ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2005

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 1255 of 2005

Deo Raj ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava

Counsel for the Respondents:
Sri Mukesh Prasad
S.C.

U.P. Minor Minerals (Concession) Rules 1963-Rule-6A-78- readwith Indian Limitation Act-Section 5-State authority hearing revision acts as a statutory authority but not as a Court-Rule 6-A empowers the Govt. to Condone the delay in filing renewal application-No provision to Condone the delay in filing revision-Condoning the delay in filing revision illegal, but the Govt. has liberty to exercise suo moto power.

Held: Para 17 & 19

The U.P. Minor Minerals (Concession) Rules, 1963 has been framed in exercise of power under Section 15 of the Mines and Minerals (Regulation and Development) Act. 1957. From the U.P. Minor Minerals (Concession) Rules, 1963 there is no indication that the State Government while hearing revision acts as a court. The State Government while hearing revision under Rule 78 is an statutory authority to hear the revision and does not act as court.

The State Government while hearing a revision under rule 78 cannot be held a court nor it can be said that it has trappings of the court while deciding a revision. In this view of the matter Section 5 of the Limitation Act was not applicable ipso facto unless the Limitation Act or any provisions of the Limitation Act is specifically applied. To the contrary under the rules there are provisions in which power to condone the delay in making an application has been specifically provided. As noted above, rule 6-A (2) specifically empowers the State Government to condone the delay in making application for renewal of the mining lease after the period specified under sub rule (1). No such provisions have been made under rule 78 on which it can be safely inferred that the State Legislature intend applicability of Section 5 of the Limitation Act under rule 78 of the Rules.

Case law discussed:
1996 (9) SCC 414
2004 (4) SCC 252
2000 (5) SCC 355
1981 ALJ 641
1947 (4) SCC 22
2004 (4) SCC 252

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

1. Heard Sri Arvind Srivastava learned counsel for the petitioner, Sri Mukesh Prasad, learned counsel appearing for the respondent no. 4 and the learned standing counsel. Counter and rejoinder affidavits have been exchanged, by consent of parties the writ petition is being finally decided.

2. By this writ petition the petitioner has prayed for quashing the order dated 15.12.2004 passed by the respondent no. 1 by which preliminary objections raised against the maintainability of the revision were rejected. The delay in filing the revision by the respondent no. 4 was condoned. Brief facts necessary for deciding the controversy raised in this writ petition are:

3. The petitioner was granted a mining lease under Chapter II of the U.P. Minor Minerals (Concession) Rules, 1963 (hereinafter referred to "1963 Rules") in the year 1997 for a period of three years. The renewal for a further period of three years was granted by the order dated 18.2.2000. Another application for renewal of the mining lease was given by the petitioner under rule 6 A of 1963 Rules. The District Magistrate by an order dated 24.11.2003 renewed the lease in favour of the petitioner for a period of three years. A writ petition No. 20846 of 2004 Santosh Kumar Singh Vs. State of U.P. & others had been filed challenging the renewal of the lease dated 24.11.2003 which writ petition is pending consideration. The respondent no. 4 filed revision under rule 78 of 1963 Rules before the State Government praying for setting aside the order of the District Magistrate renewing and registering the mining lease in favour of the petitioner. On the revision filed by the respondent no. 4 notices were issued to the petitioner. The revision was filed by the petitioner on 4.6.2004. The petitioner appeared in the revision and raised objection regarding maintainability of the revision. Petitioner raised objections before the revisional authority that the revision is barred by time having not been filed within ninety days from the date of order of the District Magistrate, the same is liable to be dismissed as barred by time. Section 5 of the Limitation Act is not applicable while hearing the revision under rule 78 and there being no power of condonation of delay, the revision was liable to be rejected. It was further contended that the petitioner has no locus standi to challenge the order of the District Magistrate renewing the lease in favour of the petitioner. The revision being not accompanied by any application for condonation of delay, the revisional authority could not have condoned the delay in filing the revision. There was no illegality in the renewal of mining lease of the petitioner. The revisional authority without applying its mind to the facts of the case illegally condoned the delay in filing the revision.

4. Learned counsel for the petitioner has also placed reliance on the judgment of the apex Court (1996) 9 SCC 414 **Officer on Special Duty (Land Acquisition) and another** Versus **Shah Manilal Chandulal and others** and (2004) 4 Supreme Court Cases 252 **Gopal Sardar** Versus **Karuna Sardar**.

5. Sri Mukesh Prasad learned counsel appearing for the respondent no. 4 refuting the submission of the counsel for the petitioner contended that Section 5 of the Limitation Act is fully applicable under rule 78 of the 1963 Rules. The revisional court had jurisdiction to condone the delay under Section 5 of the Limitation Act. It is further contended that there was no requirement of filing of any formal application for condonation of delay. The respondent no. 4 had locus standi to challenge the renewal of the lease in favour of the petitioner. Sri Mukesh Prasad placed reliance on the judgment of the apex Court; (2000) 5 Supreme Court Cases 355 **P. Sarthy** Versus **State Babnk of India**; 2000 (6) Supreme Court Cases 94 **Essar Constructions** Versus **N. P. Rama Krishna Reddy** and 1981 All. L. J. 641 **Shiv Charan Sharma** Versus **Union of India and others**.

6. I have considered the submissions of both the parties and perused the record.

7. The impugned order has been passed by the State Government on a revision filed by the respondent no. 4 under Rule 78 of 1963 Rules. In the impugned order it has been observed by the revisional authority that the revision has been filed with some delay and looking to the facts of the case it is in the interest of justice that the delay in filing the revision be condoned. It has also been observed in the impugned order that the State Government has also jurisdiction to examine the order of the District Magistrate suo moto. The State Government further observed that the revision filed by the respondent no. 4 is maintainable and directed for hearing of the revision on merits.

8. The first question which has arisen for determination is as to whether the revisional authority while hearing the revision filed under Rule 78 of 1963 Rules has jurisdiction to condone the delay in filing the revision. The counsel for the petitioner has submitted that there is no power under rule 78 to condone the delay in filing the revision since the provisions of Section 5 of the Limitation Act, 1963 are not applicable while hearing the revision under rule 78. Before proceeding further to examine the contention it is relevant to consider the provisions of the Limitation Act and the provisions of the U.P. Minor Minerals (Concession) Rules, 1963.

9. Section 3 of the Limitation Act provides that subject to provisions contained in Section 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitgation has not been set up as a defence. Section 4 provides that where the prescribed period of any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court reopens. Section 5 of the Limitation Act which is relevant in the present case is extracted below :-

"**5. Extension of prescribed period in certain cases,**_____ Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation,_____ The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.?

10. From the perusal of Section 5 of the Limitation Act it is clear that any appeal or any application, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal. The provisions of the Limitation Act, 1963 prescribed period of limitation for institution of suit, appeal or application in a court. Section 5 of the Limitation Act as noted above clearly indicate that the extension of period shall be allowed when the applicant satisfies the court that he had sufficient cause.

11. The provisions of the limitation Act can also be made applicable in any other proceedings by specifically providing under the statute about the application of limitation Act. Even where the limitation Act is not strictly applied the principle contained under the Limitation Act are adopted by various statutes.

12. The question arose as to whether the provisions of the Limitation, 1963 are applicable for filing a revision under Section 10 (3) (b) of the U.P. Sales Tax Act, 1947. In (1975) 4 Supreme Court Cases 22 **The Commissioner of Sales Tax U.P. Lucknow Versus M/s Parson Tools and Plants, Kanpur** the appeal was filed before the apex Court against the Full Bench judgment of this Court. The majority view of this Court was that time spent in prosecuting the application for setting aside the order of dismissal of appeal in default, can be excluded for filing the revision by application of principle underlying Section 14 (2) of the Limitation Act. Minority view of this Court was that the Judge Revision Sales Tax while hearing the revision under Section 10 of the U.P. Sales Tax Act does not act as a court but only as a revisional Tribunal hence the provisions of the Indian Limitation Act may not apply to proceedings before him. The apex Court held that the appellate authority and Judge Revision Sales Tax are not courts hence Section 14 of the Limitation Act does not apply. Following was held in paragraphs 8 and 9:-

"8. Mr. Karkhanis is right that this matter is no longer res integra. In Shrimati Ujjam Bai v. State of U.P. (A.I.R. 1962 S.C. 1621) Hidayatullah, J. (as he then was) speaking for the Court, observed:

The taxing authorities are instrumentalities of the State. They are not a part of the Legislature, nor are they a part of the Judiciary. Their functions are the assessment and collection of taxes and in the process of assessing taxes, they follow a pattern of action which is considered judicial. They are not thereby converted into courts of civil judicature. They still remain the instrumentalities of the State and are within the definition of "State" in Article 12.

9. The above observations were quoted with approval by this Court in Jagannath Prasad's case (supra), and it was held that a Sales Tax Officer under U.P. Sales Tax Act, 1948 was not a Court within the meaning of Section 195 of the Code of Criminal Procedure although he is required to perform certain quasi-judicial functions. The decision in Jagannath Prasad's case, it seems, was not brought to the notice of the High Court. In view of these pronouncements of this Court, there is no room for argument that the appellate authority and the Judge (Revisions) Sales Tax exercising jurisdiction under the Sales Tax Act, are "courts". They are merely administrative tribunals and "not courts". Section 14, Limitation Act, therefore, does not, in terms apply to proceedings before such tribunals?

13. The apex Court while considering the provisions of the Land Acquisition Act, 1894 again took the view that the Collector/Land Acquisition Officer has no power to condone the delay in making application for reference since they act as statutory authority and not as a court for the purposes of Section

5 of the Limitation Act. Following was held in Paragraph 19:-

"19. The case in point is Purshottam Das Hussaram V. Impex (India) Ltd. (supra). In this Bombay case, the question was, whether the suit was barred by limitation. It was not disputed that Article 115 of the Limitation Act governed the limitation and if no other factor was to be taken into consideration, the suit was filed beyond time. But what was relied upon by the plaintiff for the purpose of saving limitation was the fact that there was certain infructuous arbitration proceedings and if the time taken in prosecuting those proceedings was excluded under Section 14, the should would be within limitation. It was held that if Section 14 were to be construed strictly, the plaintiff would not be entitled to exclude the period in question."

14. The recent judgment of the apex Court in (2004) 4 Supreme Court Cases 252 **Gopal Sardar** Versus **Karuna Sardar** had considered the provisions of West Bengal Land Reforms Act, 1955. It was held by the apex Court that in an application under Section 8 of the Act the provisions of Section 5 of the Limitation Act is not applicable. The apex Court also held that the Act is a self contained Code and in various provisions of the Act specially the provisions for appeal Section 5 Limitation Act was made applicable. The non mention of applicability of Section 5 in an application under Section 8 claiming right of pre emption indicate that Section 5 is not applicable in Section 8 proceedings. Following was laid down in paragraph 7:-

"7. ..... Even otherwise, in our view, the position as regards the applicability of Section 5 of the Limitation Act to an application under Section 8 of the Act does not get altered. As already stated above, the Act is a self-contained code inasmuch as the Act provides to enforce the rights of pre-emption, forum is provided, procedure is prescribed, remedies including the appeals and revisions are provided, penalties are indicated for non-compliance with the orders and powers are given for restoration of land. Further period of limitation is also specifically prescribed to make an application under Section 8 of the Act and for preferring appeals or revisions under the provisions of the Act. All these and a few other provisions are clear enough to indicate that the Act is a complete code in itself dealing with the rights of pre-emption. The second proviso to Section 14-H specifically provides for the application of Section 5 of the Limitation Act in the matter of preferring an appeal or revision. Section 14-O (1) specifically enables the Appellate Authority to allow to prefer an appeal even after the expiry of the period of limitation prescribed on showing sufficient cause. Similarly , the second proviso to Section 19(2) of the Act expressly provides for application of Section 5 of the Limitation Act to an appeal to be preferred under the said section. Section 51-A of the Act deals with preparation and revision of record of rights. Rule 26 of the Rules framed under the Act provides that every appeal under Section 51-A of the Act is to be filed within one month from the date of passing of the order appealed against. The proviso to the said Rule stastes that an appeal may be admitted after the said period if the appellant satisfies that he

had sufficient reasons for not preferring the appeal within the said period. Thus either Section 5 of the Limitation Act or its principles have been expressly and specifically incorporated in the various sections aforementioned. In contrast, although Section 8 of the Act prescribes the period of limitation for applying to enforce pre-emption rights, it does not speak of application of Section 5 of the Limitation Act or its principles. If in the same Act, consciously and expressly, the legislature has made provision for application of Section 5 of the Limitation Act or its principles expressly and specifically to other proceedings such as appeal or revision etc. and such a provision is not made for limitation of the proceedings under Section 8 of the Act, it necessarily follows that the legislature did not intend to give benefit of Section 5 of the Limitation Act having regard to the nature of right of pre-emption which is considered a weak right."

15. Coming to the provisions of U.P. Minor Minerals (Concession) Rules, 1963, the provisions for filing an appeal is provided under Rule 77 and for filing revision is provided under Rule 78. Rule 78 of the Rules is quoted below:-

"78. Revisions,__ The State Government may either suo moto at any time or on an application made within ninety days from the date of communication of the order, call for an examination of the record relating to any order passed proceeding taken by the District Officer Committee, Director or the Divisional Commissioner under these rules and pass such orders as it may think fit.?

16. At this juncture it is also relevant to note rule 6-A which provides for making an application for renewal of mining lease:-

"6-A. Application fee etc. for renewal of mining lease,_____ *(1) An application for renewal of mining lease may be made atleast six months before the date of expiry of the mining lease along with four copies of the map of lease hold area showing clearly the area applied for renewal and the provisions of clause (a) and (d) of sub-rule (1) of Rule 6 shall mutatis mutantis apply.*

(2) The State Government may condone the delay caused in making the application for renewal of mining lease after the period specified in sub-rule (1)."

17. The U.P. Minor Minerals (Concession) Rules, 1963 has been framed in exercise of power under Section 15 of the Mines and Minerals (Regulation and Development) Act. 1957. From the U.P. Minor Minerals (Concession) Rules, 1963 there is no indication that the State Government while hearing revision acts as a court. The State Government while hearing revision under Rule 78 is an statutory authority to hear the revision and does not act as court.

18. At this stage it is also necessary to consider the judgment of the apex Court in **P. Sarthy** Versus **State Babnk of India (supra)** as relied by the counsel for the respondents. In **P. Sarthy** Versus **State Babnk of India** (supra) the apex Court held that any authority or tribunal having the trappings of the court would be a court within the meaning of Section 14 of the Act. Paragraph 12 of the judgment is quoted below :-

"**12**. It will be noticed that Section 14 of the Limitation Act does not speak of a "civil court" but speaks only of a "court". It is not necessary that the court spoken of in Section 14 should be a "civil court". Any authority or tribunal having the trappings of a court would be a "court" within the meaning of this section."

The apex Court in the said judgment had considered Tamil Nadu Shops and Establishments Rules, 1948 framed under the Tamil Nadu Shops and Establishments Act, 1947. After considering the provisions of the said Rules the apex Court held that any authority or Tribunal having the trappings of the court would be a court. In U.P. Minor Minerals (Concession) Rules, 1963 there is no indication that the State Government while hearing the revision acts as an authority or tribunal which have trappings of the court.

19. The State Government while hearing a revision under rule 78 cannot be held a court nor it can be said that it has trappings of the court while deciding a revision. In this view of the matter Section 5 of the Limitation Act was not applicable ipso facto unless the Limitation Act or any provisions of the Limitation Act is specifically applied. To the contrary under the rules there are provisions in which power to condone the delay in making an application has been specifically provided. As noted above, rule 6-A (2) specifically empowers the State Government to condone the delay in making application for renewal of the mining lease after the period specified under sub rule (1). No such provisions have been made under rule 78 on which it can be safely inferred that the State Legislature intend applicability of Section 5 of the Limitation Act under rule 78 of the Rules.

20. It is further relevant to note that under rule 78 the State Government has suo moto power to call for and examine the record relating to any order passed, proceedings taken by the district Officer. In appropriate case the State Government can initiate suo moto proceedings. Although in the order impugned in this writ petition it has been observed by the State Government that the State Government has also suo moto power to examine the order of the District Magistrate but from the order it does not appear that the State Government has actually decided to exercise its suo moto power. It is open to the State Government to initiate suo moto proceedings in the event it so decides. It has also been contended by the counsel for the respondents that in fact there is no delay in the revision. The respondent no. 4 had applied for copy of the order which was not made available. It has been stated that the respondent no. 4 having not received copy of the order applied for copy of registered lease which was given on 11.5.2004. On the above submission it cannot be held that the revision application filed by the petitioner was within the period of limitation as prescribed under rule 78. It is not the case of the petitioner that the order passed by the District Magistrate was ever communicated to the petitioner.

21. From the above discussion it is found that there is no power of condonation of delay under rule 78 hence the order passed by the State Government condoning the delay in filing the revision by the respondent no. 4 cannot be sustained. In view of this it is not

necessary to consider other submissions raised by the counsel for the petitioner. As observed above, it is open to the State Government to exercise its suo moto power. In the result the order of the State Government passed in the revision dated 15.12.2004 condoning the delay in filing the revision and entertaining the revision, is set aside. The writ petition is allowed to the extent indicated above. Parties shall bear their own costs.

Petition allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2004

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 42901 of 2004

Ravindra Pratap ...Petitioner
Versus
Institute of Engineering & Rural Technology, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Kshitij Shailendra

Counsel for the Respondents:
Sri Rahul Sripat
S.C.

Multi Point Entry & Credit System Examination Rules-15-B- Diploma Electronic Engineering 3 years course- Back paper must be cleared within maximum duration as per rule 15-B it can not be extended beyond that.

Held: Para 7

In the opinion of the Court the language of Rule 15-B is clear and specific. It leaves no room for doubt. In no case a candidate can be permitted to continue beyond the maximum duration provided for under Rule 15-B. In such circumstances it is not necessary to refer to any other provision including Rule 16 or the purpose for which the Multi Point Entry and Credit System has been introduced inasmuch as any opportunity to a candidate to appear in a back paper must be completed within the maximum duration provided under Rule 15-B. Rule 16 or the purpose for which the Multi Point Entry and Credit System has been introduced cannot in any way extend the maximum duration provided under Rule 15-B.

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

1. Heard Sri Kshitij Shailendra Advocate on behalf of the petitioner, Sri Rahul Sripat Advocate on behalf of respondents 1 and 2, and the Standing Counsel on behalf of respondent no. 3-State.

2. The petitioner, Ravindra Pratap was admitted to 3 years Degree Course of Diploma in Electronic Engineering under Multi Point Entry and Credit System (hereinafter referred to as MPECS) in the Institute of Engineering and Rural Technology, Allahabad (hereinafter referred to as the IERT) for the academic session 1998-99. The petitioner failed to clear examination of the subject of Analog in Electronics 3rd semester and has also failed in two papers in 4th semester examination. The petitioner is aggrieved by the order passed by the Director of the IERT dated 10.08.2004 whereby the Director with reference to Rule 15-B of the Multi Point Entry and Credit System Examination Rules (hereinafter referred to as the Rules) adopted by the IERT since 1993, provided that no further chance/attempt can be given to the petitioner for clearing the back paper of 3rd semester. This order is

under challenge in the present writ petition.

3. On behalf of the petitioner it is contended that the aforesaid order passed by the Director is manifestly illegal inasmuch as under the provisions of Rule 16 of the Rules read with the purpose for which the Multi Purpose Entry and Credit System was introduced, the petitioner is entitled to be permitted to undertake the back papers in respect of the examinations which the petitioner could not clear, pertaining to 3rd semester and that Rule 15-B of the Rules is to be read down in the light of the provisions providing for back papers. Reliance has been placed in that regard upon the judgment of this Court reported in 1999 UPLBEC 2377 (*Abhishek Rathor Versus Director, Institute of Engineering and Rural Technology, Allahabad)*

4. On behalf of the respondents it is submitted that the petitioner was admitted in the year 1998. The period of six years subsequent to his admission in the said course has expired in the year 2004 and therefore, under Rule 15-B of the Rules he is not entitled to any further opportunity of appearing in back papers or to continue as a student in the said course.

5. In order to appreciate the controversy raised between the parties it would be appropriate to refer to Rule 15-B of the Rules which is quoted hereunder:--

> *"To complete a particular diploma programmed the maximum duration shall be double the number of academic years prescribed."*

6. From the aforesaid rule it is apparently clear that the entire diploma programmed is required to be completed by the petitioner within the maximum duration which shall be double the number of academic years prescribed. It is not in dispute that the number of academic years prescribed for the course of Diploma in Electronic Engineering is 3 years and therefore the maximum duration under Rule 15-B works out to 6 years only in respect of the said diploma course. The petitioner as such cannot be permitted to complete the said diploma programmed after expiry of the said 6 years from the year of his admission. The petitioner also admits the aforesaid legal position, however, he contends that the said Rule 15-B be read down in the light of the provisions of Rule 16 as well as in light of the purpose for which the aforesaid Multi Point Entry and Credit System was introduced.

7. In the opinion of the Court the language of Rule 15-B is clear and specific. It leaves no room for doubt. In no case a candidate can be permitted to continue beyond the maximum duration provided for under Rule 15-B. In such circumstances it is not necessary to refer to any other provision including Rule 16 or the purpose for which the Multi Point Entry and Credit System has been introduced inasmuch as any opportunity to a candidate to appear in a back paper must be completed within the maximum duration provided under Rule 15-B. Rule 16 or the purpose for which the Multi Point Entry and Credit System has been introduced cannot in any way extend the maximum duration provided under Rule 15-B. So far as the case *Abhishek Rathor Versus Director, Institute of Engineering*

and Rural Technology, Allahabad(Supra) relied upon by the petitioner is concerned it has no application to the facts of the present case inasmuch as in the said judgment the applicability of Rule 15-B was not under consideration.

The writ petition is accordingly dismissed.

Petition dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2005

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

Criminal Revision No.770 of 2005

Umesh Chand Verma and others
...Revisionists
Versus
State of U.P. and others
...Opposite Parties

Counsel for the Revisionists:
Sri G.S. Chaturvedi
Sri Nikhil Chaturvedi
Sri S.B. Kochar

Counsel for the Opposite Parties:
Sri D.N. Wali
Smt. Praveen Shukla
A.G.A.

Code of Criminal Procedure-S-319-offence under section 498-A/304 I.P.C.-after framing charge sheet-on the basis of statement made-prima-facie sufficient material found to summon the accused person to face the trial-although not named in FIR, nor the name disclosed during investigation-issuing the summons is proper remedy-N.B.W. can be issued if they failed to appear-positive directions issued accordingly.

Held: Para 9 and 10

It is not evidence or infirmity of evidence during the investigation which is the basis to decide as to whether the case is to be proceeded against the applicants or not, but it is the evidence or statement made after the charge is framed, which is the basis for proceeding against those accused against whom charge sheet has not been submitted and final report was submitted. Therefore when there is clear statement of the complainant prima facie there is sufficient evidence to summon the accused person to face the trial.

In the circumstances of the case issue of summon was the proper remedy rather than non-bailable warrant and upto this extent impugned order deserves to be modified.

Case law discussed:
AIR 1979 SC-339
1993 SCC Crl. 470
1994 Crl. Law Journal-3330
AIR SC 771
AIR 1978 SC-514
AIR 1964 (1) SCR 639
AIR 2004 (57) 390

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

1. Heard Sri G.C. Chaturvedi learned Senior Counsel assisted by Sri Nikhil Chaturvedi for the applicants, Smt. Praveen Shukla learned AGA for opposite party No.1 State of U.P. and Sri D.N. Wali learned counsel for opposite party no.2 Arun Kumar Verma and have gone through the record.

2. Instant criminal revision has been filed against order dated 10.2.05 passed by learned Addl. Sessions Judge, Fast Track Court no.3 Agra in Sessions Trial No. 455 of 2004 State v. Shyam Verma whereby the applicants Umesh Chandra Verma, Smt. Laxmi Verma, Smt. Mohini Verma, Rishi Verma and Chanchal Verma

have been summoned under section 319 Cr.P.C. to face trial in Sessions Trial No. 455 of 2004 under section 498 A/304 B IPC and section 3/4 Dowry Prohibition Act, Police Station Bah, district Agra. This Sessions Trial is already pending against Shyam Verma.

3. According to the prosecution opposite party no.2 complainant Arun Kumar Verma lodged FIR against applicants and Shyam Verma under section 498 A/307 IPC and section 3/4 Dowry Prohibition Act on 6.4.2004. Later on the death of Priti Verma daughter of Arun Kumar Verma took place. After investigation the charge sheet was submitted under section 498A/304 B IPC against Shyam Verma the husband only but final report was submitted in respect of father-in-law Umesh Chand Verma, mother-in-law Smt. Laxmi Verma, Jeth Rishi Verma, Jethani Smt. Mohini Verma and Nanand Chanchal Verma on 22.4.2002. One son was born from the wedlock of Priti Verma and Shyam Verma in January, 2003 but demand for Maruti car being not satisfied husband and applicants used to cause torture to her and they set her on fire on 5.4.2004 and ultimately she died on 8.6.2004 from the burn injuries received on 5.4.2004 at the residence of applicants in Mohalla Sarai, Town Bah, district Agra. After the charge was framed against Shyam Verma the husband the case proceeded and PW 1 Arun Kumar Verma father of the victim made statement that applicants also used to cause torture to her and set her on fire therefore they also be summoned and direction be made to face the trial. The application moved under section 319 Cr.P.C was allowed and a direction was made to issue non-bailable warrant against the applicants to face trial under section 498A/304B IPC and Section 4 of Dowry Prohibition Act.

4. It is submitted by learned counsel for the applicants that in dying declaration Smt. Priti Verma had stated that husband Shyam Verma had suspicion about her character and therefore he set her on fire. Only in statement recorded later on under section 161 Cr.PC she stated that though the applicants were present when she was set on fire but she was not saved and her dying declaration was made only against husband because other family members who carried her to hospital threatened her not to carry her to hospital for medical treatment in case she made statement against the applicants. It is also submitted that in evidence under section 161 Cr.PC the witnesses have stated that due to dispute between victim Smt. Priti Verma and her husband Shyam Verma her-in-laws Jeth, Jethani and Nanand started to live in Gwalior and they were present at the time in Gwalior.

Section 319 of Cr.P.C. contemplates: -

"319. Power to proceed against other persons appearing to be guilty of offence- *(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed."*

5. In **AIR 1979 SC 339 Joginder Singh v. State of Punjab** it has been held by Hon. Apex Court that even the persons who have been dropped by the Police

during investigation but against whom evidence showing their involvement in the offence comes before the criminal court are included in the list of the persons who can be summoned to face the trial and once the case in respect of offence is committed the cognizance of the offence is taken and any person who is involved in the crime even though charge sheet has not been submitted can be summoned under section 319Cr.PC to face the trial with the accused already facing the trial.

6. In **1993 SCC Crl. 470 Kishun Singh v. State of Bihar** it has been laid down that section 319 Cr.P.C. can be invoked by the court even though a person is not named as offender in FIR or charge sheet but whose complicity in the crime comes to light from the evidence and he can be summoned. When the offence of the cognizance is taken summoning any other accused involved in the crime is part of the process of taking cognizance. It was held that once the case has been committed the bar of section 193 Cr.P.C. was removed and the court of Sessions is vested with the fullest jurisdiction to summon any individual accused of the crime.

7. In **1994 Crl. Law Journal 3330 Dr. J. Jacab and others v. State** it has been held by Hon. Delhi High Court that evidence under section 319 Cr.P.C. means evidence recorded during enquiry or trial and not during investigation by the Police. **AIR SCW 771; AIR 1978 SC 514 and AIR 1964 (1) SCR 639** was relied on while laying down the law.

8. In instant case after the charge was framed. The complainant stated that demand for dowry was made and his daughter used to inform him that she was being harassed because demand for dowry was not satisfied and she apprehended that her life was in danger and any happening could take place with her. He also stated that cruelty was exercised not only by husband but by applicants also. In view of this statement which the court below recorded after the charge was framed, there appears prima facie evidence to summon the accused. Contradiction if any, in dying declaration of the victim and her statement under section 161 Cr.P.C. while lying in the hospital or present residence of the applicants at Gwalior are the circumstances which are to be considered at final stage of the case when both parties are allowed to adduce evidence but any such infirmity in the prosecution evidence cannot be taken to be sufficient at this stage to exclude the evidence recorded after the charge is framed wherein it has been stated that cruelty was exercised by applicants also on the victim.

9. Other witnesses of the family of victim have also to make statement. It is not evidence or infirmity of evidence during the investigation which is the basis to decide as to whether the case is to be proceeded against the applicants or not, but it is the evidence or statement made after the charge is framed, which is the basis for proceeding against those accused against whom charge sheet has not been submitted and final report was submitted. Therefore when there is clear statement of the complainant prima facie there is sufficient evidence to summon the accused person to face the trial.

10. It has been held by Full bench of this Court in **ALR 2004 (57) 390 Smt. Amrawati and another v. State of U.P.** that even if cognizable offence is disclosed the arrest of the accused is not must and it is at the discretion of the Sessions Judge or the Magistrate to

consider as what process would be suitable to procure the attendance of the accused. In instant case when 3 out of 5 applicants are ladies and their case is that due to dispute between husband and wife applicants started to live in Gwalior and it was proper that when application under section 319 Cr.P.C. moved by the complainant was allowed the attendance of the applicants was to be procured by summoning them rather than directly issuing non-bailable warrant against them and in case reasonable opportunity was given to them to appear in court they would have appeared, if they would have not appeared then coercive process in the nature of warrant can be issued but the learned Addl. Sessions Judge while allowing the application under section 319 Cr.P.C. passed orders for issuing of non-bailable warrant against the applicants. In the circumstances of the case issue of summon was the proper remedy rather than non-bailable warrant and upto this extent impugned order deserves to be modified.

11. Revision is **dismissed** with the modification that orders passed for issuing of non-bailable warrant against applicants Umesh Verma, Smt. Laxmi Verma, Smt. Mohini Verma, Rishi Verma and Chanchal Verma is **set aside**. They are directed to appear in court of Addl.Sessions Judge, Fast Track Court no.3, Agra within a month and in case they appear they will be given opportunity to file bail bonds to the satisfaction of the trial court to proceed with the case. In case they do not appear only thereafter coercive process may be issued against them. If the court of Addl. Sessions Judge, Fast Track Court No. 3, Agra is not in existence the applicants have to appear in court where the Sessions Trial No. 455 of 2004 State v. Shayam Verma as mentioned above is transferred by learned Sessions Judge, Agra.

Revision dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2004

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Second Appeal No. 5 of 2004

Ram Das Gupta ...Appellant
Versus
Bhajan Prakash Girhotra and others ...Respondent

Counsel for the Appellants:
Sri R.P. Tewari

Counsel for the Respondents:
Sri G.N. Verma
Sri B.N. Agarwal
Sri Sanjay Agarwal
Sri A.N. Verma
Sri S.C. Srivastava

Transfer of Property Act-Section-60-words Phrases-'Once Mortgage always mortgage'-the condition specifying period-failing to which the mortgage shall be deemed as sale-held-illegal-statutory rights provided to the mortgagor to redeem the property-can not be denid-principle behind the doctrine elog on redemption-explained.

Held: Para 4

If a transaction is not a sale in its origin but is a mortgage in origin a condition which provides that on the default of the mortgagor to redeem the mortgage within a stipulated time, the transaction would become a sale, would be void for once a mortgage always a mortgage.Section 60 of the Transfer of Property Act gives

statutory right to the mortgagor to redeem the mortgage.

The principle behind the doctrine has been stated to be that a person in need of money is not a free person and he will readily accept whatever condition is imposed upon him.

Case law discussed:

AIR 1965 SC-225
AIR 2000 Sc –1935
AIR 2000 SC-1085
1999 (1) ARC-632
AIR 1977 SC-242
1989 (1) ARC-41

(Delivered by Hon'ble Janardan Sahai, J)

1. A suit for redemption of mortgage of 2 shops filed by the plaintiff-respondent has been decreed by both the courts below. The plaintiff's case was that Ashok Kumar Sharma the original owner of the two shops in dispute had executed a deed of mortgage dated 13.1.1969 in favour of the appellant Ram Das Gupta. Ashok Kumar Sharma subsequently executed a sale deed dated 15.9.1975 of the disputed shops in favour of the plaintiff respondent who brought the suit for redemption. The defence was that the deed in question though described as mortgage was a sale as it bears a condition that if the mortgage money was not paid within a period of four years the transaction will be treated as a sale. Both the courts below have found that this condition in the deed was a clog on the equity of redemption and therefore void.

2. Heard Shri R.P. Tewari learned counsel for the appellant and Shri G.N. Verma, learned senior counsel for the respondent.

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

(1) Whether the courts below were right in holding that the condition in the mortgage deed dated 13.1.1969 that if the mortgage is not redeemed within four years, it will be treated as sale is a clog on the equity of redemption?

3. Before dealing with the contention of the learned counsel for the parties, it is necessary to state the material terms of the deed. The deed recites that Ashok Kumar Sharma is the owner of the two shops in dispute; that he has taken a loan of Rs.8,000/- from the appellant on the assurance that the money will be paid back; that the mortgagee was being put into possession of the two shops; that no interest would be payable by the mortgagor on the loan taken by him nor any rent would be paid by the mortgagee; that if the payment is made within a period of four years the possession of the property would be handed over to the mortgagor but if the payment is not made within the stipulated time the mortgage deed would be treated as a sale deed.

4. Counsel for the appellant submitted that it is clear from the terms of the deed that it was the intention of the parties to make a sale of the property and therefore the condition referred to does not amount to a clog on the equity of redemption. In support of this submission he laid emphasis upon the fact that the mortgagee has been given a right to remain in occupation himself or to let out the property to any person and that no interest was to be paid to the mortgagor nor any rent was payable by the mortgagee and that if the mortgage is not redeemed within 4 years the transaction will be treated as sale. I am not inclined to accept the submission made by the learned counsel. It is well settled that the

intention of the parties is to be gauged from the recitals in the deed itself. It is stated in the deed that Ashok Kumar was in need of money that advance of Rs.8,000/- was paid to him and that the deed was being executed as an assurance (security) for the loan. The transaction was described as a 'mortgage'. From the terms it is clear that a usufructuary mortgage was created. The intention of the parties was to secure the money paid to Ashok Kumar by the deed and interest was not payable by the mortgagor nor rent was payable by the mortgagee. A mortgage by conditional sale and usufructuary mortgage are both mortgages. Where the intention of the parties is to secure a debt, it is a mortgage. If therefore there is a subsisting relationship of debtor and creditor between the parties created by the deed it will be a mortgage deed but if the ownership is transferred outright it would be a sale. If a transaction is not a sale in its origin but is a mortgage in origin a condition which provides that on the default of the mortgagor to redeem the mortgage within a stipulated time, the transaction would become a sale, would be void for once a mortgage always a mortgage. Section 60 of the Transfer of Property Act gives statutory right to the mortgagor to redeem the mortgage. Any condition, which puts a clog on the equity of redemption, is void. From the terms in which the deed is couched it appears that the transaction was not a sale in its origin but was a mortgage. The condition in the deed that if the money is not paid within four years by the mortgagor the transaction would be treated as sale, is a clog on the equity of redemption. Any obstruction in the way of the mortgagor for the redemption of the mortgaged property is a clog. The principle behind the doctrine has been stated to be that a person in need of money is not a free person and he will readily accept whatever condition is imposed upon him.

5. Learned counsel for the appellant relied upon the provisions of Section 58 (c) of the Transfer of Property Act and submitted that it relates to an ostensible sale. Reliance has been placed upon the proviso to the Section which stipulates that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale. This provision does not support the case of the appellant. In this case the condition that after a period of 4 years the deed would be treated as a sale deed is incorporated in the mortgage deed itself.

6. In **Murari Lal Vs. Devakaran** [AIR 1965 SC 225] the stipulated period for the redemption was 15 years. It was agreed that if the redemption was not made within this time the transaction would be treated as 'Mala Kalam' which was interpreted literally to mean 'where there is no scope for any say' and in effect to mean a sale. In para 5 of the judgment the apex court observed that it was undisputable that a stipulation of this kind amounts to a clog on the equity of redemption. In **Shivdev Singh and another Vs. Sucha Singh and another** [AIR 2000 SC 1935] it was held in para 10 that the court will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage and the term in the mortgage deed that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgage property and the mortgage deed

would be deemed to be a deed of sale in favour the mortgagee was unsustainable. In **Mushir Mohammed Khan Vs. Smt. Sajeda Bano and others** [AIR 2000 SC 1085] the distinction between a mortgage by conditional sale and a sale with the condition of repurchase has been explained – the distinction being that in a mortgage by conditional sale there is a relationship of debtor and creditor and the money sought to be secured is a charge upon the property whereas in a sale with a condition for repurchase there is no relationship of debtor and creditor nor is the price a charge upon the property sold. The right to repurchase is a personal right of the seller like a right of pre-emption.

7. Learned counsel for the appellant submitted that the decisions cited by the counsel for respondent are not applicable to the facts of the present case. The decision of the Apex Court in Murari Lal Vs. Devakaran (Supra) has been sought to be distinguished on the ground that it was based on the principles of equity and good conscience and not upon the provisions of Section 58 of the Transfer of Property Act. The decision of the Apex Court in Mushir Mohammed Khan Vs. Smt. Sajeda Bano and others (Supra) is also sought to be distinguished on the ground that the Supreme Court did not interpret the effect of Section 58 (c) of the Transfer of Property Act. The distinction is of no consequence. The application of the equitable doctrine of clog on the equity of redemption applied in Murrari Lal's case is not affected by Section 58 (c) of the Transfer of Property Act. Section 60 of the Transfer of Property Act gives statutory sanction to the mortgagor to redeem the mortgaged property.

8. Learned counsel for the appellant relied upon **Vidyadhar Vs. Manikrao and another** [1999 (1) ARC 632]; **Gulab Chand Sharma Vs. Saraswati Devi and another** [AIR 1977 SC 242] **Pomal Kanji Govindji and others Vs. F Vrajilal Karsandas Purohit and others** [1989 (1) ARC 41]. The decisions cited by the counsel for the appellant do not advance the case of the appellant. In Vidyadhar's case the transaction in question was held to be a mortgage by conditional sale. Section 60 of the Transfer of Property Act which gives the mortgagor a right to redeem the mortgaged property is applicable to all mortgages. In Gulab Chand Sharma (Supra) it was held that the condition in the mortgage deed, which seeks to take away the right of redemption even before the period within which the mortgagor was entitled to pay off the mortgage debt had run out is a clog on the right of redemption. This case is distinguishable on facts and does not help the appellant. In Pomal Kanji Govindji (Supra) it was held that if the mortgagor is prevented from redeeming the mortgage the prevention is bad in law. Whether or not in a particular transaction there is a clog on the equity of redemption, said the Supreme Court, depends upon the period of redemption, the circumstances in which the mortgage was created, the economic and financial position of the mortgagor the economic and social conditions of the country and the totality of circumstances in which the mortgage is created. In that case there was a long period of redemption. On facts it was held that there was a clog on the equity of redemption. The condition in the impugned deed that if the mortgage is not redeemed within 4 years it shall be treated as sale obstructs the right of the mortgagor to redeem the

property after four years and is therefore a clog on the equity of redemption.

9. In view of the above discussion, the question is answered in favour of the plaintiff-respondent and it is found that the condition in the mortgage deed that if the security money is not paid within 4 years the document would be treated as sale is void. The appeal therefore lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2004

BEFORE
THE HON'BLE R.P. MISRA, J.
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No. 51175 of 2004

Shivalik Sahkari Avas Samiti
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Rakesh Pandey

Counsel for the Respondents:
Sri Anurag Khanna
S.C.

Land Acquisition Act S.-48- read with U.P. Industrial Area Development Act 1976 read with U.P. Urban Planning Development Act 1973-Exclusion from acquisition-can be made only when the Possession not taken -instructions issued in the shape of G.O. or execution instruction-without taking recourse of section 48-can not sustained.

Held: Para 12 & 13

Further the impugned order in the present case has also not taken into account as to whether the government order dated 22.10.2002 is a direction issued by the State Government as contemplated under section 12 of the 1976 Act read with section 41 of the U.P. Urban Planning and Development Act or not.

The provisions under which, exemption of a land acquired under the Land Acquisition Act can be granted, is section 48 of the Land Acquisition Act. The land can be excluded from acquisition proceeding by taking resort to the notification in the official Gazette under section 48 which provides that such an exemption can be made where the possession of the land has not been taken over. In view of the aforesaid position, no instructions issued by the State Government either in the shape of a government order or any other executive instructions can be pressed into service for exempting the land without taking recourse to section 48.

Case law discussed:
(1988) 1 SCC-63

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

1. The present writ petition has been filed questioning the legality of the order dated 11.10.2004. Annexure-11 to the writ petition, on the ground that the reasons given for rejecting the representation suffer from manifest error of law inasmuch as the respondent-State Government has failed to take into consideration the provisions of Sections 6 and 12 of the U.P. Industrial Area Development Act, 1976 and Section 41 of the U.P. Urban Planning and Development Act, 1973.

2. We have heard Sri Rakesh Pandey, learned counsel for the petitioner, learned Standing Counsel for respondent nos. 1,2 and 3 and Sri Anurag Khanna, learned counsel for respondent no 4.

3. The matter was taken up by us on 2.12.2004 on which date a request was made by the learned Standing Counsel for receiving instructions and then the matter was taken up on 8.12.2004, 10.12.2004 and finally heard on 13.12.2004 with the consent of the learned counsel for the parties.

4. Having heard the learned counsel for the parties, we are of the opinion that the present matter can be disposed of on a very short question as to whether non consideration of the relevant provisions as referred to herein above vitiate the order or not.

5. Learned counsel for the petitioner has urged that the representation of the petitioner was to be considered in the light of the judgment of this Court dated 23.4.2004 and that the petitioner was entitled to get the land and constructions exempted to the extend as indicated in the government order dated 22.10.2002 and the decisions rendered by the Apex Court in this regard.

6. In reply to the submissions of the learned counsel for the petitioner, Sri Anurag Khanna, learned counsel for the respondent has urged that the impugned order clearly records that the petitioner is not entitled to any such benefit inasmuch as the benefit is not available to the petitioner in view of Khodaiji Committee report as the petitioner's society was constituted in the year 1982. Learned counsel for the respondent has further urged that the State Government has, while disposing of the representation, taken a decision to the effect that the government order dated 22.10.2002 is not applicable inasmuch as the said government order applies only with regard to the development authority constituted under the U.P. Urban Planning Development Act, 1973 and not to the Industrial Development Authority under the 1976 Act. He, therefore, submits that no ground for interference is made out with the impugned order. Sri Khanna has placed reliance on the decision of the Apex Court rendered in Kendriya Karamchari Sahkari Grih Nirman Samiti Ltd. and another Vs. New Okhla Industrial Development Authority and others reported in (1988) 1 SCC. 63 with particular reference to paragraph 12 of the said decision.

7. Upon having examined the rival contentions, we find it necessary to quote sections 6 and 12 of the U.P. Industrial Area Development Act 1976 herein under:-

"6.**Functions of the Authority**-

(1) The object of the Authority shall bed to secure the planned development of the industrial development areas.

(2) Without prejudice to the generality of the objects of the Authority, the Authority shall perform the following functions-

(a) to acquire land in the industrial development area, by agreement or through proceedings under the Land Acquisition Act, 1894 for the purpose of this Act;
(b) to prepare a plan for the development of the industrial development area;
(c) to demarcate and develop sites for industrial, commercial and residential purposes according to the plan;
(d) to provide infra-structure for industrial, commercial and residential purposes;
(e) to provide amenities;

(f) to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes;
(g) to regulate the erection of buildings and setting up of industries; and
(h) to lay down the purpose for which a particular site or plot of land shall be used, namely for industrial or commercial or residential purpose or any other specified purpose in such area.

"**12. Applications of certain provisions of President's Act XI of 1973**- The provisions of Chapter VII and sections 30, 32,40,41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 53 and 58 of the Uttar Pradesh Urban Planning and Development Act, 1973, as re-enacted and modified by the Uttar Pradesh President's Act (Re-enactment with Modifications) Act, 1974, shall mutatis mutandis apply to the Authority with adaptation that-

(a) any reference to the aforesaid Act shall be deemed to be a reference to this Act;
(b) Any reference to the Authority constituted under the aforesaid Act shall be deemed to be a reference to the Authority constituted under this Act; and
(c) any reference to the Vice-Chairman of the Authority shall be deemed to be a reference to the Chief Executive Officer of the Authority."

8. A perusal of Section 6(2) (c) and (d) would indicate that the industrial area constituted under 1976 Act has the authority to secure the planned development of an area for " industrial, commercial and Residential" purpose. A perusal of Section 12 indicates the application of Section 41 of the U.P. Urban Planning and Development Act, 1973 which is quoted herein below: -

"**41. Control by State Government-**

(1) The [Authority, the Chairman or the Vice-Chairman] shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of this Act.

(2) If in, or in connection with, the exercise of its powers and discharge of its function by the [Authority, the Chairman or the Vice-Chairman] under this Act any dispute arises between the [Authority, the Chairman or the Vice-Chairman] and the State Government the decision of the State Government on such dispute shall be final.

(3) The State Government may, at any time, either in its own motion or on application made to it in this behalf, call for the records of any case disposed of or order passed by the [Authority, or the Chairman] for the purpose of satisfying itself as to the legality or property of any order passed or direction issued and may pass such order or issue such direction in relation thereto as it may think fit.

Provided that the State Government shall not pass an order prejudicial to any person without affording such person a reasonable opportunity of being heard.

[(4) Every order of the State Government made in exercise of the powers conferred by this Act shall be final and shall not be called in question in any court.]"

9. A perusal of the aforesaid sections and a conjoint reading thereof clearly indicates that the State Government has power to control such authorities and has also power to issue directions.

The question, therefore, is as to whether the government order dated 22.10.2002 is applicable to the respondent no. 4- authority or not in the light of the aforesaid provisions.

10. A perusal of the impugned order indicates that the State Government while passing the impugned order has not at all considered the impact of the applicability of the aforesaid sections. The State Government has simply recorded its conclusion that the government order is not at all applicable without referring to the aforesaid provisions In view of the aforesaid situation the impugned order is vitiated and, therefore, the matter deserves to be remitted back to the State Government for consideration of the matter afresh in the light of the observations made herein.

11. The contention of the learned counsel for the respondent, on the basis of paragraph 12 of the decision in Kendriya Karamachari Sahkari case (supra), cannot be accepted, inasmuch as in the instant case the government order is not qualified by the words " as far as may be " as compared to the government order which was in question in the aforesaid case before the Apex Court. Thus, there is a clear distinction between the government order which was being considered by the Apex Court in Kendriya Karamachari Sahkari case (supra) and the present government order. Hence the aforesaid argument of the learned counsel for the respondent cannot be accepted. It was on account of the specific use of the words " as far as may be " that the Apex Court took a view that the directions contained in the government order in question therein were not mandatory.

12. Further the impugned order in the present case has also not taken into account as to whether the government order dated 22.10.2002 is a direction issued by the State Government as contemplated under section 12 of the 1976 Act read with section 41 of the U.P. Urban Planning and Development Act or not.

13. There is yet another aspect which has also to be taken into consideration by the State Government while taking a decision. The provisions under which, exemption of a land acquired under the Land Acquisition Act can be granted, is section 48 of the Land Acquisition Act. The land can be excluded from acquisition proceeding by taking resort to the notification in the official Gazette under section 48 which provides that such an exemption can be made where the possession of the land has not been taken over. In view of the aforesaid position, no instructions issued by the State Government either in the shape of a government order or any other executive instructions can be pressed into service for exempting the land without taking recourse to section 48. Further once a sanctioned plan for planned development has been finalized the same amounts to enforcement of statutory provisions and which cannot be deviated or modified with the aid of executive instructions. The aforesaid proposition needs to be examined by the State Government while deciding such an issue.

14. A perusal of the facts and circumstances of the case as well as the law applicable in the matter, it is clearly evident that the impugned order does not take into consideration the factors

enumerated herein above and in the absence of any such consideration and recording of reasons accordingly, the impugned order cannot be sustained and is liable to be set aside.

15. Accordingly, we quash the order dated 11.10.2004 with a direction to the respondent no. 1 to reconsider the matter again in the light of the observations made herein above and also taking into account all such relevant matters pertaining to the applicability of the government order dated 22.10.2002 in the case of the petitioner.

16. The writ petition is, accordingly allowed. The impugned order dated 11.10.2004 is quashed with a direction to the respondent no. 1 to consider the matter afresh in the light of the observations made herein above and in accordance with law within a period of three months from the date of presentation of a certified copy of the order before him.

Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2005

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 9626 of 2001

State of U.P. ...Petitioner
Versus
The Presiding Officer, Labour Court (II), U.P., Meerut and another ...Respondents

Counsel for the Petitioner:
S.C.

Counsel for the Respondents:
Sri Y.K. Sinha

S.C.

U.P. Industrial Dispute Act 1947-Section 6-A-readwith U.P. Industrial Dispute Rules 1957-Rule-16-Setting a side-exparte award-passed on 1.10.97-Published 1.6.98- became inforceable on 1.7.98-No application filed either before the Labour Court or before the Civil court prior 1.7.9-held-Labour Court became functus office.

Held: Para 7

In the instant case admittedly the order to proceed ex-parte was passed on 1.10.1997 and the award was published on 1.6.1998. According to Section 6-A of the Industrial Disputes Act it became enforceable on 1.7.1998. Admittedly also the application to recall the ex-parte order was not filed and has neither been challenged before the Labour Court nor in the writ petition before this Court. The application for restoration has therefore been filed after about three months from the date of enforcement of the award. The Labour Court became functus officio on 1.7.1998; hence the application for recall of the order filed on 26.9.1998 was not applicable.

Case law discussed:
1983 UPLBEC-56 (FB)
1984 (48) FLR 606

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

1. Heard counsel for the petitioner and Sri Y.K.Sinha for the contesting respondent.

2. This writ petition has been filed by the State of U.P. challenging the validity and correctness of the impugned ex-parte award dated 13.11.1997 as well as of the impugned order dated 5.8.2000 passed by the Labour Court dismissing the application moved by the petitioner for recall of the aforesaid ex-parte award which was published on 1.6.1998 and

became enforceable under Section 6-A of the Industrial Disputes Act after 30 days of the expiry of the publication, i.e., w.e.f. 1.7.1998. The petitioner filed an application on 26.9.1998 for setting aside the impugned ex-parte award, but the same was rejected by respondent no. 1.

3. This Court after discussing the case laws on the question of limitation for recall of the order of award to proceed ex-parte under Section 16 (2) of the Industrial Disputes Act as well as the provisions of the Limitation Act held as under: -

"Limitation Act, 1963 provides for limitation for suits and applications. Section 29(2) of the Limitation Act, 1963 provides as under:-

"29(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law."

4. Under entry 123 limitation for moving application for ex-parte decree is 30 days but in view of Section 29(1) the limitation of 30 days. It will have to be read as 10 days in cases governed by U.P. Industrial Disputes Act, which is a special Act. The provisions of Limitation Act have not been excluded by the U.P. Industrial Disputes Act. Hence Sections 4 to 24 of Limitation Act including Section 5 thereof applies to proceedings under U.P. Industrial Disputes Act also and a party can file application under Rule 16(2) of U.P. Industrial Disputes Rules with application under Section 5 of the Limitation Act explaining the delay in not filing application within 10 days and the Labour Court has full power to decide it providing of course the application is moved within 30 days of the publication of the ex-parte order or award. If application is filed after said 30 days the Labour Court cannot entertain it as it becomes functus officio on expiry of 30 days.

5. A Full Bench of this Court in case of **Badri Prasad Haridas, 1983 U.P. Local Bodies and Education Cases page 56= 1984(48) FLR- 315** relying on the case of **Grindlays Bank Case 1981 SC-606** held that Labour Court/Industrial Tribunal retains power to set aside ex-parte proceedings till award is enforced after 30 days of the publication.

6. Admittedly, the notice was served on the manager of the Cinema Hall of the petitioner, hence it cannot be said that the summons had not been served on the employer. The application for setting aside the ex-parte award had been filed after about 7 months from the date of the publication of the award and the employer was negligent not even to attend the court without sufficient cause. Under Rule 16 of the U.P. Industrial Disputes Rules, 1957 framed under the U.P. Industrial Disputes Act, 1947 the application for setting aside the ex-parte award should have been moved within 10 days from the date of the passing of the ex-parte award. Any application filed beyond the aforesaid time prescribed would be beyond the limitation for which sufficient

cause has to be shown. This is because the rule provides 10 grace days for moving the application for setting aside the ex-parte award."

7. In the instant case admittedly the order to proceed ex-parte was passed on 1.10.1997 and the award was published on 1.6.1998. According to Section 6-A of the Industrial Disputes Act it became enforceable on 1.7.1998. Admittedly also the application to recall the ex-parte order was not filed and has neither been challenged before the Labour Court nor in the writ petition before this Court. The application for restoration has therefore been filed after about three months from the date of enforcement of the award. The Labour Court became functus officio on 1.7.1998; hence the application for recall of the order filed on 26.9.1998 was not applicable.

8. For the reasons stated above, no interference with the impugned order, which has attained finality, is called for. The writ petition is accordingly dismissed. The interim order granted by this Court is vacated.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2005

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No.25118 of 1996

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

Counsel for the Petitioner:
Sri B.K. Chaturvedi

Counsel for the Respondents:
Sri U.N. Sharma
Sri S.K. Rai
S.C.

Army Rules-Rule 15 (2)(g)II-discharge from service-Petitioner being habitual offender- being absent-four times without leave-4 times award red ink entry-full opportunity given for defence-discharge from service held-proper.

Held: Para 7 & 9

From the perusal of the aforesaid rule, it is clear that the power has been conferred to the Army authorities to take an administrative action against a person, who is serving in the army, as the petitioner was a habitual offender and he was warned and he was punished four times and found absent without leave as provided U/s 39 of the Army Act.

It has also been held that the person concerned was given adequate opportunity of placing his defence in accordance with rules and procedure provided, therefore, it cannot be held that the punishment which has been awarded is not correct.

Case law discussed:
AIR 1994 SC 215
AIR 1988-SC 705
AIR 1996-SC 1368
2002 ESC- ?

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

1. By means of the present writ petition, the petitioner has approached this Court for issuing a writ of certiorari quashing the order of discharge dated 16.9.1995 under Rule 13 (3)(v) of the Army Rules.

2. The fact arising out of the present writ petition is that the petitioner joined

the Indian Army as Sipahi on 22.6.1984 and after completion of 11 years, two months and two days, has been discharged from service on 16.9.1995. The petitioner's case is that petitioner has got a clean service record and has participated in the operation of Sri Lanka and he is a disciplined soldier and, therefore, the order of discharge under the aforesaid Rule is illegal and is liable to be set aside. The case of the petitioner is that the petitioner was given only five days leave to attend his seriously illness wife from Pathankot to Fatehpur which was insufficient and a telegram was sent by the petitioner for its extension and no reply was given by the authorities and as such the respondents have taken the aforesaid days as absent without leave and for the aforesaid act, the petitioner was given a punishment of 42 days RI in the military guard room from where he was released. While the petitioner was inside the detention cell, he was asked whether he wished to continue on service or not and on his affirmation, an application was taken from the petitioner inside the cell for continuing in service on 8.8.1995 in Pathankot and suddenly, the petitioner was discharged from service. The punishment awarded to the petitioner who has rendered such a long service for more than 11 years, is having the responsibility of the family and is entitled to complete 15 years of service for the purposes of pension. It has also been stated that as required under the Army Rule 13 (iii)(iv), as the requirement of the aforesaid rule has not been completed which is mandatory in nature as no show cause notice was given to the petitioner before passing the order of discharge, therefore, the order of discharge against the petitioner is unjust, unreasonable and against the mandatory provision of law. The further case of the petitioner is that if there was something against the petitioner, the petitioner could have been trial by the Court Martial without observing the said procedure, no order of discharge can be passed.

3. The notices were issued to the respondents and a counter affidavit has been filed. The allegation made in the writ petition and the argument raised on behalf of the petitioner has been denied by the respondents alleging that a show cause notice was given to the petitioner on 12th August, 1995 as the petitioner was habitual offender and was unlikely to become a good soldier and the petitioner has been awarded four red ink entries, hence the further retention of the petitioner in service is not considered desirable. It has also been submitted on behalf of the respondents that the petitioner has also submitted a reply to the show cause notice. The said reply of the cause notice has been annexed by the respondents in the supplementary counter affidavit as Annexure-2. The respondents have clearly stated in paragraph 5 of the supplementary counter affidavit that the petitioner was awarded punishment U/s 80 of the Army Act four times. The punishment, which was awarded to the petitioner is being reproduced below-

Date of award	**Under Section**	**Punishment awarded**
09.07.1986	Section 39 (b) of the Army Act	28 days RI and 14 days detention in military custody.
28.1.1992	Section 39(b) of the Army Act	07 days RI

22.6.1992	Section 29(b) of the Army Act	28 days RI
1.8.1995	Under Section 39(b) of the Army Act	28 days RI and 14 days detention in military custody

4. It has also been stated that the petitioner was provided opportunities by the unit concerned to improve himself but the petitioner had shown utter disregard to the military discipline and failed to improve himself and, as such, the petitioner was discharged finally from the term service on 17th September, 1995 under Rule 13(iii)(v) of the Army Rules before completion of his terms of engagements being undesirable in accordance with the Army Head Quarters letter No.A/13210/159/RG-PS2(C) dated 28.12.1988. Since the discharge of the petitioner was duly sanctioned under the provision of the Army Rules, being an unreasonable soldier, he is not eligible for reinstatement into Army service. It has also been specifically denied by the respondents that no representation or application was received from the petitioner as submitted by the petitioner.

5. I have heard learned counsel for the petitioner and Sri S.K.Rai as counsel for the respondents and have perused the records.

6. The argument raised on behalf of the petitioner regarding that if some punishment is awarded to the petitioner, there was no occasion to initiate an administrative action against the petitioner under Rule 13(iii)(v) of the Army Rules. It was incumbent on the part of the respondents to make an enquiry and to hold a trial for the purposes of initiation of action against the petitioner as no opportunity to the petitioner was given, therefore, the order is bad. Rule 13(III)(v) is being quoted below-

Grounds of discharge	**Competent authority to authorize discharge**	**Manner of discharge**
(v) All other classes of discharge.	Brigade/Sub-area Commander	The Brigade or Sub-area Commander before ordering the discharge shall, if the circumstances of the case permit give to the person whose discharge is contemplated, an opportunity to show cause against the contemplated discharge.

7. From the perusal of the aforesaid rule, it is clear that the power has been conferred to the Army authorities to take an administrative action against a person, who is serving in the army, as the petitioner was a habitual offender and he was warned and he was punished four times and found absent without leave as provided U/s 39 of the Army Act. The contention of the petitioner to this effect that no administrative action should have been taken against the petitioner as no

Court martial was held, therefore, the punishment is bad and cannot be accepted as in view of the provisions of Section 125 of the Army Act, it is the army authorities to choose the forum. In the Army Act, there are two mode of punishment, which is to be awarded to the army personnel, one by a court martial as provided under the act, and other is administrative action provided under the Army Act and the procedure has been given under Rule 13(iii)(v) of the Rules. The petitioner has placed reliance upon a judgment of the Supreme Court reported in ***A.I.R.1994, Supreme Court, 215, Union of India and others Vs. Giriraj Sharma*** and has submitted that in view of the aforesaid judgment the punishment of dismissal merely on the ground of over-staying leave period is harsh and disappropriate. The Court has perused the said judgment and the fact of this case and the case in hand is clearly distinguishable as the case before the Hon'ble Supreme Court, mentioned above was regarding a civilian employee, who was an electrician, sought leave for 10 days on 10th December, 1982. The leave was granted while he was on leave. He sent a telegram for extension of leave by 12 days. The said request was rejected. However, the respondents joined duty on 22nd December, 1982 thereby over-staying the period of leave by 12 days; for this act the services were terminated. In that case, the Supreme Court has said that the order of High Court quashing the order of dismissal from service cannot be interfered because the Apex Court has taken into consideration that the application was received but the same was rejected.

8. There is no dispute to this fact that the case in hand is a case of military personnel and the discipline in the military service has to be maintained for the purposes of security of the country. In the case reported in ***A.I.R. 1988, Supreme Court, 705, Vidya Prakash Vs. Union of India and others.*** The question raised before the Apex Court was in order to awarding four red ink entries and if a person is absent without leave, whether the punishment of dismissal is disproportionate or not. In the aforesaid case the Supreme Court has held that if a persons is punished for an offence of absence from duty on four occasions and there was red ink entry, then the punishment awarded by the Court-martial for dismissal of service cannot be said to disproportionate to the charge leveled against the person concerned. In the case reported ***in A.I.R. 1996, Suspreme Court, page-1368, Union of India and others Vs. Corporal A.K.Bakshi and another*** the Hon'ble Apex Court, while considering the similar provisions of Air force, which is, similar to Air Force Rule 15(2)(g)(ii) and 18 was under consideration. The similar provision is in the Army Act and Rules. It has been held by the Apex Court that policy of discharge of habitual offender as prescribed in the policy directive dated 14.3.1988 discharging a person in accordance with procedure laid down does not amount to removal by way of punishment. It is a discharge under Rule 15(2)(g)(ii). It is important to mention here that similar policy for removal for undesirable and inefficient soldiers has been framed by the Army authorities dated 28th December, 1988. The relevant part is being quoted below.

*"**JCOs, Wos and OR who have Preved Inefficient***

3. (a) *before recommending or sanctioning discharge, the following points must be considered* :-

(i) If lack of training is the cause of his inefficiency, arrangements will be made for his further training.
(ii) If an individual has become unsuitable in his arm/service through no fault of his own, he will be recommended for suitable extra-regimental employment.

(b) Should it be decided to transfer a JCO, he may be transferred in his acting/substantive rank according to the merits of the case and will not be recommended for further promotion and / or increment of pay until he proves his fitness for promotion and / or increment of pay in his new unit.
(c) prior to transfer, if such a course is warranted on the merits of the case, a WO or an NCO may be reduced to one rank lower than his substantive rank under Army Act Section 20(4).

Procedure for Dismissal/Discharge of undersirable JCOs/Wos/OR

4. AR 13 and 17 provide that a JCC/WO/OR whose dismissal or discharge is contemplated will be given a show cause notice. As an exception to this, services of such a persons may be terminated without giving him a show cause notice provided the competent authority is satisfied that it is not expedient or reasonable practicable to serve such a notice. Such cases should be rate, eg, where the interests of the security of the State so require, Where the serving of a show cause notice is dispensed with, the reason for doing so are required to be recorded. See provision to AR 17.

5. Subject to the foregoing, the procedure to be followed for dismissal or discharge of a person under AR 13 or AR 17, as the case may be, is set out below :-

(a) Preliminary Enquiry. Before recommending discharge or dismissal of an individual the authority concerned will ensure: -

(i) that an impartial enquiry (not necessarily a Court of Inquiry) has been made into the allegations against him and that he has had adequate opportunity of putting up his defence or explanation and of adducing evidence in his defence.
(ii) that the allegations have been substantiated and that the extreme step of termination of the individual's service is warranted on the merits of the case.

(b) Forwarding of Recommendations. The recommendation for dismissal or discharge will be forwarded, through normal channels, to the authority competent to authorize the dismissal or discharge, as the case may be, along with a copy of the proceedings of the enquiry referred to in (a) above.

(c) Action by Intermediate Authorities. Intermediate authorities through who the recommendations pass will consider the case in the light of what is stated in (a) above and make their own recommendations as to the disposal of the case.

(d) Action by Competent Authority. The authority competent to authorize the dismissal or discharge of the individual will consider the case in the light of what is stated in (a) above. If he is satisfied that the termination of the individual's service is watt ranted he should direct

that show cause notice be issued to the individual in accordance with AR 13 or AR 17 as the case may be. No lower authority will direct the issue of a show cause notice. The show cause notice should cover the full particulars of the cause of action against the individual. The allegations must be specific and supported by sufficient details to enable the individual to clearly understand and reply to them. A copy of the proceedings or the enquiry held in the case will also be supplied to th3e individual and he will be afforded reasonable time to state in writing any reasons he may have to urge against the proposed dismissal or discharge.

(e) Action on Receipt of the Reply to the Show Cause Notice. The individual's reply to the show cause notice will be forwarded through normal channels to the authority competent to authorize his dismissal/discharge together with a copy of each of the show cause notice and the proceedings of the enquiry held in the case and recommendations of each forwarding authority as to the disposal of the case.

(f) Final Orders by the Competent Authority. The authority competent to sanction the dismissal/discharge of the individual will before passing orders reconsider the case in the light of the individual's reply to the show cause notice. A person who has been served with a show cause notice for proposed dismissal may be ordered to be discharged if it is considered that discharge would meet the requirements of the case. if the competent authority considers that termination of the individuals servic3e is not warranted but any of the actions referred to in (b) to (j) of Para 2 above would meet the requirements of the case, he may pass orders accordingly. On the other hand, if the competent authority accepts the reply of the individual to the show cause notices entirely satisfactory, he will pass orders accordingly.

9. The Apex Court has further held that in the said circumstances, discharge from service cannot be said to be by way of punishment. The Division bench of this Court in the case reported in ***2002, ESC (Allahabad), Sugriv Singh Desuriya Vs. Central Government*** has also taken the same view and has held that policy of discharging of habitual offender cannot be said to be ultra vires and if a person has been awarded four red ink entries punishment cannot be said to be illegal. It has also been held that the person concerned was given adequate opportunity of placing his defence in accordance with rules and procedure provided, therefore, it cannot be held that the punishment which has been awarded is not correct.

10. After considering all the facts and the decisions, I am of the view that the order of discharge cannot be said to be illegal and the petition is having no merit and is hereby dismissed.

No order as to costs.

Petition dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.10.2004

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Misc. Application No. 1962 of 2002

Shri Baij Nath and another
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri L.P. Naithani
Sri A.N. Singh
Sri Piyush Shukla

Counsel for the Respondent:
Sri Nikhil Kumar
Sri R.K. Saini
A.G.A.

Code of Criminal Procedure-S. 482-Summoning Order-passed by the Magistrate on the basis of statement made by the complainant under section 200 Cr.P.C. without examining the witnesses-complainant a retired Executive Engineer filed complaint for pressurising the Chief Managing Director O.N.G.C.-Complaint for creating pressure to pass inadmissible Bills-held-grossest abused of the process of court-liable to quashed.

Held: Para 4 & 5

It is interesting to note that the summoning order was passed by the learned Judicial Magistrate even without requiring the complainant to examine any witness under Section 202 Cr.P.C. This does suggest an over-anxiety on part of the Magistrate to summon the applicants at any cost for unexplained reasons.

On a bare perusal of the complaint and the surrounding circumstances, it is apparent that this complaint has been filed in a completely mala fide manner and allowing this criminal proceedings against the applicants to continue would amount to the grossest abuse of the process of the court.

Case law discussed:
J.T. 2000(1) SC-360
AIR 1982 SC-1238

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

1. Heard Shri L.P. Nathani, learned Senior Advocate on behalf of the applicants, Shri Nikhil Kumar, learned counsel for the opposite party No. 3 and learned Additional Government Advocate representing the State.

2. This application has been filed under Section 482 Cr.P.C. by Shri Baij Nath, Chief Manager (Personnel and Administration) Oil and Natural Gas Corporation Limited (hereinafter referred to as ONGC) and the ONGC, Dehradun for quashing a criminal complaint filed by opposite party No. 3, who has retired as Assistant Executive Engineer from the ONGC and who has settled in Saharanpur.

3. The allegations in the complaint were that on different dates the complainant had submitted medical bills totaling Rs. 56,403/- for reimbursement after his retirement, but the applicants unlawfully and in pursuance of a conspiracy for drawing undue advantage, held the payments on the medical bills to be inadmissible. The complainant examined himself under Section 200 Cr.P.C. and filed certain documents. Thereafter the impugned order summoning the applicant under section 406 IPC was passed by the Judicial Magistrate-III, Saharanpur on 8.8.2000. The case was numbered as Criminal Complaint Case No. 306/2000, J.P. Sharma Vs. A.S. Soni.

4. It is interesting to note that the summoning order was passed by the learned Judicial Magistrate even without requiring the complainant to examine any witness under Section 202 Cr.P.C. This

does suggest an over-anxiety on part of the Magistrate to summon the applicants at any cost for unexplained reasons.

5. On a bare perusal of the complaint and the surrounding circumstances, it is apparent that this complaint has been filed in a completely mala fide manner and allowing this criminal proceedings against the applicants to continue would amount to the grossest abuse of the process of the court. The applicants have filed the relevant rules, which clearly show that the complainant was only eligible for reimbursement of his medical bills provided he was medically treated in the ONGC hospital or in a Government hospital after his retirement and not in a private hospital. This fact has not been denied by the complainant, whose claim is that he was not aware of these rules, which were kept away from him. In any view of the matter, there is no question of the application of Section 406 IPC on the facts of the case. If the senior authority refuses to pass ineligible medical bills, then where is the question of his having committed criminal breach of trust in respect of any money or property entrusted to him.

6. Significantly, the opposite party No. 3 has even been filing cases before the Consumer Forum for realisation of his medical bills and he has even filed a writ petition before this Court bearing No. 27660 of 2003 (J.P. Sharma Vs. Union of India and others), which has been dismissed by this Court on 10.9.2004 holding the writ petition to be not maintainable.

7. It does therefore appear that this complaint has been filed in a wholly mala fide manner only to exert illegal pressure and to black mail the applicants into passing the bills which have been submitted by the complainant. Applying pressure for vindicating ones civil claims should never be allowed to become the object of a criminal prosecution.

It may be noted that the Apex Court in the case of *G. Sagar Suri & another Vs. State of U.P and others, JT 2000(1) SC 360,* in paragraph 8 has observed:

"Jurisdiction under Section 482 of the Code has to be exercised with a great care. In exercise of its jurisdiction High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter."

8. The observations of the Supreme Court in the beginning of the decision in *Chandrapal Singh and others Vs. Maharaj Singh and another (AIR 1982 SC 1238)* are also relevant in this connection:

"A frustrated landlord after met his waterloo in the hierarchy of civil courts, has further enmeshed the tenant in a frivolous criminal prosecution which prima facie appears to be an abuse of process of law. The facts when stated are so telling that further discussion may appear to be superfluous."

9. In this view of the matter this application succeeds and is allowed. Criminal proceedings in criminal complaint case No. 306 of 2000 J.P. Sharma Vs. A.S. Soni, under section 406

IPC pending in the court of Judicial Magistrate-III, Saharanpur are quashed.

Application allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 20264 of 2004

Ram Het Tewari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh
Sri V.K. Singh

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226 readwith U.P. Regularization of Ad hoc appointments (on the post, outside the period of the Public Service Commission) Rules 1979 rule-4 Regularisation-working on officiating basis on the Post of Lekhpal w.e.f. 20.2.87-termination order dated 9.11.89 stayed-lastly by judgment dated 5.12.03. Petition disposed of with direction to consider the representation for Regularisation-other employees working on officiating basis regularized despite of Specific averments-not Responds can not take contrary stand -held-Petitioner entitled for regularization.

Held: Para 10

The learned counsel for the petitioner has invited my attention to Annexures-11 and 12 to the writ petition where, in similar situation, another employee was appointed on an officiating basis and thereafter, the respondents had regularized his services. This fact has not been controverted by the respondents. Consequently, in my view, it is not open to the respondents to take a contrary stand. A uniform policy has to be adopted and it is not open to the respondents to pick and choose at their own convenience.

Case law discussed:
1985 (2) SCC-451

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

1. Heard Sri G.K. Singh, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents.

2. The petitioner was appointed on 20.2.1987 to officiate on the post of Consolidation Lekhpal. Subsequently, the post on which the petitioner was working became substantive in nature on 19.10.1989. The services of the petitioner was dispensed by an order dated 9.11.1989. The petitioner made a representation on 11.12.1989, which was rejected and consequently, the petitioner filed Civil Misc. Writ Petition No. 288 of 1990 in which an interim order was granted permitting the petitioner to continue to function on the post of Consolidation Lekhpal. This writ petition was disposed of by judgment dated 5.12.2003 directing that the petitioner's case for regularization be considered under the relevant regularization Rules and till such time, as the petitioner's case for regularization remained pending, he was allowed to continue in service. Based on this direction given by this court, the respondents by the impugned order dated 15.5.2004 has rejected the claim of the regularization of the petitioner and consequently by the same order his services was also dispensed with.

3. Being aggrieved, the petitioner has now filed the present writ petition praying for the quashing of the order dated 15.5.2004 passed by respondent no. 3, namely, the Settlement Officer Consolidation, Mirzapur and has also prayed for a writ of mandamus commanding the respondents to consider his case for regularization on the post of Consolidation Lekhpal.

4. The sole ground for rejecting the claim of the petitioner is that the petitioner was appointed on an officiating basis and therefore, the Rules, namely The U.P. Regularisation of Ad-hoc Appointments (on Posts Outside the Purview of the Public Service Commission) Rules 1979 (hereinafter referred to as the Rules of 1979) are not applicable to a case of an officiating employee, inasmuch as, the Rules of 1979, as amended from time to time only applies to an ad-hoc appointee.

5. In order to appreciate the submissions made at the Bar, Rule 4 of the rules of 1979 is quoted hereunder:

"4. Regularisation of ad hoc appointments- (1) 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 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 appointments 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 of orders."

6. The aforesaid Rules indicate that any person who was appointed 'on an adhoc basis' on or before 30.6.1998, who possessed the requisite qualification for regular appointment and who had completed three years of continuous service, would be considered for a regular appointment in a permanent or temporary vacancy, as may be available. In the present case, there is no dispute with regard to the fact that the petitioner was working on a substantive vacancy, as is clear from the order of appointment itself. The only question, which arises for consideration is whether the petitioner being appointed on an officiating basis could be included in the definition of the word 'ad hoc'. The legal glossary defines the word 'officiating' as under-

'Acting in an official capacity, filling a position temporarily'

and the word "Ad hoc" has been defined as "made, established, acting or concerned with a particular end or purpose."

7. Therefore, an ad hoc appointment is for a particular purpose or for a limited purpose. The word 'officiating' also means to fill up a position temporarily, which means to fill a post for a limited period.

8. Normally, when a person officiates on a post, he does only for a limited period in addition to the post which he holds, that is to say, that an incumbent retains his original post and in addition to it he officiates on another post. In the present case, the petitioner has been appointed afresh for the first time on the post of Consolidation Lekhpal. The petitioner was not officiating on this post in addition to another post. Therefore, the usage of the word-'Sthanpann' should be read as if it was made for a limited period on an ad hoc basis.

9. In Arun Kumar Chatterjee v. South Eastern Railway and others (1985) 2 SCC-451, The Supreme Court explained the meaning of the word 'Officiating' as generally used in service parlance.

"According to its ordinary connotation, the word 'officiating' is generally used when a servant having held one post permanently or substantively, is appointed to a post in a higher rank, but not permanently or substantively, while still retaining his lien on his substantive post i.e. officiating in the post till his confirmation. Such officiating appointment may be made when there is a temporary vacancy in a higher post due to the death or retirement of the incumbent or otherwise. In contrast, the word 'temporary' usually denotes a person appointed in the civil service for the first time and the appointment is not permanent but temporary i.e. for the time being, with no right to the post."

10. The learned counsel for the petitioner has invited my attention to Annexures-11 and 12 to the writ petition where, in similar situation, another employee was appointed on an officiating basis and thereafter, the respondents had regularized his services. This fact has not been controverted by the respondents. Consequently, in my view, it is not open to the respondents to take a contrary stand. A uniform policy has to be adopted and it is not open to the respondents to pick and choose at their own convenience.

11. In view of the aforesaid discussions, the writ petition is allowed and impugned order dated 15.5.2004 is quashed. The petitioner is entitled to the claim of regularisation. Consequently, a mandamus is issued directing the respondent no. 3 to consider the petitioner on the post of Consolidation Lekhpal by issuing consequential orders for the regularisation of his service within six weeks from the date a certified copy of this judgment is produced before him. It is made clear that if the petitioner was not found to be working between the period 15.5.2004 till the date of the order of the regularisation, he shall not be paid the salary/wages, for that period but the said period would be included for calculating the length of service and other consequential benefits of service that may be available to the petitioner.

Petition allowed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2005

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

Civil Revision No. 2 of 2005

Jagmohan Malhortra
...Defendant/Revisionist
Versus
Jai Kumar Mishra and others
...Opposite Parties

Counsel for the Revisionist:
Sri M.A. Qadeer
Sri B.C. Rai

Counsel for the Opposite Parties:
Sri P.K. Jain

Code of Civil Procedure-Sec. 11-'Res judicata'-first amendment application rejected as not pressed-on the ground of technical flaw. Whether is the second amendment application barred by the Principle of Resjudicata? Held-'No' legal position explained.

Held: Para 4

It is clearly borne out from a bare perusal of the order that the first amendment application was dismissed as not pressed considering the ground that the initial application for amendment had some technical flaw and also reckoning into consideration that second amendment was necessitated as a sequel to the averments made in para 27 of the written statement. In this background, the argument cannot be lapped up and does not commend to me for acceptance and I am of the firm view that order dismissing the initial amendment application as not pressed on account of some technical flaw would not have the consequence of operating as resjudicata. In the above perspective, the order impugned herein does not suffer from any error, illegality or irregularity and as such is not liable to be quashed.

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

1. By means of the present revision, the applicant has impugned the order-dated 16.9.2004 passed by Addl. District Judge (Court no. 3) Moradabad in SCC Suit No. 8 of 2003 whereby amendment application 40 A of the plaintiff respondents was allowed on payment of Rs. 150/- as costs.

2. It would appear from the record that the plaintiff respondent instituted a SCC suit being suit no. 8 of 2003 praying for a decree of eviction of defendants 1 to 3 from the building known as Mishra Building situated at Station Road, Moradabad and for payment of rent of Rs. 1045.12 together with damages at the rate of Rs. 27,750.00 alongwith house tax and water tax. The applicant defendant entered appearance and filed written statement. During the pendency of the suit, an amendment application came to be filed by plaintiff seeking amendment by adding para 9 A in the plaint. The amendment application was sought to be dismissed as not pressed on ground that it suffered from some technical mistake. It would further appear that the plaintiff made another application attended with an affidavit the same day by which the self-same amendment was sought to be incorporated in the plaint averring therein that the amendment sought to be incorporated, was by way of alternative plea. An objection was filed by the defendant tenant but the court below allowed the amendment allowing cost of Rs.150/- alongwith the direction that the amendment maybe incorporated in the plaint within seven days.

3. Heard learned counsel for the parties. Sri M.A.Qadeer appearing for the applicant advanced three fold arguments; firstly that U.P. Act no. 13 of 1972 does not extend coverage to the building in question attended with further argument that by way of amendment by adding para 9 A in the plaint, the defendant cannot be extended the benefit flowing from section 20 (4) of the U.P. Act no. 13 of 1972 inasmuch as the plea christened as "alternative plea" has the complexion of

contradictory plea which is not permissible in law. The second argument advanced by the learned counsel is that proviso to section 20 (4) of the U.P. Act no. 13 of 1972 cannot be called in aid in the present case as the expression "acquired/as acquired" connotes acquisition of any property during pendency of the case and as such, amendment application introducing the plea as alternative plea, being not permissible in law, cannot be sustained in law. The third argument advanced across the bar is that rejection of the amendment application which was dismissed as not pressed on ground of technical mistake, has the force of resjudicata and the self-same amendment introduced by subsequent amendment application cannot be allowed and as such the impugned order is liable to be quashed. Per contra, Sri P.K. Jain appearing for the Opp. Parties contended that amendment introduced was necessitated owing to plea taken in paragraph 27 of the written statement wherein defendant had taken the plea of benefit of section 20 (4) of the U.P. Act no. 13 of 1972 and as such, proceeds the argument, the same is in the nature of alternative plea and not a contradictory or inconsistent plea. He further contended that earlier application was dismissed as not pressed in view of technical flaw to the effect that in earlier amendment application the expression 'alternative plea' was conspicuous by its absence and that the expression 'alternative plea' was mentioned in the subsequent application as a sequel to the plea taken in para 27 of the written statement and as such by introduction of paragraph 9 A in the plaint, alternative plea was engrafted. The learned counsel further submitted that the defendant had acquired another house i.e. House no. V 77 at Gandhi Nagar Moradabad and was residing there and as such benefit flowing from section 20 (4) of the U.P. Act no. 13 of 1972 cannot be extended to him in view of proviso to section aforestated.

4. Having considered the arguments advanced across the bar and upon perusal of the materials on record, I am of the view that the amendment which the trial court allowed in the plaint does not have any complexion of contradictory plea and it was as a sequel to the plea taken by the defendant in paragraph 27 of the written statement by which benefit flowing from section 20 (4) of the U.P. Act no. 13 of 1972 was claimed by the defendant and in the circumstances, the trial court rightly allowed the amendment as alternative plea in the plaint particularly regard being had to proviso to section 20 (4) of the U.P. Act no. 13 of 1972 which envisages that nothing in this sub section, shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building the same city, municipality, notified area or town area. In so far as argument of the learned counsel for the applicant that after dismissal of the first amendment application, the second amendment application would be fraught with the consequence of being barred by the principles of resjudicata, is concerned, I am unable to reconcile myself to the argument. It is clearly borne out from a bare perusal of the order that the first amendment application was dismissed as not pressed considering the ground that the initial application for amendment had some technical flaw and also reckoning into consideration that second amendment was necessitated as a sequel to the

averments made in para 27 of the written statement. In this background, the argument cannot be lapped up and does not commend to me for acceptance and I am of the firm view that order dismissing the initial amendment application as not pressed on account of some technical flaw would not have the consequence of operating as resjudicata. In the above perspective, the order impugned herein does not suffer from any error, illegality or irregularity and as such is not liable to be quashed. In the perspective of the facts of the case, I am prompted to observe that the defendant will have ample opportunity to rebut the plea by filing written statement qua the amendment introduced in the plaint and the entire plea and counter plea would be reckoned with by the trial court in the course of trial of the suit.

5. As a result of foregoing discussion, the revision application is devoid of merit and is accordingly dismissed in limine.

Revision dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2005

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 45619 of 2004

Vinod Kumar ...Petitioner
Versus
Nathu Ram ...Respondent

Counsel for the Petitioner:
Sri H.M. Srivastava
Sri Neeraj Srivastava

Counsel for the Respondents:
Sri Neeraj Agarwal

U.P. Urban Building (Regulation of Letting and Rent Control) Act 1972-S. 21(1)(a)-Release application by land lord-residential accommodation on the ground of bonafied need as three sons have became major-tenant's son residing in the same-locality-No effort to find out any alternative accommodation-concurrent finding of facts-No interference.

Held: Para 5

Learned counsel for the petitioner could not demonstrate that the findings arrived at by the prescribed authority and affirmed by the appellate authority suffer from any error, much less manifest error of law or that the findings arrived at by the prescribed authority and affirmed by the appellate authority are perverse. In this view of the matter and in view of the law laid down by the apex Court reported in (2003) 6 S.C.C., page 675 Surya Dev Rai Vs Ram Chander Rai and others; and 2004 (2) A.W.C., page 1721 (SC) Ranjet Singh Vs. Ravi Prakash, I do not find this to be a fit case for interference by this Court in exercise of power under Article 226 of the Constitution of India, thus, in my opinion this writ petition has no force and is accordingly dismissed.

Case law discussed:
1984 ARC 113
2003 (6) SCC-675
2004 (2) AWC 1729

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

1. By means of present writ petition under Article 226 of the Constitution of India, the petitioner-tenant challenges the orders passed by the prescribed authority as well as by the appellate authority under the provisions of U.P. Act No.XIII of 1972,.

2. The facts leading of the filing of present writ petition are that the respondent-landlord filed an application under Section 21 (1)(a) of the U.P. Act No. XIII of 1972, *here-in-after referred to as 'the Act',* before the prescribed authority for the release of the accommodation in question in possession of the petitioner-tenant on the ground that at the time when the accommodation was let out to the petitioner, the children of the landlord were minor and the landlord was in possession of one room accommodation on the first floor, whereas the tenant was in possession of ground floor room. It has been further asserted in the release application that the landlord has three sons aged about 28 years, 25 years and 20 years, respectively and two daughters aged about 22 years and 14 years, respectively, apart from the landlord and his wife. That the large family of the landlord feels difficulties in residing in one room on the first floor portion and because of the paucity of the accommodation, the grown up sons could not be married and their marriage are being postponed. It is further asserted by the landlord that the petitioner-tenant has purchased a double story building in the same municipality of Kasganj in Mohalla Jai Jai Ram by registered sale deed dated 23rd June, 1998 in the name of his son, namely, Vivek Kumar Bansal and is also the possession of the aforesaid accommodation was delivered to be son of the tenant. It was therefore prayed that in case the accommodation in question is release in favour of the landlord, the tenant can comfortably shift in the accommodation acquired by the tenant as the tenant and his son are not separate and are living jointly.

3. The petitioner-tenant contested the aforesaid release application filed by the landlord-respondent and denied the allegations made in the application under Section 21 (1)(a) of the Act. Before the prescribed authority, the parties have exchanged their pleadings and adduced evidence and the prescribed authority after considering the arguments advanced on behalf of the parties and the materials on record have recorded a finding that the need of the landlord is bonafide and further that since the tenant has acquired another house in Mohalla Jai Jai Ram in the same municipality in the name of his son, who is living with the landlord, therefore he can comfortably shift to that house, which is purchased in the name of his son. The prescribed authority further found that since the petitioner-tenant has not made any effort to find out any alternative accommodation after the filing of the application under Section 21 (1)(a) of the Act by the landlord, therefore in view of the law laid down by this Court in the case reported in **1984 A.R.C., 113 - N.S. Datta and others Vs. The VII th Addl. District Judge, Allahabad and others,** the tenant cannot take defence regarding his alleged hardship. The prescribed authority therefore vide order dated 23rd November, 2002, copy whereof is annexed as Annexure-'13' to the writ petition, allowed the application filed by the landlord and released the accommodation in question in favour of the landlord.

4. Aggrieved thereby, the petitioner-tenant preferred an appeal before the appellate authority under Section 22 of the Act, which has been registered as Appeal No. 5 of 2002. Before the appellate authority, the same arguments were advanced and the appellate authority

affirmed the finding with regard to bonafide requirement of the landlord arrived at by the prescribed authority. On the question of comparative hardship, since the tenant has already purchased another house in the name of his son in Mohalla Jai Jai am in the same municipality by sale deed dated 23rd June, 1998 and is in possession of the same, which fact has not been denied by the tenant, except that the aforesaid is in dilapidated condition. The accommodation acquired by the petitioner-tenant consists of two rooms on the ground floor, two rooms on the first floor along with other amenities as such on the question of comparative hardship, the appellate authority found that the findings arrived at by the prescribed authority do not warrant any interference in view of the provision of Explanation to Section 21 of the U.P. Act No. XIII of 1972, which is reproduced below :-

"21. Proceedings for release of building under occupation of tenant.------

(1) .....

Explanation.----In the case of a residential building :-

(i) where the tenant or any member of his family [(who has been normally residing with or is wholly dependent on him)] has built or has otherwise acquired in a vacant sate or has got vacated after acquisition a residential building in the same city, municipality, notified area or town area, no objection by the tenant against an application under this sub-section shall be entertained;

(ii) .....

5. In this view of the matter, the appellate authority vide order dated 6th October, 2004, copy whereof is annexed as Annexure-'16' to the writ petition, dismissed the appeal filed by the petitioner-tenant and affirmed the findings arrived at by the prescribed authority. Learned counsel appearing on behalf of the petitioner-tenant argued before me on the basis of some transfer application filed by him against the prescribed authority in which no interim order was passed and tries to make out a case that the prescribed authority was acting malafide inasmuch as in spite of the pendency of transfer application, the prescribed authority has proceeded with the disposal of the application under Section 21 (1)(a) of the Act filed by respondent-landlord. Learned counsel for the petitioner submitted that in all fairness the prescribed authority ought not have proceeded with the disposal of the release application once he was informed of the fact that transfer application seeking transfer of the proceedings are pending. This contention of learned counsel for the petitioner cannot be accepted. It is not disputed that there was no interim order from any authority or from this Court staying the hearing and disposal of the release application, the prescribed authority, in my opinion, has not committed any illegality if proceeded with the disposal of the release application. On the question of the order passed by the appellate authority, nothing has been argued except the facts and questions of law, which have already been discussed above by the appellate authority and the appellate authority affirmed the findings arrived at by the prescribed authority. Learned counsel for the petitioner could not demonstrate that the findings arrived at by the prescribed authority and affirmed by the appellate authority suffer from any error, much less manifest error of law or that the findings

arrived at by the prescribed authority and affirmed by the appellate authority are perverse. In this view of the matter and in view of the law laid down by the apex Court reported in **(2003) 6 S.C.C., page 675 Surya Dev Rai Vs Ram Chander Rai and others;** and **2004 (2) A.W.C., page 1721 (SC) Ranjet Singh Vs. Ravi Prakash,** I do not find this to be a fit case for interference by this Court in exercise of power under Article 226 of the Constitution of India, thus, in my opinion this writ petition has no force and is accordingly dismissed. The interim order, if any, stands vacated. However, the parties shall bear their own costs.

Petition dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2005

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

Second Appeal No. 1766 of 1976

The Union of India ...Appellant
Versus
M/S Hari Shanker Gauri Shanker ...Respondent

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

Counsel for the Respondent:
Sri Radeshwari Prasad

Indian Railways Act-Section 77- Consigment Booked at Tatanagar-a contract brought into existence between the consignor and the Railways administration-if consignment damaged due to the Negligence of the employees of Railways-held-The railways becomes responsible for such loss or damage-Railways being largest state owned Corporation-Serving peoples of largest democracy has to conduct itself with elevated sense of responsibility with utmost care and caution.

Held: Para 10 & 12

The consignees can maintain the suit only if they proved their title to the goods in transit. Where the consignor and consignee are different, the consignees are not necessarily the owners of the goods. In the instant case, the plaintiff is a consignor of goods having a Railway Receipt in his hand. It is admitted position that the consignment was booked at Tatanagar Siding by the consignor, which brought into existence a contract of carriage between the consignor and the Railway Administration. In the circumstances, if the consignment is damaged or loss due to misconduct or negligence of the employees of the Railway Administration, the latter becomes responsible for the loss and damage.

Before parting, I feel called to observe that Indian Railways is the largest State owned Corporation and by reason of being a State owned Corporation, and serving the people of the largest democracy of the world, it has to conduct itself with elevated sense of responsibility and with utmost care and concern.

Case law discussed:
AIR 1966 SC 395

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

1. By means of the present second appeal, the appellant has assailed the judgment and decree dated 12.4.1973 rendered by Lower Appellate Court in Civil Appeal No. 98 of 1974 whereby the judgment and decree aforestated passed in O.S. No. 10 of 1971 M/S Hari Shanker Gauri Shanker v. Union of India was affirmed.

2. It would appear that the plaintiff respondent instituted O.S. No.10 of 1971 with the allegations that a consignment consisting of 316 boxes containing tin sheets was booked with the Railways at Tatanagar Tin Plate Siding for onward transmission and delivery to M/S Associated Industrial Corporation at Kanpur Fazalganj Goods Shed vide R.R. No. 238057 dated 9.7.1969. The goods according to the record was taken delivery of by M/S Associated Industrial Corporation at Kanpur Fazalganj Goods Shed on 22.7.1969 alongwith a certificate of damage issued by Railway Administration at Kanpur after it was noticed that some of the boxes of tin plates had become wet and rusted and as a sequel thereto, the plaintiff suffered loss to the extent of Rs. 6946/-. From a perusal of written statement, it would appear that defendants repudiated the plaint allegations and averred that the goods were loaded by Tata Tin Plate Company without any supervision of Railway Administration. It was further averred that the wagons in which goods were loaded, were watertight wagons and in case, the wagons developed some fault in transit as a result of which damage was caused to the goods, the defendants could not be held liable to damages. Other allied pleas were also pressed into service in extenuation of the claims of plaintiff for damages.

3. At the time of admission, it would appear from a perusal of order-dated 4.4.77, the Court was pleased to admit the appeal prima facie considering ground Nos. 7 and 9 as raising substantial questions for determination. The grounds aforestated may be quoted below.

"7. Because the plaintiff respondent being merely an endorsee of the goods was not entitled to sue.

8. Because the present case was governed by Section 73(f), (g) and (h) of the Railways Act and the plaintiff respondent was not entitled to any damage."

Heard learned counsel for the parties.

4. Submerging all the others arguments, the learned counsel for the petitioner pressed into service the only argument across the bar that the goods were not loaded at Tatanagar Tin Plate Siding under the supervision of Railway Administration and they were loaded by Tata Tin Plate Company itself and by this reckoning, proceeds the argument, the Railway Administration could not be made liable to damages occasioned to the plaintiff.

5. In connection with the above proposition, I propose the scan the finding of the trial court as well as the appellate court. The trial court framed as many as 9 issues. Issue no. 7 framed by the trial court, posed whether the plaintiff suffered damages on account of negligence and misconduct of the defendant and its employees. No doubt, the trial court held the view in answering issue no. 5 that it was plaintiff's company which had loaded the goods and affixed its seal to the water-tight wagon but in dealing with issue no. 7, the trial court referring to section 73 of the Indian Railways Act, converged to the view that it is for the Railway administration to prove that the damage to the goods occurred on account of anyone of the reasons mentioned in Section 73 of the Indian Railways Act. Section 73 before its amendment by Act 39 of 1961

envisaged the responsibility of the Railway Administration as carrier of animals and goods. It further envisaged that Railway Administration shall be responsible for loss, destruction, damage or non-delivery in transit of animals or goods delivered to the administration to be carried by Railway arising from any cause except the acts enumerated in the Section i.e. (A) Act of God; (B) Act of War; (C) Act of public enemies; (D) Arrest, restraint or seizure under the legal process; (E) Orders or restrictions imposed by the Central Government or State Government or by any officer or authority subordinate to the Central Government or State Government authorised in this behalf; (F) Act or omission or negligence of the consignor or the consignee or the agent or servants of the consigner or the consignee; (G) Natural deterioration or wastage in bulk or weight about inherent defects, quality or voices of the goods; (H) Latest defects; (I) Fire, explosion or any unforeseen risk. In the proviso, it is envisaged that even where such loss, destruction, damage, deterioration or non delivery as proved to have arisen from anyone or more of the aforesaid causes, the Railway administration shall not be relieved of its responsibility for the loss, destruction, damage deterioration or non delivery unless the administration further establishes that it has used reasonable foresight and care in the carriage of the animals or goods. After amendment by Act no. 39, this section prescribed that the responsibility of Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the Administration to be carried by Railway was, subject to the other provisions of the Act, be that of a bailee under section 151, 152 and 161 of the Indian Contract Act, 1872. The trial court on a comparative examination of the two sections held the view that Old Section 73 envisaged Railways responsible only in the capacity of a bailee while the amendment made in the year 1961 has made Railway responsible for the loss, destruction, damage, deterioration or non delivery in transmit of animals or goods except in the cases provided by the Act and on this reckoning, the trial court converged to the conclusion that the onus fell on Railway to prove that the damage or loss occurred on account of one of the conditions specified in Section 73 of the Act. While dealing with the arguments that damage to the goods occurred on account of negligence of the consignor due to defective packing, the trial court held that the defendant has failed to prove that the boxes were defectively packed and in this connection, it referred to Railway Receipt and forwarding note which contained note that packing conditions had been complied with. The trial court also referred to statement of D.W.1 Sri S.N. Bhattacharya in which it was conceded that besides the T.X.R two clerks had been posted at the siding and one of the functions of them was to supervise weight of the load and thereafter, a note is appended to the forwarding receipt. The trial court also alluded to certificate of damage and shortage a perusal of which indicated that the goods were damaged on account of rain water which trickled into the wagon and damaged the goods. In the ultimate analysis, the trial court held that the defendant had failed to prove that there was defective packing or that the goods were damaged due to fault of the consignor. The findings recorded by the trial court do not suffer from any infirmity and therefore, the contentions of the

learned counsel for the appellant do not commend to me for acceptance.

6. In so far as next contention of the learned counsel for the defendant that having assigned water-tight wagon, the Railway administration was absolved of the liability to damages if any occurred to the goods. To rephrase, it has been contended that if the water-tight wagon developed some flaw in transit, the Railway Administration cannot be fastened with the liability to damages. In connection with this contention, the learned counsel referred to paragraph 15 of the written statement filed by the Railways in the trail court.

> *"15. The goods were loaded by Tata Tin Plate Company without any supervision of Railway Administration as such said R.R. issued. Wagon No. WR 37993 in which said goods were loaded by the aforesaid company was admittedly a water tight wagon and by supplying a water tight compartment the Railway Administration discharged its duty faithfully and could not be held liable for goods being founded rusted at the destination as they could have already been rusted at the time of dispatch or may have got rusted on account of the fact that when goods were booked it was rainy season and atmosphere was surcharged with moisture. In fact, even if wagon which was water tight before dispatch became non-water tight on the way- the defendant could not be held liable for any negligence or misconduct."*

7. Precisely, the learned counsel by referring to the above paragraph tried to go into finer points, which in my opinion, are unable to turn the scale against the plaintiff. I would confine myself to saying that the trial court has extensively dealt with the above aspects and having noticed that there were Railway employees at the siding to supervise weight and loading etc. by referring to the statement of D.W. 1, and also the Railway Receipt and Forwarding note issued by the Railways, it now does not lie in the mouth to say that if any damage has been occasioned to the goods in transit or water-tight wagon stuck loose on way the Railway Administration could not be held liable to damages. The evidence appraised by both the courts below leave no manner of doubt that the goods were dispatched at the Railway's risk and Railway was rightly held liable to damages.

8. As stated supra, it would transpire from the order of the Court dated 4.4.77 that the Court was inclined to admit the appeal pursuant to grounds 7 and 9 which according to the order prima facie disclosed substantial questions of law required to be decided. Section 73 (f) envisages act or omission or negligence of the consignor or the consignee or the agent or servant of the consignor or the consignees. Sub section (g) envisages natural deterioration or wastage in bulk or weight due to inherent defect, quality of vice of the goods. From the discussion aforestated, any act or omission or negligence of the consignor or the consignee has been ruled out on valid grounds. The damage caused to the goods can also not be said stemming from natural deterioration or wastage or due to inherent defect, quality or vice of the goods in view of specific finding of the courts that certificate of damage issued by the Railway Administration at Kanpur

clearly indicated that damage was caused due to percolation of rain water into the wagon. It clearly implies that the wagons assigned were defective and hence, the Railways cannot be absolved of its responsibility. Section 77 of the Railways Act being germane to the controversy involved in the present appeal may also be excerpted below.

> *"S. 77. Responsibility of a railway administration after termination of transit.- (1) A railway administration shall be responsible as a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872 for the loss, destruction, damage, deterioration or non-delivery of goods carried by railway within a period of seven days after the termination of transit;*
>
> *Provided that where the goods are carried at owner's risk rate, the railway administration shall not be responsible for such loss, destruction, damage, deterioration or non delivery except on proof of negligence or misconduct on the part of the railway administration or of any of its servants.*
>
> *(2) The railway administration shall not be responsible in any case for the loss, destruction, damage, deterioration or non-delivery of goods, carried by railway, arising after the expiry of the period of seven days after the termination of transit.*
>
> *(3) Notwithstanding anything contained in the foregoing provisions of this section, a railway administration shall not be responsible for the loss, destruction damage, deterioration or non delivery of the goods mentioned in the Second Schedule, animals and explosives and other dangerous goods carried by railway, after the termination of transit.*
>
> *(4) Nothing in the foregoing provisions of this section shall relieve the owner of animals or goods from liability to any demurrage or wharfage for so long as the animals or goods are not unloaded from the railway wagons or removed from the railway premises……."*

9. A conjoint reading of sections 73 and 77 of the Act would be eloquent of the fact that the railway administration as bailee under sections 151, 152 and 162 of the Indian Contract Act, 1872 cannot wash his hands off the responsibility for the loss, destruction or deterioration or non-delivery of the goods carried by the railway. No doubt, responsibility of Railway Administration has been limited to seven days but here in the instant case, there is no dispute that the consignee had taken delivery of goods within the period prescribed and it is only after the expiry of the period prescribed that the responsibility of railway administration comes to an end. The goods loaded by the plaintiff were of the kind, which could well be said to be ones for which section 77 clearly postulates responsibility of the railway administration. A clear finding has been recorded by the two courts below taking into reckoning the statement of D.W.1 namely, S.S.Bhattachary that there are two clerks of the Railway in the siding of Tin Plate Company of India besides a T.X.R. and a siding clerk to supervise loading and unloading of goods. Besides, it is also worthy of notice that a

Railway receipt issued to the consignor bears ample testimony to the fact that the loading of goods had been supervised by the Railways. Relevant section envisages that a railway receipt shall be prima facie evidence of the weight and the number of packages stated therein. It is further envisaged that Railway administration shall issue a railway receipt in a case where the goods are to be loaded by a person entrusting such goods on the completion of such loading and/or in any other case, on the acceptance of the goods by it or else a statement to that effect that the consignment in wagon load or train load and the weight or the number of packages has not been checked by a Railway servant authorised in this behalf would have found mention in such railway receipt. It, therefore, furnishes enough evidence to demolish the contention of the learned counsel for the appellant that the loading of goods was not supervised by the Railways. In view of the above, ground no. 9 which was at the time of admission of appeal was considered to be one of the questions requiring determination is accordingly answered and it is held that there was no act or omission or negligence on the part of consignor or the agent or servant of the consignor nor was there any natural deterioration or wastage due to inherent defect, quality of vice of the goods etc. and the Railway administration was responsible for the damage caused to the goods of the plaintiff.

10. In so far as ground no. 7 enumerated in the memo of appeal is concerned, it is settled position in law as enunciated by various decision that the consignor of goods has right to sue for loss or damage of goods and in this connection I would not like to burden this judgment with copious citations on the aspect. In connection with this argument, I would sketch few reasons. The reason is that the contract of carriage is between the consignor and the railway administration. The consignees can maintain the suit only if they proved their title to the goods in transit. Where the consignor and consignee are different, the consignees are not necessarily the owners of the goods. In the instant case, the plaintiff is a consignor of goods having a Railway Receipt in his hand. It is admitted position that the consignment was booked at Tatanagar Siding by the consignor, which brought into existence a contract of carriage between the consignor and the Railway Administration. In the circumstances, if the consignment is damaged or loss due to misconduct or negligence of the employees of the Railway Administration, the latter becomes responsible for the loss and damage. In this connection, decision of the Apex Court in **Union of India v. The West Punjab Factories Ltd** [1] in which the Apex Court laid down the principles as to who can sue the Railway Administration for the loss or damage.

> "From the mere fact that a railway receipt is a document of title to goods covered by it, it does not follow, where the consignor and consignee are different that the consignee is necessarily the owner of goods and the consignor can never be the owner of the goods. The mere fact that the consignee is different from the consignor does not necessarily pass title to the goods from the consignor to the consignee and the question whether title to

[1] AIR 1966 SC 395

goods has passed to the consignee has to be decided on other evidence. Ordinarily, it is the consignor who can sue if there is damage to the consignment, because the contract of carriage is between the consignor and the railway administration. Where, however, the property in the goods carried has passed from the consignor to consignee, the latter may be able to sue. Whether title to goods has passed from the consignor to the consignee depends on the facts of each case."

11. In the light of discussion above that consignor had booked the goods and there was contract between the consignor and railway administration, the plaintiff rightly filed the suit in the instant case. Therefore the argument of the learned counsel that the plaintiff being merely endorsee was not entitled to sue is accordingly answered that the plaintiff being consignor of the goods was entitled to sue.

12. Before parting, I feel called to observe that Indian Railways is the largest State owned Corporation and by reason of being a State owned Corporation, and serving the people of the largest democracy of the world, it has to conduct itself with elevated sense of responsibility and with utmost care and concern. In this connection, I recall the immortal observation of Justice Brandies of U.S. quoted in (1961) 367 US 643 at page 659 which have become classic. **"Government as the omnipotent and omnipresent teacher teaches the whole people by its example, if the Government becomes a law breaker, it breeds contempt for law, it invites every man to become a law into himself."** The Railway cannot be seen to behave like private transporters who are often seen to be concerned with profits and are inclined to leapfrog to courts at the slightest pretext. It is the duty of Railway administration to ensure that loading and unloading is not left to the unguided discretion of the consignors and it must exercise utmost vigilance and circumspection and beef up vigilance at the time of loading and unloading of goods in strict observance of the Railway Act lest any laxity on the part of Railway Administration should not imperil and jeopardize the safety of the Railways and security of the country. Recently, scraps off-loaded somewhere at the shores in Gujrat from where they were transported to various factories situated all over the country, were found mingled with live grenades, rockets and it wrought havoc at places. Luckily, the mischief was nipped in the bud before it could assume proportion. From various news reports, it can be gleaned that those charged with the duties of supervising and checking on-loading and off-loading goods, were wanting in their duties. In my opinion, if the Railway Administration plugs the holes and its officials take care to do proper scanning of the goods at the siding at the time of loading or unloading of goods, the burgeoning number of frivolous litigation could well be avoided besides saving public exchequer and court's precious time. It cannot be appreciated that after losing battles in both the courts below, the matter was dragged to this Court by way of Second Appeal on grounds which do not yield any substantial question for determination and still the matter has been lingering since 1976, that is to say, it has taken 28 years to come up for final disposal. As stated supra, the Railway Administration

must pay heed that it is a responsible Government owned Corporation and it should watch every step with care and concern and take measures consistent with the urgency of situation and its responsibility so that unwarranted frivolous litigations do not gain ground.

In view of the above, the second appeal fails and is accordingly dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2005

BEFORE
THE HON'BLE RAKESH TIWARI

Civil Misc. Writ Petition No. 16836 of 2001

Adare Madarsa Ziaul-ul-um, Gontha, District Mau and others ...Petitioners
Versus
Assistant Registrar, Firms, Societies and Chits, Azamgarh Region, Azamgarh and another ...Respondents

Counsel for the Petitioner:
Sri A.N. Singh
Sri Dharam Pal Singh
Sri P.K. Dubey
Sri M.A. Siddiqui

Counsel for the Respondents:
Sri J.A. Azami
S.C.

Societies Registration Act- 1860-S-25 (2) Election held on dated 7.10.2000 found illegal by Asstt. Registrar-Society became unregistered society under the provision of Section 3-A of the Act-within five years election could not held-except the Registrar no other person can hold election.

Held: Para 12 & 13

Sub-section (2) of Section 25 of the Act provides that where any election of office bearers of the Society has not been held within the time specified, i.e., within 5 years, the Registrar may call meeting of general body of the Society for electing the office bearers.

In view of the facts and circumstances of the case, the impugned order dated 26.2.2001 deserves to be set aside and it is expedient in the interest of justice that the Registrar may be directed to hold election of the Society in accordance with law in exercise of powers under sub-section (2) of Section 25 of the Act.

Case law discussed:
1995 (2) UPLBEC-1242
1998 (2) UPLBEC 1000
2000 (III) UPLBEC 2063

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

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

2. This writ petition has been filed challenging the order dated 26.2.2001 passed by the Assistant Registrar, Firms, Societies & Chits, Azamgarh Region, Azamgarh (respondent no. 1) whereby certificate of renewal of the Society has been granted on the basis of the yearly list for 2000-2001 in exercise of powers under Section 3-A of the Societies Registration Act, 1860 (in short the Act). By the order dated 26.2.2001 Sri Iltaf (respondent no. 2) is held to be the Secretary of the Society and the list of office bearers for the year 2000-2001 submitted by respondent no. 2 is held to be valid. By the aforesaid order the election held on 7.10.2000 alleged to have been conducted by petitioner no. 3 has been held to be illegal and has been cancelled.

3. Sub-section (4) of Section 3-A of the Act is reproduced as under: -

"(4) Every application for renewal of the certificate shall be accompanied by a list of members of the managing body elected after the registration of the society or after the renewal of certificate of registration and also the certificate sought to be renewed unless dispensed with by the Registrar on the ground of its loss or destruction of any other sufficient cause."

4. Brief facts of the case are that Adare Madarsa, Ziaul-ul-um, Gontha, District Mau is a society registered under the Societies Registration Act, 1860. It is not in dispute that the said society was registered in the year 1962 and was renewed from time to time. It is also admitted to the parties that the Society was last renewed w.e.f. 10.10.1995 for a period of five years. Thus, it is not in dispute that the Society was renewed up to 10.10.2000. After 1995 the annual list sent by the managing body was registered by the office of Assistant Registrar in exercise of powers under Section 4 of the Act. It appears that there was some dispute between the petitioners and respondent no. 2 with regard to the annual list for the year 1998-99 which was decided by the Assistant Registrar vide order dated 28.8.1998. The order was challenged by one Ishtiyak Ahmad by means of Writ Petition No. 522 of 1999 which was pending at the time of filing of the present writ petition. The aforesaid writ petition has since been dismissed as withdrawn on 20.3.2003.

5. In October 2000 a controversy arose regarding renewal of the Society when petitioner no. 3 as the Secretary of the Society submitted papers of proceedings of election held on 7.10.2000 and other relevant papers along with the application for renewal of the Society.

6. Respondent no. 2 also applied for renewal of the Society along with a list of office bearers for the year 2000-2001.

7. It is submitted by the counsel for the petitioners that respondent no. 2, Iltaf, neither alleged nor filed any document to establish that election of the Society was held as claimed by him and he only prayed for renewal of the Society on the basis of the list of office bearers for the year 2000-01. It is further submitted that in the counter affidavit filed by respondent no. 2 a plea has been taken to the effect that the petitioners concealed the fact that against the impugned order dated 26.2.2001 they had already filed an appeal before the Commissioner which has been dismissed on 16.3.2001 holding that appeal was not maintainable in law against the order dated 26.2.2001. He submits that in these circumstances the petitioners have no other alternative remedy but to file the present writ petition challenging the impugned order dated 26.2.2001. It is further submitted that non-mentioning/disclosing in the writ petition the facts and circumstances in which the Commissioner held that the order dated 26.2.2001 was not appealable cannot be said to be any concealment of fact.

8. It is also submitted that in the counter affidavit much emphasis has been placed on the resignations submitted by some of the members of the Society and also on the fact that some new members have been inducted. It is stated that although the Assistant Registrar has relied upon the version of respondent no. 2 but in so far as the facts of the present writ

petition are concerned it makes no difference, as the petitioners are not challenging the annual list of any year.

9. The submissions of the petitioners against the impugned order dated 26.2.2001 passed by the Assistant Registrar are as under: -

(i) Even if the election held by petitioner no. 3 was illegal as held by the Assistant Registrar the renewal of certificate of the registration cannot be granted in favour of respondent no. 2 in the absence of any election of the managing body. Since respondent no. 2 neither alleged nor submitted any papers regarding the election of the managing body after the last renewal of registration, the renewal cannot be granted on the basis of annual list submitted by respondent no.2.

(ii) In the order impugned passed by the Assistant Registrar, there is no mention that any election was held or submitted by respondent no. 2, as such naturally there could be no finding by the Assistant Registrar regarding any election alleged to have been held by respondent no. 2.

(iii) The Assistant Registrar has no authority in law to grant renewal of certificate of registration to any society without the election of the managing body after renewal of the certificate. Since there is no allegation that after the year 1995 there was any election by respondent no.2 prior to the submission of application for renewal, the Assistant Registrar has no jurisdiction or authority in law to grant renewal of the certificate of registration to the body represented by respondent no. 2.

10. The counsel for the respondents submits that the earlier Writ Petition No. 522 of 1999 filed by the petitioners challenging the order dated 28.9.1998 passed by respondent no. 1 accepting the list of office bearers submitted by Iltaf for the year 1998-99 has been subsequently dismissed as withdrawn. No interim order was granted at any point of time and the order dated 28.9.1998 has become final. He further submits that the petitioners have no locus standi to file the present writ petition, as they are not even the members of the Society. Appeal No. 46 of 2001 filed by the petitioners against the impugned order dated 26.2.2001 has been dismissed by order dated 16.3.2001 which fact has been concealed by the petitioners. The rival claims of both the parties have already been settled by respondent no. 1 by means of orders dated 28.9.1998 and 26.2.2001. The signatures of respondent no. 2 have been attested by the District Minority Welfare Officer as the Secretary and he is in actual physical control of the institution. The learned counsel for the respondents has placed reliance upon the decisions rendered in ***Committee of Management Kishan Shiksha Sadan, Banksahi District Basti and another Vs Assistant Registrar, Gorakhpur Region, Gorakhpur and another, 1995 (II) U.P.L.B.E.C. 1242 (D.B.); Committee of Management Anjuman Islamia Mariyadih Allahabad and another Vs Assistant Registrar, Chits and Funds Allahabad and others, 1998 (II) U.P.L.B.E.C. 1000;*** **and** ***Sri Ram Laxmi Narain Marvadi Hospital, Godaulia Varanasi and others Vs Assistant Registrar Firms, Societies and Chits and others, 2000 (III) U.P.L.B.E.C. 2063*** in support of his case.

11. From the facts narrated above and deducible from the contention of the parties, the net result is that the election dated 7.10.2000 alleged to have been held by petitioner no. 3 has been held to be illegal by the Assistant Registrar. There is neither any other election nor even any allegation of any election of any other body. The renewal of the Society has been granted by the Assistant Registrar on the basis of annual list of the officers which apparently is illegal. Thus, the Society has become unregistered society within the meaning of sub-section (5) of Section 3-A and the only remedy now available is of holding a fresh election of the Society.

12. Sub-section (2) of Section 25 of the Act provides that where any election of office bearers of the Society has not been held within the time specified, i.e., within 5 years, the Registrar may call meeting of general body of the Society for electing the office bearers.

13. In view of the facts and circumstances of the case, the impugned order dated 26.2.2001 deserves to be set aside and it is expedient in the interest of justice that the Registrar may be directed to hold election of the Society in accordance with law in exercise of powers under sub-section (2) of Section 25 of the Act.

14. For the reasons stated above, the writ petition is allowed and the impugned order is set aside/quashed. The Registrar is directed to hold fresh election of the Society within a period of two months from the date of production of a certified copy of this order before it by the petitioners.

Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2005

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 5738 of 1995

M/s Somdutt Builders Ltd. ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri K.N. Tripathi
Sri V.K. Singh
Sri S.P. Gupta

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

(A) Indian Stamp Act 1899-S. 33 Nature of the Document-petitioner being highest bidder-Nazul Plot No. 10 Block 15-area 6910 Sq. Meters-Settled for Rs. 6.10 Crores-agreement executed on Rs. 7/- Stamp-whether such document can be termed as agreement to sale and the stamp duty is payable?-held--No title or ownership transferred-except the possession-hence is deed of license.

Held: Para 10

It is true that the document in question was titled as "agreement to lease" but since no proprietary rights had been transferred in favour of the petitioner and only the possession had been handed over to the petitioner with permission to raise construction along with a large number of stipulations and conditions as well as contingencies on the occurrence of which, even the agreement itself could be terminated, and also the fact that a further provision had been made in the said document/agreement for execution of

lease deed on a future date, as such in my view the same could not have been treated in law as an agreement to lease but merely as a license.

Case law discussed:

AIR 1959 SC 1264
J.T. 1999 (8) 233

(B) Indian Stamp Act 1899-Section 33 (1)-Imposition of Penality-whether the authorities have power to summon the Original document from the petitioner to assessed the stamp duty and to empose the Penality? Held-No.

Held: Para 9

the authorities have no power under section 33(1) of the Act to summon the document for the purposes of finding out whether it had been properly stamped or not. Thus the submission of the petitioner, that the case of the respondents for imposing penalty on the document would also not be covered under the provisions of section 33 (1) of the Act, has force.

Case law discussed:

1966 ALJ 514

(C) Indian Stamp Act 1899-S. 33-penalty- the authorities for the first time assessed the stamp duty by order dated 6.2.95 and 22.2.95-petitioner after receiving the notices had already deposited Rs. 60 lacs. In the 14.94 itself-bonafide conduct of the petitioner can not be doubted-held –Penality could not have been imposed.

Held: Para 13 & 14

Thus the penalty could not be levied prior to the assessment of the stamp duty on the document, which was finalised only after the passing of the impugned orders. The bonafide of the petitioner, thus, cannot be doubted and the stamp duty amount when called for from the petitioner had been paid by him partially in 1994, and thereafter finally when the lease deed was executed.

As such in my view, in the facts and circumstances of this case, and in view of the discussion here in above, under law, the penalty could not have been imposed on the petitioner.

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

1. A Nazul plot no. 10, Block 15, Civil Lines, Kanpur measuring 6910 Sq. meters had been put to auction by the Kanpur Development Authority on 28.4.1987. The bid of the petitioner for Rs.6.10 Crores was highest and had been accepted. Thereafter an agreement was executed between the petitioner and Kanpur Development Authority on 11.6.1987. The said document was executed on a stamp paper of Rs.7/- only. After seven years, in October, 1994 Kanpur Development Authority sent a complaint to Additional District Magistrate (Finance & Revenue), Kanpur Nagar (A.D.M. (F & R)) Respondent no.3, along with a photo copy of the agreement dated 11.6.1987 stating that the said document had been under-stamped and proceedings may be initiated against the petitioner under the provisions of Indian Stamps Act for not paying appropriate stamp duty. In response, on 31.10.1994 the Respondent no.3 A.D.M. (F & R) wrote to the Kanpur Development Authority and summoned the original agreement dated 11.6.1987. On 1.11.1994 the Vice Chairman, Kanpur Development Authority supplied the agreement to the Respondent no.3, which, the petitioner contends, was not the original but merely a photocopy of the original. A show cause notice dated 14.11.1994 was thereafter issued to the petitioner by the Respondent no. 3, to which a reply was filed by the petitioner on 29.11.1994. In its reply, the petitioner raised three objections, namely, that the

document did not attract any stamp duty; that the proceedings could not be initiated against the petitioner as the same were barred by limitation; and that the A.D.M. (F & R) had no authority or power to summon the document to initiate the proceedings. After filing of the reply, the petitioner on 28.12.1994 deposited a sum of Rs.60 lacs towards the estimated stamp duty on the document and thereafter again filed detailed objections before the Respondent no.3 on 1.2.1995. By his order dated 6.2.1995, the Respondent no.3 determined the stamp duty payable by the petitioner to be Rs. 72,25,450/- and further imposed a penalty of Rs.50,57,815/-. Being aggrieved by the said order, the petitioner challenged the same by filing a revision before the Chief Controlling Revenue Authority (CCRA), Respondent no.2, on 16.2.1995 along with an application for stay. On the same date the CCRA passed an order of status quo and fixed 6.3.1995 for filing of objections by the opposite parties and hearing. However, since despite the stay order granted by the CCRA the Respondent no.3 was proceeding to execute the order dated 6.2.1995 by putting seals on certain rooms and halls of the petitioner's property, the petitioner filed an application on 18.2.1995 with a prayer for a direction to the Respondent no.3 to remove the said seals on the rooms of their property. Another application was filed on 22.2.1995 with similar prayer, which was directed to be taken up on 25.2.1995. On 25.2.1995 when, according to the petitioner, only arguments were heard in respect of the applications of the petitioner, the CCRA, to the utter surprise of the petitioner, passed the order finally deciding the revision itself stating that an oral request for reviewing the order dated 16.2.1995 had been made by the Respondent-State, although in fact 6.3.1995 had been fixed for the hearing of the revision. By the said order dated 25.2.1995 the penalty was reduced to Rs. 42,45,368.75 paise since admittedly the area of the land had been found to be reduced from 6910 sq. meters to 5974 sq. meters. Aggrieved by the aforesaid order dated 6.2.1995 passed by Respondent no.3 and the order dated 25.2.1995 passed by Respondent no.2, the petitioner has filed this writ petition.

2. I have heard Sri V.K.Singh, learned counsel for the petitioner and Sri Sanjay Goswami, learned Standing Counsel appearing for the State-respondents at length and have perused the record.

3. Sri V.K. Singh, learned counsel for the petitioner submitted that by the agreement dated 11.6.1987, no rights had been transferred in favour of the petitioner. The petitioner had merely been authorized to be in possession, and mere permission had been granted to the petitioner to raise construction. Although the same had been termed as an 'agreement to lease', it was actually nothing but only a license and thus no stamp duty would be payable on the same. Learned counsel has further submitted that the dispute had arisen for the first time on 31.10.1994 after a lapse of more than 7 years and that too on a complaint of the Kanpur Development Authority which was itself a signatory to the said agreement, and as such no cognizance could have been taken by the respondents on the said complaint.

4. After hearing learned counsel for the parties the issues to be determined by

this Court could be summarized in the following manner :-

(i) In view of the first proviso to Section 33 of the Indian Stamp Act, 1899 (hereinafter referred to as the Act), the A.D.M. (F & R), Respondent no.3, could not have initiated action under section 33(4) of the Act after expiry of four years.

(ii) The A.D.M. (F & R) had no right and jurisdiction to initiate proceedings on a photocopy of the document dated 11.6.1987 by summoning the original document for the purposes of ascertaining the liability of stamp duty under the Act.

(iii) The document dated 11.6.1987 would not be chargeable with stamp duty as no rights pertaining to the land in question had been transferred in favour of the petitioner.

(iv) *No penalty could be imposed as the lease deed had not been executed and the petitioner was always ready and willing to pay the determined stamp duty on the document to be executed, and it could not be said that the petitioner ever intended to evade any stamp duty.*

5. For proper appraisal of the submissions and determination of the questions raised, a perusal of section 33 of the Act would be necessary and thus the same is reproduced below:-

"**33. <u>Examination and impounding of instruments.</u>**-(1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, **shall**, if it appears to him that such instrument is not duly stamped, **impound the same**.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed :

Provided that –

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Sections 125 to 128 and Sections 145 to 148 of the Code of Criminal procedure, 1973;

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section the State Government may in cases of doubt, determine what offices shall be deemed to be public offices and who shall be deemed to be persons in charge of public offices.

(4) Where deficiency in stamp duty paid is noticed from the copy of any instrument, the Collector may suo motu or on a reference from any

court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an assistant Commissioner of Stamps or any officer authorized by the Board of Revenue in that behalf, **call for the original instrument for the purpose of satisfying himself as to the adequacy of the duty paid thereon**, and the instrument so produced before the Collector shall be deemed to have been produced or come before him in the performance of his functions.

(5) In case the instrument is not produced within the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty under Section 40 on the copy of the instrument :

Provided that no action under sub-section (4) or sub-section (5) shall be taken after a period of four years from the date of execution of the instrument :

Provided further that with the prior permission of the State Government an action under sub-section (4) or sub-section (5) maybe taken after a period of four years but before a period of eight years from the date of execution of the instrument."

(Emphasis supplied)

(Note: The last proviso has been inserted w.e.f.1.9.1998)

6. The dispute between the petitioner and the Kanpur Development Authority with regard to the area for which lease had to be granted in favour of the petitioner remained pending. Although the auction had been for an area of 6910 sq. meter but the dispute was finally resolved only on 22.11.1995 (which was even after the passing of the impugned order by the CCRA) and it was only in pursuance thereof that on 31.1.1996 the Kanpur Development Authority wrote to the A.D.M.(F & R), Respondent no.3, that the lease deed between the petitioner and the Kanpur Development Authority would now be executed for a reduced area and for a reduced amount of approximately Rs. 5.5 Crores on which stamp duty may be determined. Such position has not been denied in the pleadings or by the learned Standing Counsel at the time of arguments. It has also not been disputed that in pursuance of the aforesaid letter a lease deed has now been finally executed on 5.2.2003 for an area which is substantially lesser than the original area shown in the agreement dated 11.6.1987 for which auction had been granted in favour of the petitioner. On the total amount paid by the petitioner for the said area (which included the interest paid to the Kanpur Development Authority) the stamp duty determined by the Respondent no.3 came to about Rs. 84 lacs and has already been paid.

7. In the backdrop of the aforesaid facts I now proceed to decide the issues as summarized by me above.

8. As regards the first issue, although the agreement had been executed on 11.6.1987, action was first sought to be initiated only on 31.10.1994, which was after a lapse of more than 7 years. Admittedly the said action was initiated on the basis of a photo copy of the document dated 11.6.1987, by summoning the original document. The first proviso to section 33 of the Act

makes it clear that no action can be taken under section 33 (4) of the Act (which deals with the cases where copy of the document is produced and the original instrument is called for) after a period of four years from the date of execution of the instrument. Since admittedly action was being taken on the basis of a document executed on 11.6.1987 and more than four years had elapsed, the provision of section 33(4) of the Act could not be attracted. The second proviso to section 33 of the Act having been inserted only w.e.f. 1.9.1998 would not be attracted in this case.

9. As regards the second issue that the Additional District Magistrate had no jurisdiction to initiate proceedings on a photo copy of the document by summoning the original document for the purposes of ascertaining the liability of stamp duty under the Act, even if the notice dated 31.10.1994 and the action taken by the respondents in pursuance thereof could be said to be covered under section 33(1) of the Act (although the petitioner disputes the same), still the said action would also be illegal and without jurisdiction. In response to the letter dated 31.10.1994 written by the Additional District Magistrate to the Kanpur Development Authority, the Kanpur Development Authority on 1.11.1994 is said to have sent the document in question to the Respondent no.3. According to the petitioner the document so sent was only a copy of the original and not the original, which was and still remains in the possession of the petitioner. Specific assertion to that effect has been made in paragraph 31 of the writ petition that the original agreement is with the petitioner and the same has not been denied by Kanpur Development Authority or the State of U.P. in their counter affidavits. The learned Standing Counsel had also placed the original records of the case before me and the original agreement was not found there. The learned Standing Counsel could also not justify as to on what basis it has been claimed by him that the original document had been placed before the Additional District Magistrate on which action has been taken. At the time of hearing, the original document was actually placed before me by the learned counsel for the petitioner to show that the same was and still is in the possession of the petitioner. As per section 33(1) of the Act, once the document or instrument appears to be under-stamped, the officer concerned shall impound the same. In the present case, the original document had never been impounded. The procedure for impounding a document has been laid down in section 40 of the Act and it is no one's case that the same had been followed in the present case. Further, the said document was never produced nor came before the Additional District Magistrate in the performance of his official functions and hence the provisions of section 33(1) of the Act could not have been attracted. In the case of R. A. Remington vs. Deputy Commissioner & Collector, Pithoragarh 1966 A.L.J. 514 the Apex Court has held that the authorities have no power under section 33(1) of the Act to summon the document for the purposes of finding out whether it had been properly stamped or not. Thus the submission of the petitioner, that the case of the respondents for imposing penalty on the document would also not be covered under the provisions of section 33 (1) of the Act, has force.

10. For deciding the third issue that the document dated 11.6.1987 would not be chargeable with stamp duty as no rights pertaining to the land in question had been transferred in favour of the petitioner, what is to be considered for determining the nature of the document is not the title of the document, but its contents. It is true that the document in question was titled as "agreement to lease" but since no proprietary rights had been transferred in favour of the petitioner and only the possession had been handed over to the petitioner with permission to raise construction along with a large number of stipulations and conditions as well as contingencies on the occurrence of which, even the agreement itself could be terminated, and also the fact that a further provision had been made in the said document/agreement for execution of lease deed on a future date, as such in my view the same could not have been treated in law as an agreement to lease but merely as a license. The Apex Court in the case of Associated Hotels of India Ltd. vs. R.N.Kapoor A.I.R.1959 SC 1264 has held that "it is not the form but substance of the document has to be seen to gather the intention of the parties for determining whether the document/transaction is a lease or licence." For determining the same, what was held to be considered was:

"(1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form;

(2) the real test is the intention of the parties whether they intended to create a lease or a licence;

(3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and

(4) if under the document a party gets exclusive possession of the property, prima-facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease."

11. In the case of ICICI vs. State of Maharashtra JT 1999(8) 233, while dealing with a case of an agreement to create a lease in future and the person having been given an authority only to enter upon the land for the purposes of erecting a building or buildings for the purposes of housing its offices and no other purpose and until the grant of a lease, and the document gave only a right to use the property in a particular way or under certain terms, while it remains in possession and control of the owner, it was held that such document would be a licence.

12. In the present case also, the document in question refers to creation of lease in future. The possession had been handed over on stipulation of a large number of conditions and contingencies mentioned in the agreement. No proprietary right had been transferred and no interest on the land had been conveyed when the petitioner was put in possession and was allowed only to make constructions. The terms and conditions show that the land remained in the ownership of the Kanpur Development Authority. As such in my view, the document dated 11.6.1987 could not be taken to be a lease and no such stamp duty could be chargeable as no right pertaining to the land in question had been transferred in favour of the petitioner.

13. Now we come to the last question with regard to the imposition of penalty. Learned counsel for the petitioner has urged that the petitioner was always ready and willing to pay stamp duty as and when the same was determined or called for from the petitioner. The document dated 11.6.1987 was executed between the petitioner and the Kanpur Development Authority. It was only in October, 1994 that the Kanpur Development Authority itself made a complaint to the District Magistrate that the agreement (which was signed by them also) had been under-stamped. It was on such complaint that the Additional District Magistrate summoned the original document from the Kanpur Development Authority. On receipt of the notice dated 14.11.1994 and immediately after giving a reply on 29.11.1994, the petitioner made a provisional deposit of Rs. 60 lacs on 28.12.1994. As such the submission of the petitioner has force, that had the petitioner been informed earlier that any stamp duty is to be paid on the agreement executed on 11.6.1987, the petitioner would have paid the same. According to the petitioner, they were not liable to pay any stamp duty till the lease deed was executed in their favour, still a deposit of Rs.60 lacs had been made by them and thereafter in pursuance of an interim order granted by this Court, they have deposited a further amount of Rs. 6 lacs towards stamp duty, which has not been denied by the learned Standing Counsel. As already stated above, the dispute between the petitioner and the Kanpur Development Authority with regard to the area of land to be transferred and the final price remained pending besides the suit relating to the said land which was pending before the Civil Courts at Kanpur. All such disputes were resolved only in November, 1995 and it was only then that in 1996 that the Kanpur Development Authority for the first time, wrote to the Additional District Magistrate that the lease deed between the petitioner and the Kanpur Development Authority could now be executed for a certain reduced area and for a reduced amount than that shown in the agreement in question dated 11.6.1987. Thus it cannot be said that any finality regarding the execution of the lease deed had been arrived at the time when the impugned order dated 6.2.1995 had been passed by Additional District Magistrate (F&R), Respondent no.3, or when the order dated 25.2.1995 had been passed by CCRA, Respondent no.2. By order dated 6.2.1995 the Additional District Magistrate had imposed a penalty of Rs.50 lacs and odd which had been reduced by the CCRA, Respondent no. 2, to about Rs. 42 lacs and odd, after taking into consideration that the area of which possession had been delivered to the petitioner, had been substantially reduced from 6910 sq. meters to 5974 sq. meters. It was itself stated in the impugned order dated 25.2.1995, that the penalty amount would be subject to the final outcome of the decision of the Civil Court or under the arbitration clause, and the penalty amount and stamp duty paid would accordingly be adjusted in the background of the final decision. Thus, in the circumstances, when the lease deed had not even been executed and the final decision with regard to the price and area of the land for which lease deed was to be executed, had been taken as late as in November, 1995, and even prior to that date, the petitioner had immediately at the first instance of having received the notice in 1994 itself deposited a provisional amount of Rs. 60 lacs and thereafter

another sum of Rs. 6 lacs, the bonafide of the petitioner cannot be doubted. The penalty amount, which is in question in the present writ petition, itself could not be finalized even by the impugned order dated 25.2.1995 and was left subject to the decision of the Civil Court as well as final decision as per the arbitration clause. When the respondents themselves could not finalize the amount of stamp duty which was payable, the petitioner cannot be said to be at fault for not paying the same. However, now during the pendency of this writ petition the lease deed has been executed on an amount received by the Kanpur Development Authority that included the principal amount and the interest paid thereon. Accordingly, the stamp duty of about Rs. 84 lacs has already been paid, which is more than the stamp duty assessed by the impugned orders dated 6.2.1995 and 25.2.1995. As such the dispute relating to payment of stamp duty has now been resolved only during the pendency of this writ petition. Thus the penalty could not be levied prior to the assessment of the stamp duty on the document, which was finalised only after the passing of the impugned orders. The bonafide of the petitioner, thus, cannot be doubted and the stamp duty amount when called for from the petitioner had been paid by him partially in 1994, and thereafter finally when the lease deed was executed.

14. As such in my view, in the facts and circumstances of this case, and in view of the discussion here in above, under law, the penalty could not have been imposed on the petitioner. The impugned orders dated 6.2.1995 and 25.2.1995 passed by Respondent nos. 3 and 2 respectively thus deserve to be quashed.

15. The petitioner has also challenged the impugned order dated 25.2.1995 on the ground that the same could not have been passed on a date prior to 6.3.1995 fixed for hearing of the case (as 25.2.1995 was fixed only for deciding the stay matter); and that the date had been proponed without notice, merely on an oral request made by the respondents. But this argument of the petitioner is not being gone into in view of the fact that I have heard and decided the issues involved in this writ petition on merits itself.

16. The writ petition is, accordingly, allowed. The order dated 6.2.1995 passed by Respondent no.3 and the order dated 25.2.1995 passed by Respondent no.2 are thus quashed. No order as to cost.

Petition allowed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2005

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Second Appeal No. 1057 of 2004

Ram Saran ... Defendant-Appellant
Versus
Smt. Khazani. ...Plaintiff-Respondent

Counsel for the Appellant:
Sri Dhan Prakash

Counsel for the Respondent:
Sri Pankaj Mithal

(A) Code of Civil Procedure-S.-149-'Date of the institution of suit' what is ? either the date on which plaint presented on the day on which the court issued summons-held-in view of amended provision the date of issuance of

summon to be the deemed institution of suit.

Held: Para 5

A suit can be said to be duly instituted for the purposes of issuance of summons when in fact it has become duly instituted and not from a retrospective date which for certain purposes may be treated as the deemed date of institution. The date of payment of court fee and registration of the suit and issuance of summons was as we have seen after the provisions of the amended Civil Procedure Code had come into force. The amended provisions were therefore applicable for issuance of summons.

(B) Code of Civil Procedure-Order 8 r. 1,9,10 read with Section 157, 148-Time limit for filling written statement-90 days-whether can be extended by the court on its dissertation? Held-'No'

Held: Para 6

A Division Bench of the Karnataka High Court in A.I.R. 2004 Karnataka 246 (A. Sathyapal and others vs. Smt. Yasmin Banu Ansari and others) has interpreted the provisions of Order 8 Rules 1, 9 and 10 and Sections 157 and 148 Civil Procedure Code and has held that the time for filing the written statement cannot be extended beyond 90 days from the date of service of summons and the power under the proviso to Rule 1 to extend time limited to the period provided under the proviso. The decision of the Karnataka High Court has been followed by our Court in 2004 (2) ARC 779 (Nanku Vs. Kailash and others). The decision relied upon by Sri Dhan Prakash in Topline Shoes Vs. Corporation Bank has been considered in Nanku's case and it has been held that the court does not have any discretion to extend the time beyond that provided under the proviso to Order 8 Rule 1 Civil Procedure Code. As such the submission of the learned counsel for the appellant that the court had discretion to extend the time cannot be accepted.

Case law discussed:

AIR 2004 Karnatka 246
(2004) 2 ARC 779

(Delivered by Hon'ble Janardan Sahai, J.)

1. A suit for possession and damages for use and occupation was filed by the plaintiff/respondent, which has been decreed by both the courts below applying the provisions of Order 8 Rule 10 Civil Procedure Code. The plaint was presented on 20.5.2002 but it is not in dispute that the full court fee was not then paid. The suit was registered on 27.8.2002 after payment of court fee on that very day. The amendments by the Civil Procedure Code Amendment Act 22 of 2001 had come into force with effect from Ist July 2002 which was after the presentation of the plaint and before the registration of the suit. Summons were issued on 2.9.2002 fixing 3.10.2002 for appearance of the defendant and for filing of the written statement and 10.10.2002 for issues. The defendant/appellant appeared and sought adjournment on 10.10.2002 for filing the written statement. The court granted time. On 21.1.2003 the case was adjourned to enable the defendant to file written statement and the court fixed 4.3.2003. On 4.3.2003 the defendant again sought adjournment and the court adjourned the case but passed an order that no further time would be granted and fixed 8.5.2003. On 8.5.2003 there was a strike of the lawyers and again the case was adjourned to 27.5.2003 on which date the defendant/appellant sought adjournment, which was refused and the right to file written statement was forfeited. It appears that the defendant moved an application for taking the

written statement on the record, which application was rejected by the trial court on 11.9.2003. The suit was then decreed under Order 8 Rule 10 Civil Procedure Code on 19.9.2003. The appeal against the decree filed by the appellant was dismissed.

2. I have heard Sri Dhan Prakash, learned counsel for the appellant and Sri Pankaj Mittal, learned counsel for the respondent.

3. Under the provisions of the Civil Procedure Code before the amendment the court had discretion to extend the time for filing the written statement without limit. The proviso to the amended Order VIII Rule 1 however limits this discretion to a period of 90 days from the date of service of summons upon the defendant.

4. It was submitted by Sri Dhan Prakash, learned counsel for the appellant that by virtue of the provisions of Section 149 of the Civil Procedure Code the suit would be deemed to have been instituted on the date the plaint was presented, namely, on 20.5.2002 and as such the provisions of the unamended Civil Procedure Code were applicable and consequently the court had discretion to extend the time for filing the written statement without limit and the provisions of Order 8 Rule 1 Civil Procedure Code as amended by the Civil Procedure Code Act 22 of 2002 were not applicable. It is also submitted that the outer limit of 90 days fixed under the proviso to Order 8 Rule 1 is only directory and not mandatory. In support of his second submission he places reliance upon the decision of the Apex Court in A.I.R. 2002 SC 248 Topline Shoes Ltd. Corporation Bank.

5. The consequence of applying Section 149 Civil Procedure Code is that the suit would be deemed to have been presented on 20.5.2002. However, it is clear from the fact that before the suit was registered the amended provisions of the Civil Procedure Code had become applicable. Order 5 Rule 1 of the Civil Procedure Code provides that the summons will be issued in a duly instituted suit. No doubt the suit would be deemed to have been duly instituted for the purpose of limitation on 20.5.2002 but no summons could have been issued in fact on 20.5.2002 because the order for issuance of the summons could have been passed only after actual payment of the court fee and registration of the suit. A suit can be said to be duly instituted for the purposes of issuance of summons when in fact it has become duly instituted and not from a retrospective date which for certain purposes may be treated as the deemed date of institution. The date of payment of court fee and registration of the suit and issuance of summons was as we have seen after the provisions of the amended Civil Procedure Code had come into force. The amended provisions were therefore applicable for issuance of summons.

6. A Division Bench of the Karnataka High Court in A.I.R. 2004 Karnataka 246 (A. Sathyapal and others vs. Smt. Yasmin Banu Ansari and others) has interpreted the provisions of Order 8 Rules 1, 9 and 10 and Sections 157 and 148 Civil Procedure Code and has held that the time for filing the written statement cannot be extended beyond 90 days from the date of service of summons and the power under the proviso to Rule 1 to extend time limited to the period provided under the proviso. The decision

of the Karnataka High Court has been followed by our Court in 2004 (2) ARC 779 (Nanku Vs. Kailash and others). The decision relied upon by Sri Dhan Prakash in Topline Shoes Vs. Corporation Bank has been considered in Nanku's case and it has been held that the court does not have any discretion to extend the time beyond that provided under the proviso to Order 8 Rule 1 Civil Procedure Code. As such the submission of the learned counsel for the appellant that the court had discretion to extend the time cannot be accepted. On facts also it appears that the appellant was granted sufficient time. The relevant dates in this connection have already been referred to above in this order. It is clear that the case was adjourned on 10.10.2002, 19.11.2002, 21.1.2003, 4.3.2003 and 8.5.2003 and on 4.3.2003 last opportunity was granted to the appellant. In the circumstances the order passed by the court below refusing to grant any further time and forfeiting the right to file the written statement and applying the provisions of Order 8 Rule 10 was justified. The applicant has been granted more time than was required. There is no merit in this appeal. Dismissed.

Appeal dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2005

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

Criminal Misc. Application No. 3908 of 2004

Rakesh Kumar Gupta and two others
...Applicants
Versus
State of U. P. and two others
...Opposite Parties

Counsel for the Applicants:
Sri Kumar Anish
Sri B.D. Mandhyan
Sri Satish Mandhyan

Counsel for the Opposite Parties:
Sri S.D. Kautilya
Sri K.M. Tripathi

U.P. Municipal Corporation Act 1959-Section-570-Code of Criminal Procedure-Section-482-quashing of Criminal proceeding complaint case-applicant an employee of Municipal Corporation-applicants made compliance of the direction given by Mukhya Nagar Adhikari to remove the encroachments made by the complainant on the path of Nagar Parishad-during the course of official duty-they are protected by Section 570 of the Act-complaint case against the applicants-can not proceed-accordingly Quashed.

Held: Para 12

When police force was made available the applicants made compliance of the order passed by the Mukhya Nagar Adhikari. Thus it is a clear case in which the applicants acted in discharge of their official duties and therefore, they are protected by Section 570 of the U.P. Municipal Corporation Act, 1959 and complaint case against the applicants cannot proceed.

Case law discussed:
AIR 1979 SC- 1841
AIR 1999 SC-1437
2000 SCC (Crl.) 872

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

1. Instant application has been moved by Rakesh Kumar Gupta and two others, employees of Nagar Nigam, Gorakhpur, under Section 482 Cr.P.C. to quash proceeding of Complaint Case No. 1189 of 2002 pending against them in the Court of Additional Chief Judicial

Magistrate III, Gorakhpur, under Sections 147, 427, 504, 506, 120B, 382, 148, 451 I.P.C. and Section 3 (1)(x) of S.C. S.T. Prevention of Atrocities Act and also to quash the order dated 18.3.2004 whereby the applicants have been summoned to face trial.

2. Heard Sri Kumar Anish, Advocate, holding brief of Sri Satish Mandhyan, learned counsel for the applicants, Sri S. D. Kautilya learned AGA and Sri K. M. Tripathi, counsel for the O.P. No. 2 and have gone through the record.

3. Applicants are employees of Nagar Nigam, Gorakhpur. The applicant no. 1, Rakesh Kumar Gupta is Sahayak Nagar Adhikari, applicant no. 2, Parasnath Shukla is Revenue Inspector and applicant no. 3 Sheshnath Shukla is an employee of Nagar Nigam, Gorakhpur. Affidavit has been filed by Parasnath Shukla, applicant no. 2 that the opposite party no. 2, Vijay Kumar Kushwaha filed a complaint that his Tin shed in Mohalla Hasupur, police station Rajghat, district Gorakhpur, was existing since last 50 years but the applicants, who are employees of Nagar Nigam, Gorakhpur, in collusion with O. P. No. 3, Harsh Chandra Prajapati got it demolished. It is stated that there was enmity of election between O. P. No. 2 Vijay Kumar Kushwaha and O. P. no. 3 Harsh Chandra Prajapati. On the complaint filed by the O. P. No. 2 Case No. 1189 of 2002 was registered in the Court of Additional C. J. M. III, Gorakhpur. Copy of the complaint is Annexure no. 2 to the affidavit. The case of the O.P. No. 2, complainant, was that it was got done by O. P. No. 3, who was elected as Corporator, Nagar Nigam, Gorakhpur. While no encroach on Nali and road was made by him.

4. When the complaint was filed the applicants were summoned, hence this application has been filed for quashing the proceedings of the complaint case and it is submitted that the applicants are protected under Section 570 of the U. P. Municipal Corporation Act, 1959, which contemplates as below:

"**570. Indemnity for acts done in good faith.-** No suit, prosecution or other legal proceedings shall lie in respect of anything in good faith done or purported or intended to be done under this Act against the State Government, any Sabhasad, Nagar Pramukh or against the Mukhya Nagar Adhikari or any Corporation officer or servant or against person acting under and in accordance with the direction under this Act of the State Government, Corporation, any Committee constituted under this Act, the Mukhya nagar Adhikari, any Corporation Officer or servant or of a Magistrate."

5. Section 571 of the Act has also bee relied on which provides that no suit shall be instituted against the Corporation or against the Mukhya Nagar Adhikari or against any Corporation officer or servant, in respect of any act done or purported to be done in pursuance of execution or intended execution of this Act or in respect any alleged neglect or default in the execution of this Act.

6. Learned counsel for the applicant has submitted that the protection under Sections 570 and 571 has been provided to the employees of Nagar Nigam by U. P. Municipal Corporation Act, 1959 as has been provided by Section 197 of

Cr.P.C. which provides that no Court shall take cognizance of any offence when a government servant specified in the Section acts or purports to acts in discharge of the official duty and any offence is alleged to have been committed in the discharge of the said duty.

7. Learned counsel for the applicant has cited *AIR 2000 SC 3187, Abdul Wahab Ansari Vs. State of Bihar and another* in which it has been laid down by Hon'ble the Apex Court that when there is a dispute about encroachment of the property belonging to mosque and the appellant was a Circle inspector appointed as Dy. Magistrate pursuant to orders of Sub Divisional Magistrate who directed to use police force to remove the encroachment, some miscreants armed with weapons started hurling stones and situation became out of control and when the applicant directed opening of fire to control mob, two persons were injured and one person died, it was held that the order for opening fire is in exercise of official duty imposed under the order of the Magistrate. Cognizance of the offence against the applicant without prior sanction of the competent authority under section 197 was quashed.

8. In *AIR 1979 SC 1841 S. B. Saha and others Vs. M. S. Kochar* it has been laid down by Hon'ble Apex Court that "*the question of sanction under section 197 can be raised and considered at any stage of the proceedings. In considering whether prosecution was required, it is not necessary for the Court to confine itself to the allegations in the complaint. It can take into account all the materials on the record at the time when the question is raised and falls for consideration."*

9. In *AIR 1999 SC 1437, N. K. Ogle Vs. Sanwaldas* it was held by Hon'ble the Apex court that Tehsildar and the District Collector had passed an order for collecting lease money from the respondent. On the basis of the aforesaid order the appellants had registered the matter in his Court and ordered for issuance of demand letter. The letter was served on the respondent and yet he did not make payment, therefore, the order of attachment warrant was issued. When the respondent was available with scooter in the Tehsil the scooter was seized and was auctioned by the Tehsildar. The respondent filed a complaint and initiated criminal prosecution against the Tehsildar for the offence under Section 379 I.P.C. it was held by Hon'ble the Apex Court that the act complained of against the Tehsildar was an act committed in discharge of the official duty of such Tehsildar and therefore the cognizance cannot be taken against the Tehsildar by any Court without prior sanction of the competent authority.

10. In *2000 SCC (Crl) 872, Gaurishanker Prasad Vs. State of Bihar and another* it was laid down by Hon'ble the Apex Court that under Section 197 of Cr.P.C. what is to be determined is whether the alleged action, which constituted an offence has a reasonable and rational nexus with the official duties required to be discharged by the public servant. If answer is in affirmative then sanction for his prosecution is required to be obtained. In the cited case the appellant in his official capacity as Sub Divisional Magistrate went to the place of the complainant for the purpose of removal of encroachment from Government land and in exercise of such duty he allegedly entered the chamber of the complainant,

used filthy language and dragged him out of his chamber. It was held that the act had reasonable nexus with the official duty of the appellant and no criminal proceeding could be initiated against the application without obtaining prior sanction because the appellant was present there in his official capacity as Sub Divisional Magistrate for the purposes of removal of the encroachment from the government land and in exercise of such duty he committed the act.

11. In instant case it is admitted that the applicants are officers or employee of the Nagar Nigam, Gorakhpur, it is alleged that and they are protected under Section 570 of the U. P. Municipal Corporation Act as Government servant and officers are protected under section 197 of Cr.P.C.

12. In instant case when Corporator moved application and complaint was received from another person also the Mukhya Nagar Adhikari sent letter no. 203 dated 5.9.2002 to Superintendent of Police, Gorakhpur that complainant-respondent and two others had made encroachment on path of Nagar Palika Parishad by installing water tank and erecting Chabutara. On receipt of the letter the Superintendent of Police passed order on 9.9.2002, copy of which is Annexure no. 2 to the affidavit, for removal of encroachment on 11.9.2002 and for maintaining law and order on the spot. Police force was appointed and duties were allotted to the police officials. The Superintendent of Police directed that the police force be got made available to the officers and officials of Nagar Nigam, Gorakhpur, so that encroachment may be removed. When police force was made available the applicants made compliance of the order passed by the Mukhya Nagar Adhikari. Thus it is a clear case in which the applicants acted in discharge of their official duties and therefore, they are protected by Section 570 of the U.P. Municipal Corporation Act, 1959 and complaint case against the applicants cannot proceed.

13. The applicant no. 2 has filed affidavit and has denied that any insulting language was used or any threatening was extended. No enmity was existing on the date of the occurrence between the complainant- O. P. No. 2 and the applicants. Therefore, there is no reason to disbelieve the affidavit of the applicant no. 2.

14. Therefore, the application under Section 482 Cr.P.C. filed by the applicants is allowed and the proceedings of Complaint Case No. 1189 of 2002 pending against the applicants in the Court of Additional Chief Judicial Magistrate III, Gorakhpur, including the summoning order dated 18.3.2004 is quashed.

Application allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.10.2004

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 44190 of 2004

Chandra Bhan alias Palu ...Petitioner
Versus
Director of Higher Education, U.P., Allahabad and others
...Respondents

Counsel for the Petitioner:
Sri R.D. Agrawal

Counsel for the Respondents:
S.C.

Constitution of India, Article 14- Rights to contest election-whether a is, it statutory right? Held-'No'-clause 20 provides-admission in Single Subject-not a regular statement-Petition being student B.Sc. Part III in Single subject-not a regular student-depositing the student unlcen fee-can not confer any right-No question of discrimination.

Held: Para 4

Petitioner has been granted admission in a single subject (B.Sc. Part-III), as such in view of the provisions of the rules regulating the elections, he not being a regular student is not entitled to contest the election. The identity card issued to petitioner is for the purpose to enable him to undertake the practical classes in the subject (B.Sc.-III). Therefore, no benefit can be withdrawn by the petitioner on the basis of the identity card. Similarly, the depositing of student union membership fee cannot confer a right upon the petitioner to contest the election. It is needless to point out that right to contest election is statutory right.

Case law discussed:
2000 (10) SCC 648

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

1. Heard R.D. Agrawal on behalf of the petitioner and Learned Standing Counsel on behalf of respondent no.1.

2. Petitioner has admittedly been granted admission in B.Sc. Part-III (single subject only). The petitioner has been restrained from contesting the election of the student union of Bareilly College, Bareilly in view of the provisions regulating the elections of the Union as framed by the institution, copy whereof has been enclosed as Annexure-6 to the writ petition. Clause 20 of the aforesaid rules provides that a candidate admitted in a single subject shall not be treated to be a regular student. It has further been provided that a student obtaining admission in a single subject may be permitted by the Principal of the institution to undertake practical classes also, however, the said permission would not amount to petitioner being treated as a regular student.

3. On behalf of the petitioner it is contended that he has deposited the requisite fee and has also been issued identity card, copy whereof have been enclosed as Annexure-1 and 2 to the writ petition. The petitioner further contended that a certificate has been issued by the Principal of the college categorically stating that the petitioner is a bona fide student of the college. The petitioner has also made reference to the document dated 29th September, 2004 whereby he has deposited student union membership fee to the tune of Rs. 25/- which has been accepted and, therefore, the petitioner has become a valid member of the student union and is entitled to contest the elections. It is further stated that if the petitioner is not permitted to contest the election there would be violation of Article 14 of the Constitution of India. Lastly it is contended that it is in the interest of the student and public also that the petitioner should be permitted to contest the election.

I have heard counsel for the parties and have gone through the records of the writ petition.

4. The contentions raised on behalf of the petitioner are totally misconceived. From the documents, which have been

brought on record by the petitioner including the admit card, fee receipt, identity card and the certificate issued by the Principal, it is established beyond doubt that the petitioner has not been declared to be a regular student of the said college. As already noticed above, petitioner has been granted admission in a single subject (B.Sc. Part-III), as such in view of the provisions of the rules regulating the elections, he not being a regular student is not entitled to contest the election. The identity card issued to petitioner is for the purpose to enable him to undertake the practical classes in the subject (B.Sc.-III). Therefore, no benefit can be withdrawn by the petitioner on the basis of the identity card. Similarly, the depositing of student union membership fee cannot confer a right upon the petitioner to contest the election. It is needless to point out that right to contest election is statutory right (Reference- **2000 (10) SCC 648**; *University of Delhi and another Vs. Anand Vardhan Chandal)* and the right to contest election and to participate in the election is regulated under the provisions so made.

5. In such circumstances, since the petitioner does not answer the description of regular student of Bareilly College, Bareilly, the question of his being permitted to contest the election does not arise. The plea of Article 14 of the Constitution of India, raised on behalf of the petitioner, is totally out of context.

6. As in paragraph 6 of the writ petition it has been stated that the said rule 10(b) on the basis whereof the petitioner has been held not to be a regular student has already been challenged by the petitioner in writ petition no. 41948 of 2004, in which no interim order is granted to the petitioner. In such circumstances, if said writ petition is dismissed, no grievance can be survived.

With these observations, writ petition stands dismissed.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2005

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

Civil Misc. Writ Petition No. 28460 Of 1997

M/S Laxmi Palace (Cinema) Mahmoorganj Varanasi
...Petitioner
Versus
Presiding officer Labour Court Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri T.P. Singh
Sri S.S. Nigam
Sri Siddharth Singh
Sri Anupam Kumar

Counsel for the Respondents:
Sri P.C. Jhingan
Sarita Jhingan
S.C.

U.P. Industrial Dispute Rules 1957-Rule 16 (1)-Exparte award-despite of service of Notices the employer failed to appear-Labor Court invested with the Power to procee exparte-but the approach should be one simulating the judicial stander-award being bereft of any discussion on merit-Non application of mind-held-conspicuously discernible in the order can not sustained.

Held: Para 10

It is therefore explicit from the award that the award was rendered without application of mind and it cannot be given the complexion of an award on merit. The award being bereft of any discussion on merit even of claims of the workman thus, non-application of mind is conspicuously discernible in the order.

Case law discussed:

2002 (3) SCC-25
2001 LLJ
2001 (89) FLR 229
AIR 1970 SC-806

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

1. Subject matter of impugnment in the instant petition is the Award dated 3.6.1995 rendered by the Labour Court Varanasi pursuant to Reference No. 105 of 1992 made under section 4 K of the U.P. Industrial Disputes Act, 1947 in which Industrial Dispute referred was "Whether the employers have wrongfully terminated the services of Employee Sri Lalji Pandey son of Sri Dev Nath Pandey, Booking Clerk with effect from 8.12.1990 and if so, what relief/compensation he is entitled to get?"

2. It would appear from the record that the petitioner-employer entered appearance through his representative on 7.7.1992 on which date time was sought to file written statement on behalf of the petitioner employer. On 21.10.1994, time was again granted to the representative of the petitioner fixing 15.12.1994 and again upto 3.2.1995. Again, time was granted on 2.3.1995 fixing 28.4.1995. It would further appear that in the meantime representative of the petitioner reclused himself and as a consequence notice was issued to the petitioner employer on 1.5.1995, which it is alleged was served to the petitioner on 10.5.1995. In this conspectus, the Labour Court proceeded exparte and rendered the award dated 3.6.1995.

3. Learned counsel for the petitioner assailed the impugned award stating that it is unsustainable on grounds that there is no decision or adjudication even of claims of the workman in the award on merit inasmuch as there is no discussion at all of the materials on record. He further canvassed that even if the Labour Court was inclined to proceed exparte, it was under a duty to analytically examine the materials on record and record reasons for his conclusions. The learned counsel further argued that the award is telescoped into very few paragraphs and contains no discussion on merit and hence, it being not in conformity with the provisions of the U.P. Industrial Disputes Act, 1947 and Rules made there-under, renders itself liable to be quashed. Per contra, Smt. Sarita Jhingan strove hard to prop up the award urging that the Labour Court had repeatedly afforded opportunity from 1992 onwards and being satisfied that the petitioner was evading appearance, was constrained to proceed exparte. She also tried to convince that it was not necessary for the Labour Court to delve into details and ultimately contended that the award was rightly passed.

4. The short and substantial question that crops up for consideration is whether it was incumbent upon the Labour Court to decide the question on merit on the basis of materials on record notwithstanding the fact that the employer had not filed any written statement within the time fixed and there was order of the Labour Court to proceed exparte.

5. In connection with the aforestated question, Rule 16 of the U.P. Industrial

Disputes Rules, 1957 may be referred to. Clause (1) of Rule 16 clearly envisages that if on the date fixed or on any other date to which the hearing maybe adjourned, any party to the proceedings before the Labour Court or Tribunal or an Arbitrator is absent, though duly served with summons or having the notice of date of hearing, the Labour Court or Tribunal or the Arbitrator, as the case may be, may proceed with the case in his absence and pass such order as it may deem fit and property. Rule 10 (9) of the Rules framed under Central Industrial Disputes, bears close similarity with the provisions of Rule 16 of the U.P. Industrial Disputes Rules, 1957 and mandates on similar lines. There is no gain-saying that the Labour Court is invested with power to proceed exparte in the circumstances embodied therein but the question remains whether the award which is not supported with reasons or discussion could have the complexion of an award on merit. In connection with this question, I would first delve into the cases cited across the bar.

6. The first case cited by the learned counsel for the petitioner is **Range Forest Officer v. S.T.Hadimani**[2]. In this case, the Apex Court held that the onus was on claimant to prove by leading evidence that he had in fact worked for 240 days in the year preceding his termination and filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had in fact worked for 240 days in a year. The next case relied upon is **C & M.D. Tamin Ltd v. P.O., Indl. Tribunal**[3]. In the case the crux of what has been held is that the adjudicatory forum should take into consideration the statements filed by the party, which remained exparte, and only on the comparative merits of the claims and counter claims an exparte award has to be passed. It was further observed that it is clear that the exparte award passed without considering the contentions raised in the counter statement filed before the conciliation Officer or before the Labour Court or Industrial Tribunal would not be valid.

7. In **Anil Sood v. Presiding officer, Labour Court II**[4], the Apex Court held that the power to proceed exparte is available under Rule 22 of the Central Rules which also includes the power to inquire whether or not there was sufficie3nt cause for the absence of a party at the hearing and if there is sufficient cause shown which prevented a party from appearing, then if the party is visited with an award without a notice which his a nullity and therefore, the Tribunal will have no jurisdiction to proceed and consequently, it must necessarily have power to set aside the exparte award.

8. The last decision is **Agra Electric Supply Company v. Labour Court, Meerut**[5] the quintessence of what has been held by the Apex Court is that the provisions clearly indicate that the Tribunal or Labour Court should take up the case and decide it on merits and not dismiss it for default.

[2] (2002) 3 SCC 25

[3] 2001-1-LLJ

[4] 2001 *89) FLR 229

[5] AIR 1970 SC 806

9. It has been postulated both by the Apex Court and various High Courts in a catena of decisions that failure to give reasons amounts to denial of justice. In **Rural Regional Bank and another v. Munna Lal Jain (2005)** AIR SCW 95, the Apex Court elaborated that reasons are live links between the mind of the decisions taker to the controversy and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the inscrutable face of the sphinx, it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The inscrutable face of a sphinx is ordinarily incongruous with a judicial or quasi-judicial performance.

10. Reverting to the case in hand, it is luculent from a bare perusal that the award consists of four paragraphs. The first paragraph contains details of parties and dispute referred to it. The second and third paragraphs deal with the dates fixed in the case in labour court. The fourth and last paragraph contains conclusion. The decisions discussed above, do point to the requirements of taking into consideration the statements filed by the party and it is only on comparative merits of claims and counter claims that an exparte award has to be passed and any exparte award filed without discussing the claim and counter claims of the parties would not be valid. In the instant case, the Labour Court merely laid out factual aspects and jumped to the conclusion that the workman was illegally terminated and was liable to be reinstated in service. The requirement of law envisaged for quasi judicial authority such as tribunal is that the approach should be one simulating the judicial standard and it must receive and place on record all the necessary, relevant, cogent and acceptable material facts germane and relevant to the facts in issue and inference to form conclusion has to be drawn in conformity with the judicial norms. In substance, the approach of the Labour Court should be judicious. It transpires from a perusal of the award that the Labour Court has not discussed the materials on record nor it tried to discuss the question for inference how the termination order was illegal on the basis of materials on record. The least that was expected of labour court was to discuss the claims of the workman simulating the judicial standard in case it was constrained to proceed exparte in the facts and circumstances of the case i.e. to have analytically examined the merit of the claims and recorded his satisfaction with reference to the provisions of the Industrial Disputes Act. It is well enunciated by catena of decisions that the decision on merit must have its genesis on material facts on record and the authority is not permitted to traverse beyond the facts on record to draw inference and make out a case of subjective satisfaction for his conclusions. What operated in the mind of the authority remained entombed and there is no discussion to articulate the view that the workman was illegally fired away and was entitled to reinstatement. It is therefore explicit from the award that the award was rendered without application of mind and it cannot be given

the complexion of an award on merit. The award being bereft of any discussion on merit even of claims of the workman thus, non-application of mind is conspicuously discernible in the order.

11. As a result of foregoing discussion, the award under challenge cannot be sustained in law. The writ petition succeeds and is allowed and in consequence, the award dated 3.6.95 is quashed. In view of above discussion, the matter is relegated to the Labour court for decision afresh after affording opportunity to the petitioner-employer for filing written statement within a period of one month which period would commence to run from the date of production of a certified copy of this order. It is expected that the Labour Court shall complete evidence within two months thereafter and pass appropriate orders expeditiously in accordance with law.

Petition allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.022005

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Writ Petition No. 2028 of 2005

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

Counsel for the Petitioner:
Sri Tufail Hasan

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 156 (3)- Application u/s 156 (3)-from bare perusal of the allegations-prima facie offence made out-except directing the S.O. to register and investigate- the application can not be treated as a complaint-held magistrate is under obligation to direct the S.O. to registered and investigate the case. .

Held- Para 5

In such circumstances the learned Magistrate was under obligation to direct the S.O. of police station concerned to register the case and investigate the same. If on the basis of the allegation made in the application under Section 156 (3) Cr. P. C. prima facie cognizable offence is made out such application cannot be treated as a complaint because in such cases the learned Magistrate is under obligation to direct the S.O. of police station concerned to register the case and investigate the same.

(Delivered by Hon'ble Ravindra Singh, J.)

1. Heard Sri Tufail Hasan learned counsel for the petitioner and learned A.G.A.

2. This petition is filed against the order dated 28.8.2004 passed by the learned Chief Judicial Magistrate, Firozabad whereby the application under Section 156(3) Cr. P. C. filed by the petitioner was treated as complaint and the police station concerned was not directed to register the case and investigate the same in exercise of the powers conferred under Section 156(3) Cr. P. C. and the order dated 27.11.2004 passed by the learned Additional Sessions Judge, Fast Track Court No.4, Firozabad, whereby the revision filed by the petitioner was dismissed.

3. It is contended by learned counsel for the petitioner that the impugned orders have not been passed in accordance with the provisions of law. The impugned orders are illegal because on the basis of the allegations made in the application under Section 156(3) Cr. P. C. a prima facie cognizable offence is made out, even then the learned C.J.M. has not directed the S.O. of police station concerned to register the case and investigate the same, but the application under Section 156(3) Cr. P. C. was illegally treated as a complaint. The learned revisional court has also not considered the manifest error committed by the learned Magistrate and dismissed the revision filed by the petitioner on 27.11.2004.

4. This contention has been opposed by learned A.G.A. by stating that the impugned order passed by the learned courts below are perfect orders, there is no illegality or irregularity in the impugned orders.

5. From the perusal of the allegations made in the application under Section 156(3) Cr. P. C. it appears that on the basis of the allegations made therein a prima facie cognizable offence is made out against the accused and the allegations are of such nature which require investigation by the police. ***In such circumstances the learned Magistrate was under obligation to direct the S.O. of police station concerned to register the case and investigate the same***. If on the basis of the allegation made in the application under Section 156 (3) Cr. P. C. prima facie cognizable offence is made out ***such application cannot be treated as a complaint because in such cases the learned Magistrate is under obligation to direct the S.O. of police station concerned to register the case and investigate the same.*** Therefore the impugned order dated 28.8.2004 passed by the learned C.J.M. Firozabad is illegal. The learned revisional court has not considered the manifest error committed by the learned Magistrate in passing the order dated 28.8.2004 and dismissed the revision filed by the petitioner on 27.11.2004. Therefore, the order dated 29.11.2004 passed by the learned Additional Sessions judge, Fast Track Court no. 4, Firozabad in Criminal Revision No.176 of 2004 is also illegal. Consequently, both the abovementioned orders dated 28.8.2004 passed by the learned C.J.M. and 27.11.2004 passed by the learned Additional Sessions Judge, Fast Track Court No. 4, Firozabad respectively are set aside.

6. In view of the facts and circumstances of the case and the submissions made by the learned counsel for the petitioner the learned C.J.M. Firozabad is directed to pass a fresh order on the application under Section 156(3) Cr. P. C. filed by the petitioner in accordance with the provisions of law.

7. With this observation the petition is finally disposed of.

Petition finally disposed of.

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