfied that the contention raised on behalf of the petitioner has force. For appreciating the controversy involved, it would be necessary to refer clause 3C and 3D of the Rules and Regulation of the Sansthapak Mandal, which are not in dispute between the parties. It is pointed out that clause 3C and 3D of the Rules of the Sansthapak Mandal as enclosed by the petitioner as Annexure-1 and clause 3C and 3D of the Rules of the Sansthapak Mandal as enclosed by the respondent no. 3 alongwith his counter affidavit are identical in nature. However, there is only change of the names of the persons attached to the memorandum as life member between the two set of bye laws, which have been filed separately. Clause 3C, 3D, 4G, 4H and clause 7 of the memorandum also have relevance. Clauses are quoted below:-

3C. The persons named in the attached memorandum shall be life members of sansthapak Mandal which itself shall be a permanent Board of the founders of the Institution and shall not be subject to alteration so long as institution exist.

3D. The vacancy caused by death of any of the members of the Sansthapak Mandal shall be filled in by any capable members of his family.

4G. Vacancy caused by the resignation of any member of the Sansthapak Mandal shall be filed by one of the life trustees of the Kisan National Education Trust, Pratapganj, Jaunpur, He shall be accepted by two third majority of the members of the Sansthapak Mandal.

4H. Vacancy caused by the resignation of any of the office bearers of the Sansthapak Mandal shall be filled by any one of the members of the Sansthapak Mandal by two third Majority of the members of the

Sansthapak Mandal from its own members by co-option.

7-Votes:- All question at a meeting shall be decided by majority of votes but in case of equality the vote, President shall have a second vote. Vote by proxy shall not be allowed but the president shall put up for consideration of the members any written opinion of the absent member on any subject on the agenda."

17. It is not in dispute between the parties that there is absolutely no rules under the bye laws providing for procedure for election of the office bearer of the Sansthapak Mandal

18. Clause 3C of the bye laws of the Sansthapak Mandal referred to above provides that life member of the Sansthapak Mandal shall be the permanent member of the institution and will not be subject to alteration so long as to institution exists. Clause D referred to above contemplates filling of the vacancies caused due to death of any of the member of the Sansthapak Mandal.

19. The member of the Sansthapak Mandal can also be one of the office bearer of the Sansthapak Mandal. Reading of Clause D, as is exists, leave no room to doubt that nomination of a family member on the death of member of Sansthapak Mandal would only be as member of the Sansthapak Mandal. The provisions of Rule 3D cannot be extended to read in the manner suggested by the respondents, that if member of the Sansthapak Mandal, who was also one of the office bearer, expires then the family member appointed in his place would automatically become the office bearer. If such interpretation is accepted, it would mean that the office bearer of the Sansthapak Mandal can always be replaced by family member of the earlier office bearers of the said Sansthapak Mandal only. Such interpretation would lead to absurdity inasmuch as in a given case the office bearer, who is also a member of the Sansthapak Mandal, expires and there is no other person in his family available or willing to fill up the vacancy so caused, it would mean that the office would go unattended and there would be no person to be appointed as office bearer after his death.

20. Logically it follows that if one member of the Sansthapak Mandal expires, he may or may not be an office bearer, any member of his family can only be substituted in his place as member of the Sansthapak Mandal. Such a substituted member cannot automatically become the office bearer of the Sansthapak Mandal against the post which was held by the member, who had since expired.

21. In view of the said conclusion it would be seen that the findings recorded by the Assistant Registrar in the impugned order to the effect that because of appointment of Sri Anil Kumar Upadhyaya as member of the Sansthapak Mandal in place of his father Bateshwar Nath Upadhyaya he automatically became the President of the Sansthapak Mandal, is totally misconceived and unsustainable in the eye of law. The Assistant Registrar has misread the provisions of clause 3D of the bye laws and as such the order passed by him cannot be sustained. The further finding recorded by the Assistant Registrar with regard to the appointment of Sri Anil Kumar Upadhyaya as member of the Sansthapak Mandal on the basis of

the part of the paragraph of the judgment of this Court, reproduced in the order, is also based on misreading and complete non-consideration of the judgment of the High Court. The relevant paragraph of the judgment of this Court reads as follows:-

"Admittedly Bateshwar Nath Upadhya, the founder member and President of the society died in 1986. Under bye-law the vacancy caused due to his death could be filled by any capable member of his family. He is survived by petitioner, who is Principal of the college. Opposite party no. 3, a Lecturer and other sons, two of whom are in judicial service. There was thus no derth of capable members. Dispute however, arose between the two brothers and both claimed to have been elected on death of their father. The petitioner claims to have been elected in meeting held in 1986 whereas opposite party claimed to have been elected in 1987. Both sent their list for registration under Section 4 of Societies Registration Act. On 20th November, 1987, the Assistant Registrar issued a letter against which petitioner came to this court by way of Writ Petition No. 23943 of 1987. It was disposed of on 11th April, 1988 and Assistant Registrar was directed to look into the matter and decide dispute after hearing. It was observed that the letter dated 20th November, 1987 was not an order but only a letter seeking certain information. Despite this the Assistant Registrar on 16th June, 1988 observed in an answer given to opposite parties on the query made by him about renewal of registration certificate that the order dated 20th November, 1987 recognising the list submitted by him was still operative. This was act of impropriety on part of Assistant Registrar as this court having constructed the letter as seeking certain information and not an order recognising the opposite party. List which after explanation given by opposite party has been accepted, Prima-facie a list which contained not only name of opposite party who claims to have been elected after the death of his father but was a list of different persons than the person who were members of the Committee of Management as shown in the earlier list could only establish that opposite party was claiming that fresh elections had taken place in which the new office bearers had been elected. Such a dispute could not have been decided by the Assistant Registrar U/S 35 and it could have been referred to the sub-divisional Magistrate only."

22. The Assistant Registrar has only reproduced underlined portion of the said judgment for the purposes of recording finding that Sri Anil Kumar Upadhyaya was alone the eligible person for being appointed in place of his father. This Court had not recorded any such finding as suggested in the order of the Assistant Registrar. The High Court while referring to the sons of Bateshwar Nath Upadhyaya ad only illustrated the eligible person amongst other who were available for such an appointment. The High Court did not confine the illegibility to the person mentioned in the judgment of the High Court only.

23. In such circumstances even grandson of Sri Bateshwar Nath Upadhyaya namely Vinod Kumar could also be appointed as one of the member of

the Sansthapak Mandal after the death of Sri Bateshwar Nath Upadhyayaand Sri Anil Kumar alone was not the eligible candidate. It is further relevant to note that the Assistant Registrar has not noticed as to in what manner Sri Anil Kumar has been appointed in place of his father.

24. The Assistant Registrar has failed to take into consideration scope of the clause 7 of the bye laws, which provides that all decisions of the Sansthapak Mandal shall be taken on the basis of majority votes. Thus, if there were more that one eligible family member of Sri Bateshwar Nath Upadhyaya for appointment after his death as member of the Sansthapak Mandal, it was necessary for the Assistant Registrar to have looked into the record and to have recorded a finding as to whether Anil Kumar has been appointed by any decision of the Sansthapak Mandal by any majority vote or not.

25. In absence of any such fact having noticed and in absence of any finding having been recorded, the order holding Sri Anil Kumar as President, appointed in place of his father Sri Bateshwar Nath Upadhyaya, cannot be legally sustained.

26. From the finding recorded above, it would be apparent that the issue with regard to appointment of the President, as claimed by the petitioner and as that set up by Sri Anil Kumar Upadhyaya on the strength of his nomination as member of the Sansthapak Mandal requires adjudication by a Prescribed Authority under Section 25 of the Societies Registration Act.

27. The issue as to whether the petitioner has been validly elected in accordance with the bye laws of the society as President of the society on the death of Sri Bateshwar Nath Upadhyaya and the issue whether Anil Kumar Upadhyaya was the only eligible member entitled to such an appointment requires decision, on the basis of evidence to be led by parties, by Prescribed Authority under Section 25 of the Societies Registration Act.

28. Since it has been held that merely on the strength of appointment as member of the Sansthapak Mandal Anil Kumar cannot claim himself to be the President of the Committee of Management to the Sansthapak Mandal, the said issue is no more open and stands decided against Anil Kumar Upadhyaya. However, if Anil Kumar Upadhyaya sets up any independent election for the post of President, the said issue may also be adjudicated upon by the Prescribed Authority.

29. The contention raised on behalf of the respondent to the effect that amendments in clause 3C of the bye laws of the society was legally not permissible and is not correct. Clause 3C has already been quoted hereinabove. This Court fail to appreciate the general statement of fact made on behalf of the respondent in alleging that the said clause cannot be amended. Section 2 read with Section 4A and Section 12 of the Societies Registration Act leaves no room of doubt that provisions of memorandum of association including by lays, which are attached there to, can be amended from time to time. It is always open to the member of the society to make such amendment, if necessary, including

change in the name of life members in the interest of the society.

30. The contention of the respondents that the amendment in the bye laws/3C of the Sansthapak Mandal cannot take effect unless the said amendments was registered with the Registrar in view of the Section 12B(2) of the U.P. Societies Registration Act, proceeds on non-consideration of the fact that Section 12A to 12D, including Section 12B, were added by U.P. Act No. 52 of 1975 and they have prospective application only. In such circumstances the amendments made in the bye laws of the society/memorandum of association on 28th may, 1970, whereby clause 3C has been amended, cannot be said to be enforcible because of its non-registration with the Registrar under Section 12B(2) of the Societies Registration Act.

31. It is further pointed out that the issue as to which of the bye laws, one relied upon by the petitioner and another one relied upon by the respondent no.3, are genuine bye laws will also be a subject matter of consideration before the Prescribed Authority and while deciding the issue as to whether the election of the petitioner on the post of the President of the society is valid, the Prescribed Authority shall also record finding with regard to genuineness of the bye laws as set up by the parties.

32. In such, circumstances, the dispute with regard to the election on the post of President of the Sansthapak Mandal should necessarily be decided by the Prescribed Authority under Section 25 of the Societies Registration Act and Assistant Registrar is directed to refer the said dispute for adjudication to the Prescribed Authority within a period of one month from the date a certified copy of this order is produced before him and the Prescribed Authority in turn shall decide the dispute within four months thereafter, after affording opportunity of hearing to the parties.

33. For the reasons stated above, the writ petitions filed by the petitioner deserves to be allowed. The order dated 29.1.1990 is hereby set aside. Under interim order passed by this Court dated 26th April, 1990 there was a restrained order, whereby Anil Kumar Upadhyaya was restrained from working as President of the Sansthapak Mandal and further liberty was given to the Sansthapak Mandal to hold fresh election in pursuance of the interim order of this Court.

34. It is alleged by the petitioner that fresh election was held on 12th August, 1990 in which the petitioner has again elected as President. It is further stated that the petitioner is continuously working as President. On behalf of the respondent Anil Kumar Upadhyaya election for the post of President is also alleged to have taken place in pursuance of the interim order of this Court dated 30th April, 1990. The validity of the aforesaid fresh elections would depend upon the judgment of the Prescribed Authority with regard to the original election set up by the parties, which have been referred under order of this Court to the Prescribed Authority under Section 25 of the Societies Registration Act. The fresh election held by the petitioner and the respondent shall abide by the decision of the Prescribed Authority referred to above.

35. In such circumstances, writ petition is allowed. The order dated 29.1.1990 is hereby quashed. Interim order, if any, stands discharged.

36. Till the decision of the Prescribed Authority, referred to above, parties shall maintain status quo as prevailing till date with regards to office of President of the Sansthapak Mandal.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Second Appeal No.1669 of 1988

Manjoor Ali and another ...Appellants
Versus
Kishmat Ali and others ...Respondents

Counsel for the Appellants:
Sri N.C. Rajvanshi

Counsel for the Respondents:
Sri Irshad Ali

(A) Evidence Act, 1872-Ss 90 and 63- Presumption under-Availabilty-Secondary evidence-Admissibility-Suit for permanent basis of sale deed more than 20 years old-Original sale deed not produced-only copy filed-No statement or evidence led by plaintiff to prove loss or destructions of original sale deed-No presumption as to execution under S. 90 can be drawn in favour of plaintiff.

Held: Para 11

Presumption of genuineness may be raised where the document is produced from a proper custody. However, in view of the provisions of section 90 of the Act, it is the discretion of the Court to accept the presumption flowing from section 90. In the present case, the mere production of the certified copy of the sale deed was not by itself sufficient to justify the presumption of the execution of the original under section 90. The provisions of section 90 has to be read alongwith section 65 of the Act. Mere production of a certified copy of the sale deed is not sufficient to draw a presumption under section 90. It must be shown that the document produced was a copy admitted as secondary evidence under section 65 of the Act.

(B) Civil Procedure Code-S. 100- Second appeal-concurrent findings of fact by Courts below-No interference.

Held: Para 14 & 16

In the present case, the plaintiff has only produced a copy of the sale deed and has not stated in his plaint or led evidence, nor laid the foundation for admission of the secondary evidence by proving the loss or destruction of the original document. Nothing has been shown by the plaintiff-appellants as to why the original document could not be produced. Thus, the presumption under section 90 could not be drawn in favour of the plaintiff. I therefore, hold that in the present case, the presumption under section 90 of the Act, was not available on the copy of the sale deed dated 16.5.1933.

On the question as to whether the sale deed conferred any right to the plaintiff-appellants, I find that both the Courts below have given concurrent findings of fact to the extent that the name of Mst. Maida was never recorded in the revenue records and that she had no right to execute the sale deed in favour of the plaintiffs' father. Further, the Courts below have held that no action whatsoever was taken by the plaintiffs' father or by the plaintiffs to get their names mutated in the revenue records or to take possession and therefore, the sale deed was never acted upon. The Courts below further found that Mst.

Maida did not have full ownership of the property in question and that the sale deed did not indicate the extent of her share in the disputed property. Both the Courts below have relied upon the judgment of the Deputy Director of Consolidation dated 14.1.1972 under section 48 of the U.P. Consolidation of Holdings Act 1953[hereinafter referred to as the Act] in which it was held that the plaintiffs were neither recorded nor were in possession over the plots in question on the basis of the sale deed before the date of vesting. Both the Courts below after appreciating the evidence on record have given a finding that the sale deed did not confer any right upon the plaintiffs. In view of the concurrent findings of fact given by the Courts below, I see no justification to interfere in the findings of fact recorded by the Courts below, namely that the sale deed did not confer any right upon the plaintiffs.

Case law discussed:

AIR 1980 All 385
AIR 1981 All 274
(1996) 8 SCC 357

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The plaintiff-appellants filed a suit for a permanent injunction against the defendants restraining them from interfering with their peaceful possession on the land in dispute as shown in the plaint map. It was alleged that the disputed land was the house of Mst. Maida, who had executed a sale deed dt. 16.5.1933 in respect of her one pai share in favour of the father of the plaintiffs and since then, the plaintiffs were in possession of the same. It was further alleged that the house collapsed about 10 years back. Thereafter, the plaintiffs were using the land for keeping and drying cowdung etc. and for other similar purposes. It was alleged that when the plaintiff started storing the bricks etc. for constructing a new house over the land in question, the defendants started interfering with the plaintiffs' possession and tried to take possession.

2. The defendant Ist set contested the suit contending that the plaintiffs were never in possession of the land in dispute. The names of the plaintiffs' were never recorded in the revenue records on the basis of the sale deed. The house in dispute did not belong to Mst. Maida and her name was never recorded in the village records. The defendant further contended that he had purchased one half pai share of Mst. Maida vide sale deed dated 24.8.1928 and inherited one pai share before the enactment of U.P. Zamindari Abolition and Land Reforms Act. The defendant also claimed that he had purchased the share of the daughters of Mst. Maida and was in possession of the disputed land for more than 12 years and that the sale deed filed by the plaintiff did not show that the house belonged to Mst. Maida. It was also alleged that the claim of the plaintiffs was liable to be rejected in view of the decision of Deputy Director of Consolidation dated 14.1.1972 in consolidation proceedings.

3. The defendant 2nd set stated that Salim had acquired the disputed land after paying a Nazrana and that they are in possession of the land in question and that no house of Mst. Maida existed on the disputed land and that the sale deed is a forged document.

4. The trial Court after framing the issues and recording the evidence dismissed the suit of the plaintiff holding that the plaintiffs are not the owners of the land in dispute nor were they in possession of it and therefore the

plaintiffs were not entitled to the relief of a permanent injunction. The trial Court further found that no action was taken by the plaintiffs or their father to get their names mutated in the revenue records on the basis of the sale deed nor were the plaintiffs in possession of it. The trial Court further found that the defendant no.1 was in exclusive possession of the land in dispute.

5. The appellate Court also come to the same conclusion and dismissed the appeal of the plaintiffs with costs. The appellate Court held that the name of Mst. Maida did not exist in the revenue records and therefore, Mst. Maida had no right to sell the plot to the plaintiffs' father. The sale deed dated 16.5.1933 did not confer any right upon the plaintiffs' father or upon the plaintiffs. The appellate Court further held that the disputed sale deed did not indicate the exact share of Mst. Maida or the portion of the disputed house that was being sold. The appellate Court held that the plaintiffs could not prove that the disputed house was owned by Mst. Maida. The appellate Court further held that since the original sale deed was not filed, the presumption envisaged under section 90 of the Evidence Act to the extent that the sale deed was validly executed, being a document more than 20 years also, would not apply in view of section 90-A[2] of the Evidence Act, which states that the presumption about the validity of the document shall not be made in respect of a document which is the basis of a suit and is relied upon in the plaint. The appellate court held that proper execution of the sale deed had not been proved by the plaintiffs. The appellate Court further held that even though the village is a partitioned village, the plaintiff had not given any Sikami number of the disputed land. The appellate Court further found that the plaintiff could not prove his possession over the land in question and that the judgment of the Deputy Director of Consolidation showed that the defendants' father was recorded as the owner of the plot in question.

6. Aggrieved by the judgment of the courts below, the plaintiff preferred the present second appeal under section 100 of the Code of Civil Procedure. At the time of the admission of the second appeal, the following substantial questions of law were framed namely--

1. Whether the sale deed dated 16.5.1933 conferred no right upon the plaintiff appellants ?

2. Whether the presumption under section 90[2] of the Evidence Act was available to the certified copy of the sale deed dated 16.5.1933 ?

3. Whether the presumption under section 90[2] of the Evidence Act will be deemed to be taken away by the provisions of section 90-A [2] of the Evidence Act because the aforesaid deed was the basis of the plaintiffs claim ?

In order to evaluate the aforesaid questions of law, it is necessary to consider the provisions of sections 90 and 90-A of the Indian Evidence Act 1872, as applicable in the State of U.P., as amended by U.P. Act No.24 of 1954, which reads as under :

"90.(1) Presumption as to documents twenty years old—Where any document, purporting or proved to be twenty years old, is produced from

any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested."

(2) Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed by the person by whom it purports to have been executed or attested."

"90-A. [1] Where any registered document or a duly certified copy thereof or any certified copy of any document which is part of the record of a Court of justice, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the original was executed by the person by whom it purports to have been executed.

[2] This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement.

The explanation to sub-section [1] of Section 90 will also apply to the section."

A Full Bench of this Court in **Ram Jas and others v. Surendra Nath and another, AIR 1980 [Alld.] 385** held as follows :

"The presumptions under the Evidence Act are only the inferences, which a logical and reasonable mind normally draws. Facts and circumstances [from] which certain inferences follow are indicated in various provisions of the Evidence Act running from Sections 79 to 90-A. As already seen the sections of the Evidence Act lay down different circumstances in which a presumption is to be raised. Whenever the law permits the raising of a presumption the Court can by reason of Section 4 of the Evidence Act raise the presumption for purpose of proof of a fact. If the presumption is available in one section it can raise it under that section. If it is not available in one section and is available in another section, then the Court can raise presumption under that section. It all depends upon the circumstances available in the case as applicable to a particular document. Hence, even if the case falls under Section 90-A and sub-section [2] thereof is applicable and no presumption can be drawn under Section 90-A[1] it will not exclude the Court from drawing the presumption, if the circumstances permit ;it to be drawn, under any other provision of the Evidence Act including Section 90 of the Act. The presumption, if available under Section 90, can therefore, be raised by the Court even after coming to the conclusion that a presumption under Section 90-A is not available.

7. The presumptions available under Sections 90 and 90-A are also not similar. Section 90[2] permits the raising of the presumption in respect of the signature,

handwriting, execution and attestation, while Section 90 permits a presumption only in respect of execution. Section 90 deals with documents which are more than 20 years old while Section 90-A places no such restriction and includes also documents from judicial record. Neither of the two sections, therefore, can be said to be occupying a field, which the other exclusively occupies. They deal with different fields and different circumstances and permit different types of presumptions to be raised.

8. For the reasons given above, it is not possible to hold that sub-section [2] of Section 90-A will override and nullify Section 90 if the document, through more than twenty years old, is the basis of the suit or the defence or is relied upon in the plaint or written statement."

9. In **AIR 1981[Alld] 274, Smt. Vidya Devi and others v. Nand Kumar**, it was held—

"In my opinion there is no conflict between the provisions of Section 90 as amended in U.P. and Section 90-A as added in U.P. though they are designed to operate in different fields. Yet they can operate simultaneously over a limited common area also. They do not mutually exclude the applicability of one by the other. A document, which is registered and is also more than 20 years old, cannot be admitted in evidence under section 90-A if it is the basis of the suit or of defence. Yet it can still be held proved in view of the provisions of section 90 and a presumption referred to therein can be raised in respect of such a document."

10. From the aforesaid it is clear that section 90-A[2] does not override section 90 of the Evidence Act. Both the sections operate in different fields. A document which is registered and which is more than 20 years old could not be admitted in evidence under section 90-A[2] if the said document is the basis of the suit or of defence. However, the presumption, if available under section 90, can therefore be raised by the court even after holding that the presumption is not available under section 90-A of the Act. Thus, I hold, that the presumption under section 90[2] of the Evidence Act is not taken away by the provisions of section 90-A[2] of the Act.

11. The question therefore, that arises in the present case is whether the presumption under section 90[2] of the Act was available on the certified copy of the sale deed dated 16.5.1933 to the plaintiff. It is relevant to state here that section 90 of the Act removes the strict rule of proof of private documents. Presumption of genuineness may be raised where the document is produced from a proper custody. However, in view of the provisions of section 90 of the Act, it is the discretion of the Court to accept the presumption flowing from section 90. In the present case, the mere production of the certified copy of the sale deed was not by itself sufficient to justify the presumption of the execution of the original under section 90. The provisions of section 90 has to be read alongwith section 65 of the Act. Mere production of a certified copy of the sale deed is not sufficient to draw a presumption under section 90. It must be shown that the document produced was a copy admitted as secondary evidence under section 65 of the Act.

12. The Supreme Court in **Lakhi Baruah and others v. Padma Kanta**

Kalita and others, 1996 [8] SCC-357 has held as follows :

"The position since the aforesaid Privy Council decisions being followed by later decisions of different High Courts, is that presumption under Section 90 does not apply to a copy or a certified copy even though thirty years old; but if a foundation is laid for the admission of secondary evidence under section 63 of the Evidence Act, 1872 by proof of loss or destruction of the original and the copy which is thirty years old is produced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine."

13. Thus, it is clear that the mere production of a certified copy of the sale deed is not sufficient to draw a presumption under section 90 of the Act. The plaintiff has to lay the foundation for admission of the secondary evidence by proof of loss or destruction of the original, etc. Only then, the presumption of the genuineness of the document can be drawn under section 90 of the Act.

14. In the present case, the plaintiff has only produced a copy of the sale deed and has not stated in his plaint or led evidence, nor laid the foundation for admission of the secondary evidence by proving the loss or destruction of the original document. Nothing has been shown by the plaintiff-appellants as to why the original document could not be produced. Thus, the presumption under section 90 could not be drawn in favour of the plaintiff. I therefore, hold that in the present case, the presumption under section 90 of the Act, was not available on the copy of the sale deed dated 16.5.1933.

15. It may also be stated here that the rule of presumption has to be exercised with exceeding caution where circumstances throw suspicion on the genuineness of a document in which case no presumption under section 90 can be drawn. In the present case the discretion exercised by the lower appellate Court was sound and reasonable and was not arbitrary.

16. On the question as to whether the sale deed conferred any right to the plaintiff-appellants, I find that both the Courts below have given concurrent findings of fact to the extent that the name of Mst. Maida was never recorded in the revenue records and that she had no right to execute the sale deed in favour of the plaintiffs' father. Further, the Courts below have held that no action whatsoever was taken by the plaintiffs' father or by the plaintiffs to get their names mutated in the revenue records or to take possession and therefore, the sale deed was never acted upon. The Courts below further found that Mst. Maida did not have full ownership of the property in question and that the sale deed did not indicate the extent of her share in the disputed property. Both the Courts below have relied upon the judgment of the Deputy Director of Consolidation dated 14.1.1972 under section 48 of the U.P. Consolidation of Holdings Act 1953[hereinafter referred to as the Act] in which it was held that the plaintiffs were neither recorded nor were in possession over the plots in question on the basis of the sale deed before the date of vesting. Both the Courts below after appreciating the evidence on record have given a finding that the sale deed did not confer any right upon the plaintiffs. In view of the concurrent findings of fact given by

the Courts below, I see no justification to interfere in the findings of fact recorded by the Courts below, namely that the sale deed did not confer any right upon the plaintiffs.

17. In view of the aforesaid, the second appeal is dismissed. However, in the circumstances, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD THE: 10.03.2004

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 33921 of 2003

Ram Dhayan Singh ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri V.K. Ojha
Sri Ramendra Asthana

Counsels for the Respondents:
Sri Suresh Singh
S.C.

Constitution of India–Arts 226, The Writ Petition against order of cancellation of termination of non-statutory agreement arising out of Government orders for appointments of agents/dealers in food grains meant for public distribution system Maintainability, no fundamental on legal right- relationship of agent with state Government contractual Alternative remedy of appeal on dismissed of appeal remedy of civil suit available writ petition writ petition, held, not maintainable–principles of natural justice–Applicationlity –non–impalement of complainants–since appeal lies only against cancellation order, held, it was not necessary to hear complaints, as Government order does not prescribe that complaints should also be heard.

Held: Paras 20 & 21

The case of the Respondents cannot be said to be either arbitrary or discriminatory so as to attract the provision of Article 14 of the Constitution of India.

I am of the opinion that against the action complained of, the present writ petitions are not maintainable before this Court under Article 226 of the Constitution of India, as the contract of the type as was in the present case is purely non-statutory arising out of the Government orders and the remedy open to the person aggrieved by the action of the authorities is under the Government Order by filing an appeal. The appeal filed on behalf of the fair price holders/dealers/having been allowed/ dismissed, the remedy open to the writ petitioners/dealers is not a writ petition under Article 226 of the Constitution of India, but ordinary civil remedy. So far as the second category of the cases wherein the dealership was cancelled/ suspended on the complaint made by the complainants and on appeal the Appellate Authority, according to the relevant Government Order, has restored the dealership without impleading these complainants, as the authority was affording an opportunity to the complainants, as the authority was affording an opportunity to the complainants, is concerned. In view of the Government Order, referred to above, since appeal lies only against the cancellation order, it was not necessary to heard the complainants, as the relevant Government Orders do not prescribe that complainants should also be heard, thus the authorities have not committed any error in not hearing the complainants.

Case Law Discussed:
C.M.W.P. No. 749 of 2003, decided on 2.5.2003 (All) (DB)
1991 (IT) ALR406: 1991 ALJ 498

1992(2) EFR.655 (All) (FB)
1992(2) EFR.669 (MP) (DB)
JT 1998 (3) SC S4
(1999) 7 SCC 89
JT 2001 (1) SC 426
AIR 1977 SC 1496
AIR 1977 SC 1504
AIR 1966 SC 334
AIR 1977 SC 2149
AIR 1977 SC 2155
AIR 1981 SC 1368
AIR 1989 SC 1076
2001 ACJ 1060
1993 (21) ALR 121
JT 1995 (3) SC1
AIR 1980 SC 738
AIR 2000 SC 2573
(2002) 1 SCC 217

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

1. These bunch of Writ Petitions, out of which the present writ petition i.e. civil misc. Writ petition No. 33921 of 2003 (Ram Dhyan Singh Versus the State of U.P. & others) is the leading case, have been filed under Article 226 of the Constitution of India by the petitioners, who can broadly be divided in the following categories:

(i) Such petitioners, who entered into an agreement with the concern Authority as per relevant Government Orders, whereby they were appointed to deal with the food grains meant for distribution under Public Distribution System as an agent on behalf of the State and their dealership (right to deal exclusively in food grains meant for Public Distribution System), have been terminated, such persons who have approached to the Appellate Authority in terms of the relevant Government Orders against the aforesaid termination and the Appellate Authority has dismissed their appeals.

(ii) Such petitioners, who were granted dealership by virtue of an agreement to exclusively deal with the food grains meant for Public Distribution System in the rural area and on being complaints filed against such dealers, the Authority acting upon the complaints have terminated their agreement of dealership; these dealers approached the Appellate Authority and the Appellate Authority; (a) has allowed their appeals without hearing the complaints and restored their respective dealership; or (b) has dismissed their appeals; these complainants have preferred writ petitions on the ground that they were not heard by the Appellate Authority before restoring the dealership of the concern dealers; and dears who have approached the Appellate Authority against the cancellation of their dealership and their appeal has been dismissed by the Authority.

2. The State Government has issued Government Order dated 3rd July' 1990 which provides the methodology of appointing dealers and includes the provision of appeal against suspension/cancellation/refusal to renew the dealership to the Commissioner of the division etc.

3. The another Government Order dated 10th August, 1999 deals with the subject. The next Government Order dated 13th January, 2000, which deals with the subject and the latest Government Order dated 22nd October, 2003, wherein relying upon the Division Bench decision of this Court, a Government Order was issued on 30th July, 2003 wherein it was stated that in view of the decision of the Division Bench of this Court in Civil Misc. Writ Petition N. 749 of 2003 (Zila Panchayat,

Ghaziabad) Vs. State of U.P. and others) decided on 2nd May, 2003, the State Government ahs issued a direction that the Gram Panchayat has been conferred with the powers of distribution etc. of the food grains meant for Public Distribution etc. of the food grains meant for Public Distribution system. The Division bench decision of this Court is subject matter of Special Leave Petition No. 17369 of 2003 before the apex Court and the apex Court vide its order dated 26th September, 2003 stayed the operation of the Judgment and order of this Court, referred to above, and consequently the Government Order was issued reviving the Government Orders dated 3rd July, 1990 and 13th January, 2000.

4. At the outset, Shri Suresh Singh, learned Standing Counsel appearing on behalf of the State of U.P. defending the interest of the State relying upon the aforesaid Government Orders raised a preliminary objection regarding the maintainability of these writ petitions before this Court, in as much as it is submitted by the learned Standing Counsel that in view of the decision of Division Bench of this Court in the case of Gopal Das Sahu and another Versus State of U.P. and others reported in 1991 (17) A.L.R., page 406 (1991 ALJ, page 498) (Civil Misc. Writ Petition Nos. 20086 of 1990, 24834 of 1990 and 32131 of 1990), decided on April 15, 1991) dealing with the similar controversy arising out of U.P. Scheduled Commodities (Regulation of Distribution Order) 1989 (herein-in-after referred to as "Distribution Order of 1989"), the Division bench of this Court has said that the fair price shops dealers have no legal right to obtain supply of schedule commodities, neither the Government is obliged to supply these commodities to agents Paragraphs 16, 17, 18, 19 and 20 deal with the subject matter, which have been referred to and relied upon by learned Standing Counsel, are quoted as hereunder:

"16. We have already noted the relevant provisions of the distribution Control Order of 1990. The Control Order of 1990 does not contain any provision for cancellation or suspension of agreement and further the order does not provide the manner in which the appointment of agent is to be made from all these provision it is manifest that the appointments of the petitions as agents to run fair price shops are contractual and their right to run the fair price shop emanates from the agreements. The Supreme Court as well as this Court on various occasions considered the aspect of the matter and held that the relationship of an agent with the State Government is contractual in the case of S.Chandra Sekharan & Others Vs. Government of Tamil Nadu & Others, reported in A.I.R. 1974, S.C. Page, 1543, the Supreme Court had occasion to consider the validity of the termination of agreement in respect of sale of levy sugar do not have any fundamental right or legal right to deal with that commodity and as such they are bound by the terms of the contract and their termination being in pursuance of the agreement cannot be assailed by means of a writ petition under Article 226 of the Constitution. Similar view was expressed by a Full Bench of this Court in the cases of Shitla Prasad Vs. Mohd. Saidullah & others, report in A.I.R. 1975, Allahabad, Page 344 and M/s. Raj Kumar Sheo Kumar & Another Vs. A.D.M. (Civil Supplies and another, reported in 1981 (1) A.L.J., page 261 and Ram

Awadh Vs. State of U.P., reported in 1990-II, Essential Commodities Cases, Page 490. IN all these cases it was held that neither Article 14 of the Constitution nor principles of natural Justice is attracted when agreement to sell Government's food grain through fair price shop is terminated.

17. In the present case the petitioners have no fundamental right or legal right to deal with the scheduled commodities distribution through the Government run fair price shops. It is open to the petitioners to carry on business of foodgrain other than the foodgrains other than the foodgrains supplied through these fair price shops. Infact their right to run fair price shops emanates from the agreement. The agreement permits the Collector to terminate or suspend the agreement permits the Collector to terminate or suspend the agreement and this termination of suspension order will not give a cause of action to the petitioners to challenge the said order of termination or suspension of agreement by means of petition under Article 226 of the Constitution.

18. Before we part with these cases we propose to deal with the arguments advanced on behalf of each of the petitioners in connected with prayer for supply of quota of scheduled commodities by the respondents in their favour. The argument is that the petitioners having been appointed as authorized retail distributors for running the Government fair price shops or issued a license for retail sale of kerosene oil, it is not open to the respondents to abruptly stop supply of scheduled commodities including kerosene oil to them arbitrary and without notice or intimation to them.

19. On the argument of the learned counsel for the petitioners the question which arises for consideration is as to whether these petitioners have a right to receive the quota of scheduled commodities including kerosene oil and in the event of non-supply of scheduled commodities in their favour can this Court compel the respondents to release the quota of the said scheduled commotions in favour of the petitioners for being distributors through fair price shops.

20. We have gone through the Control Order of 1990 and the Government Order dated 3.7.90 issued in pursuance thereof and we find that none of the petitioners thereof and we find that none of the petitioners has any legal right to obtain supply of scheduled commodities including kerosene oil for distribution through the fair price shops and furthers there is no obligation on the part of the Government to supply these commodities in favour of the agents who have been appointed to run the fair price shops. However, there are several clauses pertaining to method and manner of supply of scheduled commodities to the agents and the Government. The relevant clauses are clauses 3, 4 and 5 of the agreement Clause 3 of the agreement stipulates that an agent shall receive of lift quota of scheduled commodities in accordance with the directions issued by the authorities empowered in this behalf. Thus the supply of quota of scheduled commodities to the agents is subject to the orders issued by the authorities concerned and the agents cannot as a matter of right, claims release of scheduled commodities in their favour. We are, therefore, of opinion the petitioners have neither any fundamental right nor legal right as to compel the Government to supply the

scheduled commodities including kerosene oil in their favour. Moreover in the earlier part of the judgment we have already held that the relationship of agents who have been appointed for distribution of the scheduled commodities through the fair price shops with that of the State Government is contractual and infact their appointments as agents and determination of the agreement are under the agreements which is non-statutory in character, and, therefore, the supply of release of quota of scheduled commodities in favour of the agents has to be governed by the incidence of the contract or agreement and this Court in exercise of powers under Article 226 of the Constitution cannot compel the Government to supply the quota of scheduled commodities in favour of the petitioners."

5. For the purposes of arriving its conclusion, the Division Bench has relied upon as observed in para 22 of Gopal Das Sahu's Case, which runs as under:

"22. Moreover, controversy in the present case is squarely covered by the decisions of the Supreme Court and Full Bench of this Court in the case of S. Chandra Sekharan Vs. Government of Tamil Nadu (Supra) and Shital Prasad Vs. Mohd. Saibullah (Supra), respectively. The decision of the Supreme Court in the case of S.Chandra Shekharan Vs. Government of Tamil Nadu is a constitution bench decision of five Hon'ble Judges whereas the decision of the Supreme Court in Mahabir Auto Stores (supra) is a decision by two Hon'ble Judges of the Supreme Court. In our opinion the decision in the case of S. Chandra Shekharan Vs. Government of Tamil Nadu (supra), is binding on the High Court. We are, therefore, of the opinion that the petitioner cannot derive any assistance from the case of Mahabir Auto Stores (Supra) as to compel the respondents to supply scheduled commodities for distribution through Government run fair price shops."

6. According to learned Standing Counsel appearing on behalf of the State , the controversy stands concluded by a Full Bench Judgment of this Court in the case of U.P. State Gala Vikreta Parishad, Allahabad Versus State of U.P and others, reported in 1992 (2) E.F.R, Page 655, wherein the Full Bench considered the similar controversy and has held that the agreement between the fair price agents and District Magistrate / State for sale of the scheduled commodities through fair price shops and termination or suspension of such dealership in that event this Court will not interfere in exercise of power under Article 226 of the Constitution in paragraph 15 of the judgment, referred to above, the Full Bench has considered the decision of Division Bench of Gopal Das Sahu (Supra) and held that it lay down correct law and has given its conclusion in paragraph 21, which is quoted below :

"21. Even through the petitioners and other authorized agents cannot challenge the breach of their contract on the ground of violation of constitutional provisions before this Court under Article 226 of the Constitution but they are not remediless. Government letter itself Provides for appeal against some of the orders, which may be passed by the authorities. That part, the authorized agents like the petitioners have remedy of civil suit before the appropriate Civil Court, which they can institute before filling of the appeal as Well as after the appeal is decided.

7. Learned counsel has further relied upon a Division Bench decision of Madhya Pradesh High Court, reported in 1992 (2) E.F.R. page 669 Bank of Baroda Versus Collector, Indore and others in support of his contention.

8. Learned counsel appearing on behalf of the petitioners, on the other hand submitted that after the amendment of the Constitution by 73rd Constitutional amendment, the so called contract or appointment of the dealership cannot be said to non-statutory, particularly, in view of the observations made by the apex Court in the case reported in J.T. 1998(3) S.C., page 84 M/s. Hunderabad Vanaspati Ltd. Versus Andhra Pradesh State Electricity Board & Others and the case reported in 1999(7) S.C.C., page 89 Style (Dress Land) Versus Union Teritory, Chandigarh and Another. It is further submitted on behalf of petitioner's counsel that the appointments are under respective Control Orders, which are framed under the provisions of Essential Commodities Act, as held by the apex Court in the case reported in J.T. 2001 (1) S.C., page 426.

9. Learned Standing Counsel in support of his contention has further relied upon a decision of the apex Court reported in A.I.R. 1977 Supreme Court, page 1496 M/s. Radhakrishna Agarwal and others Versus State of Bihar and others, on the question that the petitioners cannot invoke the principles of natural Justice and even if no opportunity was given the order impugned cannot be said to be void. Learned Standing Counsel has relied upon paragraph nos. 10 and 11, which are reproduced as under:-

"10. It is thus clear that the Erusian Equipment Chemicals Ltd.'s case (AIR 1975 SC 226) (supra) invoked discrimination at the very threshold of at the time of entry into the field of consideration of persons with whom the government could contract at all. At this stage, no doubt, the State Act purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract, which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 of any other constitutional provisions when the State or its agents, purporting to act within this filed, perform any act. In this sphere, they can only claim right conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in an confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

11. In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power or obligation, which could attract the application of Article 14 of the Constitutional is involved here. Even in cases where the question is of choice or consideration of competing claims before an entry into the field of contract facts have to be investigated and found before the question of a violation of Article 14 counsel arise. If these facts are disputed and require assessment of evidence the correctness of which can only be tested

satisfactorily by taking detained evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. Such proceedings are summary proceedings reserved for extraordinary cases where the exceptional and what are described as, perhaps not quit accurately, "prerogative" powers of the Court are invoked. We are certain that the cases before us are not such in which powers under Article 226 of the Constitution could be invoked."

10. On the question of observation of principle of natural Justice, learned Standing Counsel has relied upon the decisions reported in A.I.R. 1977 Supreme Court, page 1504 Belde Venkatesham Versus Chokkarapu Lakshmi Narasian; and A.I.R. 1966 Supreme Court, page 334 Lekhraj Sathramdas Dalvani Versus N.M. Shah, Deputy Costodian cum Managing Officer, Bombay and others. Learned Standing Counsel has further relied upon the decisions in support of his contention, which are reported in A.I.R. 1977 Supreme Court, page 2149 The Bihar Eastern Gangetic Fisherman Co-operative Society Ltd. Versus Siphai Singh and others; A.I.R. 1977 Supreme Curt, page 2155 All Party Hill Leader Conference, Shillong Versus Captain W.A. Sangama and others; A.I.R. 1981 Supreme Court, page 1368 The Divisional Forest Officer Versus Bishwanath Tea Co. Ltd. and A.I.R. 1989 Supreme Court page 1076 Bareilly Development Authority and another Versus Ajay Pal Singh and others.

11. These very arguments were advanced, which have been repelled to by learned single Judge of this Court in the case reported in 2001 All. Civil Journal, page 1960 Tareef Singh and others Versus Commissioner Agra Division and others. It has been stated at Bar that the judgment of learned single Judge has become final, as no Special Appeal or Special Leave Petition was filed against the order or learned single Judge in paragraph 12 learned single Judge has held, which reads as under:

"12. The crucial question involved in these writ petitions for consideration and determination by this Court is whether the appointment of the petitioners as agents for running the fair price shops for distribution of the essential commodities to the assigned ration card holders in pursuance of the agreements executed by them in favour of the State or U.P. through the Collector/Sub Divisional Magistrate is the outcome of a statutory or a non statutory contract. The fate of these writ petitions obviously would turn out on the answer of the above question inasmuch as, the practice would swim or sink with the finding on the point."

12. After coaxing the aforesaid question, learned single judge has answered the said question in paragraph 14, which runs as under:

"14. The learned Standing Counsel pointed our that earlier a firm view had been taken by this Court that the agency to distribute the essential commodities is the product of the non statutory contract and, therefore, a writ petition under Article 226 of the Constitution is not maintainable. Obviously the reference was to the decision of a Division Bench of this Court in Gopal Das Sahu V. State of U.P. 1991 (17) A.L.R., 406, which dealt with the cancellation o contract executed

by an agent with the Collector for the sale of scheduled commodity under the Control Order. It was held that neither Article 14 of the Constitution of India, nor principles of natural Justice are attracted when agreement to sell governing food grains through fair price shops is terminated. It was further laid down that the relationship of the agents with Government is contractual and non-statutory in nature and, therefore, a writ under Article 226 of the Constitution of India is not maintainable to compel the Government to supply the quota of scheduled commodities to the petitioner therein. Subsequently, a full Bench of this Court in U.P. State Sasta Galla and Vikreta Parishad, Allahabad V. State of U.P. (1992 (2) EFR 655); and Shiv Mohan Lal V. State of U.P. & other, (1993 (21) A.L.R. 121 = (1992 All. C.J. 1139), approving the decision in Gopal Das Sahu's case (Supra) held that the order of termination or suspension of an agreement entered into between the petitioner and the District Magistrate for sale of scheduled commodities through fair price shop pursuant the U.P. Scheduled commodities Distribution Order 1990 cannot be challenged in a writ petition and the proper course, for the agent or say the dealer, was to vindicate his grievance by filing a civil suit. It was canvassed before the Full Bench the in view of the decision of the Apex Court in Km. Krilekha Vidyarthi V. State of U.P. AIR 1991 SC 537 and host of other decision, the decision in Gopal Das Sahu's case (supra) required reconsideration. The Full Bench retreated the view taken Gopal Das Sahu's case (supra) as laying down the correct law by observing that the apex Court has consistently taken the view that where the contract which has been entered into between the State and the person aggrieved is non-statutory, the right of the parties thereto are governed by the terms of the contract and not by constitutional provisions and no writ or order can be issued under Article 226 of the Constitution of India by the High Court for enforcing such a contract."

13. Learned counsel appearing on behalf of the petitioners in those cases which have been dealt with the learned single Judge of this Court, as stated above, also argued that the decision of the Full Bench in U.P. Sasta Galla Vikreta Parishad (E.F.R. 1992 (2), page 655) and Shiv Mohan Lal (1993 (21) A.L.R. 121) was primarily based on the observations made by the apex Court in the case of Bareilly Development Authority Vs. Ajay Pal Singh, reported in AIR 1989 SC, page 1076, which was subsequently not approved by the apex Court it its subsequent decision in the case of Indore Development Authority Versus Smt. Sadhana Agrawal & Others, reported in J.T. 1995 (3) S.C., page 1. Learned single Judge has sum up his conclusion in the para 17 of the said Judgment, which read as under:

"17. In Indore Development Authority (supra) the apex Court has not deviated from its earlier view taken in Bareilly Development Authority's case (supra) but justified the interference in the background of special facts and circumstances by holding that the Development Authority owned his duty to explain and satisfy the Court the reason for such high escalation. A cautions approach was adopted by the Court by making the observation that:

"We may add that this does not mean that the High Court in such disputes while exercising the writ jurisdiction has to

examine every detail of the construction with reference to the cost incurred, High Court has to be satisfied on the materials on record that the Authority has not acted in an arbitrary and erratic manner."

14. The view taken in Bareilly Development Authority's case (supra) that the nature of the contract was non-statutory has not been disturbed in the decision in Indore Development Authority (Supra). The law laid down in Bareilly Development Authority's case, that the Full Bench decision in U.P. Sasta Galla Vikreta Parishad's case (supra) and Shiv Mohan Lal's case (supra) are based on a law, which has been subsequently held to be not good."

15. the question of effect of the changes brought in by the 73rd constitutional amendment has also been dealt with the learned single Judge in paragraph 18 of the said Judgment, which runs as under:

"18. A reference was made to another decision of the apex Court in M/s Hunderabad Banaspati V. Andhra Pradesh State Electricity Board and other. JT 1998(3) SC 84 for determining whether a contract is statutory nor non-statutory and on the strength of this decision, Sri Ramendra Asthana Strenuously argued that the agreement executed by the petitioners in favour of the District Magistrate with a view to obtain license to run fair price shop for distribution of essential commodities would fall within the ambit of statutory contract. He further pointed out that a Division Bench of this Court in a recent decision in Pappu V. State of U.P. and others (supra) has held that the contracts for running the fair price shops have statutory flavour and a writ petition for the enforcement of the right in the event of their breach is maintainable under Article 226 of the Constitution of India. The law laid down by the Full Bench in U.P. Sasta Galla Vikreta Parishad (supra) and Shiv Mohan Lal (supra) was held to have no application in view of the fact that it came into being prior to the insertion of Article 243-G of the Constitution by means of Seventy Third Constitutional Amendment and substitution of Section 15 of U.P. Panchayat Raj Act by Act No. IX of 1994. It was pointed out that before the Full Bench clause 4 of the U.P. Scheduled Commodities Distribution Order. 1990 was under consideration. The Full Bench visualized that fair price shops would be run by such persons, in such a manner, a manner, as the Collector, subject to the direction of the State Government may decide and the person authorized to run a fair price shops would be treated as the agent of the State Government. By a letter dated 3.7.1990., the Government issued instructions to all the District Magistrate laying down therein the procedure for selection of agents in rural areas and by clause 6 thereof, the District Magistrate had been directed to get the contracts executed in the prescribed program by the agents running the fair price shops. Clause 11 of the said letter made provision for appeal against the order of appointment, suspension, cancellation, or non-renewal of contracts. Under the new system which was introduced as a result of the amendment in the constitution and incorporation of Section 15 in the U.P. Panchayat Raj act and the issue of Government order dated 10.8.1999, it was pointed out that the allotment of fair price shop is done pursuant to a resolution passed in that regard by the concerned Gram Sabha Certain qualifications have been prescribed in the Government Order.

The status of the allottee it was held is not that of an agent of the State Government. The matter of allotment and the procedure for cancellation as prescribed in the Government Order have the force of law. Once an allotment is made in favour of a person he acquires a right to run the shop in the manner prescribed in the Government Order. The allottee runs the risk of cancellation only in the event of committing irregularities in the distribution of scheduled commodities. A Gaon Sabha is a legal authority within the meaning of Article 12 of the Constitution of India and its decision effecting the rights of citizen cannot go beyond the purview of Judicial review under Article 226 of the Constitution of India. To be more precise, specific, and for the sake of clarity, it would be proper to quote paragraph 5 of the decision in Pappu's case (supra) which reads as follows: (All. C.J. at page 206).

"5. It would thus appear that the selection and cancellation of fair price shops are not longer a contractual matter. It is now governed by the statutory provision, namely, section 15 of the U.P. Panchayat Raj Act, read with Government order dated 10.8.1999, which has the force of law being a provision having statutory flavour.

In the instant case, the allotment of fair price shops in favour of the petitioner-appellant herein was cancelled by the concerned Gram Panchyant but without following the procedure prescribed in para 10 of the Government Order referred to above, which provides for an 'enquiry' by the Administrative Committee of the Gram Panchyat into the complaints regarding irregularities in the distribution of scheduled commodities by the allottee of the fair price shop. The enquiry visualized by clause 10 of the Government Order must, in the our opinion, be held in a fair manner in tune with the principles of natural Justice. The fact that the decision regarding cancellation is required to be taken by the Gram Sabha in its open meeting would suggest that there should be transparency in the decision making process. A decision regarding cancellation of fair price shop taken by the Gaon Sabha sans any enquiry in tune with the principles of natural Justice cannot be sustained being contrary to the procedure laid down in the Government Order aforesaid which ensures procedural fairness in the matter of cancellation of fair price shops."

16. Learned single Judge has further dealt with the arguments advanced on behalf of learned counsel for the petitioners in paragraphs 19 and 20 of the aforesaid Judgment, which read thus.

"19. On the strength of the decision in Pappu's cas (supra) Sri Ramendra Asthana pointed out that the earlier view taken in Gopal Das Sahu's case (supra) as well as U.P. Sastha Galla Vikreta Parishad (supra) and Shiv Mohan Lal (supra) does not hold good and writ petition is now maintainable under Article 226 to enforce the breach of the rights and obligation arising out under the agreement executed by the petitioners for obtaining the essential commodities for distribution to the ration card holders respectively allocated to them. It was further urged that there can be no enquiry without observation of the principles of natural Justice as has been laid down by the Apex Court in Style (Dressland) V. Union Territory Chandigarh and another, 1997(7) SCC89; Vasant D. Bhavsar v. Bar Council of India & others, 1999 (1) SCC 45 and Sahi Ram V. Avtar Singh

and others, (1999 (4) SCC 511 =1999 All. C.J. 1482.)

17. In view of the Full Bench decision in U.P. Sasta Galla Vikreta Parishad (supra) as well as Division Bench decision in Pappu, a reference to a larger Bench was made by another Division Bench in Chhokhe Singh V. Sub Divisional Magistrate, Civil Misc. Writ No. 51595 of 1999 posing as many as ten specific question to be answered by the larger Bench. The larger Bench did not answer the question on merits by observing that since the order dated 10.8.1999 (which was subject matter of challenge in Pappu's case (supra) has become redundant on account of its withdrawal and revival of the old scheme of distribution as envisaged in Government Order dated 3.7.1990 there was no need to answer the questions. The larger Bench had the occasion to sift the various legal points which have been raised by Sri Ramendra Asthana in the present writ petitioners, but since the larger Bench declined to answer the questions referred to it as the reference was found to have become redundant the judicial discipline demands that this Court sitting singly has to take into consideration the scheme of distribution of essential commodities as adumbrated by the revived Government Order dated 3.7.1990 and to adhere to the decisions in which said Government order came to be tested. The law laid down in the Full Bench decision in U.P. State Sasta Galla Vikreta Parishad (supra) and Shiv Mohan Lal (supra) hold good as regards the scheme propounded under the Government Order dated 3.7.1990. The agreements executed under the said scheme shall be treated to be non-statutory and the law laid down in Pappu's case (supra) cannot be taken into consideration as it proceeded on the premises of the new scheme as contemplated under the Government Order dated 10.8.1999 which came into being on account f insertion of Article 243-G of the Constitution of India and substitution of Section 15 of the U.P. Panchayat Raj Act."

18. The learned single Judge in the aforesaid judgment has summed up his conclusion in paragraphs 23, 24 and 25, which are as under:

"23. To, sum up, it may be printed out that what has been canvassed, discussed and decided by a Division Bench of this Court in Pappu's case (supra) in not applicable in the present circumstances as in that case the Government order dated 10.8.1999 was the subject matter of challenge which came to be issued in the wage of insertion of new article 243-G of the Constitution of India and substitution of Section 15 of the U.P. Panchyant Raj Act. After the withdrawal of the said Government order and reverting to the position as obtained at the time when the Government order dated 3.7.1990 was issued the decision in Pappu's case (supra) has lost its relevance and the cases on which reliance cannot be ignored are Gopal Das Sahu (supra) and Shiv Mohan Lal (supra) in which agreements executed pursuant to the Government order dated 3.7.1990 were held to be non statutory contracts. After the decision of the large Bench to which the conflict was referred for resolution, the legal position which emerges is that the whole controversy is to be decided with reference to the Government order dated 3.7.1990 validity of which, as a matter of fact, already stands concluded by the decision aforesaid. Of necessity,

therefore, the agreements which are in force pursuant to the Government Order dated 3.7.1990, are to be treated as non-statutory agreements. The law, as said above is well settled that in case on non statutory agreement, if there is a breach of any term or condition, remedy of the dealer/license holder is approach the Civil Court for the redressal of his grievances. For the remedial measures, the writ jurisdiction under Article 226 of the Constitution of India is not available. All the writ petitions, therefore, turn out to be devoid of any merits and substance.

24. Before parting, it maybe pointed out that recently, the State Government has issued at least three Government orders on 4th January 2001 is with regard to the issue of license for the sale of high speed diesel oil by retail/petty diesel oil dealers. The license is to be granted by a committee headed by the District Magistrate. The conditions of license have further been circulated by Government order No. 557/29.7.2001-D (15)/2000 dated 3.2.2001, Similarly separate orders have been issued by the State Government with regard to the enforcement of reservation policy in the public distribution system both for rural and urban areas. The policy governing the urban areas is contained in Government order No. 21/29 Kha-6-2001-53 (samanya)/99 dated 4.1.2001 and that of rural area is No. VIP 169/29 Kha-6-2000-53 (Samanya)/99 of date. These two Government orders are relevant for the purposes of the appointment the dealers/license holders for distribution of the essential commodities through fair price shops. In both the cases, i.e. urban and rural, reservation in respect of scheduled Caste, Scheduled Tribes and other Backward Classes has been provided besides horizontal reservation in respect of women, ex-serviceman, members of the family of service-men who laid their lives in war or were injured, wife or widow of the freedom fighters and physically handicapped persons. In case of rural areas a fair price ration shops is to be opened or every 4000 run its and the selection of such shops is to be done by a resolution to be adopted by the Gaon Sabha in its open meeting. In case of urban areas, a ration shop is to be provided for every 3000 units by a committee headed by the District Magistrate as its Chairman and District Supply Officer as its convenor/Sachiv. In both the Government orders, necessary qualifications and eligibility formula have been provided. A note of caution is required to be sounded. The new scheme, which is prevalent for distributed of essential commendations in the State is contained in the Government Order dated 3.7.1990 was amended from time to time by subsequent orders, particularly the orders dated 4.1.2001. The new ration shops dealers are to be appointed after due advertisement and as per the requisites and eligibility criteria provided in the Government orders dated 4.1.2001 referred to above. However, there are yawning gaps in the existing scheme of distribution of essential commodities adopted by the State Government in truncated form, as the position existing prior to the Seventy Third Constitutional amendment which came into force on 24.4.1993 has been revived. It does not appear fulfill the aspirations, which culminated in the Seventy Third Amendment of the Constitution of India. The State Government has to give a fresh look to the matter. It has to consider whether the prevalent scheme is in keeping with the parameters prescribed in the newly inserted provision of Article

243-G of the Constitution of India and the substituted new Section 15 of the U.P. Panchayat Raj Act. If the existing scheme does not fulfill the mandate of the Seventy Third Amendment in the Constitution and the statutory provision of the Section 15 of the U.P. Panchayat Raj Act, it is like to invite adverse criticism and may be struck down by the appropriate forum. Taking note of this situation, the State Government would be well to remove the anomaly before it is too late. This Court sitting singly has reframed to delve into the realm of this aspect of the matter."

19. Learned single Judge was of the opinion that in view of the law, referred to above, in this Judgment as also in the preceding paragraphs that the writ petition can simply be held to be not maintainable under Article 226 of the Constitution of India.

20. Shri Arvind Srivastava, learned counsel appearing on behalf of one Respondent, who is defending the orders passed by the authorities also relied upon a decision, referred to above, and submitted that in view of the decision reported in A.I.R. 1980 S.C., page 738 Premji Bhai Parmar & others versus Delhi Development Authority & others. The case of the Respondents cannot be said to be either arbitrary or discriminatory so as to attract the provision of Article 14 of the Constitution of India. According to the learned counsel, similar view, referred to above was taken in the cases reported in A.I.R. 2000 S.C., page 2573 Kerala State Electricity Board and another Versus Kurien E.Kalathil and others, 2001 All. C.J., page 1060 Tareef Singh and others Versus Commissioner, Agra Division and others; and 2002(1) S.C.C., page 217.

21. In view of the discussion, referred to above, I am in full agreement with the view taken by learned single Judge of this Court, referred to above, in the case of Tareef Singh and others Vs. Commissioner, Agra Division and others (2001 All. C.J. 1060) and I am of the opinion that against the action complained of, the present writ petitions are not maintainable before this Court under Article 226 of the Constitution of India, as the contract of the type as was in the present case is purely non-statutory arising out of the Government orders and the remedy open to the person aggrieved by the action of the authorities is under the Government Order by filing an appeal. The appeal filed on behalf of the fair price holders/dealers/having been allowed/dismissed, the remedy open to the writ petitioners/dealers is not a writ petition under Article 226 of the Constitution of India, but ordinary civil remedy. So far as the second category of the cases wherein the dealership was cancelled/suspended on the complaint made by the complainants and on appeal the Appellate Authority, according to the relevant Government Order, has restored the dealership without impleading these complainants, as the authority was affording an opportunity to the complainants, as the authority was affording an opportunity to the complainants, is concerned. In view of the Government Order, referred to above, since appeal lies only against the cancellation order, it was not necessary to heard the complainants, as the relevant Government Orders do not prescribe that complainants should also be heard, thus the authorities have not committed any error in not hearing the complainants.

22. To sum up the discussion, I am of the view that present writ petitions have no force and are accordingly dismissed. The interim order, if any, stand vacated. However, on the facts and circumstances of the case, there will be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2004

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE V.C. MISRA, J.

Civil Misc. Writ Petition No. 6121 of 1999

Lav Nigam ...Petitioner
Versus
Chairman and Managing Director, ITI Limited and others ...Respondents

Counsel for the Petitioner:
Sri H.S. Nigam
Sri Ashok Singh
Sri Shashi Nandan
Sri V.B. Upadhyay

Counsel for the Respondent:
Sri J.N. Tewari
Sri SN Tripathi

Constitution of India Article 226-Enquiry officer exonerating charged officer from all charge-disciplinary authority disagreeing with enquiry report-show cause notice giving reasons for disagreeing with enquiry report and giving opportunity of hearing, Sufficient Compliance of principles of natural justice-No necessity to give two separate notices-not required.

Held- Para 18 & 23

Applying the principles of natural justice to the context of the case; applying the yardstick of fairness, there is no necessity that two separate notices ought to be given. The only necessity is that the charged officer should be informed the reasons for disagreement and heard before recording final finding on charges. In case the disciplinary authority comes to conclusion that the charges are proved then he may be punished. These two may be combined in one notice. This has been done in this case: there is no unfairness; there is no violation of principles of natural justice on this account.

In the event, the disciplinary authority disagrees with the inquiry officer exonerating the charged officer, then there is no necessity that two separate notices be given. The only necessity is that the charged officer should be informed about the reasons for disagreement and heard before recording final finding on charges. In case the disciplinary authority comes to conclusion that the charges are proved then he may be punished. These two may be combined in one notice.

Case law discussed:
(1998) 7 SCC 84
1998 (5) JT 548
AIR 1999 SC 3734
(1999) 7 SCC 739
1999 (6) JT 62
(1991) 2 SCC 716
AIR 1987 SC 593
1995 (Supp)1 SCC 434
AIR 1970 SC 150
(1987) AC 625 (702)
(1989) 2 All. E.R. 359 (A.LP 367)
1970 (2) All. E.R. 528
1964 (1) All. E.R.109
1967 (2) All.E.R. 152

(Delivered by Hon'ble Yatindra Singh, J.)

1. The main question involved in this writ petition relates to the procedure to be adopted in a case where the disciplinary authority does not agree with the report of inquiry officer exonerating the charged officer. In such a case, is he required to give two notices: one before

recording the finding on guilt of the charged officer and the second before awarding punishment or can these two notices be combined into one?

THE FACTS

2. The petitioner was the Manager (shipping) Transmission Division, with Indian Telephone Industries Ltd. Naini, Allahabad (ITI). He was charge-sheeted on 18.1.1996. Three charges (see endnote-1) were levelled against the petitioner. The inquiry officer exonerated the petitioner from all the charges. The disciplinary authority did not agree with the inquiry report and issued a show cause notice dated 7.7.1999 mentioning reason for his disagreement and also asking him to show cause why he may not be removed from service. The petitioner filed his reply and sought time to see some more documents before submitting his reply. These documents were shown to him on 11.8.1997 and he submitted his reply on 22.9.1997. The disciplinary authority found the charges nos. 1 and 2 to be proved against the petitioner and by his order dated 22.5.1998 removed the petitioner from service. The petitioner filed an appeal which was dismissed on 16.11.1998, hence the present writ petition.

POINTS FOR DETERMINATION

3. We have heard counsels for the parties. Following points arise for determination:

(i) In this case, the disciplinary authority disagreed with the finding of the inquiry officer. He gave one show cause notice. Did he follow the correct procedure before awarding the punishment?

(ii) The case of the charged officer is that some documents were not given/shown to him. Is it correct? Were the principles of natural justice violated?

(iii) Whether the finding of the disciplinary authority on charge nos. 1 and 2 is illegal?

POINT NO. 1: CORRECT PROCEDURE HAS BEEN FOLLOWED

4. The counsel for the petitioner submitted that:

- The disciplinary authority ought to have given two notices to the petitioner: first one should have been tentative notice alongwith reasons of disagreement.

- In case the disciplinary authority was not satisfied with the explanation of the petitioner on the tentative notice then he should have given second notice regarding proposed punishment.

- The aforementioned two notices can not be combined together.

- The principles of natural justice also require that the process of coming to the conclusion on the charges and the punishment be separately undertaken

The Kunj Bihari And Bagde Case Are Not Applicable

5. The counsel for the petitioner cited Punjab National Bank vs. Kunj Behari Mishra: 1998(7) SCC 84 = 1998 (5) JT 548 (the Kunj Behari case) and Yoginath D Bagde vs. State of

Maharashtra: AIR 1999 SC 3734 = (1999) 7 SCC 739 = 1999(6) JT 62 (the Bagde case). He relied upon following observations in the Bagde case.

'But the requirement of "hearing" in consonance with the principles of natural justice even at that stage has to be read into Rule 9 (2) and it has to be held that before the disciplinary authority finally disagrees with the findings of the enquiring authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the enquiring authority do not suffer from any error and that there was no occasion to take a different view. The disciplinary authority, at the same time, has to communicate to the delinquent officer the **"TENTATIVE"** reasons for disagreeing with the findings of the enquiring authority so that the delinquent officer may further indicate that the reasons on the basis of which the disciplinary authority proposes to disagree with the findings recorded by the enquiring authority are not germane and the finding of "not guilty" already recorded by the enquiring authority was not liable to be interfered with.

6. In the Kunj Bihari case, the inquiry officer had exonerated the charged officer. The disciplinary authority without giving any show cause notice disagreed with the finding recorded by the inquiry officer and punished the officer. In this case a notice has been issued: the Kunj Bihari case is not applicable to the facts of this case.

7. Let us consider the facts of the Bagde case.

8. Sri Bagde was a judicial officer. He was charge-sheeted for demanding bribe from an accused regarding two session trials. The inquiry officer had exonerated Sri Bagde from the charges. The disciplinary authority came to different conclusion and gave notice to him to show cause as to why he may not be dismissed from service. Shri Bagde was dismissed from service. Sri Bagde challenged his dismissal in a writ petition which was dismissed by the High Court and the matter was taken to the Supreme Court. The Supreme Court held that enquiry officer had rightly exonerated the officer and the disciplinary authority had wrongly held Shri Bagde to be guilty. This is clear from the following findings recorded by the Supreme Court.

'This was enough to falsify the whole story and the enquiry officer was justified in rejecting the story of demand in the background of other facts set out above.
...
We fail to appreciate the approach of the Disciplinary Committee which has gone by surmises and conjectures rather than by the evidence on record.
...
After withdrawal of the transfer applications, when the appellant proceeded with the two sessions trials, the Disciplinary Committee inferred that the appellant was still pursuing his earlier demand of bribe as otherwise he himself would have written that he would not do these cases. This, we feel, is wholly fallacious.
...
Having regard to the circumstances of this case, we are of the view that the Disciplinary Committee was wholly in error in disagreeing with the findings recorded by the enquiry officer and the

charges levied against the appellant were not established.'

9. The aforesaid findings were sufficient to decide the Bagde case in favour of Shri Bagde. Nevertheless the Supreme Court considered the minutes of the disciplinary authority and came to a conclusion that the disciplinary authority had recorded a final finding regarding guilt of Shri Bagde without any notice to him. This is clear from the following observations of the Supreme Court:

'It is true that along with the show cause notice, the reasons on the basis of which the Disciplinary Committee had disagreed with the findings of the District Judge were communicated to the appellant but the Disciplinary Committee instead of forming a tentative opinion had come to a final conclusion that the charges against the appellant were established.

...

'Alongwith the show cause notice, a copy of the findings recorded by the enquiry officer as also the reasons recorded by the Disciplinary committee for disagreeing with those findings were communicated to the appellant but it was immaterial as he [Shri Bagde] was required to show cause only against the punishment proposed by the Disciplinary Committee which had already taken a final decision that the charges against the appellant were proved.

...

'The Disciplinary Committee consisted of five senior most Judges of the High Court which also included the Chief Justice. The Disciplinary Committee took a final decision that the charges against the appellant were established and recorded that decision in writing and then issued a notice requiring him to show cause against the proposed punishment of dismissal. The findings were final, what was tentative was the proposal to inflict upon the appellant the punishment of dismissal from service.'

10. The observation relied upon by the counsel of the petitioner (paragraph 5 of this judgement) were made in the light of the facts of the Bagde case. In that case no opportunity was given to the charged officer before reversing the finding on the charges. This is not the case here.

11. Here the disciplinary authority did not record final finding regarding charges before issuing notice to the petitioner as was in the Bagde case. In this case reason for disagreement were mentioned in the show cause notice dated 7.7.1997. It was merely provisional. This is clear from the following excerpt from the show cause notice dated 7th July 1997.

'This, after careful consideration of the evidence which has been produced for substantiating the charges one and two, the undersigned has provisionally come to the conclusion that Sri Lav Nigam, St. No. 247 (o) is not a fit person to be retained in the services of the company and that a major penalty should be imposed on Sri Lav Nigam and accordingly proposes to impose on him the penalty of removal under rule 25(f) of the conduct, discipline and Appeal Rules, 1975 of the ITI Limited.'

12. There is nothing on record to show that in this notice the ITI had recorded a final finding regarding guilt of the petitioner. In fact notice itself shows that this is merely provisional and not final. This is how it was interpreted not

only by the ITI but also by the petitioner. The reply to the show cause dated 22.9.1997 is also on the record. This reply shows that the petitioner had dealt with the merit of the findings on the charges. The dismissal order is also on the record of the case. The order discusses the different points on the merits of the case raised by the petitioner in his reply. This shows that no finding was recorded on the charges without affording opportunity to the petitioner. The Bagde case is not applicable to the facts of this case.

13. The Supreme Court in the Bagde case did not lay down that in the event the disciplinary authority did not agree with the inquiry officer then he is required to give two notices. It only lays down that the disciplinary authority before finally recording finding on the charges should hear the charged officer and in order that it is more effective and fair, the charged officer may be informed of tentative reasons for disagreement. Let us consider if this is mandated by the principles of natural justice.

Separate Notices--Not Required Under Principles of Natural Justice

14. The principles of natural justice are neither carved on stone nor are inflexible. It has been held that:

"The applicability of the principles of natural justice is not a rule of thumb or a strait jacket formula as an abstract proposition of law.' {Maharashtra State Board of HS Education Vs S. Gandhi 1991 (2) SCC 716 (22)}

"[They] are not rigid rules… [but] are flexible and their application depends upon the setting.' {RS Dass vs Union of India AIR 1987 SC 593 (24) and Sarat Kumar Das Vs Biswajit Patnaik 1995 (Supp) 1 SCC 434 (11)}

"What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case.' {AK Karipak Vs. Union of India; AIR 1970 SC 150}."

15. The principles of natural justice are also neither ultimate aim of any jurisprudence nor end in themselves. The aim of any jurisprudence is fairness. The relevant question in all proceeding is, "But, is it fair'(See end note 2). If, the procedure is fair, the end result is fair; then it is not only sufficient compliance of the principles of natural justice but is an end of the matter. It has been said,

"The courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.' {Lloyd Vs. Mc Mahaon (1987) A.C.625, 702-3}

"The test today of whether to supplement statutory procedure is no longer whether the statutory procedure alone could result in manifest unfairness. The preferable view is that fairness tout court [French words meaning without nothing added or simply] must be attained … Under either test factors … likely to be relevant [are]: the comprehensiveness of the code, the degree of deviation from the statutory procedure required, and the overall fairness of the procedures to the individual concerned' (Judicial Review of Administrative Action - De Smith Vth Ed. 409).

'[If] it can be demonstrated … that the … procedure … followed … has represented a genuine attempt, reasonable in all the circumstances … it is unlikely the court will intervene through judicial review and to strike [it] down.' {Waite Jin R Vs. Norfolk Country Council, ex p M (1989) 2 All ER 359 at 367}

16. Fairness, and not the blind application of the principles of natural justice, is the end result. It is for this reason that Lord Denning (see endnote-3) remarked,

"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and their extent. Everything depends on the subject matter.'

Halsbury's laws of England 4th edition volume 1 (para 74) states,

"The presumption in favour of importing the rule [Audi alteram partem] may be partly or wholly displaced: … where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available.'

So does the Garner's Administrative Law (page 256)

"The question that needs to be considered is not the very general one "what does audi alteram partem require"', but rather "what in particular situations may audi alteram partem be held to require"' To predict the operation of the audi alteram partem principle requires judgement of context rather than mere knowledge of "black-letter" rules.

17. The courts have evolved different principles to ensure fairness. May it be: the promissory estoppel, or the legitimate expectation, or the principles of the natural justice, or the Wednesbury principle, or any other principle (bad faith, irrelevant consideration, acting under dictation etc.) on which judicial review is permissible. These are different tools to ensure that the proceeding and the end result is fair. These tools, or principles will (if not already) merge into one-fairness. The World of Physics is yet to find its Theory of Everything (TOE) but the jurisprudence has already found its TOE in fairness. It is on this yardstick that all actions are to be judged. And it is this yardstick on which action of the disciplinary authority in this case should be judged.

18. Applying the principles of natural justice to the context of the case; applying the yardstick of fairness, there is no necessity that two separate notices ought to be given. The only necessity is that the charged officer should be informed the reasons for disagreement and heard before recording final finding on charges. In case the disciplinary authority comes to conclusion that the charges are proved then he may be punished. These two may be combined in one notice. This has been done in this case: there is no unfairness; there is no violation of principles of natural justice on this account.

POINT NO. 2: DOCUMENTS WERE SHOWN

19. The counsel for the petitioner submitted that principles of natural justice were violated as the relevant documents were not given/shown to the petitioner.

20. The petitioner was given a notice by the disciplinary authority and thereafter he had sought time to see documents. These documents were shown to him on 11.8.1997 and thereafter he submitted his reply on 22.9.1997. In this reply the petitioner has not stated the specific documents which, he had demanded and, were not shown to him. Thereafter the petitioner filed appeal. In this appeal also he had not stated any specific document which he wanted to see and was not shown to him. In this writ petition nothing has been stated about any specific document though some allegations are made in the rejoinder affidavit. This point was not raised before the authority: it can not be raised here. As a matter of fact, the petitioner was shown documents and was again shown other documents that he wanted to see by the disciplinary authority. There is no violation of principle of natural justice.

POINT NO. 3: FINDING IS NOT ILLEGAL

21. The counsel for the petitioner submitted that there is no dispute that the goods have been received by the parties to whom they had been dispatched and as such finding recorded by disciplinary authority is perverse.

22. The charges against the petitioner were not that the goods were not transported: the charges against him were that he produced fraudulent bills/receipts of the transport company. The owner of the transport company was produced and he has stated that neither he had transported the goods nor he had received the goods. It is only after considering this evidence and reply of the petitioner that the disciplinary authority has recorded a finding that the petitioner is guilty of charges no. 1 and 2. This has been accepted by the appellate authority. This is a finding of fact. It can not be interfered in writ jurisdiction.

CONCLUSION

23. Our conclusions are as follows:

I. The ultimate aim of any jurisprudence is fairness. Principles of natural justice, or promissory estoppel, or the legitimate expectation, or the Wednesbury principle, or any other principle (bad faith, irrelevant consideration, acting under dictation etc.) on which judicial review is permissible are tools to achieve fairness.

II. The Kunj bihari and Bagde case are not applicable to the facts of this case.

III. In the event, the disciplinary authority disagrees with the inquiry officer exonerating the charged officer, then there is no necessity that two separate notices be given. The only necessity is that the charged officer should be informed about the reasons for disagreement and heard before recording final finding on charges. In case the disciplinary authority comes to conclusion that the charges are proved then he may be punished. These two may be combined in one notice.

IV. In this case, the charged officer was informed about the tentative/provisional reasons of disagreement by the disciplinary authority and was heard before recording final finding on the charges.

V. All documents that the charged officer wanted to see were shown to him.

VI. The finding of the disciplinary authority is not illegal.

In view of our conclusions, the writ petition has no merit and it is dismissed.

End note-1: Following three charges were levelled against the petitioner.

Article I. Sri Lav Nigam staff no. N-247 (0) while functioning as manager (shipping), Transmission Division during the period 1990-92 produced 87 receipts purported to have been issued by Raj Road Lines, 291-Muthhi Ganj, Allahabad duly verified by him towards adjustment of advances drawn by him and fraudulently claimed Rs. 45650/- pertaining to transport charges since the said transport company had not supplied trucks nor received any amounts towards transport charges and thus, derived undue pecuniary benefits.

Article II. Sri Lav Nigam staff no. N-247 (0) while functioning as manager (shipping), Transmission Division forwarded 107 false and fictitious receipts for Rs. 42,940/- ostensibly incurred for loading and unloading operations by means of transport referred in Article I, above and thereby derived undue pecuniary benefits.

Article III. Sri Lav Nigam staff no. N-247 (0) while functioning as manager (shipping), Transmission Division, produced 26 false and fictitious bills pertaining to loading and unloading of certain items of equipments wherein he had claimed the charges more than once for the same item and thus derived undue pecuniary benefits.

End note-2: Chief Justice Earl Warren, born on March 19, 1891, was the 14th Chief Justice of the United States of America (1953-69). "But, is it fair' was a question that most of the lawyers appearing before him had to answer. It was on this touchstone that he tested all state actions. And this may well be the question to ask so far as administrative law is concerned.

End note-3: This was in R Vs Gaming Board 1970(2) All ER 528. This in turn was based on off quoted dictum of Tucker LJ in Russell Vs. Duke of Norfolk; 1964(1) ALL ER 109 and Durayappah Vs Fernando; 1967(2) ALL ER 152.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2003

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

Civil Misc. Writ Petition No. 35569 of 2003

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

Counsel for the Petitioners:
Sri B.B. Paul

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

Land Acquisition Act (As amended by U.P. Amendment Act XXII of 1954)- Section 4,6,5A and 17- Acquisition of Land under position taken by State- Jurisdiction of Civil Court-Bar of-Civil Suit Challenging land acquisition-Decree

passed quashing acquisition, since notification under Ss. 4 and 6 not published in two local newspapers-Publication of notification in locality where authorities have waived enquiry under S.5A, dispensed with by U.P. Amendment Act–mandamus to enforce Civil Court decree-Maintainability-Held, Scheme of L.A. Act is complete in itself-Jurisdiction of Civil Court barred-Before hearing suit by land owner on merit, Civil Court should first decide question of maintainability-In Munsif without deciding the question of maintainability Decreed the suit- Decree passed by Civil Court Being nullity, held, cannot be put into action-Writ not maintainable.

Held: Para 9

The object of the Act to acquire any land for public purpose or for any company would be frustrated if steps taken by the authority in acquiring any land are interfered by the civil court on approach being made by the land owner. So when a suit is filed to invalidate any action taken in pursuance of the Act, civil court should be loathe to exercise power and before hearing the suit on merit, should first decide the question of maintainability of the suit. In the present case, had the learned Munsif taken pains to decide the question of maintainability and decide the same against the plaintiffs, the present writ petition would not have been filed. In our opinion, the decree passed by the civil court being nullity cannot be put to action and none of the reliefs as praved for by the petitioners can be granted.

Case law discussed:

AIR1996 Sc520. AIR1969 SC 78. AIR1996 SC 1045. AIR1996 SC 523

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

1. In the instant writ petition filed under Article 226 of the Constitution of India, the petitioners have prayed for the following reliefs:

1. "To issue a writ, order or direction in the nature of mandamus commanding the respondents not to enforce the impugned land acquition proceedings against the petitioners on any ground and in any manner whatsoever.
2. To issue a writ, order or direction in the nature of mandamus commanding the respondents not to interfere with the actual physical possession of the petitioners in respect of plot No. 322 area 3-3-15 situate in village pargana, Tehsil Khairagarh, District Agra.
3. To issue a writ, order or direction in the nature of mandamus commanding the respondents to take follow up action in pursuance of orders of civil court dated 31.5.1984 and 22.8.1990.
4. To issue and interim mandamus commanding the respondents neither to interface with the actual physical possession of the petitioners in respect of plot No. 322, area 3-3-15, situate in village pargana, Tehsil Khairagarh, district- Agra nor to otherwise dispossesses the petitioners from the property in question on any ground and in any manner whatsoever.
5. To issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper in the peculiar facts and circumstances of the case to meet the ends of justice,"

2. Shortly stated, petitioners' case is that they are the Bhumidhars of plot No. 322 of village and tehsil Khairagarh in the district of Agra. Without their knowledge, the said plot was acquired under the Land Acquisition Act (hereinafter referred to as 'the Act') and necessary correction was made in the revenue record in the name of the State without issuing any notice to them. It is urged that though acquisition was made for some public purpose and

notification was issued under Sections 6 and 9 of the Act and symbolic possession was taken on 7.8.1982, but after acquisition, neither any development was made nor compensation was paid and petitioners were allowed to continue to possess as before. So, they filed a civil suit bearing O.S. No. 306 of 1982 for permanent injunction against the State and its officials and ultimately it was decreed by the XVI Additional Munsif, Agra vide judgment and order dated 31.5.1984. Appeal preferred by the state was also dismissed for default.

3. Despite civil court's decree, no steps have been taken to delete the name of the state from the revenue record concerning the aforementioned plot. Such inaction on the part of the officials, forced the petitioner to file the present writ petition seeking the reliefs as ext acted above.

4. Learned standing counsel has filed a written note of submission challenging the maintainability of the writ petition and also questioning the legality of the decree passed by the civil court. It is stated that notification under seduction 4,6 and 9 of the Act were issued on 16.2.1982, 13.3.1982 and 26.9.1982 respectively. After issuance of notification under Section 4, Section 17 was invoked and possession was taken and thereafter necessary entries were made in the revenue records. In Khasra and khatauni, plot in question has been shown as State's property. Predecessor in interest of the petitioners filed civil suit bearing O.S. No. 306 of 1982 against the state seeking relief of prohibitory injunction and the suit was decreed on a short point that no notification was made in two local newspapers.

5. Challenging the judgment and decree, appeal was preferred, but the same was dismissed for default. It has been urged that the writ petition is not maintainable since no writ in the nature of mandamus can be issued to execute the civil court's decree. Besides, writ petition is also not maintainable, as the petitioners have filed to show any enforceable right in their favour.

6. Relying upon the decision of the Supreme Court in the case of **Yadu Nandan Garg Vs. State of Rajas than and others**, AIR 1996, 520 learned standing counsel has contented that once acquisition is finalized and possession is taken, the State is entitled to possess with absolute title free from all encumbrances and the erstwhile landowner cannot get any title much less any valid title. With regard to maintainability of the suit, it is urged that in view of the law laid down by the Supreme Court in the case of **Dhulabhai and others Vs. State of Madhya Pradesh and another**, AIR1969 SC 78, that where the statute gives finality to the orders of the special tribunals, the civil court's jurisdiction must be held to have been excluded if there is adequate remedy to do what the civil court would normally do in a suit. In that view of the matter, the suit filed by the petitioner's predecessor should not have been entertained being without jurisdiction. It is further submitted that the civil court while passing the decree, failed to notice that Section 4 (1) of the Act was amended by Land Acquisition (U.P Amendment) Act No. XXII of 1954 dispensing publication of notification in the locality where authorities have waived the enquiry under Section 5-A in the case where the land is urgently needed. Besides, it is urged, that once the land acquisition

proceeding has reached its finality and the possession of the land has been taken, the only course open to the land owner or his successor to challenge the acquisition in the manner as provided in the Act or by approaching the High Court by way of filing writ petition under Article 226 of the Constitution and not by filing a civil suit.

7. The Act being a complete Code in itself, contends the counsel, jurisdiction of the civil court impliedly barred and if any inference is made by the proceedings, either pending or disposed of, the purpose, for which the Act has been enacted, will be frustrated. Therefore, the court for the interest of Justice should declare the civil court's decree passed in favour of the petitioner's predecessor as a nullity being without jurisdiction and dismissed the writ petition in limine.

We have gone through the averments made in the petition and the documents annexed thereto, more particularly the decree of the civil court and have considered the submissions made by the Learned Counsel for the parties. Way back in 1982 notification under Section 4, 6 and 9 of the act were published and by invoking emergency clause of Section 17, possession was taken and necessary correction was made in the revenue records deleting name of the land owners and inserting name of the State. In order to nullify the orders of the authority passed under the Act, Petitioners' predecessor civil suit No 306 of 1982. Learned Additional Munsif, Agra framed four issues of which issue Nos. 2 and 3 were as to whether the property in suit was acquired by the state and whether the acquisition was lawful and valid. Upon hearing the counsel appearing for the parties and making reference to relevant provisions of the Act, the court held that for acquisition of the land in question, mandatory provision regarding publication of notice was not complied with and therefore, in the eye of law there was no acquisition. Having so held, the learned Munsif decreed the suit and restrained the State and its officials from interfering in plaintiffs' possession. True it is, Section 4 of he Act envisages that where the land in any locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the Official Gazette and in two daily newspapers having circulation in that locality of which at least one shall be in the regional language. But by U.P Amendment Act of XXII of 1954, the mandatory requirement of publication of notification in the locality has been done away with in the case where the Government is of the opinion that the land is urgently needed and the authorities have dispensed with the inquiry under section 5A of the Act. The Apex Court took note of the aforesaid state amendment in the case of **Ghaziabad Development Authority V. Jan Kalyan Samiti, Sheopuri, Ghaziabad and another** AIR 1996 Sc 1045 and held that notification under Section 4 (1) is not vitiated for non-publication of notification in the local newspaper. Unfortunately, the State amendment was not brought to the notice of the learned Munsif nor the Munsif took pains to have a glimpse of the Act as well as the amendment before giving his verdict. Besides the Act being a special Statute and the authorities having exercised their power in accordance with law and the procedure, the Learned Munsif should have held to have no

jurisdiction to decide the question of validity of acquisition.

8. In the case of **Laxmi Chand and others Vs. Gram Panchayat, Kararia and others**, AIR 1996 SC 523, the validity of acquisition and award passed under the Act were challenged by filing a civil suit. On a preliminary issue, the civil court held that suit was not maintainable. The matter was then carried to the High Court. The order of the civil court was upheld by the learned Single Judge and upon appeal, by the Division Bench. Lastly the matter was carried to the Supreme Court. In Paragraph 3 of the judgment, the court observed as under:

"It would thus be clear that the scheme of the Act is complete in itself and thereby the jurisdiction of the Civil Court to take cognizance of the cases arising under the Act, by necessary implication, stood barred. The Civil Court thereby is devoid of jurisdiction to give declaration on the invalidity of the procedure contemplated under the Act. X X X X X X.''

9. The object of the Act to acquire any land for public purpose or for any company would be frustrated if steps taken by the authority in acquiring any land are interfered by the civil court on approach being made by the land owner. So when a suit is filed to invalidate any action taken in pursuance of the Act, civil court should be loathe to exercise power and before hearing the suit on merit, should first decide the question of maintainability of the suit. In the present case, had the learned Munsif taken pains to decide the question of maintainability and decide the same against the plaintiffs, the present writ petition would not have been filed. In our opinion, the decree passed by the civil court being nullity cannot be put to action and none of the reliefs as praved for by the petitioners can be granted.

10. In the result, writ petition fails and the same is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2004

BEFORE
THE HON'BLE TARUN CHATTERJEE, C.J.
THE HON'BLE DILIP GUPTA, J.

Special Appeal No. 90 of 1995

Raghvendra Singh ...Petitioner
Versus
Union of India & others ...Respondents

Counsel for the Petitioner:
Sri K.P. Agarwal
Sri M.K. Mishra
Miss Anuradha Sundaram

Counsel for the Respondents:
Sri Ajit Kumar Singh
S.C.

Constitution of India-Article 311 (2) Second Proviso Cl. (b) and 311 (3)- Termination of Service-Departmental enquiry-Dispensation with-Satisfaction of disciplinary authority that it would not be reasonable practicable to hold enquiry-Dismissal order needs no interference.

Held: Para 8, 10 & 11

From the order of the concerned authority it is clear that reason was recorded by him, in writing, in which it has been clearly stated that it would not reasonably practicable to hold the enquiry. Since the authorities have

followed the principle laid down in the Second proviso (b) to Article 311(2) of the Constitution, we are unable to interfere with the order passed by the learned Judge.

The writ petitioner appellant along with his associates indulged in acts of insubordination, indiscipline and dereliction of duty, declared strike and deserted their posts on 25.6.1979 in complete disregard of their duties. In the order it has been stated that the petitioner as active participant of the group absented himself from duty unauthorisedly and indulged in various acts of indiscipline and misconduct.

It has further been stated that any attempt to hold departmental enquiry will be frustrated by the collective action on the part of the aforesaid group and the witnesses were unlikely to cooperate and give factual evidence and put all impediments in the conduct of the enquiry.

Case law discussed:
1981 Lab. I.C. 881 (All)(FB)
AIR 1984 SC 1499
AIR 1986 SC 555
AIR 1986 SC 617
AIR 1985 SC 1416
(1997) 10 SCC 430
(1997 3 SCC 68

(Delivered by Hon'ble Tarun Chatterjee, C.J.)

1. By consent of the parties, this Special Appeal is taken-up for final disposal.

2. This appeal arises out of a judgment and order dated 4.1.95 passed by a learned Judge of this Court dismissing the writ petition No.7649 of 1979 of the writ petitioner/appellant.

3. Having heard learned counsel appearing for the parties and after going through the impugned order and other materials on record, we do not find any ground to interfere with the order passed by the learned Judge for the reasons mentioned herein-below.

4. In the writ application, the writ petitioner-appellant had challenged the order of his dismissal from service. He was Naik Radio Operator in the employment of Central Reserve Police Force, constituted under Section 3 of the Central Reserve Police Force Act, 1949. The case against the writ petitioner was that he, along with some other members indulged in acts of insubordination, indiscipline and dereliction of duty and disobeyed lawful command, declared strike and deserted the post and duties on 25th June, 1979. The only plea, which was raised by the learned counsel for the appellant in support of his contention, was that there was no justification on the part of the authorities to hold that there was reasonable practical reason not to hold any enquiry into the allegations made against the appellant. Article 311 of the Constitution clearly provides for holding an enquiry before any punishment is inflicted on an employee. As noted here in earlier, it is an admitted position that the order of dismissal was passed without holding any enquiry and without giving any reasonable opportunity of hearing to the writ petitioner- appellant.

5. Mr. Agarwal, learned counsel appearing on behalf of the appellant placed implicit reliance on a full Bench decision of this Court in the case of **Maksudan Pathak versus Security Officer, Eastern Railway, Mughal Sarai, reported in Lab. I.C. 1981 881** in which it has been held that the enquiry could be dispensed with only on the satisfaction of the concerned disciplinary

authority. In **Sengara Singh and others Versus State of Punjab and others reported in AIR 1984 S.C. 1499** where no enquiry was held in terms of Article 311(2) of the Constitution, it was held that it was not open to the authority to dismiss the appellant without holding such enquiry.

6. It is true that Article 311(2) of the Constitution lays down that no such person who is a member of a Civil Service of the Union or an all-India Service or a Civil Service of a State or holds a civil post under the Union or a State shall be dismissed or removed or reduced in rank except after holding an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. If we apply this provision of Article 311(2) of the Constitution, then we have no other alternative but to set aside the orders of the learned Judge as well as of the authority. But in our view, such situation has not happened in the instant case. Before we go into this question, we may refer to clause (b) of the Second proviso to Article 311 (2) of the Constitution according to which Article 311(2) of the Constitution shall not apply "where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry."

7. We may also refer to Article 311(3) of the Constitution which provides that if a question arises whether it is reasonably practicable to hold such enquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

8. If clause (b) of the Second Proviso to Article 311(2) of the Constitution could be made applicable in this case, then we are unable to find any infirmity in the order passed by the learned Judge. To find-out the solution, we have examined the materials on record and also the order passed by the authority regarding his dismissal. While passing the order of dismissal, the authority has stated as follows:-

"And whereas I am satisfied that in the facts and circumstances, any attempt to hold departmental inquiry by serving a written charge sheet and following other procedures in the manner provided in the Central Reserve Police Force Rules, 1955 will be frustrated by the collective action on the part of the aforesaid group. Moreover, most of the witnesses are agitators themselves and have committed act of indiscipline and are unlikely to cooperate and give factual evidence and are likely to put all types of impediments in the conduct of inquiries. It is, therefore, not reasonably practicable to hold an enquiry."

Therefore, in our view, the submission of Mr. Agarwal that Article 311(2) of the Constitution should have been followed in the present case cannot be accepted. From the order of the concerned authority it is clear that reason was recorded by him, in writing, in which it has been clearly stated that it would not reasonably practicable to hold the enquiry. Since the authorities have followed the principle laid down in the Second proviso (b) to Article 311(2) of

the Constitution, we are unable to interfere with the order passed by the learned Judge. The decision in **Satyavir Singh Versus Union of India reported in A.I.R. 1986 S.C. 555** on which Mr. Agarwal has relied upon also clearly shows that where the disciplinary authority feels that crucial and material evidence will not be available in an inquiry because the witnesses who could give such evidence are intimidated and would not come forward and the only evidence which would be available are of police-men, police officers and senior officers would only be peripheral and cannot relate to all the charges and that, therefore, leading only such evidence may be assailed in a court of law as being a mere farce of an inquiry and a deliberate attempt to keep back material witnesses, the disciplinary authority would be justified in coming to the conclusion that an inquiry is not reasonably practicable.

9. We may at this stage also refer to the decision of the Supreme Court in ***Shivaji Atmaji Sawant Vs. State of Maharashtra and another reported in AIR 1986 SC 617***. In this case the order of dismissal was passed under clause (b) of the Second proviso to Article 311(2) of the Constitution of India. The order of dismissal against Sawant set out the reasons why it was not practicable to hold the enquiry. It was stated in the said order that some members of the Bombay City Police Force, had been instigating others to indulge in acts of insubordination and indiscipline and were instigating them to withdraw from their lawful duties, inciting them to violence and willfully disobeying orders of their superior officers and that these acts had created a situation whereby the normal functioning of the Force in Bombay had been rendered difficult and impossible and thereby any attempt to hold a departmental enquiry would be frustrated by the collective action of those persons. The Supreme Court upheld the termination order.

10. Similar situation has arisen in this case. The writ petitioner appellant along with his associates indulged in acts of insubordination, indiscipline and dereliction of duty, declared strike and deserted their posts on 25.6.1979 in complete disregard of their duties. In the order it has been stated that the petitioner as active participant of the group absented himself from duty unauthorisedly and indulged in various acts of indiscipline and misconduct.

11. It has further been stated that any attempt to hold departmental enquiry will be frustrated by the collective action on the part of the aforesaid group and the witnesses were unlikely to cooperate and give factual evidence and put all impediments in the conduct of the enquiry.

12. The scope of Cl. (b) of the second proviso to Art. 311(2) and of Art. 311(3) came up for consideration before a Constitution Bench of the Supreme Court in ***Union of India v. Tulsi Ram Patel, reported in AIR 1985 SC 1416***. While construing the clause "it is not reasonably practicable to hold such enquiry" used in Cl. (b) aforesaid, it was held:-

"Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by Cl. (b). What is requisite is

that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidates witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so…."

13. With regard to Art. 311(3) of the Constitution after pointing out that where a Government servant is dismissed, removed or reduced in rank by applying clause (b) or an analogous provision of the service rules and he approaches either the High Court under Art. 226 or the Supreme Court under Art. 32, the Court will interfere on grounds well established in law for the exercise of judicial review in matters where administrative discretion is exercised, it was held :-

"If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by Cl. (b) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated. In considering the relevancy of the reasons given by the disciplinary authority the court will not, however, sit in judgment over them like a court of first appeal. In order to decide whether the reasons are germane to Cl. (b), the court must put itself in the place of the disciplinary authority and consider what in the then prevailing situation a reasonable man acting in a reasonable way would have done. The matter will have to be judged in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a court room, removed in time from the situation in question. Where two views are possible, the court will decline to interfere."

14. On the material on record, it is not possible for us to take a view that there was an abuse of power by the disciplinary authority in invoking clause (b). The Commandant 3 Signal Battalion CRP Force, Rampur who passed the order of dismissal was the best authority on the spot to assess the situation in the circumstances prevailing at the relevant time and we do not find any good ground to interfere with the view taken by him in this behalf. As pointed out in the case of Tulsi Ram Patel (supra) in such matters the Court will not sit in judgment over the relevancy of the reasons given by the disciplinary authority for invoking clause (b) like a Court of first appeal.

15. The Supreme Court in ***Chandigarh Administration and others Vs. Ex. S.I. Gurdit Singh reported in (1997) 10 SCC 430*** and in the case of ***Union Territory, Chandigarh and others Vs. Mohinder Singh reported in (1997) 3 SCC 68*** clearly upheld that the dismissal orders passed under clause (b) of the second proviso to Article 311(2) of the Constitution after dispensing with the regular departmental enquiry for the reason that witnesses would not come forward to depose against the employee freely.

16. According to Mr. Agarwal, the strike was only for one day and steps for removal of the writ petitioner-appellant was taken after 35 days. It cannot be contended that since the authorities had taken the decision after 35 days to remove the writ petitioner-appellant from service, the provisions of Article 311(2) of the Constitution should have been followed as we are of the firm view that it was not reasonably practicable to hold the enquiry and the gap of 35 days would not have changed the situation.

17. We are, therefore, not inclined to interfere with the order passed by the learned Judge. Accordingly, the appeal is dismissed. There will be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.3.2004

BEFORE
THE HON'BLE S.P. SRIVASTAVA, J.
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 2688 of 2004

Anish Kumar Mishra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri P.C. Pandey
Sri A.K. Sinha

Counsel for the Respondents:
Sri Brahmdeo Misra,
S.C.

Natural Justice-Domicile Certificate granted Assistant Collector-Subsequent cancellation without affording any opportunity to petitioner of being heard-Impugned order passed in violation of principles of natural justice-quashed.

Held- Para 7

Mere knowledge of the enquiry proceedings or presence at the hearing is not enough. The person, who is going to be adversely affected must be informed of all the material which may be utilized against him so that he may have the opportunity to adduce the additional evidence or material of probative value which might deter the enquiring authority from making the finding as indicated above.

Case law discussed:
1984 (3) All E.R. 201
JT 1992 (6) SC 673
(1993) UPLBEC 25 (SC)

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

1. Heard the learned counsel for the petitioner.

2. Learned Standing Counsel representing the respondents no. 1 to 4 has also been heard.

It may be noticed that inspite of repeated opportunities having been provided to file a counter affidavit in opposition to the writ petition, no counter affidavit has been filed so far inspite of the fact that on 23.2.2004 it was made clear that no further time for filing the counter affidavit will be granted.

3. The petitioner has asserted that Up Zila Adhikari/Deputy District Magistrate, Bhadohi, who was also functioning as Assistant Collector, had granted demicile certificate in favour of the petitioner dated 10.7.2002 certifying in favour of the petitioner dated 10.7.2002 certifying that he was a permanent resident of village Kandhiya, Tehsil-Bhadohi, District- Sant Ravi Das Nagar. However, the aforesaid certificate was

subsequently, vide the order dated 5.1.2004, a copy of which has been filed as Annexure- 4 to the writ petitioner, cancelled with the direction to initiate the disciplinary proceedings against the Lekhpal who had submitted the report and for lodging a First Information Report initiating criminal proceedings against the present petitioner.

4. The grievance of the petitioner is that the aforesaid order proceeds on the basis of the evidence which was never brought to the notice of the petitioner and further that the aforesaid order stands vitiated in law as it has been passed without affording any opportunity to the petitioner of being heard.

5. The contention of the petitioner is that the impugned order which visits the petitioner with penal consequences ought not to have been passed without affording any opportunity of being heard to the affected party.

6. As has already been noticed herein above, the allegations made in the writ petition specifically asserting that the impugned order had been passed without affording any opportunity of hearing to the petitioner have not been controverted by filing any counter affidavit and can safely be accepted as correct.

7. The rules of natural justice can operate in areas not covered by any law validly made and are evolved to ensure fair adjudication whenever rights of an individual are affected. They are aimed to secure fair play in action and prevent miscarriage of justice. One of the first principles of natural justice is that you must not permit one side to use means of influencing a decision which means are not known to the other side. It has to be emphasized that any person even if represented at any enquiry who is to be adversely affected by any decision therein should not be left in the dark as to the risk of the finding being made depriving him any opportunity to adduce evidence or material of probative value which, had it been placed before the decision maker, might have deterred him from making the finding even through it cannot be predicated that it cannot inevitably have had that result. Observation to this effect occurring in the decision of the Privy Counsel in the case of Mohan Vs. Air , Newzealand Ltd. and others, reported in 1948 (3) All ER 201 at 210 clearly indicate that mere knowledge of the enquiry proceedings or presence at the hearing is not enough. The person, who is going to be adversely affected must be informed of all the material which may be utilized against him so that he may have the opportunity to adduce the additional evidence or material of probative value which might deter the enquiring authority from making the finding as indicated above. As a matter of fact the Apex Court in its decision in the case of State Bank of India and others Vs. D.C. Aggarwal and another, reported in JT 1992 (6) Supreme Court 673 (1993) 1 UPLBEC 25 (SC) has clearly held that taking action against a person on the basis of certain material or evidence without bringing the same to the notice of such person is violative of procedural safeguards and contrary to fair and just enquiry.

8. Considering the fact and circumstances as brought on record, sufficient ground has been made out for interference by this Court.

9. Accordingly, this writ petition succeeds and the impugned order dated 5.1.2004 is quashed with the liberty to the concerned authority to proceeds afresh in accordance with law against the petitioner and pass a fresh order after affording him reasonable opportunity of being heard.

Ordered accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.03.2004

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

Civil Misc. Writ Petition No. 44463 of 1997

Param Singh and others ...Petitioner
Versus
State of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri Pankaj Mithal

Counsel for the Respondents:
S.C.

Land Acquisition Act-S. 18-Reference under-Application for-Limitation-Award passed on 26.2.1992-Application for reference under S. 18 filed on 30.7.1996-Applicants came to know about the award on 3.6.1996-Application, held, within time-Direction that notice with copy of award must be sent either by Regd. Post or personally though some messenger or through coureer and if service is not effected in that manner, then notice with essential contents of award should be published in newspaper having wide circulation-in the area.

Held: Paras 11 & 11

In our opinion the notice alongwith the copy of the award must be sent to the person concerned either by Registered A/D post or personally through some messenger or by courier, and if service is not affected in that manner then the notice with the essential contents of the award should be published in some well known newspaper having wide publication.

In the present case in the counter affidavit it has only been stated that the award was published by pasting it in the notice board of the office of the SLAO and by beat of drums (munadi). In our opinion this is not adequate and hence we have to conclude that proper notice of the award was not given to the petitioners, and they came to know of the award only on 3.6.96. The application under S. 18 was filed well within 6 months of that date.

Case law discussed:
AIR 1961 SC 1500
AIR 1963 SC 1604
JT 1995 (2) SC 572
AIR 1989 Petitioner & H 261
AIR 1985 Guj. 170
1989 LACC 246

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

1. This writ petition has been filed against the impugned orders dated 4.10.97 Annexure-5, 6 and 7 to the writ petition and for a mandamus directing the respondents to forward the reference application under section 18 of the Land Acquisition Act for decision by the District Judge, Ghaziabad.

Heard learned counsel for the parties.

2. In this case it appears that the award was given by the Special Land Acquisition Officer on 26.2.92 and the application under section 18 of the Act was filed only on 30.7.96. That application has been dismissed by the

impugned order as time barred. Aggrieved this petition has been filed in this Court.

Section 18 of the Land Acquisition Act states that every application under section 18 shall be made: -

"(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire."

3. In the present case the application was filed after a delay of more than four years. It has been stated in paragraph 11 of the petition that the petitioners came to know about the award dated 25.2.92 for the first time on 3.6.96 when other villagers whose land was similarly acquired went to collect the compensation.

4. It is stated in paragraph 8,9 and 10 of the petition that the petitioners or their representative were not present when the award was given and no information was given by the SLAO that the award would be pronounced on 25.2.92. Learned counsel for the petitioner has submitted that the date of the award should mean the date of knowledge of the award as held by the Supreme Court in ***Harish Chand Raj Singh v. Deputy Land Acquisition Officer, AIR 1961 SC 1500; State of Punjab v. Qaisar Jahan Begum, AIR 1963 SC 1604; State of Punjab v. Satindra Bir Singh JT 1995 (2) SC 572, Jaswant Rai v. Land Acquisition Collector, AIR 1989 Punjab & Haryana 261; Rajat Hirabhai Motibhai v. Deputy Collector, AIR 1985 Gujrat 170; Usaf v. Collector ,1`989 LACC 246.***

5. In the counter affidavit it has been stated that due information was given of the declaration of the award dated 26.2.92. Notice of the award was pasted on the notice Board of the office of the SLAO and copy of the said notice was also sent for public advertisement (munadi) through the chainmen (peon) in the concerned village. True copies of these notices are CA-1 and 2 to the counter affidavit. It has further been stated in paragraph 8 of the counter affidavit that other nearby land holders namely Dharampal, Dharamveer both son of Kale and Gajraj son of Harchander filed their application under section 8 of the Land Acquisition Act well within time i.e. in the year 1992 and hence the contention of the petitioner that they had knowledge of the award for the first time on 3.6.96 cannot be accepted. Even from 3.6.96 the reference was barred by time as the petitioner has filed the same after six weeks.

In our opinion this petition deserves to succeed.

6. There is no dispute that petitioner or his representatives were not present when the award was delivered. Hence clause (a) of the proviso to section 18 (2) does not apply. As regard clause (b) this is in two parts. The first part states that the application has to be moved within six weeks of receipt of the notice from the Collector under section 12 (2).

7. There is no allegation in the counter affidavit that the Collector sent any notice to the petitioner. In our opinion

mere pasting on the notice board or munadi (beat of drums) does not amount to notice from the Collector under section 12. Hence it has to be held that the period of limitation is six months from the date of the Collector's award. It is well settled that date of award means the date of the knowledge of the award as held in the aforementioned decisions.

8. In our opinion the mode of notice by beat of drums (munadi) is totally out dated in this modern age. If an award is given it should be communicated by the Collector as required by section 12 (2), which states: -

"the Collector shall give immediate notice of his award to such of the persons interested as are not personally present or by their representatives when the award was made"

9. The obligation on the Collector is not only to intimate the passing of the award but to communicate the essential contents of the award if not a copy of it vide AIR 1995 Gujrat 170. This is necessary to enable the tenure holder to exercise his valuable right under section 18 within the time prescribed.

10. In our opinion the notice alongwith the copy of the award must be sent to the person concerned either by Registered A/D post or personally through some messenger or by courier, and if service is not affected in that manner then the notice with the essential contents of the award should be published in some well known newspaper having wide publication.

11. In the present case in the counter affidavit it has only been stated that the award was published by pasting it in the notice board of the office of the SLAO and by beat of drums (munadi). In our opinion this is not adequate and hence we have to conclude that proper notice of the award was not given to the petitioners, and they came to know of the award only on 3.6.96. The application under S. 18 was filed well within 6 months of that date.

For the reasons given above this petition is **allowed.** Impugned orders are quashed. The Collector is directed to make the reference to District Judge under section 18 forthwith.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 15.3.2004

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

First Appeal No. 135 of 1997

Moradabad Development Authority ...Appellant
Versus
Hussain Bux and others ...Respondents

Counsel for the Appellant:
Sri P.K. Singh
Sri A.K. Misra

Counsel for the Respondents:
Sri V.P. Rai

Constitution of India, Article 226-Land Acquisition Act-S. 18-Acquisition of land–Award of compensation–Scandalous practice going on in Western U.P. districts in collusion with certain judicial officers-As a result exorbitant compensation is being awarded by reference courts under S. 18 of L.A. Act in collusion between certain

unscrupulous lawyers and certain dishonest judicial officers being disrepute to entire judiciary in State of U.P.–Appropriate directions issued to Administrative Committee, which appointed a committee of two Hon'ble Judges to probe into such scandalous practice.

Held- Paras 5 & 6

A scandalous practice is going on in the District Courts of Western U.P. e.g. Ghaziabad, Bulandshahr, Meerut, Muzaffarnagar, Moradabad, Gautam Budha Nagar, Agra, Aligarh etc. obviously in collusion with some Judicial Officers. As a result exorbitant compensation is being awarded by the Reference Courts under Section 18, and this is usually done in collusion between certain unscrupulous lawyers and certain dishonest Judicial Officers, and this is bringing disgrace to the entire judiciary in the State of U.P.

We directed that the aforesaid judgments and other similar judgments be placed before the Administrative Committee of the High Court. Accordingly, the matter was placed before the Administrative Committee in its meeting on 12.3.2004 and the Administrative Committee constituted a Committee under the Chairmanship of Hon'ble Dr. Justice B.S. Chauhan with Hon'ble Mr. Justice Ashok Bhushan as member to probe into this scandalous practice which is going in the District Courts of Western U.P.

Case law discussed:

F.A. No. 247 of 1997 decided on 5.3.2004
F..A. No. 254 of 1997, decided on 3.3.2004
F.A. 251 of 1997 decided 3.3.04
F.A. No. 153 of 1997, decided on 3.3.2004

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

1. Heard learned counsel for the parties.

This appeal has been filed against the impugned judgment of the Court below dated 24.12.1996 by which the compensation at the rate Rs. 80/- sq.m. granted by the S.L.A.O. has been enhanced to Rs. 270 per Sq.m. by the Court below.

2. This case is covered by the division Bench judgments of this Court in *First Appeal No. 247 of 1997 (Moradabad Development Authority v. Shami Ahmad) decided on 5.3.2004,* and in *First Appeal Nos. 251 of 1997, 253 of 1997 and 254 of 1997 (Moradabad Development Authority v. Chidda and others; Moradabad Development Authority vs. Gafar and others; Moradabad Development Authority v. Tofisan and others) decided on 3.3.2004.*

3. Following the aforesaid decisions this appeal is **allowed.** Impugned judgment of the Court below is **set-aside**, the award of the S.L.A.O. is restored.

4. In *First Appeal No. 981 of 2002 (Agra Development Authority v. State of U.P.) decided on 5.3.2004,* we observed that litigations are being purchased in relation to land acquisition cases in Western Districts of U.P. by certain unscrupulous lawyers and/or others in collusion with certain Judicial Officers and this practice is bringing the entire judiciary of the State into disrepute.

5. In *First Appeal No. 247 of 1997, Moradabad Development Authoroity v. Shami Ahmad (Supra)* we had observed that a scandalous practice is going on in the District Courts of Western U.P. e.g. Ghaziabad, Bulandshahr, Meerut, Muzaffarnagar, Moradabad, Gautam Budha Nagar, Agra, Aligarh etc.

obviously in collusion with some Judicial Officers. As a result exorbitant compensation is being awarded by the Reference Courts under Section 18, and this is usually done in collusion between certain unscrupulous lawyers and certain dishonest Judicial Officers, and this is bringing disgrace to the entire judiciary in the State of U.P.

6. We directed that the aforesaid judgments and other similar judgments be placed before the Administrative Committee of the High Court. Accordingly, the matter was placed before the Administrative Committee in its meeting on 12.3.2004 and the Administrative Committee constituted a Committee under the Chairmanship of Hon'ble Dr. Justice B.S. Chauhan with Hon'ble Mr. Justice Ashok Bhushan as member to probe into this scandalous practice which is going in the District Courts of Western U.P.

7. Let a copy of this judgment be placed before Hon'ble Dr. Justice B.S. Chauhan and Hon'ble Mr. Justice Ashok Bhushan for considering the appropriate action against the concerned Judicial Officers in these matters. Serious and strong action must be taken against those involved in this nefarious practice which is giving a bad to the entire judiciary of Uttar Pradesh.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 5.3.2004

BEFORE
THE HON'BLE A.K. YOG, J.
THE HON'BLE V.C. MISRA, J.

Civil Misc. Writ Petition No. 9400 of 1997

Sri Ravi Narain Malviya and others
...Petitioners
Versus
The State of U.P. and others
...Respondents

Counsel for the Petitioners:
Sri A.K. Goyal
Sri A. Kumar

Counsel for the Respondents:
Sri Anil Tiwari
Sri Vishnu Pratap
Sri A.K. Mishra
S.C.

Constitution of India, Article 226- Mandamus- Land acquisition- compensation award in favour of petitioners/tenure holders/owners- Payment of compensation illegally to society, which played fraud and mis representation–only for recovery- inordinate delay in filing F.I.R.- Directions issued to initiate departmental inquiry against erring officers-Directions also to D.M. to ensure adequate action under societies Registration Act- apart from criminal proceedings on basis of F.I.R. lodged against officers of society who played fraud- To ensure recovery of embezzled amount-D.M. and S.S.P. directed to take coercive measures including arrest.

Held- Para 21

In the above state of affairs, we deem it appropriate to direct the District Magistrate, Allahabad, and Chief Secretary, Government of U.P., Lucknow

to take requisite steps and initiate departmental enquiry forthwith against concerned erring officers and, if necessary, suspend the delinquent officer's whose integrity is doubtful. An officer who indulges in and colludes with others to misappropriate money by playing fraud, does not deserve to be in the office even for a moment. The District Magistrate shall also ensure adequate action under Societies Registration Act in accordance with law, apart from criminal proceedings on the basis of the F.I.R. lodged against the officers of the Society who are responsible in playing fraud. In order to ensure recovery of the embezzled amount, the District Magistrate, Allahabad and the S.S.P., Allahabad shall take all steps including arrest, etc. and other coercive measures against Jai Prakash Ojha, the then Secretary of the Society forthwith.

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

1. Heard learned counsels for the parties. Perused the record of the case.

2. Facts of the case, required for the adjudication of the issues raised in this petition are not in dispute and briefly stated as follows –

3. The petitioner are admittedly recorded tenure holders/owners of Khasra plot no. 790 situate in Mauza Puresurdas, Pargana Jhunsi, district Allahabad measuring 7752 sq. yards (2 Bighas 17 Biswas). Petitioners entered into an agreement to sell the land in question on May 18, 1983 with Prayag Upniveshan Avas Evam Nirman Sahkari Samiti Limited, Balrampur–House, Allahabad, for short called 'the society'. It is also not in dispute that sale deed, on the basis of said agreement was not executed, and the said deed was impounded under Indian Stamp Act, the Society failed to get the sale deed executed and the petitioners finally gave notice dated March 4, 1991, revoked the agreement to sell in favour of the Society.

4. In para 6 of the writ petition it is stated that petitioners continued to be recorded as owners of the land in question and this averment has not been disputed vide para 5 of the counter affidavit (sworn by Gyan Prakash Srivastava filed on behalf of the contesting respondents).

5. State Government issued notification under Sections 4 and 6 of the Land Acquisition Act which was published in daily newspaper dated 8.6.1990 and 26.6.1990 respectively. Petitioners, vide para 10 of the writ petition contends that office bearer oaf the society had obtained a Vakalatnama from them before cancellation of the agreement i.e. 4.3.1991 on the pretext that they shall pursue the 'Land-Acquisition" proceedings before concerned authorities and on the basis of that Vakalatnama, the Society filed writ petition no. 2255 of 1991 in this Court challenging the aforesaid notifications under Land Acquisition Act.

6. It is not necessary for us to go into the details of the said writ petition since parties to the present proceedings are not challenging the 'Land Acquisition' proceedings which ultimately culminated into 'compensation award' in favour of the petitioners who are recorded as tenure holders.

7. Vide para 14 of the writ petition it is pleaded that petitioners submitted representation dated 27.12.1991 to the respondent no. 3/Special Land

Acquisition Officer bringing to the notice of the parties that no sale deed was executed in favour of the Society and that no person except the petitioners, were entitled for compensation in respect of the land in question. It was also prayed that compensation be not paid to any one without petitioners' consent and verification. A true copy of the said representation dated 27.12.1991 has been filed as Annexure 1 to the Writ petition.

8. In para 16 of the writ petition it is stated that, without giving opportunity of hearing or notice to the petitioners or obtaining consent of the petitioners an order dated 2.6.1992 was passed and a cheque was also prepared for payment of compensation to the Society. It has also come on record that cheque was prepared on 2.6.1992 itself and on the following day i.e. 3.6.1992 encashed it from the bank. It appears that petitioners again on 10.6.1992 made a representation objecting payment of compensation to any other person, copy of the said representation is Annexure 2 to the writ petition.

9. It will suffice to mention that petitioners continued to approach concern authorities asking for 'no payment' under compensation award to any one including the society and also finally made complaint to the concerned authorities.

10. It is also contended that the petitioners, as an abundant caution, submitted a representation dated 11.6.1992 to the Commissioner, Allahabad Division, Allahabad protesting against payment in favour of the society. The commissioner in turn vide order dated 11.6.1992 directed the District Magistrate, Allahabad to hold an enquiry and to stop payment. The Special Land Acquisition Officer also passed an order dated 10.6.1992 stopping payment of the cheque. True copy of the order dated 10.6.1992 and 11.6.1992, referred to above have been filed as Annexures 3 & 4 to the writ petition respectively.

11. The Special Land Acquisition Officer in compliance with the Commissioner's order dated 11.6.1992, after giving an opportunity of hearing to the Society, vide order dated August 23, 1994/Annexure 7 to the writ petition held that payment in favour of the Society is illegal, that the society played fraud by concealing relevant material facts, it succeeded in receiving and encashing the cheque. In this order it was also directed that F.I.R. should be filed against the person responsible for such fraudulent act.

12. In pursuance to the aforesaid order dated August 23, 1994, Collector issued another order dated April 27, 1995 requiring S.D.M. Chail, Allahabad to recoverk the amount fraudulently received by the Society, by taking steps under Revenue Recovery Act. In pursuance thereof Tahsildar issued a recovery citation dated 1.8.1995 against the Society.

13. The Society, being aggrieved filed writ petition no. 30168 of 1995- **Prayag Up Niveshan Avas Evam Nirman Sahkari Samiti, Balrampur Vs. Special Land Acquisition Officer, Allahabad and others** (including present petitioners and prayed for quashing of the aforesaid order dated 23.8.1994/Annexure 7 to the Writ petition as well as the consequential order of recovery dated 27.4.1995/Annexure 8 to the writ petition and recovery citation dated 1.8.1995.

14. Operative portion of the judgment and order dated January 8, 1996/Annexure 9 to the writ petition, passed in the aforesaid writ petition reads–

"…..

"*In the result, the writ petition is allowed and the impugned notification Annexure VII and VIII to the petition are quashed . It is however, made clerk that this decision will not in any manner prejudice the right of respondents no. 1 and 2 to recover the amount in question in accordance with law. There is no order as to costs."*

15. Above quoted order/judgment shows that Court rejected the prayer of the petitioner- and specifically observed that the said judgment was not to prejudice in any manner rights of the authorities to recover the amount in question in accordance with law. The respondent authorities, who have filed counter affidavit do not plead that any appeal was filed against the said judgment.

16. The petitioners have filed copy of the letter dated 28.6.1996 written by Special Land Acquisition Officer, to the petitioners/Annexure 10 to the writ petition informing of the High Court judgment and order dated 8.1.1996, canceling recovery certificate in pursuance of the aforesaid High Court judgment, a review application has been filed against aforesaid judgment ink High Court and compensation amount shall be paid to the petitioners in accordance with the orders of the High Court and as and when this amount is recovered from the Society.

17. We are conscious that the Society has not been impleaded in this petition kand that we are not sitting in review or appeal over the judgment and order of the High Court dated 8.1.1996 but we are constrained to note from perusal of the said judgment and order dated 8.1.1996, that it was not argued that the High Court should not have interfered and granted relief to the said petitioner (society), in exercise of its discretionary jurisdiction under Article 226, Constitution of India, once it was proved that Society had resorted to fraud and misrepresentation in misappropriating compensation amount.

18. The facts of the instant case are glaring.

The then Secretary of the Society, apparently colluded with the Government Officials (the then Special Land Acquisition Officer) and ensured that payment is made to the person acting as the Secretary of the Society, and succeeded din depriving the persons in whose favour compensation award stood (namely the petitioners). It is evident that there was a pre conceived plan to play fraud which is evident from the fact that cheque was prepared on 2.6.1992 and it was encashed on the following day i.e. 3.6.1992 ignoring the representation of the petitioners requesting the then Special Land Acquisition Officer not to make payment to any other person.

19. A supplementary counter affidavit (sworn by present Special Land Acquisition Officer- Nagendra Sharma) has been filed enclosing therewith documents to show that a F.I.R. dated 24.2.2004 has been lodged against one Jai Prakash Ojha (the then Secretary to the

Society), Tulsi Ram Gangwar (the then concerned Special Land Acquisition Officer), and Dev Nath Singh (the then Chief Revenue Officer), coy of the said F.I.R. dated 24.2.2004 is Annexure 2 to the Supplementary Counter Affidavit.

20. Why there is inordinate delay in filing the F.I.R.? Annexure 1 to the Supplementary counter affidavit is the notice dated 21.2.2004 to Jai Prakash Ojha, Secretary to the Society. Why notice was not sent earlier immediately after delivery of the High Court judgment and order dated 8.1.1996/Annexure 9 to the Writ petition. These are the matters to be probed and require necessary action against delinquent officers. This shows complete apathy on the part of the officers to initiate enquiry in the matter.

21. In the above state of affairs, we deem it appropriate to direct the District Magistrate, Allahabad, and Chief Secretary, Government of U.P., Lucknow to take requisite steps and initiate departmental enquiry forthwith against concerned erring officers and, if necessary, suspend the delinquent officer/s whose integrity is doubtful. An officer who indulges in and colludes with others to misappropriate money by playing fraud, does not deserve to be in the office even for a moment. The District Magistrate shall also ensure adequate action under Societies Registration Act in accordance with law, apart from criminal proceedings on the basis of the F.I.R. lodged against the officers of the Society who are responsible in playing fraud. In order to ensure recovery of the embezzled amount, the District Magistrate, Allahabad and the S.S.P., Allahabad shall take all steps including arrest, etc. and other coercive measures against Jai Prakash Ojha, the then Secretary of the Society forthwith.

22. We find that in para 20 of the Counter affidavit sworn by Ghyan Prakash Srivastava , filed on behalf of the respondents, in reply to the para 36 of the writ petition it is stated that only recorded tenure holders are entitled to receive compensation, as such, there is a statutory obligation of the respondents to pay compensation amount to the petitioners.

23. Learned Standing Counsel had no answer as to why compensation amount be not paid to the petitioners when compensation award stands in favour of the petitioners. It has already been found during enquiry, vide order dated 23.8.1994, passed by Special Land Acquisition Officer/Annexure 7 to the writ petition that the then Secretary of the Society had succeeded in withdrawing compensation amount by fraud and having committed forgery and misrepresentation, and also in view of the judgment and order dated 8.1.1996/Annexure 9 to the writ petition passed by this Court in Writ petition no. 30168 of 1995.

24. In the result, there appears to be no logic or reason for depriving the petitioners from receiving compensation amount. In case, respondent authorities had made payment of the compensation amount to third person who was not entitled to receive the same, it is the respondent authorities to ensure recovery but that cannot be an excuse/pretext to deprive of the ‘compensation amount’ to the rightful persons. We hold that the petitioners are entitled to the relief claimed in the writ petition.

25. Accordingly, we issue a writ of mandamus commanding the respondent nos. 1,2,& 3 , their officers, employees, agents, etc. to ensure payment of compensation of the amount of Rs. 3,74,205.51 P. in lieu of compulsory acquisition of the land in plot no. 790, in Mauza Puresurdas, Pargana Jhunsi, district Allahabad alongwith interest @ 10% per annum simple interest within two months from today.

26. Writ petition stands allowed with costs which we quantify at Rs. 10,000/- and to be paid to the petitioners within two month from today.

27. Copy of this judgment shall be sent to the District Magistrate, Allahabad, and the S.S.P., Allahabad and the Chief Secretary, U.P. Government, Lucknow within four weeks from today.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2004

BEFORE
THE HON'BLE A.K. YOG, J.
THE HON'BLE V.N. SINGH, J.

Civil Misc. Writ Petition No.5018 of 2004

Subhash Chandra & others ...Petitioners
Versus
State of U.P and another ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri Sharad Chandra Singh

Counsel for the Respondents:
Sri Sudhir Agarwal
S.C.

U.P. Higher Judicial Service Rules, 1975- Rr. 5,6,16,17,18- Constitution of India, Articles 14,16,233 (2)-advertisement for HJS Examination–petitioners being eligible applied-Admit cards issued for appearing in written examination-declared successful in written examination-called for interview initially in January 2004-Meanwhile they were selected and joined UP Judicial Service-applied for permission through District Judges, who forwarded to High Court/Administrative Judge- Initially accorded provision-Selection committee not interview on ground of ineligibility, since they had joined U.P. Judicial Service-Therefore ceased to be an Advocate on date of interview-Held, there is no logic to exclude a person selected in Judicial Service and a person in service other than judicial service does not suffer such disqualification-Further no authority other than Full Court is competent to decide ineligibility of candidates- writs allowed.

Held: Paras 43 & 101

A candidate like the petitioners, who joins 'judicial service' after submitting application form and permitted in written examination, merely carries a temporary kind of 'handicap/hurdle and does not render ineligibility or 'disqualification' in its ordinary sense and therefore, need not be normally excluded/debarred except for very compelling and relevant reasons. There is nothing on record to show that the petitioners as candidates of Higher Judicial Service Examination shall not be in a position to surrender their lien and/or quit the posts held by them in 'judicial service' by resigning if he is offered 'appointment' in H.J.S. Under Article 233 (2) of the Constitution.

In this case also, two candidates working as Additional District Judges in the Jharkhand State, were permitted to appear in the interview, while the petitioners were not allowed to appear in interview, on the ground that, they joined judicial service. It is clear

violation of Article 14 & 16 of the Constitution.

Case law discussed:

(1999) SCC
AIR 1987 AP 230 (FB)
AIR 1958 All. 323
AIR 1989 SC 509
(1981) 1 SCC 166
(1996) 4 SCC 596
(1949) 2 All ER 155 (CA)
AIR 1961 SC 816
AIR 1966 SC 1987
JT 2002 (3) SC 503
1979 Labour & Industrial Cases (NOC) 162 (All)
AIR 1969 All 594 (FB)
AIR 1985 SC 308
AIR 1969 P & H 178 (DB)
AIR 1967 SC 142
AIR 1974 SC 555
AIR 1981 SC 487
AIR 1983 SC 130
AIR 1978 SC 597

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

Subhash Chandra, Angad Prasad, Abdul Quaiyam and Narendra Kumar Singh, four petitioners, have filed the present writ petition under Article 226, Constitution of India praying for following reliefs:-

(i) issue a writ, order or direction of a suitable nature commanding the respondents to produce a copy of the decision of the selection committee holding the petitioners in eligible for consideration and to quash the same.

(ii) issue a writ, order or direction of a suitable nature commanding the respondents to forthwith interview the petitioners for UP Higher Judicial Service in pursuance to the interview letters issued to them within a period to be specified by this Hon'ble Court.

(iii) issue a writ, order or direction of a suitable nature quashing the entire proceedings of interview and to direct de novo interview proceedings to be conducted of all candidates including the petitioners and only thereafter to declare the final result.

(iv) writ, order or direction in the nature of which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(v) award cost to the humble petitioner throughout of the present writ petition".

FACTS OF THE CASE:-

1. On behalf of High Court of Judicature at Allahabad, Registrar General of the Court published an advertisement in News Paper dated 8th June, 2000 inviting applications from eligible persons for appearing in H.J.S. Examination, 2000, Annexure no.1 to the writ petition.

2. Petitioners, vide para 5 to 20 of the writ petition, contend that according to the eligibility clause in the advertisement, 1.1.2001 is the cut of date for computing 7 years standing as an Advocate: the petitioners as Advocate had more than 7 years standing on 1.1.2001, being eligible they applied in pursuance to the advertisement, their application forms were found in order; admit cards were issued for appearing in the written examination (held on 25th and 26th November, 2000); after three years written examination result was published in December, 2003; petitioners were called for interview initially scheduled on 8th, 12th and 15th January, 2004; petitioners meanwhile selected and joined U.P. Nyayik Sewa (on 23-03-2001, 26-

03-2001, 23-05-2001 and 25.05.2001 as disclosed by the respondents); petitioners applied for permission through concerned District Judges who forwarded it to High Court/respective Administrative Judges, they were initially accorded permission; petitioners appeared on the original dates fixed for interview but later intimated of change of dates; petitioners again reported on the re-scheduled dates for interview; and that the Selection Committee did not interview these candidates on the ground that they were not eligible since petitioners had joined U.P. Nyayik Sewa (i.e. they were in judicial service) and therefore ceased to be Advocate on the date of interview. The petitioners, therefore, felt aggrieved.

3. We called for the original record of the case from the Registry. It shows that these petitioners submitted applications for permission to appear in interview through their concerned District Judges who forwarded them to the Court. The office report dated 14.1.2001, addressed to Deputy Registrar (Misc.), shows that Subhash Chandra, Abdul Quaiyam and Narendra Kumar Singh (three petitioners) were granted permission by their respective Administrative Judges. It is also admitted in para 14 of the Counter affidavit.

4. The record also shows that similar application of Angad Prasad/petitioner no.2 was referred by the Registrar General along with his note dated 14.1.2002 to the Administrative Judge who in turn referred the matter to the Hon'ble the Chief Justice for appropriate orders. The Hon'ble the Chief Justice, presumably in exercise of powers of under Chapter III, Rule 4, clause (A) sub-clause 6 of the Rules, passed order dated 16.1.2004, which reads:-

"*Permission cannot be granted in view of the admitted fact that he has been working as P.C.S (J) and he cannot be said to be a pleader or an Advocate at the time of interview*".

(Also quoted in para 16 of the counter affidavit.)

5. It appears, in view of the aforequoted order dated 16.1.2004, other three petitioners were also consequently not allowed to participate in the interview.

Petitioners, who were not permitted to appear in the interview in the aforesaid circumstances, have filed this petition primarily on the following grounds quoted below:-

(a) Because rule 5 specifies the source of recruitment to the said service and includes direct recruitment of pleaders and advocates of not less than 7 years standing on the first day of January of next following the year in which the notice inviting the applications is published.

(b).....

(c) Because a perusal of 1975 rule as also the advertisement issued by the High Court initiating the selection process demonstrates that first day of the succeeding year is the date for computing eligibility of possessing 7 years length of service as also the permissible age limit.

(d) Because clearly the date for adjudging the eligibility has been specified both under rules and the advertisement initiating the recruitment

process. Alternatively in the absence of any such specification the last date for submitting application form would be the relevant date for consideration.

(e) Because on either of the aforesaid two dates the petitioners were fully eligible for appointment and suffer from no in eligibility.

(f) Because the petitioners can not be held to be in eligible for appointment on account of any subsequent facts which comes into existence subsequent to the aforesaid dates.

(g).....
(h) Because the petitioners have been wrongly excluded from the selection process despite their success in the written examination.
(i).....
(j).....

(k) Because even otherwise the decision to exclude the petitioners from consideration in interview is a decision taken by the selection committee who has no power in this regard. There does not exist any decision of the full court of the High Court holding the petitioners to be in eligible.
(l).....
(m) Because even in the past selections whenever there existed doubt with regard to the candidature of any candidate called for interview the objection against his name was noted in the selection proceedings but such candidate nevertheless interviewed by the selection committee and the matter referred to the full court of the High Court for final decision on the candidature.

(n).....

(o) Because in a process of selection of candidates who have qualified the written examination ought to be interviewed by the same interview board in the same proceedings so that the norm for awarding marks is in no manner affected. In such view of the matter it is essential in the interest of justice that the entire proceeding of interview of the all the candidates be set aside with the direction issued of holding de novo interview proceeding with regard to all candidates including the petitioners.

Counter affidavit (sworn by Sri P. K. Goel, Joint Registrar (Inspection), High Court Allahabad), has been filed on behalf of the Respondent no.2 only.

6. Para 9 to 13 of the counter affidavit are relevant wherein 'Advertisement' in question is admitted and it is stated that 4103 candidates applied in pursuant thereto; on scrutiny 385 candidates were permitted to appear in the written examination held on 25th/26th November, 2000, the petitioners were issued admit cards to appear in the examination, result was published in December, 2003, and petitioners were issued interview letters. It is pleaded by the answering respondents that the petitioners had, in the meantime, applied for recruitment and got appointed to U. P. Nyayik Sewa on the basis of the result declared by the U.P. Public Service Commission in the year 2001 and the petitioners being in U. P. Nyayik Sewa sought for permission for appearing in interview.

7. In the rejoinder affidavit sworn by Narendra Kumar Singh (one of the petitioners) there is nothing in particular except that in para 5 of the rejoinder

affidavit, while replying to para 14 to 17 of the counter affidavit, it is stated that the order of Hon'ble the Chief Justice dated 16.1.2004 was on the basis of the application of one of the petitioners (Angad Prasad), that the said order of the Hon'ble the Chief Justice was not an order of general nature applicable to all the petitioners and the question whether the petitioners were eligible or not ought to have been adjudged with reference to Article 233 of the Constitution and the Rules, and whether a person is 'eligible' or 'in eligible' could be decided only by 'Full Court' of the High Court and not by the Hon'ble the Chief Justice or the Selection Committee.

8. From original record of the case, it transpires that two candidates (Sunil Kumar Panwar/Roll no.1225 and Sri Pradeep Kumar/Roll no. 2088), who were also eligible at the time of submitting their applications as per advertisement but subsequently joined Judicial services and working as 'Judicial Officer' in the State of Jharkhand and Bihar and given permission by their respective High Courts for appearing in interview, were also not accorded permission to appear in the interview in question.

9. Apart from the above, in para 29 of the petition, it is stated that two candidates were interviewed by the Selection Committee who were already in the judicial service and posted as Additional District Judge in other State.

10. Respondents, vide para 29 of the counter affidavit, in reply admit that two persons, already in Judicial Service in the State of Jharkhand and holding the post of Additional District Judges were though interviewed by the Selection Committee but their candidature was later cancelled by the Section Committee on the ground of being ineligible.

11. On behalf of the petitioners, it is argued that plain reading of Article 233(2) read with Rule 5 and Rule 18 of the Rules along with the advertisement/Annexure 1 to the writ petition, it is amply clear that in case of direct appointment under U.P. Higher Judicial Services, eligibility condition of 7 years practise as an 'advocate or pleader' is to be seen and satisfied at the time of submitting application. In other words, an applicant need not continue as 'advocate' or 'pleader' through out the process of selection which include 'recommendation by the High Court' and to be actually appointed by the Governor of the State.

12. In the backdrop of the facts of this case the question to be answered is 'Whether a person (admittedly eligible at the time of submitting application as per advertisement) who later during 'Selection'/'Recruitment Process' of H.J.S Exam joins 'judicial service', and ceases to be 'Advocate', will be entitled to be considered for rest of selection process and recommended by the concerned High Court for appointment under Article 233(2), Constitution of India and the relevant Rules.

13. Answer to the above question depends upon interpretation of Article 233, Constitution of India and certain provisions of U.P. Higher Judicial Services Rules 1975 (as amended up to date); hereinafter called 'the Constitution' and 'the Rules' respectively.

14. Before dealing with the respective contentions of the parties, it

will be appropriate to reproduce relevant statutory provisions.

RELEVANT PROVISIONS:
CONSTITUTION OF INDIA-CHAPTER VI -SUBORDINATE COURTS

Article "233. Appointment of district judges.- (1) *Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.*
(2). A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

236. Interpretation- In this chapter-
(a) *the expression 'district judge' includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;*
(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

THE UTTAR PRADESH HIGHER JUDICIAL SERVICE RULES, 1975
(framed under rules regulating recruitment and appointment to the U.P. Higher Judicial Service framed by the Governor in exercise of powers conferred by the proviso to Article 309, read with Article 233 of the Constitution):

PART II --Cadre

5. Sources of recruitment.-- T*he recruitment to the Service shall be made--*
(a) by direct recruitment of pleaders and advocates of not less than seven years standing on the first day of January next following the year in which the notice inviting applications is published;
(b) by promotion of confirmed members of the Uttar Pradesh Nyayik Sewa (hereinafter referred to as the Nyayik Sewa), who have put in not less than seven years' service to be computed on the first day of January next following the year in which the notice inviting applications is published :

Provided that for so long as suitable officers are available from out of the dying cadre of the Judicial Magistrates, confirmed officers who have put in not less than seven years' service to be computed as aforesaid shall be eligible for appointment as Additional Sessions Judges in the service.

Explanation.-- *When a person has been both a pleader and an advocate his total standing in both the capacities shall be taken into account in computing the period of seven years under clause (a).*

6. Quota.--*Subject to the provisions of Rule 8, the quota for various sources of recruitment shall be --*
(i) direct recruitment from the Bar 15%

(ii) Uttar Pradesh Nyayik Sewa 70% of the vacancies

(iii) Uttar Pradesh Judicial Officers Service(Judicial Magistrates). 15%

Provided that where the number of vacancies to be filled in by any of these sources in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted as one:-

Provided further than when the strength in the cadre of the Judicial Magistrates gradually gets, depleted or is completely exhausted and suitable candidates are not available in requisite numbers or no candidate remains available at all, the shortfall in the number of vacancies required to be filled from amongst Judicial Magistrates and in the long run all the vacancies, shall be filled by promotion from amongst the members of the Nyayik Sewa and their quota shall, in due course, become 85 per cent.

16. Selection Committee.- (1) *The Chief Justice shall, for each recruitment Service, appoint a Selection Committee consisting of such number of Judges of the Court, not less than three, as he may decide.*

(2) No proceeding of the Selection Committee shall be invalid merely by reason of a vacancy occurring in it, or by a member or members being not present at one or more of its meetings, provided that a majority of the members of the committee have been present at each meeting.

17. Direct recruitment. ---(1) *Applications for direct recruitment to the service shall be invited by the Court by publishing a notice to that effect in the leading newspapers of the State and shall be made in the form prescribed from time to time to be obtained from the Registrar of the Court on payment of the prescribed fee.*

(2) The application shall be submitted to the Court by the candidate through the District Judge within whose jurisdiction the candidate has been practising, and in the case of members of the Bar normally practising in High Court, through the Registrar of the High Court. The application shall be accompanied by certificates of age, academic qualifications, character, standing as a legal practitioner and such other documents as may be required to be furnished.

(3) The District Judge shall forward to the court all applications received by him along with his own estimate of each candidate's character and fitness of appointment to the service.

18. Procedure of selection.----*(1) The Selection Committee referred to in Rule 16 shall scrutinize the applications received and may thereafter hold such examination, as it may consider necessary for judging the suitability of the candidates. The Committee may call for interview such of the applicants who in its opinion have qualified for interview after scrutiny and examination.*

(2). In assessing the merits of a candidate the Selection Committee shall have due regard to his professional ability, character, personality and health.

(3) The Selection Committee shall make a preliminary selection and submit the record of all candidates to the Chief Justice and recommend the names of the candidates in order of merit who, in its opinion, are suitable for appointment to the service.

(4) The Court shall examine the recommendations of the Selection Committee and, having regard to the number of direct recruits to be taken, prepare a list of selected candidates in order of merit and forward the same to the Governor.

Relevant extract of the Advertisement dated 8th June 2000 published under Rule 17(3) of the Rules, 1975 (Annexure 1 to the writ petition) is reproduced:

"THE RECRUITMENT TO THE UTTAR PRADESH HIGHER JUDICIAL SERVICE"

Applications for direct recruitment to 38 vacancies in the Uttar Pradesh Higher Judicial Service .....are invited by the undersigned. Out of this 19 vacancies are for general candidates, 8 vacancies are reserved for Scheduled Caste candidate, 1 vacancy for Scheduled Tribe candidate and 10 vacancies for Other Backward Classes. The recruitment will consist of a written examination followed by an interview.

Eligibility of candidate: *1. The applicant must be a citizen of India.*

2. The applicant must be an advocate of not less than 7 years standing on 1.1.2001.

3. The applicant must have attained the age of 35 years and must not have attained the age of 42 years on the 1st day of January 2001 in other words, must have been born on or after 1.1.1959 and not later than 1.1.1966.

.....

Last date for submission of duly completed form before the concerned District Judge or the Registrar/Registrar General, High Court, Allahabad is 16.8.2000 by 5. P.M.

The manner in which the application shall be submitted and other details are contained in "Instructions to the Candidates" which will be sent alongwith the application form. "

Clause(2) of the aforequoted advertisement is relevant for the present case which clearly spells out 'cut of date' of an applicant being 'advocate 9 of not less than 7 years standing) on 1.1.2001.

BROCHURE & APPLICATION FORM:

Brochure containing-'application form' required to be filled for direct recruitment to the U.P. Higher Judicial through H.J.S, Exam, 2000 (bearing Serial no.6700) is also placed on record by the respondents for perusal of the court. Relevant columns and the declaration (to be filled up and submitted by a candidate) are reproduced --

11. Whether your were a candidate for a post in the Higher Judicial Service in the past ? If so, state the year and the fact whether you were called for interview:

16. If you have been employed at any time? Give particular below:

Name of the post or nature of employment	*Name of employer*	*Date of Joining*	*Date of termination*	*Reason for termination*	Salary	*Proof furnished (Enclosure no.)*

If you have practiced as an Advocate, give particulars below:

(i) (a) Date of enrolment as an Advocate
(b) Are you enrolled with Bar Council? If so, of which State. Give the Enrolment number.
(c) Name of Advocate with whom you received training.
(d) Did you work as a Junior to any Advocate? If so, with whom and for what period.
(ii) Period during which you practised regularly and continuously and the Courts and Districts in which you practised.
(iii) Did you pay any Income Tax on your professional Income?
If so, the amount on which Income Tax was paid in each of the last 3 years
(iv) Whether any proceeding was ever taken against you for Professional Misconduct or Contempt of court? If so, give particulars with result and also enclose certified copies of the judgment/order passed in the proceedings by the State Bar Council/the Bar Council of India/ the High Court and the Supreme Court of India, if any.
(v) Did you ever figured as an accused or a complainant in any criminal case ? If so, give particular with result and also enclose certified copies of the judgment/order of the trial court, or of the appellate Court, or of Revisional Court if any.

15. In the Brochure also there is nothing to show that candidate is required to disclose/declare that he continues or that he shall continue to be Advocate throughout process of selection. From underlined expressions in column 17 quoted above it is clear that information sought in respect of the applicant is the period during which he had already practiced as 'Advocate' – continuously and on regular basis in Court on or before 1.1.2001.

REASONS AND DISCUSSION

16. Rule 5(a) of the Rule provides that a 'pleaders' or 'advocates' of not less than seven years standing on the fist day of January next following the year in which the notice/ advertisement inviting applications is published, shall be eligible for 'direct recruitment' to the service, viz. 'U.P. Higher Judicial Service'.

17. Rule 17(2) of the Rules provides that the application shall be submitted to the Court by the candidate through the District Judge within whose jurisdiction the candidate has been practising, and in the case of 'Advocate' practising in High Court, through the Registrar General/Registrar of the High Court. This rule require that the application shall be accompanied by certificates of age, academic qualifications, character, standing as a legal practitioner and such other documents as may be required to be furnished.

18. This Rule shows that position, as existed on the date of submitting application is required to be disclosed.

19. Rule 18 of the Rules, lays down procedure for selection makes it clear that Selection Committee, constituted by the Chief Justice under Rule 16(i) of the Rules, shall on receiving applications, scrutinies them and thereafter it may hold such examination, as it may consider necessary for judging the suitability of the

candidates and the Committee may also call for interview such of the candidates who are, after scrutiny and examination, found suitable for interview.

20. There is no other provision of scrutiny of 'eligibility' of candidate except the scrutiny before written examination. In practice also, as informed by the learned counsel for the respondent, there is no second scrutiny.

21. We fail to find in the brochure containing Application form, any column requiring a candidate to declare or disclose that he shall continue to be a practising advocate till actual appointment, if selected. Nor do we found any such condition mentioned in the advertisement or Article 233(2) or the Rules.

22. Learned counsel for the respondents as well as the official of the Registry present in Court disclosed that no such declaration is taken from concerned candidates at any stage nor scrutiny of any kind done to ascertain that candidate continued to be 'Advocate' after 1.1.2001 and during entire selection process including interview.

23. This naturally raises question-as to how the concerned authorities involved with 'selection process' in question otherwise identify that a candidate, who was eligible while submitting application form; has not entailed 'ineligibility' by ceasing to be an advocate after 1.1.2001. This tends to bring in element of 'unfairness'. Respondents fairly conceded that there was no methodology or mode to identify such candidates and permit those candidates only who continue to be Advocate 'during selection process'.

24. On the other hand it is also admitted to the respondents that the fact that the petitioners (and some other candidates), joined 'judicial service' in U.P or other States (like Uttaranchal, Jharkhand and Bihar) came to light only because they had applied for permission from concerned High Court in the context of their service condition and not as a part of ' selection process' of Direct Recruitment. It is clear that these candidates did not disclose the fact of their joining 'judicial service' under the Rules 1975 or under the Advertisement or the application form in question not it was otherwise required under the 'selection process'. It is interesting to note that in the case of other candidates, who may have otherwise ceased to practise as Advocate after submitting application form and may be sitting idle, or opted to indulge in some other vocation, trade, etc., or failed in judicial service examination (in which the petitioners were successful and proved their merit) are not screened/eliminated and permitted to participate in the process of selection. Apparently, there is no rationale or logic in the said approach.

25. Under Rule 5(a) and the Advertisement provide 'cut of date' which alone is relevant to ascertain eligibility of being an 'Advocate with not less than 7 years practice'. 'Origin' or the 'source' of a candidate being 'Advocate', is referable to the 'cut of date' and this is to be seen at the time when he applies in response to the advertisement.

26. The stand taken by the petitioners is that a candidate need not continue to be 'Advocate' throughout 'process of 'selection'; no such statutory requirement can be culled out from the

language used either in Article 233(2) of the Constitution or the Rules 1975 or the Advertisement issued under said rules or the application form supplied by the High Court. According to him subsequent change in candidates position is immaterial. In this context reference is to the case of **Gopal Krushna Rath Vs M. A. A. Baig (Dead) by Lrs and others– (1999) 1 Supreme Court Cases (para 6 & 7)** held that subsequent change in eligibility qualification will not adversely effect a candidate who was eligible when he had applied. For ready reference para 6 and 7 are quoted below:-

"*6. When the selection process has actually commenced and the last date for inviting applications is over, any subsequent change in the requirements regarding qualifications by the University Grants Commission will not affect the process of selection which has already commenced. Otherwise it would involve issuing a fresh advertisement with the new qualifications. In the case of P. Mahendran v. State of Karnataka -(1990) 1 SCC 411-this Court has observed: SCC p.416 para 5).*

"5. It is well-settled rule of construction that every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect."

The Court further observed that :

" Since the amending Rules were not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force, the amended Rules could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment."

7. In the present case, therefore, the appellant possessed the necessary qualifications as advertised on the last date of receiving applications. These qualifications were in accordance with the Rules/guidelines then in force. There is also no doubt that the appellant obtained higher marks than the original Respondent 1 at the selection. There is no challenge to the process of selection nor is there any allegation of mala fides in the process of selection."

27. Learned counsel for the respondent, Sri Sudhir Agarwal, Additional Advocate General, on the other hand, argued- (i) Article 233 provides for two sources of recruitment to the post of District Judge; one by 'promotion' of those who are already in judicial service and the other by 'direct recruitment' from the Bar who have minimum of seven years practise as advocate/pleader; and

(ii) Article 233(2) of the Constitution, requires that a person, who has applied for direct recruitment in U.P. Higher Judicial Services, should continue to be, an Advocate throughout selection process of Direct-recruitment.

In support of his contention he has referred to the words "from the Bar" in Rule 6(i) of the Rules.

28. It is argued that the words 'from the Bar' indicate that 'status' of being a member of the Bar should continue through out the 'process of selection' and if the candidate ceases to be 'Advocate' at

any point of time during process of selection, he will become ineligible and consequently exposed to rejection of his candidature.

29. Sri Sudhir Agarwal, learned counsel for the Respondent, submits that expression 'recruitment' and 'appointment' are synonymous and the two, in given context, may of same connotation. He argued that the word 'appointed' appearing in Article 233, Constitution of India includes both 'Appointment' and process of 'recruitment'. It is also argued that expression *'has been for not less than seven years an advocate'* is to be interpreted and read as-'an advocate', who continues to be as such through out 'selection process' including recommendation by the High Court.

30. Respondents endeavoured to derive help from the Full Bench decision of **Andhra Pradesh High Court; reported in AIR 1987 Andhra Pradesh 230(Full Bench)-- K. Naga Raja and others Vs. The Superintending Engineer, Irrigation Department and another.** In the case **K. Naga Raja (supra)** Supreme Court considered the meaning of the expression 'matters relating to the appointment' which includes process of selection and of appointment. In the case in hand, no such expression is used in the relevant Rules, 1975 or Article 233(2), Constitution of India. On the other hand, advertisement in question and the Rules 5 and 17 of the Rules, clearly indicate that there is no mention that a candidate for direct recruitment should continue to be 'practising advocate' after submitting application.

Decision in the case of K. Naga Raja (supra) is, therefore, distinguishable and out of context.

Answer of the question in hand depends upon the interpretation of Article 233(2) of the Constitution read with Rules, 1975.

31. Learned counsel for the respondents pointed out that words “has been” used in Article 233(2), Constitution of India supports his contention-namely candidate should, throughout selection process, continue to be Advocate. It is argued that the eligibility feature of candidate being 'Advocate' (which admittedly existed at the time of submitting application in the present case) ought to continue through out the process of selection. We are unable to agree with this preposition.

Expression “has been” is present perfect tense. This shows that identify of 'source' is not referable to selection process. Candidates' 'eligibility' of being an 'Advocate' of not less than 7 years' practice is required and referable to 'cut of date' mentioned in the Rules/Advertisement and it is sufficient, as the statutory provision exist on date, that such condition is 'fait accompli' on 'cut of date' and not beyond.

32. In the case of **Mubarak Mazdoor Vs. K.K. Banerjee-AIR 1958 All 323 (Pr.4)**-, Division Bench interpreted the expression “A person who has been a judge' and explained that the said phrase used in S.86 (3), Rep. Of People Act means a person who has, at some time, held office as Judge but it does not necessarily mean that the person

must be holding office as a Judge at the time of his appointment.

33. In the case of the **Secretary, Regional Transport Authority, Bangalore and another Vs. D. P. Sharma and another --AIR 1989 Supreme Court 509** (para 15) court observed:- ".....In our opinion, whether the expression 'has been' occurring in a provision of a statute denotes transaction prior to the enactment of the statute in question or a transaction after the coming into force of the statute will depend upon the intention of the Legislature to be gathered from the provision in which the said expression occurs or from the other provisions of the statute....."

Earlier Rule 5 of the Uttar Pradesh Higher Judicial Service Rules, 1953, quoted below ready reference read:

"5. Sources of recruitment.- (1) *Recruitment to the service shall be made to the posts of Civil and Sessions Judges-*
(i) by promotion from the members of the Uttar Pradesh Civil Service (judicial Branch);
(ii) by direct recruitment after consultation with the court.

(2) Persons eligible for direct recruitment under sub-clause (ii) of clause (1) of this rule shall be-

(a) Barristers, Advocates, Vakils or Pleaders of more than 7 years' standing;

(b)....."

'Ex ANIMO, i.e. intentional, change in expression of present existing Rule 5 of the Rules, 1975 is clear and apparent

34. Rule 5 (2)(a) of Rules, 1953 required that Advocate, Pleader etc. should be of more than 7 years' standing. From the expression used therein, it could be probably possible to argue that for direct recruitment, Advocate must continue to be as such. Aforesaid Rules 1953 have been replaced by Rules, 1975 which brought in distinct and clear change in the expression.

35. A plain reading of the above expression in Rule 5 of the Rules, 1975, means that a candidate should be an 'Advocate' having seven years standing at to his credit on or before the 'cut of date' prescribed in the said Rule 5 itself. The above expression in Rule 5 of the Rules 1975 by no stretch can be read to mean that candidate ought to continue to be Advocate through out process of selection.

Change in status after 'cut of date' is also not material under Article 233(2), as it stands today.

36. To have better appreciation of the point in hand, it will be useful to examine it with the help of illustration. For this purpose-one may pose following two questions-

I-Whether any of the petitioners who would have resigned from the judicial service before interview (and hence needed no permission from High Court to appear in interview) could be declared ineligible and deprived from participating in interview? And,

II-'whether there is any methodology adopted to identify and exclude candidates who rendered ineligibility after filing application/cut of date-and as of

fact not continuing to be Advocate during Selection process?

As noted earlier there is nothing in the Rules 1975 to warrant cancellation of a candidate if he is not in regular practice or otherwise cease to be Advocate after 'cut of date' and during Selection process.

37. Let us take the present case itself. There may be other candidates who may have applied and appeared in U.P. Nyayik Sewa Examination alongwith these petitioners, and not being successful may have taken other vocation and thus ceased to be practicing 'Advocate' as such. Such candidates shall not be checked and will be able to participate in 'selection process' which includes interview. There is no rationale in it. Moreover, there is also otherwise, no 'device' to identity that a candidate is actually 'practicing' and not stopped working as 'Advocate', after submitting application.

This brings us back to the task of interpreting Article 233(2) of the Constitution and to find out the meaning of the expression "if he has been for not less than seven years an advocate ....."

At the outset we may note that not a single decision is cited at the Bar wherein the question of eligibility, in the facts of present case, has been considered.

PRINCIPLES OF INTERPRETATION:-

38. In the case of **Maharao Sahib Shri Bhim Singhji Versus Union of India and others,** (1981) 1 Supreme Court Cases 166, Krishna Iyer, J in para 12 of the Judgment observed that

".....there are no absolutes in law as in life and the compulsions of social realities must unquestionably enter the judicial verdict.....".

39. In para 17 of this very judgment the Court observed-

".....Courts can and must interpret words and read their meanings so that public good is promoted and power misuse is interdicted. " As Lord Denning said: ' A judge should not be a servant of the words used. He should not be a mere mechanic in the powerhouse of semantics'....."

40. In the case of **S. Gopal Reddy Versus State of A.P.** (1996) 4 Supreme Court Cases 596 in para 12 of the judgment Apex Court observed-

"It is well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary....."

41. In **Seaford Court Estates Ltd. V. Asher**, (1949)2 All ER 155 (CA), Lord Denning advised a purposive approach to the interpretation of a word used in a statute and observed:

*".....*It would certainly save the Judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. *He must se to work on the constructive task of*

finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy ,and then he must supplement the written word so as to give 'force and life' to the intention of the legislature..... A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out ? He must then do as they would have done. *A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."*

(emphasis supplied)

42. As seen above, it is a well settled principle of interpretation that when two interpretations are possible, the one which better serves the purpose and makes the provision workable should be adopted. On this criterion, we may test as to what purpose is sought to be achieved by requiring a candidate to continue to be a practising advocate/member of Bar through out the process of selection and what purpose shall be served by excluding candidates, who are eligible on the date of submitting application but subsequently joined judicial services during selection process and have not suffered any permanent disability nor rendered disqualified permanently.

43. A candidate like the petitioners, who joins 'judicial service' after submitting application form and permitted in written examination, merely carries a temporary kind of 'handicap'/hurdle and does not render ineligibility or 'disqualification' in its ordinary sense and therefore, need not be normally excluded/debarred except for very compelling and relevant reasons. There is nothing on record to show that the petitioners as candidates of Higher Judicial Service Examination shall not be in a position to surrender their lien and/or quit the posts held by them in 'judicial service' by resigning if he is offered 'appointment' in H.J.S. Under Article 233 (2) of the Constitution.

44. From the U.P Government Notifications dated 13.3.2001, 23.6.2001 and 6.6.2001, Notifying appointment of the petitioners' and others on the basis of U.P. Judicial Service Examination 1999 held by the U.P. Public Service Commission show that the petitioners' appointment was on temporary basis on the post of Civil Judge (Junior Division) and apparently there appears to be no permanent obstacle in their way to relinquish their right in the aforesaid service except offer of appointment in future, if selected.

45. It is to be noted that petitioners 'candidature' were picked up because they had applied for permission, as a part of their service obligation and not as a part of 'Selection Process' under any statutory Rule/provision dealing with the direct-recruitment of eligible 'Advocates' in U.P. Higher Judicial Service under Article 233(2) of the Constitution.

Rule 34 of The Uttar Pradesh Judicial Service Rules, 2001 read:-

"34. Regulation of other Matters.- In regard to matters not specifically covered by the rules or special orders, the members of the service shall be governed by the rules, regulations and orders applicable generally to government

servants serving in connection with the affairs of the State.

46. The petitioners when joined U.P. Nyayik Sewa, as contemplated under U.P. Judicial Services Rules, 2001, aforequoted Rule 34 became applicable to them and consequently the Rules and Government orders also became applicable to them in general.

In this context reference may be made to Rule 3(2) & 15 of **'U.P. Government Servant Conduct Rules, 1956'** which is reproduced-

"3(2) *Every Government servant shall at all times conduct himself in accordance with the specific of implied orders of Government regulating behaviour and conduct which may be in force.*

If a Government servant conducts himself in a way not consistent with due faithful discharge of duty in service it is misconduct, Misconduct means misconduct arising from ill motive. Acts of negligence, errors judgment or innocent mistakes do not constitute misconduct.

"15 Private trade or employment.- *No Government servant shall, except with the previous sanction of Government, engage directly or indirectly in any trade or business or undertake any employment:*

Provided that a Government may, without such sanction, undertake honorary work of a social or charitable nature or occasional work of a literary, artistic or scientific character, subject to the condition that his official duties do not thereby suffer and that he informs his Head of Department, and when he is himself the Head of the Department, the Government, within one month of his undertaking such a work; but he shall not under take, or shall discontinue, such work if so directed by the Government.

Aforequoted Rule 15 merely require sanction of the Government, in case of Government servant intend to take any other employment.

47. The provisions dealing with an application, for out side employment within the country, received from the Government Servant are being dealt under Chapter 143, titled 'DISPOSAL OF APPLICATIONS FROM GOVERNMENT SERVANTS FOR OUTSIDE EMPLOYMENT'. Relevant extract of para 1090 and 1091 are being reproduced-

"1090. *The disposal of applications received from government servants for employment outside their departments will be made in accordance with the following orders:*

1. G.O.No.16/2/68-
Apptt. (B) dated
January 23, 1970

2. G.O/ no.16/2/68-
Karmik-2, dated
June 19, 1979.

(a).....

(b) Disposal of applications from permanent government servants will be regulated in accordance with the orders given below:-

(1) General.- Not more than six applications of a permanent employee will be forwarded for outside posts during the entire period of his service.

(2) No applications will be forwarded for any post in a private sector.

(3) There is no bar for posts advertised by the Lok Seva Ayog, Uttar Pradesh, Union Public Service Commission and Public Service Commissions of other States. The posts advertised by other institutions e.g., Public Sector Corporations etc., will be treated as "outside posts".
(4).....
(5).....
(6).....
(7) Any Head of Department or Head of Office can withhold, in his discretion, the application of an employee, in the public interest.

(c) Disposal of applications from temporary government servants will be regulated as follows:-

(1) The applications of temporary employees (gazetted or non-gazetted) will be forwarded in keeping with the conditions contained in paras 17-20 of O.M. no.4379/II-A-661-57, dated November 19, 1959. No other restriction will apply to them. Sometimes, a Head of Department, while forwarding an application of a temporary employee, imposes a condition that, in the event of his selection for the new posts, he will have to resign from his post under Government. It has also come to notice that an employee made a request for being relieved after his selection for the outside post as a result of his application having been duly forwarded by his employer, but he was not relieved or was asked to submit his resignation. This position is not correct. The application of a temporary employee should be forwarded according to the provisions of paras 17-18 of the aforesaid O.M. without imposing the condition of resignation. In the event of his selection for the new post he should be relieved as early as possible in accordance with para 19 of the above O.M.

(2) .....

1091. Competence of Officers to forward applications.- *Heads of Departments/Heads of offices are competent to forward applications of such employees only as have been appointed by them. Applications in respect of employees, whose appointing authority is the Governor, should be forwarded through Government.*

G.O.no.16/2/1968
Karmik-2, dated
January 14, 1976."

48. In the light of the above and as per prevalent, practice petitioners applied for sanction/promotion being under obligation as part of their service condition contained in Rule 34 of The Uttar Pradesh Judicial Service Rules, 2001, dealing with U.P. Nyayik Seva.

49. It is another thing that a Government employee or Judicial Officer is required to take permission for joining selection process from its employer (High Court in the instant case) so that the 'Judicial work' pertaining to the post held by the petitioners in U.P. Nyayik Sewa did not hamper or otherwise adversely affected. The question as to whether the petitioners had rendered ineligibility or not was not at all relevant for deciding aforementioned applications seeking permission.

50. To elaborate further one may ask a question--'What would be the position if High Court would have withheld permission sought by the petitioners for

appearing in the interview at the relevant time. Answer will be that petitioners could resign and then appear for interview. Then why petitioners and like candidates be forced to gamble and not to take up other Examinations/job inasmuch as no one could be sure to be appointed finally. On the other hand they are not expected to sit idle also and forego other opportunities except for specific prohibition in law. The stage to opt will arise only if the petitioners were finally selected/recommended. In the instant case that stage never arose because the petitioners have been deprived of appearing in the interview for seemingly no good reason

51. Reference may be made to the following decisions cited at the Bar.

1. Rameshwar Dayal Versus State of Punjab and others, AIR 1961 SC 816 (para 12). In this case question of eligibility at the time of making 'appointment' was considered. It is not a decision on the question arising in the present case, i.e. Whether a candidate should continue to be Advocate throughout 'selection process', under Article 233(2) of the Constitution of India. The aforesaid case is distinguishable on facts. Supreme Court, in para 12 of the above judgment observed.

"12. Learned Counsel for the appellant has also drawn our attention to Explanation I to Cl.(3) of Art. 124 of the Constitution relating to the qualification for appointment as a Judge of the Supreme Court and to the Explanation to Cl.(2) of Art. 217 relating to the qualifications for appointment as a Judge of a High Court, and has submitted that where the Constitution makers thought it necessary they specifically provided for counting the period in a High Court which was formally in India. Articles 124 and 217 are differently worded and refer to an additional qualification of citizenship which is not a requirement of Art. 233, and we do not think that Cl.(2) of Art.233 can be interpreted in the light of explanations added to Arts.124 and 217. Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under Cl.(1) the Governor can appoint such a person as a district judge. In consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in Cl.(2) and all that is required is that he should be an advocate or pleader of seven years' standing. The clause does not how that standing must be reckoned and if an Advocate of the Punjab High Court is entitled to count the period of his practice in the Lahore High Court for determining his standing at the Bar, we see nothing in Art. 233 which must lead to the exclusion of that period for determining his eligibility for appointment as district judge."

2. Chandra Mohan Vs State of Uttar Pradesh – AIR 1966 Supreme Court 1987, the Supreme Court pointed out about two sources of appointment one, by promotion from the 'service' of the Union or of the State; two, by direct recruitment from the Advocates. Supreme Court further observed that the expression 'the service' appearing in Article 233(2) of the Constitution is to be read as judicial service (vide para 16 and 18 of the said reported judgment). This judgment does

not answer the question arising in present case.

In the case of Chandra Mohan Vs State of U.P., AIR 1966 SC 1987 (5JJ)-para 17--referred to above Supreme Court Judgment in the case of Rameshwar Dayal (*supra*) and noted aforequoted para with the observation--"This passage in nothing more than a summary of the relevant provisions, the question whether' the service' in Article 233(2) is any service of the Union or of the state did not arise for consideration in that case nor did the court express any opinion therein".

52. A careful reading of the cases cited at the Bar, we find that no judgment lays down that under Article 233(2), candidate's character as 'Advocate' must continue throughout from the date of submitting application and always during 'process of selection'.

53. In the case of All India Judges Associations Vs. Union of India and others–Jt 2002 (3) Sc 503 (para 26) (3 JJ) Supreme Court noted ".....while we agree with the Shetty Commission the recruitment to the higher judicial service, i.e. District Judge cadre from amongst the advocates should be 25 per cent ....." Their lordship, however, did not elaborate the point in hand.

54. During the course of arguments parties were unable to dispute the following preposition. It may be pointed out that by adding word 'judicial' before expression 'service' used in Article 233(2), Constitution of India, a serious anomaly arises. There is no logic to exclude a person who is selected in 'judicial service' and on the other hand a person in service other than 'judicial service' does not suffer such disqualification. There is no logic behind it. Reference be made to Article 236, which contains interpretation of expression 'judicial service'. The Constitution makers intentionally did not use the word 'judicial' before expression 'the service' in Article 233(2) of the Constitution. The word 'judicial' according to settled principle of interpretation should not be read in Article 233(2), of the Constitution, more so when there is no ambiguity in the said provision.

55. It will be useful to refer to the book titled 'Constitutional Law of India' by H. M. Seervai, IIIrd Edition, page 2511- paragraph 26.8; relevant extract of which is reproduced:-

".....District judge" and " judicial service' are defined respectively by Art. 236(a) and (b). The interpretation of Art.233 was considered by the Supreme Court in Chandra Mohan V. U.P. The question for determination in that case was, whether the appointment of district judges selected by a committee, with a right to the High Court to veto such recommendation complied with the requirements of Art.233. Article 233 falls into two parts. As regards persons in the service of the Union or of the State, the appointment is to be made by the Governor in consultation with the High Court. As regards an advocate or a pleader of seven years' standing it can only be made on the recommendation of the High Court.....As regards advocates, the decision of the Supreme Court is clearly right, because recommendation by a committee with a veto by the High Court is not recommendation by the High Court. As regards the appointment of persons

already in the service of the Union or a State, the decision of the Supreme Court is open to question. It reads into Art.233(2), which speaks of the "service of the Union or of the State", the definition of "Judicial service" given in Art. 236(b), and this is against the canons of construction, and there are no compelling reasons why in a part which uses in two Articles the words "service' (Art.233(2) and "judicial service" (Art. 234), the definition of "judicial service" should be read into Art. 233. Again, the judgement of the Supreme Court is not consistent. "

56. It is also pointed out at the Bar that since there has been no All India Judicial Services and Article 233(2) uses the word 'Union' it also reflects that word 'judicial' 'before' the expression service' was deliberately avoided by the framers of the Constitution.

57. However, we are not entering into this dispute as this question does not arise in the present case. Facts of the case of **Chandra Mohan** (*supra*) and the facts of present case are distinguishable, inasmuch as in the case in hand, all the petitioners were admittedly eligible when they applied for being considered for appointment but changed their position by joining judicial service later (i.e. after submitting application for Direct Recruitment). In the case of Chandra Mohan (*supra*), the candidates were in already 'judicial service', when they applied for 'Direct recruitment' and were not 'Advocate' as such at the initial stage of 'selection process' itself.

3. 1979 Labour and Industrial Cases(NOC) 162 (Alld.)-Satya Narain Singh Versus Chief Justice.

Since the journal contained only short note, we called for complete text of it.

58. A Division Bench (Yashoda Nandan and Gopi Nath,JJ.) while deciding Writ Petition No.8642 of 1978-Satya Narain Singh Versus The Chief Justice and others connected with Civil Misc. Writ Petition No.9146 of 1978-V.K.Jain Versus The Chief Justice and others considered the question of eligibility, at the time of submitting application for seeking appointment under Article 233(2), Constitution of India.

Respondent seek to place reliance on the following observation in the said judgement of Satya Narain Singh (*supra*) which read-

"In our opinion, the Rules contemplate that pleaders and Advocates of not less than seven years' standing and continuing in the profession alone are eligible for direct recruitment to the Service, and those who are either members of the U.P. Nyayik Sewa or belong to the cadre of Judicial Magistrates can be considered only for appointment by promotion....."

59. Their Lordships referred to Rule 6, which provides quota and uses the expression "direct recruitment from the bar" and also other provisions of the Rules and observed that the words "has been practising" and "normally practising" used in Rule 17 (2) of the Rules are in 'present continuous tense' which indicate that applicant must be practising Advocate. The Court observed-

".....While forwarding applications is required to give his estimate ---------- If an advocate has ceased to be in active practice either because he has taken up employment or has retired from practice after surrendering his certificate of enrolment or his right to practice has been suspended by the bar council, the District Judge cannot possibly make and give any estimate either of his character or fitness for recruitment to the service."

60. The above passage shows that it was also a case where court was considering 'eligibility' as Advocate at the time of submitting application and not the subsequent stages during selection process.

61. Division Bench referred to Article 233(2) of the Constitution, Judgement in the case of Rameshwar Dayal (*supra*) and in the case of Behariji Das Versus Chandra Mohan, AIR 1969 All 594(FB) this court held that, Prayag Narain, who was judicial Magistrate, could not be treated in 'judicial service', and hence he was eligible for being recruited/appointed under Article 233(2) of the Constitution of India.

62. It may be noted that appointment of Prayag Narain was under challenge in the aforesaid Full Bench decision and whether said Prayag Narain was eligible to apply at the initial stage itself. In this case also the question of eligibility as Advocate during selection process was not under consideration.

63. The Division Bench approved said 'Full Bench' decision in the case of Behariji Das (*supra*) and held that Prayag Narayan was not in 'Judicial service' of the State within the meaning of Article 233 (2) of the Constitution and since he has been a pleader/Advocate for not less than seven years before his appointment to the Higher Judicial Service, he was eligible for appointment under Article 233 (2) of the Constitution.

64. This shows that appointment of Prayag Narayain was held 'not' bad even though Prayag Narain was admittedly not advocate even at that stage -being in service and holding the post of Judicial Magistrate at relevant point of time under Article 233(2) Constitution of India.

65. In para 18 of the judgment reported in **AIR 1969 All 594 (FB), Behariji Das Versus Chandra Mohan** court observed -

" Sri Prayag Narayan was not already in the service of the State within the meaning of clause (2) of Article 233. He has been a pleader for not less than seven years before his appointment to the Higher Judicial Service. He was, therefore, eligible for the appointment under clause (2) of Article 233. The learned single judge was right in upholding Sri Prayag Narain's appointment."

66. One thing which clearly descerns from the aforesaid Full Bench judgment is that Prayag Narayan, who was, admittedly, in service (though not in judicial service) was not practising as Advocate at relevant point of time but still he was held to be eligible for appointment under Article 233(2).

4. AIR 1985 SC 308, Satya Narain Singh etc. Versus The High Court of Judicature at Allahabad and others, etc. In para 1 and 3 of the said judgment, Supreme Court noted -

1. The petitioners in the several writ petitions now before us as well as the appellants in Civil Appeal No.528 of 1982 and the petitioners in Writ Petition Nos. 6346-6351 of 1980 which we dismissed on 11th October, 1984 were members of the Uttar Pradesh Judicial Services in 1980 when all of them, in response to an advertisement by the High Court of Allhabad, applied to be appointed by direct recruitment to the Uttar Pradesh Higher Judicial Service. They claimed that each of them had completed 7 years of practice at the bar even before their appointment to the Uttar Pradesh Judicial Service and were, therefore, eligible to be appointed by direct recruitment to the Higher Judicial Service. As there was a question about the eligibility of members of the Uttar Pradesh Judicial Service to appointment by direct recruitment to the Higher Judicial Service, some of them filed writ petitions in the Allahabad High Court. The said petitions were dismissed and it was held that members of the Uttar pradesh Judicial Service were not eligible to be appointed by direct recruitment to the Uttar Pradesh High Judicial Service. Civil Appeal; No.548 of 1982 was filed in this Court after obtaining special leave under Art. 136 of the Constitution. By virtue of the interim order passed by this Court, members of the Uttar Pradesh Judicial Service, who desired to appear at the examination and selection were allowed to so appear, but the result of the selection was made subject to the outcome of the civil appeal and the writ petitions in this Court. The civil appeal and some of the writ petitions were dismissed by us on October 11, 1984. The remaining writ petitions are now before us. Sri Lal Narain Sinha and Sri K.K.Venugopal, learned Counsel who appeared for the petitioners, tried to persuade us to reopen the issue, which had been concluded by our decision on October 11, 1984. Having heard them, we are not satisfied that there is any reason for re-opening the issue. When we dismissed the civil appeal and the writ petitions on the former occasion, we were content to merely affirm the judgment of the High Court of Allahabad without giving our own reasons. In view of the arguments advanced, we consider that it may be better for us to indicate briefly our reasons.

3......"In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who; are members of a Judicial Service the 7 years rule has no application but there has to be consultation with the High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same ship cannot sail both the streams simultaneously. The dichotomy is clearly brought out by S.K.Das, J. in Rameshwar Dayal V. State of Punjab (AIR 1961 SC 816) (supra) where he observes (at P. 822):

"..... Article 233 is a self contained provision regarding the appointment of District Judge. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under cl.(1) the Governor can appoint such a person as a District

Judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in cl.(2) and all that is required is that he should be an advocate or pleader of seven years' standing."

67. The case of Satya Narayan Singh (supra) is clearly distinguishable in as much as the petitioners/candidates in that case were already in 'judicial service' even at the time of advertisement/submitting applications. The Supreme Court had no occasion to interpret the relevant provisions in the context of the 'fact-situation' of the case before us; i.e. Whether a candidate will render ineligibility if he joins judicial service and as a consequence ceases to be 'Advocate', after submitting Application.

68. It shall be noticed that in the case of present petitioners who have joined judicial service is not a kind of 'disqualification' of permanent nature. It is merely a 'hurdle' which a candidate can overcome by relinquishing his lien in the 'judicial service' (by resigning) if selected/recommended for appointment and before he avails himself of the offer of 'appointment'. Unless a candidate is selected/recommended for selection, there is no statutory requirement or otherwise that a candidate, after 'cut of date' given in the advertisement, should continue to be Advocate or sit idle. In absence of any good reason and to save a candidate from unnecessary hastles which may arise ude to uncertainties in life, a candidate should be allowed to exercise his 'option' to sail in one stream-(i.e. of continuing in 'Judicial Service' if selected during selection process or to sail in the other stream (i.e. To be appointed through 'Direct Recruitment from the 'Bar'.

69. To interpret Article 233(2), otherwise and by not adopting its plain meaning better candidates, as noted earlier, shall be prevented from joining 'selection process in absence of a statutory prohibition and that too without having a through and proper screening by a scientific methodology to exclude all other similarly situated persons to add in the present scenario by excluding the petitioners there may be charged of not adopting criteria equally and fairly. 'Source' is merely relevant to identity, that a candidate is 'picked up' from the 'class' earmarked for Direct Recruitment.

70. Learned counsel for the respondents has laid emphasis upon the 'source' of 'appointment' of District Judge relying upon Supreme Court judgment in the case of Satya Narain Singh (*supra*) and submitted that candidate in question must continue to belong to the 'source' (i.e. to say 'Bar') through out the selection process by continuing as Advocate.

Above interpretation is not possible unless we add a few words of our own in Art. 233 (2) of the Constitution and the Rules.

We fail to infer the meaning suggested by the respondents from the reading of statutory Rules, the advertisement or Article 233(2) of the Constitution.

71. Even assuming for the sake of argument, that there may be some scope to interpret Article 233(2) as suggested on behalf of the respondents, we shall prefer to assign the meaning which is more practical, pragmatic and serves the purpose better. There seems to be no 'good object' in excluding the candidates

like the petitioners who have proved their merit on being selected in judicial service after 'cut of date' prescribed in the advertisement. In absence of express statutory rules, a candidate for Direct Recruitment is not required to continue to be Advocate after filing application, and hence there is possibly no justification as to why such a candidate be denied opportunity of interview, particularly when there is no provision for giving declaration in this respect by the candidate.

72. All the petitioners were admittedly eligible on that date and they had, accordingly, applied. They were also found eligible for appearing in 'interview on the basis of the result of written-examination. They were in fact initially invited also for that purpose. The question of their 'eligibility' in absence of any statutory rule could not be a matter of scrutiny and have to be allowed to appear for interview.

(Delivered by Hon'ble V. N. Singh, J.)

73. I agree with the conclusion arrived at by the brother judge (Hon. A.K.Yog,, J.). In addition to what has been stated in the judgment I want to add following things-

Respondents have challenged the petition on the following grounds:-

(i) Appointment includes recruitment process, hence even during recruitment process, ineligibility can be considered.

(ii) Petitioners must be in active practice as an advocate or the pleader at the time of their selection as district judge, even during process of selection till the recommendation as a district judge.

(iii) Petitioners became ineligible for appointment because they joined judicial service.

Now the point for determination in this case is, whether appointment includes recruitment process.

74. In this connection, attention of this Court has been drawn towards the decision in ***K. Naga Raja and others Versus The Superintending Engineer, Irrigation Department, Irrigation circle, Chittoor, and another*** *referred* AIR 1987 Andhra Pradesh 230 (FB).

In this case, it has been held that, matters relating to appointment, includes not only the actual appointment, but also earlier process of recruitment.

Article 233 sub clause (1) & (2) of the Constitution is relevant in this connection, which is being reproduced-

"233. Appointment of district judges- (1) Appointments of per sons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

In the Article 233 sub clause (1) & (2) word "Appointment" has been used and not the word "matters relating to Appointment".

Moreover, in the above mentioned decision also, it has been held that, word "Recruitment" and "Appointment" are not synonymous.

75. In this connection, decision in the case of ***Basant Lal Malhrotra Versus State of Punjab and others*** referred in AIR 1969 Punjab and Haryana 178 (DB) is relevant.

In this case Division Bench held that-

"After the formalities under the rules up to Part C of Vol. 1 of the Rules and Orders of the Punjab High Court are completed the appointment to the post of Subordinate Judge takes place under Part D of the same Rules. From the Home Gazette Notification No.3010-G-51/1-6094 D/- 26-10-1951 (Punjab) and Rr. 6 & 7 in Part D of Chap. 22 of the Rules and Orders of the Punjab High Court. Vol. I, it is evident that a clear distinction is being drawn between the words "recruitment and "appointment". The two words are not synonymous but connote different meanings. According to the dictionary meaning of the word "recruit", "recruitment" is only for making up the deficiency occurring in the cadre and this term clearly signifies enlistment, acceptance, selection or approval for appointment and not actual appointment or posting in service, while "appointment" means an actual act of posting a person to a particular office. Thus the word "recruited" in R. 4.2 does not mean actual appointment."

76. In such circumstances, it is clear that, decision of Andhra Pradesh High Court referred by the respondents is not helpful to the respondents and argument of learned counsel for the respondents has no force that, word "Appointment" includes recruitment process.

Next point for determination is, whether the petitioners should be in the active practice, even during process of selection till the recommendation.

77. In this connection attention of the Court has been drawn towards decision in the case of ***Satya Narayan Singh (supra)*** in which, it has been held by the Division Bench of this High Court that, "contention of Sri S.P. Gupta that word "Bar" used in Rule 6 should be interpreted in the light of Rule 5(a) which makes eligible for appointment as direct recruits, advocates or pleaders of 7 years standing, irrespective of the question, as to whether on the relevant date they were practising or not, in our opinion, is unsound and must be rejected."

In this connection, judgment of Full Bench of Allahabad High Court given in the case of ***Behariji Das Versus Chandra Mohan*** referred in AIR 1969 All 594(FB) is relevant.

In para 13 of the judgement it has been held that-

"It is true that Sri Prayag Narayan was in service at the material time....."

In para 14 of the judgment it has been held that-

"Some emphasis was placed upon expression " has been" appearing in Clause (2) of Article 233....."

78. Contention was that, expression "has been" made it necessary that, per son concerned must have been in active practice as an advocate or the pleader at the time of his selection as district Judge.

79. In this connection, Court considered decision in the case of ***State of Assam V. Horizon Union*** referred in AIR 1967 SC 442 in which, point for consideration was, whether Sri Dutta was eligible to be appointed as the presiding officer of an Industrial Tribunal in Assam under the Industrial Disputes Act, 1947?

Sub section 3 Section 7A of Industrial Disputes Act runs as follows-

"A person shall not be qualified for appointment as the presiding officer of a Tribunal unless-

(a) .....

(aa) he has worked as a District Judge or as an Additional District Judge or as both for a total period of not less than three years or is qualified for appointment as a Judge of a High Court....."

It was held by Apex Court that, Sri Dutta was qualified for appointment as the presiding officer of the Industrial Tribunal under Clause (aa) of Sub-section (3) of Section 7A. It is important that, Sri Dutta's appointment in the year 1965 was upheld, although he had retired from service long before 1965.

In this connection clause (2) of Article 217 was also considered by the Hon'ble Full Bench. According to which, 'a person shall not be qualified for appointment as a Judge of a High Court, unless he is a citizen of India and-(a) has for at least ten years, held a judicial office in the territory of India.....'

In para 17 of the of the decision in ***Behariji Das (supra)*** it has been held by the Full bench that-

"It is well known that in several cases persons have been appointed as High court Judges some time after their retirement as District Judges. Such appointments have never been challenged. The position under Article 233(2) is similar to that under Article 217 (2) of the Constitution. "

80. In such circumstances it is clear that, Even though, Prayag Narayan was in service at the time of his appointment and he was not in active practice as an advocate, full bench approved the appointment of Sri Prayag Narayan.

81. It has been argued by the learned counsel for the respondents that, judgment of the Division Bench in the case of ***Satya Narayan Singh (supra)*** was confirmed by the Supreme Court.

82. From perusal of the judgment in the case of **Satya Narayan Singh (supra)** it is clear that, fact of continuance as an advocate or pleader during process of the selection till recommendation for appointment as District Judge, was not considered by the Apex Court.

So far as the case of ***Rameshwar Dayal (Supra)*** is concerned, in that case also the Hon'ble Supreme Court in para 6 has held that-

".....Harbans Singh and P.R.Sawhney did not have their names factually on the Roll when they were appointed as District Judges. P.R.Sawhney, it appears, had his name so enrolled on October 20, 1959, that is, after his appointment as District Judge....."

83. In such circumstances it is also clear that, so far as the decision in the Case of Rameshwar Dayal (supra) is concerned, even though Sri Harbans Singh and P.R.Sawhney were not on the roll as advocate, their appointment was upheld.

In this connection, Article 217 (2) of the Constitution is relevant.

Article 217 sub rule (2) is being reproduced as follows-

" A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and-

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such courts in succession;"

It is relevant that, in sub section 2(b) word " has been' an advocate has been used.

In this connection, Article 217 (2) Explanation (aa) is relevant, which is being reproduced-

" in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person (has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law) after he became an advocate;

84. It also shows that, in computing the period, during which a person has been an advocate period, during which, he held the judicial office shall also be considered, it means that, active practice during process of selection till recommendation for appointment as district judge is not essential. In such circumstances, argument of the learned counsel for the respondents has no force that applicants should remain in active practice, during process of selection till recommendation for appointment.

The next argument of the learned counsel for the respondents is that, petitioners became ineligible for appointment because they joined judicial service.

85. In this connection, point for determination is, (1) what will the be date of deciding the eligibility (2) who will be competent to decide the question of eligibility (3) whether refusal of permission to appear in interview, amounts declaration of ineligibility.

In this connection Rule 18 (1) ***THE UTTAR PRADESH HIGHER JUDICIAL SERVICE RULES, 1975*** referred to earlier is, relevant which reads-

"18(1).The Selection Committee referred to in Rule 16 shall scrutinize the applications received and may thereafter hold such examination, as it may consider necessary for judging the suitability of the candidates. The Committee may call for interview such of the applicants who in its opinion have qualified for interview after scrutiny and examination."

86. There is no provision in the Rule 18 (i) that, scrutiny of the candidates at the time of interview is also essential, because according to Rule 18(i) Committee will call for interview of such a candidate, who in its opinion have

qualified for interview after scrutiny and examination. Scrutiny means scrutiny at the time of receipt of the application before examination.

From perusal of the record, it is clear that, no scrutiny has been made regarding other candidates also by Selection Committee.

87. Besides it, from perusal of the counter affidavit filed by the respondents, it is clear that, two candidates who are working as Additional District Judge in Jharkahand State were permitted to appear in the interview and were interviewed.

It also shows that no scrutiny was done by the Selection Committee after examination. Had it been done, then those two candidates of Jharkhand State in the judicial service, working as Additional District Judges would not have been permitted.

Next question for determination is, whether any permission is required to appear in the interview.

No provision or relevant Circular or Government order has been shown in spite of specific direction to produce it, by respondents.

In this connection, attention of the court has been drawn towards Chapter 143 para 1090 and para 1091 of Manual of the Orders of the Personnel Department of U.P. Published in 1989.

This chapter is regarding disposal of the application of the Government Servants for out side employment.

88. It is admitted that petitioners who are in judicial service working as Civil Judge (Jr. Div.) are under the control of the High Court and even if, they are appointed as Additional District Judge, they shall remain under the control of the High court and the Hon'ble the Chief Justice shall be the head of the department in both the cases, as such this provision is not applicable.

89. It is admitted fact that, Petitioners appeared in the examination before they joined the judicial service and as such at that time, there was no question for permission to appear in the examination, because they were Advocates.

90. Besides it, from perusal of the record, it is clear that, permission was granted to petitioner nos.2, 3 & 4 to appear in the examination. Subsequently permission to Angad Prasad petitioner no.2 to appear in the interview was refused.

91. From perusal of the record it is clear that, there is no order in writing that, permission to petitioner nos. 3 & 4 Abdul Quaiyum and Narendra Kumar Singh who were already granted permission, was refused later on.

Contention of the petitioners is that, eligibility is to be decided by Full Court of the High Court and not by another authority.

92. It has also been argued that, refusal to permit the petitioners to appear in the interview, amounts to declare them ineligible. As decision has not been taken by the Full Court, regarding their ineligibility, there was no question for

refusal for permission to appear by any other authority.

As per Rule 18(3) Selection Committee shall make a preliminary selection and submit the record of all the candidates to the Chief Justice.

As per Rule 18(4) the Court, shall examine the recommendations of the Selection Committee and, having regard to the number of direct recruits to be taken, prepare a list of selected candidates in order of merit and forward the same to the Governor.

As per Article 233 (2) recommendation is to be made by the High Court for appointment.

High Court means, Full Court as held by the Apex Court in the case of ***Chandra Mohan (supra).***

93. As such, it is clear that, only Full Court and not any other authority, is competent for recommendation for appointment and according to the Rule 18 (4) Court shall examine the recommendations of the Selection Committee, it means that Full Court shall examine recommendation and forward the same to the Governor.

94. As per Article 233(1), appointment of the person as district judge in the State shall be made by the Governor of the State. As such it is clear that, appointment is to be made by the Governor of the State.

95. In such circumstances, it is clear that, only the Full Court is competent to decide the ineligibility of the candidates and by refusal of the permission to appear in the interview, ineligibility has been decided by the authority other than the Full Court.

As per rule, Selection Committee has no power to decide ineligibility after examination of candidates, who qualified in examination, for interview, before interview.

Besides it, contention of the petitioners in para 33 of the writ petition has not been rebutted by the respondents.

Para 33 of the writ petition is being reproduced. -

"That even in the past selections, whenever there existed doubt with regard to the candidature of any candidate called for interview the objection against his name was noted in the selection proceedings, but such candidate nevertheless interviewed by the selection committee and the matter referred to the full court fo the High Court for final decision on the candidature."

96. In the counter affidavit filed by the respondents, this fact has not been specifically denied that, it has not been a prevalent practice. Only this much has been said that, para 33 is argumentative in nature, hence not admitted as such.

Contention of the petitioners is that refusal to permit them to appear in interview is in violation of Article 14 and 16 of the Constitution of India.

Article 14 & 16 are reproduced as follows-

"14. Equality before law- The State shall not deny to any person equality

before the law or the equal protection of the laws within the territory of India.

16. Equality of opportunity in matters of public employment-

1. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
2. .....
3. .....
4. .....
5 ....."

97. In this connection, it is relevant that, it is admitted in the counter affidavit of the respondents that, two person already in the service in the State of Jharkhand and holding the post of Additional District Judge (Judicial service) have been interviewed by the Selection Committee, although their names have not been disclosed, nor denied in spite of contention of petitioners that, perhaps one of them is, Sri Sandeep Srivastava.

98. Contention of the petitioners is that, although two of the applicants of Jharkhand, who are in judicial service and are holding post of Additional District Judge have been allowed to appear in the interview, but petitioners who are in judicial service, have not been allowed to appear in the interview, is clear violation of Article 14 & 16 of the Constitution of India.

99. In this connection, decision in **E.P. Royappa V. State of Tamilnadu** AIR 1974 SC 555 and decision in Ajay Hasia's case refereed in AIR 1981 SC 487, and decision in D.S.Nakara V. Union of India AIR 1983 SC 130 and decision in the case of **Maneka Gandhi V. Union of India**, AIR 1978 SC 597 are relevant.

100. In this connection, decision of the Apex Court in the case of **A.L.Kalra Versus the Project and Equipment Corporation of India ltd.** referred in AIR 1984 Supreme Court 1361 is relevant in which, the Apex Court considering the above mentioned cases held that, "it is difficult to accept the submission that, executive action, which results in denial of equal protection of law or equality before law, cannot be judicially reviewed, nor can be struck down on the ground of arbitrariness as being violative of Article 14."

101. In this case also, two candidates working as Additional District Judges in the Jharkhand State, were permitted to appear in the interview, while the petitioners were not allowed to appear in interview, on the ground that, they joined judicial service. It is clear violation of Article 14 & 16 of the Constitution.

ORDER

In the result, Writ Petition stands partly allowed.

We direct that the petitioners be interviewed forthwith. We also direct that the candidates in U.P. Nyayik Sewa or Judicial Service of other States, who are similarly situated, shall also be interviewed, if not already interviewed and the names of all such candidates be included in the list along with other candidates for consideration of the Court.

No order as to costs.