ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2005

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 6544 of 1984

Brijendra Singh and others ...Petitioners
Versus
The Third Additional District & Sessions Judge, Agra and others ...Respondents

Counsel for the Petitioners:
Sri G.N. Verma
Sri J.S. Baghel
Sri Shailendra Kumar Singh
Sri A.N. Verma

Counsel for the Respondents:
Sri Satya Prakash
Sri V.S. Mishra
Sri Nrapendra Chaturvedi
S.C.

U.P. Consolidation of Holding Act 1953-S. 49-void document-validity can be adjudicated-by consolidation authorities earlier the objection under S.-9 of the Act-rejected-upheld by High Court subsequent civil suit rightly held barred by Section 49 of the Act.

Held- Para 11 & 12

The proposition laid down by the Full Bench judgment is well settled. The document in view of the authority of the Full Bench above quoted, which are void can be adjudicated and decided by the consolidation courts. As observed above the sale deed in question whose declaration has been sought by the plaintiffs in the civil courts on own pleadings of the plaintiffs is a void document. The consolidation courts had every jurisdiction to adjudicate with regard to sale deed in question and in fact objection under Section 9-A (2) of the U.P. Consolidation of Holdings Act was filed by Smt. Surya Kumari challenging the right of Smt. Chandrawali on the agricultural land on the ground that she had no right. The objection was rejected which order was upheld upto the High Court.

In view of the forgoing discussions the revisional court has rightly taken the view that the suit filed by the plaintiffs-petitioners is barred under Section 49 of the U.P. Consolidation of Holdings Act. No error has been committed by the revisional court in allowing the revision filed by the respondent no. 2. I do not filed any merit in the writ petition.

Case law discussed:
1976 AWC-412
AIR 1973 SC-2451
AIR 1968-SC-956
1976 AWC-412

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

1. Heard Sri G.N. Verma, learned senior Advocate and Sri Satya Prakash appearing for the respondents.

2. By this writ petition the petitioners have prayed for quashing the order dated 6th March, 1984 passed by the 3rd Additional District Judge allowing the revision filed by the respondent no. 2 against the judgment and order dated 14.11.1979 passed by the Munsif, Fatehabad in Original Suit No. 273 of 1973. The original suit No. 273 of 1973 was filed by the petitioners impleading the respondent No. 2 as the defendant No. 3 and other defendants praying for a decree of declaration that the sale deed dated 3.3.1966 executed by Smt. Chadrawali in favour of the defendant no. 3 Bishan Lal is null and void. Before the trial court issue No. 4 was framed to the effect that "whether the suit is barred by Section 49 of the Consolidation of

Holdings Act?" Learned Munsif decided the issue in favour of the plaintiffs and held that the suit is not barred. A revision was filed by the respondent no. 3 Bishan Lal which has been allowed by the revisional court. The revisional court has held that the suit is barred under Section 49 of the U.P. Consolidation of Holdings Act. The order of the revisional court dated 6th March, 1984 has been challenged in this writ petition.

3. Brief facts necessary for appreciating the controversy raised in the writ petition are that the land in question was taken under consolidation proceedings under the provisions of the U.P. Consolidation of Holdings Act, 1953. The village was published under Section 9 of the U.P. Consolidation of Holdings Act on 25.2.1964 and a time barred objection was filed by Smt. Surya Kumari on 13.5.1966 claiming that the name of Smt. Chandrawali is wrongly recorded. It was further stated that Smt. Chandrawali was not entitled to execute any sale deed. The land in dispute was recorded originally in the name of one Agent Singh. Smt. Savitri Devi was his widow and Smt. Chandrawali was the widowed mother. Both Smt Savitri Devi and Smt. Chandrawali executed the sale deed. Smt. Surya Kumari was vendee from Smt. Savitri Devi and an objection under Section 9 of the U.P. Consolidation of Holdings Act was taken by Smt. Savitri Devi against Smt. Chandrawali. The case was that Smt. Chandrawali did not inherit after the death of Agent Singh and her name has been wrongly recorded and the sale deed executed by her was without any right. The objection of Smt. Surya Kumari was rejected and an objection under Section 11 (1) of the U.P. Consolidation of Holdings Act was filed by Smt. Surya Kumari which was dismissed by the Settlement Officer of Consolidation on 8.5.1967. A revision was filed before the Deputy Director of Consolidation which revision was also dismissed. A writ petition No. 2291 of 1969 was filed by Smt. Surya Kumari which writ petition was also dismissed by the order of this Court dated 15.12.1972. After dismissal of the above writ petition suit No. 273 of 1973 was filed by the petitioners seeking declaration that the sale deed dated 3.3.1966 is null and void.

4. Sri G.N. Verma, learned senior Advocate appearing for the petitioner raised following two submissions:-

(i) the sale deed in question was voidable sale deed and it was only the civil court who had jurisdiction to decide the issue and the suit was not barred under Section 49 of the U.P. Consolidation of Holdings Act.

(ii) Consolidation courts had not decided any issue after taking the evidence no findings have been rendered by the consolidation courts that the sale deed is void. The issue having not been decided by the consolidation courts, the civil court had jurisdiction to entertain the suit and decide the matter.

5. Reliance has also been placed on the judgment of the apex Court in A.I.R. 1968 Supreme Court 956 **Ningawwa Versus Byrappa Shiddappa Hireknrabar and others** and the Full Bench judgment of this Court in 1976 A.W.C. 412 **Ram Nath Versus Smt. Munna**.

I have considered the submissions and perused the record.

6. The orders passed by the consolidation officer, Settlement Officer of Consolidation as well as this Court in writ petition filed by the petitioners against the orders of the consolidation authorities are on record. The objection was filed by Smt. Surya Kumari under Section 9 A-s of the U.P. Consolidation of Holdings Act which was barred by time. In the objection the case of the objectors was that Smt. Chandrawali had no right to execute the sale deed and entry of her name was a fictitious entry. The objection was rejected as barred by time which order was upheld all the courts below.

7. A copy of the plaint has been filed as Annexure-1 to the writ petition. As noted above the relief claimed in the plaint itself was that the sale deed dated 3.3.1966 executed by Smt. Chandrawali be declared as null and void. Relevant averments made in the plaint are contained in paragraphs 2 to 7. The pleadings in the above paragraphs of the plaint are that one Agent Singh was co-sharer in plots No. 311, 315 and 316 with Om Prakash, Renuka and Sukhdei. Agent Singh died in the year 1952 leaving behind his widow Smt. Savitri Devi and mother Smt. Chandrawali. It was pleaded in paragraph 5 that Smt. Chandrawali had no right and she was not heir of Agent Singh. It was further pleaded that the name of Smt. Chandrawali was wrongly mutated in the records and on the basis of the said entry Smt. Chandrawali executed sale deed on 3.3.1966 in favour of the defendant no. 3. The submission of the counsel for the petitioners is that the sale deed is voidable. From the pleadings as notes above it was clear case of the plaintiff that Smt. Chandrawali had no right in the land in dispute and the sale deed executed by her was beyond her right. It is well settled that the consolidation courts/revenue courts had jurisdiction to adjudicate and ignore a deed which is void. It is only voidable deed which requires declaration in the civil court. The legal position is well settled by the judgment of the apex Court in A.I.R. 1973 SC 2451 **Gorakh Nath Versus H.N. Singh**.

8. The judgment of the apex Court in A.I.R. 1968 Supreme Court 956 **Ningawwa versus Byrappa Shiddappa Hireknrabar and others** relied by the counsel for the petitioner was a case with regard to character of document based on fraudulent misrepresentation. The apex Court held that fraudulent misrepresentation regarding character of the document makes the document voidable. Following was laid down in paragraph 4:-

"*(4) On behalf of the respondents Mr. Naunit Lal, however stressed the argument that the trial court was wrong in holding that the gift deed was void on account of the perpetration of fraud. It was submitted that it was only a voidable transaction and the suit for setting aside the gift deed would be governed by Article 95 of the Indian Limitation Act. In our opinion, the proposition contended for by Mr. Naunit Lal must be accepted as correct. It is well established that a contract or other transaction induced or tainted by fraud is not void, but only voidable at the option of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in*

the matter which they may enforce against the party defrauded."

9. The above case was a case which was considering a document which was based on fraudulent misrepresentation with regard to character of document which was a voidable document. The facts of the present case are to the opposite. In the present case the pleadings of the plaintiff-petitioners are to the effect that Smt. Chandrawali had no right to the agricultural land since she was not the heir of Agent Singh and the sale deed executed by her was without authority and thus void. The above judgment of the apex Court does not help the petitioner.

10. The judgment of the Full Bench relied by the counsel for the petitioner in the case of **Ram Nath versus Smt. Munna** reported in 1976 A.W.C. 412 was a case in which the issue considered was as to whether the suit for cancellation of voidable sale deed relating to an agricultural plot will abate under Section 5 (2) of the U.P. Consolidation of Holdings Act. The Full Bench held that the suit in respect of void document abate by reasons of Section 5 but the suit for cancellation of voidable deed do not abate. Following was laid down in paragraph 9:-

"9. Shri H.N. Tilharfi contended that the use of the words "it could be urged" appearing in the Supreme Court's judgment means that their Lordships were not giving any decision but only mentioning a plausible argument. In our opinion, this cannot be the meaning of these words in the context in which they have been used. These words only mean that it could be validly urged that the Consolidation authorities had no power to cancel the deed. The subsequent part of the sentence to the effect "it must be held to be binding on them so long as it is not cancelled by a court having the power to cancel it" makes it clear that the Lordships of the Supreme Court intended to declare the law in respect of voidable documents. We are, therefore, of the opinion that the Supreme Court has laid down the law in Gorakh Nath's case, A.I.R. 1973 SC 2451 that suits in respect of void documents abate by reason of section 5 of the U.P. Consolidation of Holdings Act, but the suits for cancellation of voidable sale deeds do not abate."

11. The proposition laid down by the Full Bench judgment is well settled. The document in view of the authority of the Full Bench above quoted, which are void can be adjudicated and decided by the consolidation courts. As observed above the sale deed in question whose declaration has been sought by the plaintiffs in the civil courts on own pleadings of the plaintiffs is a void document. The consolidation courts had every jurisdiction to adjudicate with regard to sale deed in question and in fact objection under Section 9-A (2) of the U.P. Consolidation of Holdings Act was filed by Smt. Surya Kumari challenging the right of Smt. Chandrawali on the agricultural land on the ground that she had no right. The objection was rejected which order was upheld upto the High Court.

12. In view of the forgoing discussions the revisional court has rightly taken the view that the suit filed by the plaintiffs-petitioners is barred under Section 49 of the U.P. Consolidation of Holdings Act. No error has been

committed by the revisional court in allowing the revision filed by the respondent no. 2. I do not filed any merit in the writ petition. The writ petition is dismissed. Parties shall bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2005

BEFORE
HON'BLE AJOY NATH RAY, CJ.
HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 296 of 2005

Gyan Pratap Singh ...Appellant
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Appellant:
Sri Dr. R. Dwivedi
Sri V.S. Dwivedi
Sri R.B. Singhal

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

U.P. Panchayat Raj Rules 1947-rule 165 (4) and (5)- Prohibition on appointment of certain relatives of village Pradhan-as mentioned in S.-165-Selection of the appellant cancelled-only reasons for cancellation disclosed-at that material time the appellant was the son of the brother in laws son of a lady village Pradhan-explanation 'nephew'-does not include a brother in law's son-a legal restricted meaning of nephew should be given rather than a Special wide meaning-prohibition has to be clear and accurate-accordingly-cancellation of appointment held-illegal.

Held: Para 14

On the basis of these materials we have to take a decision whether the explanation to Rules 165 prohibits a brother-in-law's son by prohibiting a nephew. We are unable to opine that in that explanation nephew includes a brother-in-law's son. We give a legally restricted meaning to the word nephew rather than give it a socially wide meaning; where people's rights are involved and curtailment of the eligibility to appointment in a Panchayat is concerned, the prohibition has to be clear and accurate before a person can be barred from entering into a Panchayat service.

(Delivered by Hon'ble Ajoy Nath Ray, CJ)

1. This appeal is taken up and disposed of.

2. It is from an order of an Hon'ble Single Judge dated 10.2.2005 wherein his Lordship has quashed the selection and appointment of one Gyan Pratap Singh, who was respondent no. 5 in the Court below. The only reason for quashing is his relationship to the Village Pradhan. It is an admitted case that the appellant at the material time was the husband's brother's son, i.e. the brother-in-law's son of the Village Pradhan, who was a lady.

3. The only provision of law which is material for our consideration, is the explanation of sub-rule (5) of Rule 165 of the U.P. Panchayat Raj Rules, 1947. Sub-rule (4) prohibits the appointment of a Panchayat member's "Relation" to any post (menial servants excepted).

The said explanation is set out below:-

"Explanation--The word "relation" in the proviso means father, grand-father, father-in-law, maternal or paternal uncle,

son, grandson, son-in-law, brother, nephew, first cousin, brother-in-law, sister's husband, wife, wife's brother, son of nephew"

4. We are of the clear opinion that the explanation is not illustrative but exhaustive. The wording of the explanation indicates that the wording "relation' is restricted in its meaning to the particular relationships which are mentioned in the explanation and not otherwise. It would not be open to the Court to find out different degrees or items of prohibition, which are not mentioned in the Rule.

5. A simple reading of the explanation shows that although brother-in-law is a prohibited relation, brother-in-law's son is not a prohibited relation.

6. The only submission, which deserves any mention from the side of the respondents, is that brother-in-law's son is a nephew and, therefore, a prohibited relationship.

7. We are unable to accede. What a nephew is, is best understood by looking at a helpful chart of consanguinity given in Schedule I of the Indian Succession Act, 1925. It would be seen there that a brother's son is a nephew but it is quite different from the son of the brother-in-law.

8. A brother and a brother-in-law, in relation to proximity of relationship, are extremely wide apart. If the Schedule to the Hindu Succession Act, 1956 is considered, it would be seen that a brother is at Item No. (3) of Head II of Class II of the Schedule, but a brother-in-law is not much of a relationship at all, from the point of view of an inheritance of property. We are aware that these property legislations should not be placed too much reliance upon when the Court is construing word "relation' given in a Rule, which is meant to prohibit nepotism rather than prohibit only some technically proximate relation from being appointed. But the words used in the explanation are English words, which have specific meaning both in the dictionary and in the law, and help taken from these sources cannot be wholly brushed aside.

9. It is important to note that from the point of view of the Indian Succession Act Chart, the nephew of the wife would be the wife's brother's son, who would be quite a different person than the brother's son of the wife's husband, i.e. brother-in-law's son.

10. However, if The Concise Oxford Dictionary is to be consulted, the meaning of nephew as given in the 1995 edition is as follows:

Nephew; a son of one's brother or sister, or of one's brother-in-law or sister-in-law.

11. The Indian Succession Act, therefore, speaks with a different voice from The Concise Oxford Dictionary; dictionaries speak with the same voice and Black's Dictionary defines nephew as the son of one's brother or sister, or one's brother-in-law or sister-in-law.

12. The reason for this difference is not far to see; when one is looking at the Indian Succession Act, one is judging the descent of property, which has everything to do with blood relationship.

13. The dictionaries, however, refer to the common parlance and, therefore, the reference to one's brother-in-law's son as a nephew, would be quite right, say, in a social conversation, although not quite so right, if a lawyer were referring to that relationship in his arguments made to a judge in a Court of law.

14. On the basis of these materials we have to take a decision whether the explanation to Rules 165 prohibits a brother-in-law's son by prohibiting a nephew. We are unable to opine that in that explanation nephew includes a brother-in-law's son. We give a legally restricted meaning to the word nephew rather than give it a socially wide meaning; where people's rights are involved and curtailment of the eligibility to appointment in a Panchayat is concerned, the prohibition has to be clear and accurate before a person can be barred from entering into a Panchayat service.

15. We are also of the opinion that if the Rule making authorities were minded to stop a member's brother-in-law's son from being inducted in the same Panchayat, it would have specifically said so by prohibiting a brother-in-law's son, as it has prohibited a nephew's son by express mention.

16. In these circumstances, the appeal is allowed. The writ petition is dismissed and the quashing of the appellant's appointment and selection is set aside. The appellant shall function hereafter in accordance with law.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2005

BEFORE
THE HON'BLE VIKRAM NATH, J.

Civil Misc. Writ Petition No. 12671 of 1990

Smt. Amrawati and others ...Petitioners
Versus
The XI Additional District Judge, Moradabad and others ...Respondents

Counsel for the Petitioners:
Sri Rajesh Tandon
Sri Kshitij Shailendra
Sri S.K. Johri

Counsel for the Respondents:
Sri A.N. Tripathi
S.C.

Code of Civil Procedure-Order 50 Rule 1(8), Order 41 rule 27 readwith Small Causes Courts Act, Section 17 and 25- Additional evidence-although the provision of Order 41 rule 27 are not applicable-Document sought to be admitted are relevant and necessary to arrive at a correct and proper decision-held-revisional court correctly exercised its jurisdiction by admitting additional evidence-can not be interfered under writ jurisdiction.

Held: Para 18

In the present case I have already considered and recorded that the documents sought to be admitted were relevant and necessary for meeting out justice between the parties and also for the Court to arrive at a correct and proper decision inter se between the parties, therefore, the revisional court has correctly exercised its jurisdiction in admitting the additional evidence.

Case law discussed:
1979 ALJ 1263
1983 ARC-15

1997 ARC-540
2003 J.T. (11) SC-438
AIR 1968 SCC-271
1992 AWC-273
2001 (9) SCC-245

(Delivered by Hon'ble Vikram Nath, J.)

1. These two writ petitions have been filed by the defendants for quashing the order dated 7.2.90 passed by XI Additional District Judge, Moradabad (respondent no. 1) In civil revision no. 92 of 1985 and civil revision no. 93 of 1985 whereby the application filed by the plaintiff revisionist (respondent no. 2) for admitting the additional evidence has been allowed and the objections of the petitioners have been rejected.

2. The dispute relates to the properties mentioned in schedule 'A' to the plaint of suit no. 129j of 1984, Smt. Ramawati vs. Amrawati and others by which Smt. Ramawati claims herself to be the owner and land lord and the petitioners as tenants. The suit was filed with the allegation that property in dispute was owned by Sri Jagdish Kumar and upon his death it was inherited by his widow Smt. Surendra Bala and his mother Smt. Genda Kunwar. Earlier Smt. Sunrendra Bala had filed a suit against Smt. Genda Kunawar for her eviction and for declaration, which was registered as suit no. 17 of 1944. The said suit was decided against Smt. Genda Kunwar, against which she filed a civil revision before the High Court, which was registered as civil revision no. 338 of 1945. A compromise was arrived at on 16.12.1947 and on its basis Smt. Genda Kunwar was given life interest in the property, detailed in Schedule 'B' to the plaint in lieu of the maintenance and she was accordingly, put into possession of the said property. Upon enforcement of the Hindu Succession Act, 1956. Smt. Genda Kunwar executed a Will in respect of the said property on 23.2.67 in favour of her grand daughter Smt. Rajeshwari Devi Tandon became the owner and continued to remain to be so till her death on 17.12.80. On that date Smt. Beena Bahal, only daughter and sole heir of Smt. Rajeshwari Devi Tandon inherited the property and she executed the will deed dated 7.7.83 in favour of the plaintiff Smt. Ramawati. It was further alleged in the plaint that the accommodations detailed in Schedule 'B' and 'C' at the end of the plaint were part and parcel of the property shown in Schedule 'A' to the plaint. It was clarified that the properties of the Schedule 'B" and 'C" were in tenancy of Sri Ram Kishore, husband of the defendant no. 1 Smt. Amrawati and father of the defendant nos. 2 to 5, namely Sri Rajendra Kishore, Sri Ravindra Kishore, Sri Dharmendra Kishore and Sri Arvind Kishore. On the death of Ram Kishore defendant nos. 1 to 5 became tenants of the original owner Smt. Genda, thereafter of Smt. Rajeshwari Devi Tandon, then of Smt. Beena Bahal and finally of the plaintiff Smt. Ramawati. The defendant had committed default in payment of rent from 7.7.1983 and therefore a notice requiring to pay the arrears as also terminating their tenancy and to vacate the premises was given on 20.1.1984. However as the defendant failed to pay arrears despite notice and had further denied the title of the plaintiff as land lord as such the suit was filed on these two grounds for recovery of rent and ejectment from the properties detailed in schedule 'B' at the foot of the plaint. In respect of properties mentioned in schedule 'A' and 'C' since they were in occupation and possession of other parties

separate suits were filed against them, being registered as Small Causes Suit No. 130 of 1984 and 131 of 1984.

3. The defendants contested the suit and filed their written statements alleging, inter alia, that Smt. Surendra Bala, widow of Jagdish Kumar, was the owner and land lord of the properties in dispute. She had executed a registered will deed in favour of Sri Vinshu Kumar s/o Lala Tara Chand on 23.12.1963. The said Will was also registered on 14.1.1964. Upon the death of Smt. Surendra Bala, Sri Vishnu Kumar became the exclusive owner and land lord of the properties. Subsequently by a registered sale deed dated 22.4.1983. Sri Vishnu Kumar transferred his right as follows: half share in favour of Smt. Kusum w/o Sri Rajendra Kishore, and Smt. Jaymata w/o Sri Ravindra Kishore. The remaining half share was transferred in favour of Smt. Amrawati, widow of late Ram Kishore, Sri Dharmendra Kishore and Sri Arvind Kishor4e, sons of late Ram Kishore and Smt. Ansuiya w/o Sri Dharmendra Kishore. In the circumstances it was contended by the defendants in the written statement that the plaintiff was not the owner and land lord of the properties in dispute and therefore could not maintain the suit. It was also denied in the written statement that Smt. Genda Kunwar never executed and Will in favour of the Smt. Rajeshwari Devi Tandon on 23.2.1967 and therefore, Smt. Rajeshwari Devi Tandon never became owner and land lord of the properties in dispute and subsequently Smt. Beena Bahal (daughter of Smt. Rajeshwari Devi Tandon) also had no right to execute the sale deed in favour of the plaintiff.

4. Before the trial court both the parties led the evidence. The plaintiff filed a copy of the compromise dated 16.12.1947, which was arrived at between the parties in civil revision no. 338 of 1945. However, neither the pleadings of suit no. 17 of 1944 nor the order sheet of civil revision no. 338j of 1945 etc. could be filed before the trial court even though the pleading to the same were made in the plaint. The trial court after hearing the parties and considering the materials on records came to the conclusion that Smt. Genda Kunwar never became the absolute owner and had no right to execute the Will and subsequently the rights alleged to have accrued pursuant to the sale deed and the subsequent sale deed by Smt. Beena Bahal could not make the plaintiff owner and land lord of the properties in dispute. The trial court was of the view that it was always Sri Vishnu Kumar on the basis of will of Smt. Surendra Bala who became the owner and land lord and therefore there existed no relationship of land lord and tenant between the parties. On these findings of fact the trial court vide judgment dated 8.2.1985 dismissed the suit. Aggrieved by the same the plaintiff filed a revision under section 25 of the Provincial Small Causes Courts Act, 1887 (hereinafter referred to the Act) before the District Judge, Moradabad, which was registered as revision no. 92 of 1985. During pendency of the said revision the plaintiff filed an application under section 151 C.P.C. read with Order XLI Rule 27 C.P.C. for admitting additional evidence on record for correct and proper adjudication of the rights of the parties. This application was supported by an affidavit. The five papers sought to be placed on the record included.

1) Plaint of Original Suit No. 17 of 1944, Smt. Surendra Bala vs. Smt. Genda Kumar
2) Written statement filed in O.S. 17 of 1944 by Smt. Enda Kunwar
3) Judgment of Civil Judge, Moradabad in Original Suit No. 17 of 1944
4) Order sheet in originals suit no. 234 of 1975 Smt. Rajreswri Devi vs. Sri Vishnu Kumar
5) Order sheet in original suit no. 234 of 1975 Smt. Rameshwari Devi vs. Sri Vishnu Kumar.

5. It was explained in the affidavit that despite best efforts the plaintiff could not get the copy of these papers during pendency of the suit as they were not available in the record room being very old and that the plaintiff had exercised due diligence and had made full efforts to obtain the copy of these documents but had failed even though these documents find mention in the plaint. It was stated that with great difficulty these papers have been obtained and therefore they may be taken on record as they would be necessary for deciding the controversy in the suit.

6. An objection was filed by the defendants on 17.1.1989 which was only formal to the effect that firstly no additional evidence could be taken in revision and secondly, that no explanation has been tendered with regard to non availability of the record. The revisional court vide order dated 7.2.1990 has allowed the application for admitting evidence holding that they would be necessary for arriving at a correct decision in the case. Aggrieved by the said order the present writ petition has been filed.

7. I have heard Sri Kshitij Shailendra, learned counsel for the petitioners and Sri Ashok Nath Tripathi, learned counsel for the respondents.

8. The sole question which arises for determination in the petition is as to whether the additional evidence can be admitted in a revision under section 25 of the Act and if such evidence can be admitted then under what circumstances its allowance would frustrate the very purpose of summary disposal of the cases under the provision of the Act.

9. From a perusal of the record it is clear that the pleading relating to the original suit no. 17 of 1944 between Smt. Surendra Bala and Smt. Genda Kunwar, filing of Revision No. 338 of 1945 before the High Court and the compromise arrived at between the parties in this civil revision are not disputed. Plaint clearly mentioned these facts. It is also clear from the pleading that both the parties are claiming title through the heirs of Sri Jagdish Kumar. The two heirs who succeeded Sri Jagdish Kumar were his mother Smt. Genda Kunwar and his widow Smt. Surendra Bala. Plaintiff Smt. Ramawati claims her title coming down from Smt. Genda Kunwar whereas defendants Smt. Amrawati and her son claim title coming down from Smt. Surendra Bala. In the suit for declaration between smt. Surendra Bala and Smt. Genda Kunwar, their rights stood determined under the compromise dated 16.12.1947. It is not in dispute that the full compromise is not available and has been destroyed. In the circumstances the pleading of the suit no. 17 of 1944 i.e. plaint and written statement thereof would be relevant to consider the circumstances under which the compromise was arrived

at and also to some extent the nature of the compromise which was arrived at between the two ladies.

10. In my considered view the pleading of the original suit no. 17 of 1944 would be relevant as also necessary for arriving at a correct and proper conclusion with regard to the rights of the parties in the present proceeding.

11. Learned counsel for the petitioners has contended that applicability order XLI Rule 27j of the C.P.C. is specifically barred in view of the second order 50 of C.P.C. and section 17 of the Act. These two provision provide the details of the provision of the C.P.C. which can be applied in proceeding under 1887 Act, in Order L of the C.P.C., Order XLI Rule 27 has not been included rather Order XLI to Order XLV have been specifically excluded from being extended to the courts constituted under the Act.

12. The contention of Sri Kshityij Shailendra, learned counsel for the petitioner, therefore, is that even if these papers sought to be filed were necessary and proper for correct adjudication of the rights, since Order XLI Rule 27, CPC has been excluded from being applied to the proceedings under the Act, these documents could not have been admitted in revision. In support of his contention reliance has been placed on the following judgment:

1) 1979 All L.J. **Smt. Kamini Khare vs. Ram Naresh Pandey and another**
2) 1983 ARC Page 15, **Babu Ram vs. The Additional District Judge, Dehradun and another**
3) 1997 ARC page 540, **Kailash Chandra Jain vs. Jagdish Chandra Nagpal and another**
4) 2003 JT (II) SC 438, **State of Andhra Pradesh vs. P.V. Hanumanta Rao (dead).**

13. On the other hand, Sri Ashok Nath Tripathi, learned counsel for the respondents has contended that in order to meet the ends of justice and for arriving at correct decision, if the Court comes to the conclusion that certain papers need to be admitted it can always exercise power under its inherent jurisdiction available under section 151 C.P.C. In the present case the court below having recorded the findings that admitting of the evidence would help in correct and proper adjudication of the rights, it was fully justified in passing the order admitting the evidence and such order cannot be termed to be suffering from any error of law warranting interference by this Court in its extraordinary jurisdiction.

14. Sri Tripathi has also relied upon the following judgements in support of his contention:

1) AIR 1968 SCC 271 **The Pabbojan Tea Co. Ltd. etc. vs. The Deputy Commissioner, Lakhimpur and others**
2) 1992 AWC 273 **Smt. Gayatri Devi and others vs. Additional District Judge/Special Judge (EC ACT) Etawah and another**
3) (2001) 9 Supreme Court Cases 245 **Badami Devi (Smt.) and another vs. Ambuja Raghav and anothe**r.

15. All the judgment relied upon by both sides ultimately rest upon the law laid down by the Division Bench of this Court in the case of ***Babu Ram (supra)***.

In the said cases this Court, after holding that even though an order under Order XLI Rule 27 C.P.C. cannot be pressed into service for admitting the additional evidence in revision under section 25 of the Act, but at the same time the Division Bench held that the court is constituted for the purpose of doing justice according to law and must therefore be deemed to possess as a necessary corollary and as inherent in its very constitution such powers as may be necessary to do justice and undo wrong in the course of the administration of the justice. The Division Bench further goes on to say that inherent power of a court to do justice in fact flows from the well recognized principle of equity justice and good conscious which equally applies to Courts deciding a suit under the Small Cause Court Act. The Division Bench while considering the provision contained in order 50 Rule 1(B) held as follows:

"After a review of the various provision of the Provincial Small Cause Courts Act and the Code of Civil Procedure, we find that there is no prohibition contained in either of the two enactments expressed or impliedly providing for the bar of admitting additional evidence. What Order 1, Rule 1(b) did by excluding order XLI was only that this provision will not apply to revisions. But, the fact that order XLI Rule 27 has been excluded does not lead to the conclusion that the Court cannot in exercise of its inherent power admit additional evidence when the ends of the justice requires the same to be done.

Thus, there is no doubt that the Court of Small Cause can in exercise of its inherent power admit additional evidence. However, when that power could be exercised and in what manner, that is a different question and that should not be mixed up with the jurisdiction of the court to admit additional evidence."

16. In view of the above clear and unambiguous law laid down by Division Bench of this Court in the case of ***Babu Ram (Supra),*** which has also been followed and concurred with in the subsequent judgment in the case of ***Gayatri Devi (Supra)*** there cannot be any doubt that the revisional court exercising power under section 25 of the Act can admit additional evidence.

17. In the case of ***Mohair (supra)***, relied upon by the petitioners also this Court has said down that there can be a situation where the revisional court exercising power under section 25 of the Act may admit the additional evidence. Further in the case of ***Kailash Chandra Jain (supra)*** also the court has held that in the revisional jurisdiction under section 25 of the Act the power to admit additional evidence is inherent and that jurisdiction is always available. The case of ***State of Andhra Pradesh vs. P.V. Hanumanta Rao (supra)*** also is of no help to the petitioner as it relates to exercise of jurisdiction or appreciation of the evidence by the High Court under Article 226 and 227 of the Constitution of India.

18. In the present case I have already considered and recorded that the documents sought to be admitted were relevant and necessary for meeting out justice between the parties and also for the Court to arrive at a correct and proper decision inter se between the parties, therefore, the revisional court has correctly exercised its jurisdiction in admitting the additional evidence.

19. In view of what has been discussed above the revisional court has not committed any error much less error of law so as to warrant interference by this Court under its equitable and extraordinary jurisdiction under Article 226 of the Constitution of India.

20. Accordingly, both the writ petitions fail and are dismissed. However, there shall be no order as to costs.

Petition Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.5.2005

BEFORE
THE HON'BLE AJOY NATH RAY, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 587 of 2005

Narendra Kumar and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri M.D. Singh Shekhar

Counsel for the Respondents:
Sri Kapil Rathore
S.C.

Constitution of India, Article 226-Service Law-Ad-hoc appointment-Appellants/ Petitioner ungone the regular selection process-but the authority instead of giving appointment on probation basis for one year appointed adhoc basis-the appellant, joined without any protest-can not have legitimate expiation, for permanent job-held petitioner rightly dismissed.

(Delivered by Hon'ble Ajoy Nath Ray, C.J.)

1. The appeal is taken up and summarily disposed of. The appellant-writ petitioners were issued letters of adhoc appointment but they filed the writ for the purpose of continuing to work. The term of appointment on the adhoc basis ran out on 17th February, 2004, when they were stopped from discharging their duty, they came to Court.

2. We are in respectful agreement with the order passed by Hon'ble Mr. Justice Tarun Agarwal dated `12th April, 2004 whereby his Lordship has held that the writ petitioners were not entitled to any relief and they had no right to hold their respective posts.

3. We assume for the purposes of this appeal, though the Hon'ble Judge has held otherwise in the court below that the posts were in the nature of substantive permanent vacancies. However, it is the admitted position that though the selection committee after advertisement had recommended appointments with a probationary period, the appointing authority chose quite a different procedure and issued adhoc letters of appointments to all the writ petitioners.

4. On behalf of the appellants, it has been contended that on the facts of this case, the appointments granted must be treated by the court as permanent appointments to substantive posts, mere running out of the period of ad hoc appointment would not entitle the Court to allow the writ petitioners ' services to be terminated summarily.

5. On the part of the respondents, the impugned judgment was supported on the

basis that, if an adhoc appointment comes to an end with the running out of the period of the granted tenure, the employee would not necessarily have the right to continue in the post.

6. In our opinion, in these service matters, the facts and circumstances of each case have to be looked at with regard to the special attending details. On that basis the Court has to come to a conclusion whether the intention of the appointing authority was a treat the selection process as continuing regularly as a regular sequence after the advertisement and the selection committee's report. The Court has to consider, whether the appointing authority did not choose to continue the process of selection on a regular basis or on the basis of the recommendations made by the selection committee and chose instead, to adopt a procedure which cannot be called the culmination of the regular selection process. Similarly, the point of view of the employee has also got to be judged. If the employee has undergone a fully regular selection process and at the end thereof has been issued a regular letter of selection with the usual probationary period, then and in that event the employee would be entitled to a legitimate expectation of regularization after the probationary period has been properly served out.

7. In the instant case, as the Hon'ble single Judge has also noted, the grant of ad hoc appointment expressly described as such made a world of difference. The appointing authority was not minded to grant probationary periods of service to the Class IV employees the reason whey it did not do so is its own business and the writ court need not necessarily enquire into that. The appellant on being issued the ad hoc letters of appointment did not there and then raise an objection that they should have been issued probationary periods and not mere ad hoc appointments for one year. As such they were aware of the tenuous nature of the appointment which was being offered to them and they accepted even such offer. It could not be said that even on the ad hoc appointments they had the same legitimate expectation of getting permanent job just as if they have been issued normal letters for probationary service.

8. On this basis we respectfully agree with his Lordship's reasoning that the appointment of the writ petitioners was purely temporary and was for a limited period upto 17.2.2004. We also agree with his Lordship's finding that it was not a case of hire and fire as was found in the case reported at 1986 (3) SCC 156, ***Central Inland Wat4er Transport Corporation Ltd. and another vs. Brojo Nath Ganguli and another.***

9. The Division Bench judgment referred to on behalf of the appellant being the case of ***Dr. (Kumari) Ranjana Saxena Vs. Vice Chancellor, Rohilkhand University, Bareilly and others*** reported at 1980 UPLBEC 225, is distinguishable on this essential factual difference that in that case the writ petitioner had objected in the very beginning as to the offered nature of temporary employment.

As such the appeal is dismissed without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.3.2005

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 16485 of 2001

Ravindra Raghav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri V.M. Zaidi
Sri V.D. Chauhan

Counsel for the Respondents:
S.C.

U.P. Police Officers of subordinate ranks (Punishment & Appeal) Rules 1991-Rule-8 (2)-Dismissal Order-without holding any enquiry or without any order dispensing holding inquiry-No reasons recorded-statutory requirement of recording the reasons about satisfaction dispensing to hold enquiry also not there-held-order passed by S.P. to contrary to requirement of rule 8 (2)(b) of act-can not sustained.

Held: Para 6 & 7

The Rules contemplate exercise of power under Rule 8 (2)(b) for dispensing holding of disciplinary enquiry when it is not reasonably practicable to hold such enquiry. The reasons thus which can satisfy the requirement of Rule 8(2)(b) has to be referable to not reasonably practicable to hold an enquiry. No reasons have been given in the order which can be said to fulfil the requirement of not reasonably practicable to hold enquiry. The statutory requirement of exercising the power is absent in the present case. As observed above, no reasons have also been given in the counter affidavit bringing on the record the reasons on the basis of which such satisfaction was recorded by Superintendent of Police, the court is at last to find out the basis for invoking the power under Rule 8 (2)(b) of the Rules.

In above view of the facts, it is clear that power has been exercised by Superintendent of Police under Rule 8 (2)(b) contrary to the requirement as laid down in Rule 8(2)(b). The order of Superintendent of Police cannot be sustained.

Case law discussed:
1991 SCC (1) 362
1996 (2) AWC-245
1994 (2) UPLBEC-1717
1998 (1) UPLBEC-638

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

1. Heard counsel for the petitioner and learned standing counsel. Counter and rejoinder affidavits have been exchanged between the parties with the consent of the parties the writ petition is being finally disposed of.

2. By this writ petition, the petitioner has prayed for quashing the order dated 21st October, 2000 passed by Superintendent of Police dismissing the petitioner from service dispensing holding of the enquiry under the provisions of U.P. Police Officers of the subordinate ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as the Rules) and the appellate order dated 15th February, 2001 dismissing the appeal filed by the petitioner.

3. Learned counsel for the petitioner, challenging the orders, contended that no reasons have been given for dispensing holding of the enquiry and dismissal of the petitioner invoking the power under Rule 8 (2) (b) of the Rules. The

submission of counsel for the petitioner is that no reasons having been recorded for dispensing holding of the enquiry invoking of power under Rule 8 (2) (b) is unjustified. He has placed reliance on judgment of this Court reported in (1991) 1 SCC 362, ***Jaswant Singh Vs. State of Punjab and others***, judgments of this Court reported in 1996(1) AWC 245, ***Balveer Singh Vs. State of U.P. and others***, (1994) 3 UPLBEC 1717, ***Deep Narain Vs. Deputy Inspector General of Police, Gorakhpur and others*** and 1998(1) UPLBEC 638, ***Brijendra Singh Yadav Vs. State of UP and others.***

I have considered the submissions raised and perused the record.

Rule 8 of the Rules provides for dismissal and removal. Rules 8(1) and 8(2) of the Rules which are relevant for the present case, are extracted below :-

"8. Dismissal and removal- *(1) No Police Officer shall be dismissed or removed from service by an authority subordinate to the appointing authority.*

(2) No Police Officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings is contemplated by these rules :

Provided that this rule shall not apply –

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry; or

(c) Where the Government is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry.

4. Rule 8(2) (b) of the Rules provides that where the authority empowered to dismiss or remove a person is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry, the police officer shall be dismissed or removed without proper enquiry as contemplated in sub Rule (2) of Rule 8 of the Rules. For invoking the power under Rule 8 (2)(b) of the Rules the authority empowered to dismiss has to be satisfied for reasons to be recorded in writing that it is not reasonably practicable to hold such enquiry. It is well settled that when power under Rule 8 (2) (b) is invoked judicial review is permissible where subjective satisfaction of the authority that it was not reasonably practicable to hold an enquiry was not based on objective facts as laid down by the apex court in Jaswant Singh's case (supra). The apex court in Jaswant Singh's case (supra) had considered the provisions of Article 311(2) second proviso (b) of the Constitution of India. Rule 8(2)(b) of the Rules is para matena with the second proviso (b) of Article 311 sub clause (2). The apex court in the aforesaid judgment laid down two conditions for invoking the power under clause (b) of Rule 8(2) of the Rules. Following was laid down in paragraph 4 of the said judgment.

"4…….Insofar as clause (b) is concerned this Court pointed out that two conditions must be satisfied to sustain any action taken thereunder. These are (i) there must exist a situation which renders holding of any inquiry –'not reasonably practicable, and (ii) the disciplinary authority must record in writing its reasons in support of its satisfaction. Of course the question of practicability would depend on the existing fact situation and other surrounding circumstances, that is to say that the question of reasonable practicability must be judged in the light of the circumstances prevailing at the date of the passing of the order. Although clause (3) of that article makes the decision of the disciplinary authority in this behalf final such finality can certainly be tested in a court of law and interfered with if the action is found to be arbitrary of mala fide or motivated by extraneous considerations or merely a ruse to dispense with the inquiry. Also see, Satyavir Singh v. Union of India, Shivaji Atmaji Sawani v. State of Maharastra and Ikrammuddin Ahmad Borah v. Superintendent of Police, Darrang.

5. The apex court further held in the above judgment that clause (b) of second proviso to Article 311 (2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold enquiry. Further satisfaction has to be based on certain objective facts and not the out come of him or caprice of concerned officer. Following was laid down in paragraph 5 of the said judgment:-

"5…….It was incumbent on the respondents to disclose to the Court the material in existence at the date of passing of the impugned order in support of the subjective satisfaction recorded by respondent no. 3 in the impugned order. Clause (b), of the second proviso to Article 311 (2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry- This is clear from the following observation at page 270 of Tulsiram case : (SCC p. 504 , para 130)

"A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merley in order to avoid the holding of an inquiry or because the departments case against the government servant is weak and must fail."

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority – When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer……"

6. In the present case the order of Superintendent of Police dismissing the petitioner from service after invoking the powers under Rule 8 (2)(b) of the Rules has not given any reason as to why it is not reasonably practicable to hold an enquiry. The order notes the incident dated 19th October, 2000 in which allegation against the petitioner was made that he along with other constables had realized Rs. 50/- each from drivers of

Combine Machines and when Incharge Kotwali reached on the spot then he misbehaved with Incharge in presence of public. Observation has been made in paragrah 3 of the order that by the misconduct of the petitioner the faith of public is losing in police and by the above act of petitioner there is strong possibility of encouragement of indiscipline in the force. After noticing the above facts, the Superintendent of Police held that he is satisfied that it is not reasonably practicable to hold enquiry against the petitioner. It was further observed that in case petitioner remain in the force he may repeat the incident in future and taking advantage of he being in police he may make efforts to save himself from his deeds and in continuing the petitioner in department there will be possibility of increase of indiscipline in the employees. No reason in the order has been recorded as to why it is not reasonably practicable to hold disciplinary enquiry against the petitioner. It has been observed by the apex court in Union of India vs. Tulsiram Patel, (1985) 3 SCC 398 that disciplinary authority is not expected to dispense with a disciplinary enquiry lightly or arbitrarily. In the counter affidavit which has been filed by the respondents also there is no reason given for not holding disciplinary enquiry against the petitioner. No facts have been mentioned in the order or referred to on the basis of which satisfaction has been recorded for dispensing holding of disciplinary enquiry against the petitioner. The observation that in the event petitioner is allowed to remain in the department there is possibility of increase of indiscipline in the department cannot be held to be germane for dispensing holding of disciplinary enquiry. The appellate authority while dismissing the appeal has observed that there was possibility of petitioner threatening the compliant and witnesses was an observation which does not find place in the order of Superintendent of Police who invoked the power under rule 8(2)(b) of the Rules. Neither any reasons have been recorded in the order of superintendent of police for dispensing holding of disciplinary enquiry nor other observations made in the order to the effect that continuance of the petitioner in the police force would have encouraged indiscipline in the department were relevant for dispensing holding of disciplinary enquiry. The key words in Rule 8 (2) (b) are "not reasonably practicable". The Rules contemplate exercise of power under Rule 8 (2)(b) for dispensing holding of disciplinary enquiry when it is not reasonably practicable to hold such enquiry. The reasons thus which can satisfy the requirement of Rule 8 (2)(b) has to be referable to not reasonably practicable to hold an enquiry. No reasons have been given in the order which can be said to fulfil the requirement of not reasonably practicable to hold enquiry. The statutory requirement of exercising the power is absent in the present case. As observed above, no reasons have also been given in the counter affidavit bringing on the record the reasons on the basis of which such satisfaction was recorded by Superintendent of Police, the court is at last to find out the basis for invoking the power under Rule 8(2)(b) of the Rules.

7. In above view of the facts, it is clear that power has been exercised by Superintendent of Police under Rule 8 (2)(b) contrary to the requirement as laid down in Rule 8(2)(b). The order of Superintendent of Police cannot be sustained. The appellate order which

confirms the said order also cannot survive and both the orders are consequently quashed. It is, however, open to the respondents to hold disciplinary enquiry against the petitioner in accordance with law.

8. The writ petition is disposed of accordingly.

Petition Disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.6.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 29555 of 2004

Anju Nagar ...Petitioner
Versus
Chairman Counseling Board- C.P.M.T.-2004 Mahanideshak Chikitsa Shiksha Evam Prashikshan, U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Mool Behari Saxena
Sri P.N. Tripathi

Counsel for the Respondents:
Sri Mahendra Pratap
Sri Anurag Khanna
Sri R.P. Tiwari

Constitution of India, Article 226- Admission in M.B.B.S.–Petitioner belonging to Physically handicapped lady in Backward category- appeared and qualified in C.P.M.T. examination 2004- under open category such physically handicapped candidates given admission-the claim of petitioner denied as the P.H. Quota under Backward category already occupied by the candidates possessing higher rank than the petitioner- whether a candidate of reserve category can be adjusted in open category in accordance with merit ? held–'yes' fault lies with the Respondents who adopted illegal and unsustainable approach- Necessary direction issued to give admission in any one of the state medical colleges by forthwith.

Held- Para 17, 18 and 20

In such circumstances, this Court has no hesitation to hold that the condition mentioned in the brochure has been misread by the respondents and the right of the petitioner to be admitted in the open category seats, reserved for physically handicapped candidates, has been illegally denied.

The purpose of reservation in favour of scheduled caste/scheduled tribe and other backward classes category students cannot be used as to toll to oust the claim of candidates of physically handicapped category who complete with the open category belonging to said category and have secured more merit that the candidates, who have been offered admission in the open category.

The fault for her being not admitted lies with the respondents, who had adopted an illegal and unsustainable approach to the, matter and since the said academic year has already commenced, it would be fair to direct that the petitioner should be given admission in the M.B.B.S. Course in any of the State Medical colleges in the current academic session.

Case law discussed:
2002 (7) SCC- 258
1992 supp. (3) SCC-217
2004 (23) AIC 96 SC

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

1. Heard Sri P.N. Tripathi on behalf of the petitioner, Sri Mahendra Pratap on behalf of respondent no. 1, Sri Anurag Khanna on behalf of respondent no. 2, Sri

Indra Raj Singh on behalf of respondent no. 3 and Sri R.P. Tiwari on behalf of respondent no. 4.

2. Petitioner Anju Nagar had appeared as a candidate in the U.P. Combined Pre Medical Test held in the year, 2004 with Roll No. 1601597. The Petitioner is physically handicapped and a member of other backward classes. According to petitioner 27% of the seats are reserved for other backward classes, while a reservation of 3% has been provided for physically handicapped category.

3. The result of the said entrance examination was decided in the month of June, 2004. The petitioner secured 1544 over all rank in other backward classes category and 25 rank in physically handicapped category.

4. According to schedule published by the respondents, she reported for counseling on 16th July, 2004 before the Counseling Board. On 16th July, 2004 she was informed by the Counseling Board that no seat under the category of physically handicapped female candidate belonging to other Backward classes is available as all such reserved M.B.B.S. seats have already been fulfilled by the candidates of same category with higher merit.

5. According to petitioner the respondents granted admission to physically handicapped category candidates under the General category with lower in over all merit than the petitioner and therefore she has approached this Court by means of the present writ petition.

6. A counter affidavit has been filed by the Chairman, Counseling Board/Director General, Medical Health and Training U.P. Lucknow and the fact as stated by the petitioner in his writ petition, so far as the merit secured by her in entrance examination are concerned, has not been disputed. The relevant paragraph nos. 4,5,6 and 7 of the counter affidavit read as follows:

'4. That in pith and substance the petitioner wants her admission in M.B.B.S./B.D.S course in pursuance of the result of C.P.M.T.-2004.

5. That the total seats for M.B.B.S. course are 629. As per reservation policy the vertical reservation is as follows:-

(i) 50%= General Category
(ii) 27% = Other backward class category
(iii) 21%= scheduled caste category
(iv) 2% = scheduled Tribes category

There is also horizontal reservation, which are given as follows:

(i) 3%= Physically handicapped
(ii) 2% = Dependent of Freedom Fighters
(iii) 2% = dependent of War victims
(iv) 20% = Female candidates

It has also been made clear that horizontal reservation could be compartmentalized. The petitioner has filed relevant extract of Brochure.

6. That out of 629 seats for M.B.B.S. course, 169 seats are reserved for other backward class category. 3% seats for handicapped, from 169 seats, come as 5 seats. Following are candidates and their

rank, who have been admitted for M.B.B.S. course:-

(i) Rajesh Kr. Singh = P.H. Rank-3
(ii) Ranjeet Singh = P.H. Rank-5
(iii) Hari Kishan Yadav = P.H. Rank-8
(iv) Rajan = P.H. Rank-10
(v) Deepak Kr. Jaiswal = P.H. Rank- 13

That rank of petitioner Anju Nagar is P.H. Rank- 25. In this way the petitioner has not been admitted for M.B.B.S. course and she appeared in the counseling, but has not opted the seat, which were available for P.H. Rank-25.

7. That for general category, out of 314, 3% come as 10 seats. The name and rank of the candidate who have been admitted for MB.BS. course are as follows:-

(1) Shekhar Puri = P.H. Rank-2
(2) Javed Akhtar = P.H. Rank- 5
(3) Suresh Narain Singh = P.H. Rank-7
(4) Mohd. Jafar = P.H. Rank-9
(5) Vivek Maheshwari = P.H. Rank-11
(6) Hari Om Nigam = P.H. Rank-15
(7) Ruchi Gupta =P.H. Rank-17
(8) Reena Singh =P.H. Rank –21
(9) S.K. Tiwari =P.H. Rank- 26
(10) Pradeep Kharya =P.H. Rank-27

In this way Pradeep Kharya P.H. Rank-27 has been admitted for M.B.B.S. course.

7. From the facts, which have been stated in the counter affidavit, it is apparently clear that the candidates belonging to physically handicapped category of General category namely Sri S.K. Tiwari and Pradeep Kharia, who were lower in merit than petitioner in physically handicapped category having secured rank 26 and 27 in the said category (physically handicapped), have been granted admission in the M.B.B.S. course.

8. The explanation furnished for grant of admission to the members of the General category lower in merit than the petitioner in physically handicapped category has been stated to be based on the fact that the petitioner being a member of other backward classes category was entitled to be considered within 3% quota of physically handicapped in the said reserved category alone, namely that the petitioner was entitled to be considered against the 3% seats reserved for physically handicapped within 27% quota of other backward classes category (i.e. 5 seats of OBC Category).

9. The said stand has been taken on the basis of compartmentalization of horizontal and vertical reservation in respect of the members of the othe3r backward classes category and in light of the conditions mentioned in the brochure for the C.P.M.T. Entrance Examination-2004, copy whereof has been enclosed as annexure –4 to the counter affidavit filed by Sri Pradeep Kharya, which reads as follows :

"……..उपर्युक्त हॉरिजोन्टल आरक्षण के आधीन आने वाले अभ्यर्थियों से यह भी अपेक्षित है कि वे अपनी आरक्षित श्रेणी से सम्बन्धित प्रमाण-पत्र के साथ-साथ यदि अन्य पिछडे वर्ग, अनुसूचित जाति अथवा अनुसूचित जनजाति के हैं तो इससे सम्बन्धित विवरण पुस्तिका में निर्धारित प्रमाण पत्र भी अवश्य भरें। उपर्युक्त हॉरिजोन्टल आरक्षण (सम्बन्धित कम्पार्टमेन्टलाइज्ड) होगा। उपर्युक्त प्रत्येक श्रेणी में मैरिट के आधार पर चयनित अभ्यर्थियों को अनुसूचित जाति/अनुसूचित जन जाति/अन्य पिछडे वर्ग/सामान्य श्रेणियों में से उस श्रेणी में रखा जायेगा जिससे वह सम्बन्धित है। उदाहरणार्थ यदि स्वतंत्रता संग्राम सेनानी के आश्रितों का प्रदत्त आरक्षण के अंतर्गत चयनित कोई अभ्यर्थी अनुसूचित जाति का है, तो उसे अनुसूचित जाति के लिए आरक्षित सीटों में समायोजित किया जायेगा। इसी प्रकार यदि विकलांग अभ्यर्थियों को प्रदत्त आरक्षण

के अन्तर्गत चयनित कोई अभ्यर्थी अन्य पिछडे वर्ग या सामान्य श्रेणी के लिए आरक्षित सीटों में समायोजित किया जायेगा। विकलांग अभ्यर्थियों की विकलांगता इस सीमा तक न होगी कि चिकित्सा चिकित्सा में बाधक हो।"

10. In view of the aforesaid, it is contended on behalf of the respondent that since compartment providing for reservation of physically handicapped category within the other backward classes, persons higher in merit than the petitioner have been admitted and thereafter no seat is left within the said compartment for admission being granted to the petitioner in the M.B.B.S. Course. It is submitted that the petitioner cannot be considered in respect of the seats within the quota of physically handicapped which may be available in general category, although persons lower in merit than the petitioner in the physically handicapped category belonging to General category may have been admitted in the said quota.

11. In the short, the controversy between the parties is as to whether the candidate belonging to other backward classes category, who claims reservation of physically handicapped category is entitled to be admitted in accordance with her over all merit against the seats which are available in the General category for physically handicapped or not.

12. On behalf of the respondent Sri Indra Raj Singh has contended that even if the petitioner had any right to be considered for admission against the M.B.B.S. course, this Court may not pass an order directing the respondents to grant admission to petitioner at such a belated stage in view of the circular of the Medical council of India, which is statutory in nature, dated 15.9.2004, which in turn is based upon the directions issued by the Hon'ble Supreme Court in the case of Medical council of India Vs. Madhu Singh 2002(7) SCC 258.

13. Sri R.P. Tiwari submits that respondent no. 4 has already been admitted to the M.B.B.S. Course and has completed nearly 8 months of teaching in the said course and, therefore, this Court may not pass orders affecting the academic career of the respondent nos. 3 and 4 inasmuch as no fault can be attributed to the said respondents in respect of the admission granted in their favour.

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

14. Petitioner is a member of other backward classes belonging to physically handicapped category. She has secured 25th position in the physically handicapped category pursuant to the entrance examination. The ranking secured by the petitioner and Respondent nos. 3 and 4, who have been admitted in M.B.B.S. Course, is as follows:

Name	All over ranking	rank in P.H. Category
1. Anju Nagar (petitioner)	1544	25
2. Satya Kant Tiwari	3941	26
3. Pradeep Kharia	3980	27

15. It is not in dispute that the persons, who have secured lower overall ranking than the petitioner in physically handicapped category, namely Satyakant Tiwari and Pradeep Kharia have been granted admission in the M.B.B.S. course under the physically handicapped category than the aforesaid two persons,

has been denied admission against the open category seats on the ground that the petitioner being a member of backward classes in entitled to be admitted in the compartment worked out after vertical and horizontal reservation belonging to O.B.C. category only. It is submitted that the persons higher in the merit than the petitioner have been adjusted in the said compartment. The petitioner has no right to be admitted against the general category seats reserved for physically handicapped. The aforesaid contention of the respondents has been supported on the strength of the conditions as mentioned in the brochure published for the C.P.M.T. Examination-2004, referred to above.

16. In the opinion of the Court, the aforesaid stand taken by the respondents is patently illegal and based on the complete misreading of the conditions of the brochure. It may be pointed out that the compartmentalization is provided for only in respect of backward classes category seats, Scheduled caste category seats and scheduled Tribe category seats only. There can be no compartment so far as the open category seats are concerned, as the open category seats cannot be said to be vertically reserved for general category of persons to the exclusion of other persons belonging to the reserved category and therefore the issue of any compartment being formed in respect of the said open category does not arise. The aforesaid circular has to be read in a manner to make it in conformity with the judgment of Hon'ble Supreme Court reported in **1992 Supp (3) SCC 217**, *Indra Sawhney and others vs. Union of India and others,* wherein it has been held that if a reserved category candidate is selected or admitted on the basis of overall merit, it cannot be said that the quota reserved for the said category has been occupied. Meaning thereby the candidate belonging to Scheduled caste/schedule tribes and other backward classes continue to be a member of the open category and if they enter into the list of meritorious candidates on the basis of their overall merit in the said open category, his right for admission against the said open category seats cannot be denied on the ground that he is member of schedule castes/schedule tribes or other backward classes. As a matter of fact the nomenclature given to the general category is in itself incorrect, it would be more appropriate to name the same as open category where all category of persons name general, reserved can complete and are to be admitted as their overall ranking.

17. In such circumstances, this Court has no hesitation to hold that the condition mentioned in the brochure has been misread by the respondents and the right of the petitioner to be admitted in the open category seats, reserved for physically handicapped candidates, has been illegally denied.

18. The purpose of reservation in favour of scheduled caste/scheduled tribe and other backward classes category students cannot be used as to toll to oust the claim of candidates of physically handicapped category who complete with the open category belonging to said category and have secured more merit that the candidates, who have been offered admission in the open category.

19. The contention of the respondents that in view of the judgment of the Hon'ble Supreme Court in the case of Medical Council of India Vs. Madhu

Singh 2002(7) SCC 258 read with the circular of the Medical Council of India dated 15.9.2004 the admission cannot be granted to the petitioner after expiry of cut of date, has to be read with the latest judgment of the Hon'ble Supreme Court reported in **2004(23) all India Cases 96**, *Dolly Chhanda Vs. Chairman, JEE and others*, wherein in practically similar circumstances the Hon'ble Supreme Court in para 10 has provided as follows:

"The appellant had qualified in the JEE-2003 but the said academic year is already over. But for this adopted a highly technical and rigid attitude and not with the appellant. We are, therefore, of the opinion that the appellant should be given admission in MBBS course in any of the State medical colleges in the current academic years.

20. Applying the principle so provided for by the Hon'ble Supreme Court, in the facts of the case, the petitioner had qualified JEE 2004. The fault for her being not admitted lies with the respondents, who had adopted an illegal and unsustainable approach to the, matter and since the said academic year has already commenced, it would be fair to direct that the petitioner should be given admission in the M.B.B.S. Course in any of the State Medical colleges in the current academic session.

21. The writ petition is accordingly allowed with costs. The respondents are directed to give admission to the appellant in any one of the State Medical colleges forthwith. In case of State seats have already been filled up, one extra seat shall be created for her.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.5.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 8525 of 2002

Ravindra Nath Misra ...Petitioner
Versus
District Inspector of Schools, Varanasi and another ...Respondents

Counsel for the Petitioner:
Sri Shiv Kumar Pal

Counsel for the Respondents:
Sri B.P. Singh
Addl. Chief Standing Counsel

Constitution of India, Article 226-Service Law-Pension-petitioner retired on 31.1.01-retirement benefits with held for 4 years 3 months without any justification-Joint Director (Pension) as well as the D.I.O.S. found equally negligent-During intervening period even provisional pension not given-direction issued to release entire amount alongwith 9% interest-the amount of interest to be recovered from the personal benefit of both the guilty officers.

Held- Para 13 and 14

In such cases where the officers of the State Government have failed to perform their statutory duties, the liability must be put upon them, to compensate the petitioner for the hardship and mental agony suffered by him. The petitioner has lost four years and three months of life with dignity and has suffered severe harassment and insult from these officers of his own department.

The writ petition is consequently allowed. The petitioner is made entitle for 9 percent simple interest on the

delayed payment of pensionary benefits which the petitioner could have earned from this amount if the pensinary benefits were paid to him within reasonable time. The Joint Director (Treasury & Pension) Varanasi Region, Varanasi shall work out this amount of interest within a period of six weeks, which shall be recovered from the salaries of the Joint Director (Treasury & Pension) Varanasi Region, Varanasi and the District Inspector of Schools, Varanasi in equal proportion. The payment shall be realized within six weeks, and the amount so deducted shall be paid to the petitioner without any delay.

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

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

2. Sri Sanjiv Kumar Singh, District Inspector of Schools, Varanasi and Dr. Vimal Shankar Srivastava, Joint Director (Treasury & Pension), Varanasi Division, Varanasi, are present in person and have filed their affidavits in compliance with the order dated 7.4.2005 by which they were required to show cause as to why the interim mandamus dated 4.3.2002, as confirmed on 5.5.2003, has not been complied with and the pensionary benefits were not pad to the petitioner.

3. The petitioner was appointed a clerk in the office of District Inspector of Schools in the year 1962. He retired on 31.1.2001, while serving as Senior Assistant clerk in the same office.

4. By this writ petition, filed on 25.2.2002, the petitioner has prayed for payment of retrial dues, including pension, gratuity, leave encashment, traveling allowance etc.

5. A letter dated 17.4.2001 was issued by the Joint Director (Treasury & Pension), Varanasi to the District Inspector of Schools, Varanasi calling for all the records for settlement of the retrial benefits of the petitioner. By this letter the District Inspector of Schools, Varanasi was requested to put his office stamp on the joint photographs of the petitioner and his wife, to make entry of the increments of the year 1994 and 1995 in the service book and to rectify the discrepancy with regard to pay scale on 1.1.1996 and the revised pay scale. The matter was kept pending for long and no action was taken by the office of the District Inspector of Schools, Varanasi.

6. In this writ petition, an interim mandamus was issued on 4.3.2002 to pay provisional pension to the petitioner within two months or to show cause. Since no counter affidavit was filed, the interim mandamus was confirmed on 5.5.2003. The respondents, however, did not make any payment to the petitioner and thus by the order dated 7.4.2005, both the concerned officers were called upon to appear in person before the court along with their explanations by way of affidavits.

7. Sri Sanjiv Kumar Singh, Co-District Inspector of Schools, Varanasi has admitted petitioner's appointment and retirement. It is stated in para 5 of his counter affidavit that by letter dated 17.2.2001, all the papers for sanction of pension were submitted to the Joint Director (Treasury & Pension), Varanasi, on which he had made the aforesaid queries for removing the defects vide his letter dated 17.4.2001. The office of the District Inspector of Schools resubmitted the papers to the Joint Director (Treasury

& Pension), Varanasi on 12.10.2001. The Joint Director by his letter dated 911.2001 gave a direction for calculation of the excess amount which were paid to the petitioner by mistake in fixation of salary and for deposit of the same by the petitioner to which the petitioner was informed on 26.3.2002 to deposit the amount and reminders were sent to the petitioner. In para 7 of the counter affidavit, it is stated that as per the service rules, the sanction for pension and commutation has been given on 8.9.2004. The gratuity was sanctioned but the same was stopped for want of deposit of the difference of salary after recalculating the applicability of the revised pay and that on 5.4.2004, the payment has been made. The matter of the payment of provident fund has been taken up with the competent authority. With regard to pay difference and allowances etc. the matter was also been taken up with the Joint Director (Treasury & Pension), Varanasi.

8. Dr. Vimal Shanker Srivastava, Joint Director (Treasury & Pension), Varanasi Division, Varanasi states in para 3 (ii) of his counter affidavit that on 17.4.2001 his office had raised certain objections by sending a letter of objection to the District Inspector of Schools and thereafter letters were sent as reminder to remove those objections. It is further stated that since the objection was not removed by the department, the payment of gratuity was stopped whereas the pension and commutation were sanctioned vide letter dated 8.9.2004. Since the release of gratuity was delayed, the matter, in the meantime, was referred by the District Inspector of schools, Varanasi to the Accountant General, UP, Allahabad where it is still pending. However, looking into the delay from the office of the Accountant General, all dues except an amount of Rs.19,269/- have been released on 13.4.2005. In para 12 of the counter affidavit it is stated that vide letter dated 27.4.2002, the petitioner was informed by the District Inspector of Schools, Varanasi to deposit the excess amount of Rs.34,099/- by treasury challan and to send a copy whereof to the District Inspector of Schools. This amount apparently is by way of re fixation of pay on the applicability of the date from which the revised pay was payable.

9. It has been held by Supreme Court that post retirement benefits are not dependent upon the discretion of the employer. These are not given by way of any grace or bounty. The petitioner has statutory right as also fundamental right under Article 21 of the constitution of India, to be paid the benefits earned out of his long service rendered and to get retrial dues as well as pension immediately upon his retirement. Time and again, the State Government has been issuing Government Orders to the concerned authorities to deal with the pension matters expeditiously. It appears that the department has no sympathy and has forgotten the retired person on account of which the pensioner is running from pillar to post.

10. The present case is the classic example of gross negligence which has resulted into great in justice and hardship to the petitioner. He has been deprived of his statutory dues and payment of pension for four years and three months. Inspite of an interim mandamus issued by this Court on 4.3.2002, as confirmed on 5.5.2003, the respondents did not care to take steps in the matter, and to comply with the orders.

11. I have gone through the reasons given for delaying the sanction of pension. These reasons had nothing to do with the petitioner. The objections, taken by the office of the Joint Director (Treasury & Pension) Varanasi Division, Varanasi, could be removed within few days. The first objection related to the stamp of the office of District Inspector of Schools, the second with regard to the making of entry about the increments for the years 1994 and 1995 in the service book, and the 3rd and 4th objections were with regard to the applicability of revised pay scales before they were actually due to the petitioner and the refixation of pay in the revised pay scale, which only required calculations to be made. Although, the petitioner has disputed the correctness of fixation of pay, I am not inclined to entertain the challenge in this writ petition as no prayer has been made to set aside the order. It will be open to the petitioner to challenge the order by making an appropriate representation.

12. The Court is, however, concerned with the delay caused in the settlement of pension and disobedience of the interim mandamus issued on 4.3.2002, confirmed on 5.5.2003. The Government Orders issued from time to time, have provided that even if there is any defe3cts in the pension papers, the provisional pension must be paid from the next month of the retirement. In the present case, there was no impediment to pay the provisional pension.

13. In the aforesaid facts and circumstances, I find that the respondents were not at all justified in with holding pensionary benefits for a long period of four years and three months. Learned counsel for the petitioner submits that the mean time the petitioner has suffered severe hardship and mental agony and was left to survive with his wife at the mercy of his children. In such cases where the officers of the State Government have failed to perform their statutory duties, the liability must be put upon them, to compensate the petitioner for the hardship and mental agony suffered by him. The petitioner has lost four years and three months of life with dignity and has suffered severe harassment and insult from these officers of his own department.

14. The writ petition is consequently allowed. The petitioner is made entitle for 9 percent simple interest on the delayed payment of pensionary benefits which the petitioner could have earned from this amount if the pensinary benefits were paid to him within reasonable time. The Joint Director (Treasury & Pension) Varanasi Region, Varanasi shall work out this amount of interest within a period of six weeks, which shall be recovered from the salaries of the Joint Director (Treasury & Pension) Varanasi Region, Varanasi and the District Inspector of Schools, Varanasi in equal proportion. The payment shall be realized within six weeks, and the amount so deducted shall be paid to the petitioner without any delay. The pension shall be paid to the petitioner from 1st may, 2005.

15. The petitioner shall also be entitled to the costs of this writ petition.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 29522 of 2004

Sampurnand Sanskrit University, Varanasi through' Its Registrar ...Petitioner
Versus
State of U.P. through its Principal Secretary, Basic Education, Lucknow and others ...Respondents

Connected with

Civil Misc. Writ Petition Nos. 29092 of 2004, 29207 of 2004, 29208 of 2004, 29210 of 2004, 29212 of 2004, 29215 of 2004, 29217 of 2004, 29221 of 2004, 29236 of 2004, 29436 of 2004, 29523 of 2004, 29524 of 2004, 29545 of 2004, 29549 of 2004, 29621of 2004, 29647 of 2004**,** 29652 of 2004**,** 29938 of 2004, 29991 of 2004, 30426 of 2004, 30428 of 2004, 30431 of 2004, 30433 of 2004, 30435 of 2004, 30437 of 2004, 30438 of 2004, 30440 of 2004, 30442 of 2004, 30444 of 2004, 30446 of 2004, 30447 of 2004, 30449 of 2004, 30488 of 2004, 31113 of 2004, 31241 of 2004, 31399 of 2004, 31407 of 2004, 31416 of 2004, 31422 of 2004, 31553 of 2004, 31556 of 2004, 31559 of 2004, 31585 of 2004, 31611 of 2004, 31680 of 2004, 31683 of 2004, 31708 of 2004, 31710 of 2004, 31713 of 2004, 31714 of 2004, 31717 of 2004, 31719 of 2004, 31721 of 2004, 31724 of 2004, 31726 of 2004, 31742 of 2004, 31980 of 2004, 31984 of 2004, 32215 of 2004, 32250 of 2004, 32493 of 2004, 32736 of 2004, 33103 of 2004, 33186 of 2004, 33513 of 2004, 33536 of 2004, 33762 of 2004, 33926 of 2004, 33928 of 2004, 33941 of 2004, 34016 of 2004, 34017 of 2004, 34064 of 2004, 34074 of 2004, 34075 of 2004, 34090 of 2004, 34282 of 2004, 34385 of 2004, 35337 of 2004, 33320 of 2004, 36013 of 2004, 36015 of 2004, 35864 of 2004, 35241 of 2004, 37822 of 2004, 40061 of 2004, 42579 of 2004, 40061 of 2004, 42579 of 2004, 42615 of 2004, 32436 of 2004, 43674 of 2004, 43978 of 2004, 44418 of 2004, 47558 of 2004, 47688 of 2004, 47689 of 2004, 47762 of 2004, 48335 of 2004, 49463 of 2004, 49035 of 2004, 49765 of 2004, 50264 of 2004, 50390 of 2004, 503589 of 2004, 52362 of 2004, 52741 of 2004, 52864 of 2004, 53993 of 2004, 54288 of 2004, 4920 of 2004, 33320 of 2004, 7542 of 2004, 8089 of 2004, and 29326 of 2004.

Counsel for the Petitioner:
Sri Anil Tiwari
Sri Manish Goyal

Counsel for the Respondents:
Sri Rajiv Gupta
Sri R.S. Parihar
S.C.

National Council Teachers Education Act, 1993-Section 14 (1) whether the course of Shiksha Shashtri offered by Sampurnanad University Varanasi from the faculty of Education of university and its affiliated colleges is equivalent to B.Ed. and are valid qualification?-held-'yes' upto the year 1995-96 for the year 1996-97 also-in view of the fact the university had applied but no refusal communicated-but for 97-98, 1998-99 not valid as the facality of university and its colleges were not re cognised-again from the academic year 1999-2000 and thereafter are valid for the purposes of pursuing special B.T.C. course.

Held: Para 23 & 24

For the aforesaid reasons, I find that the course of 'Shiksha Shastri' as equivalent to B.Ed. officered by Sampurnanand Sanskrit University, Varanasi, from the Faculty of Education of the University

and its affiliated Colleges is valid qualification up to year 1995-96, before the provisions of NCTE Act of 1993 became applicable and thereafter for academic session 1999-2000 when permission was granted by Northern Regional Committee, Jaipur for running the course in the Faculty as well as affiliated Colleges. The course of study offered by the Faculty of Education of the University is also valid for 1996-97, as it had applied under proviso to Section 14 (1) and NCTE Act 1993 and no restrain order or refusal was communicated to the University. The degrees, however, for the academic year 1996-97, pursued in the affiliated Colleges of the University and for the years 1997-98 and 1998-99 both for the Faculty of Education by the University and the affiliated Colleges is not valid as the University and Colleges were not recognised for these academic sessions. These qualifications shall not be treated to be valid for the purposes of pursuing Special B.T.C. Course 2004 and public employment.

The students, who have obtained 'Shiksha Shastri' degree from the University and its Colleges upto 1995-96; from the Faculty of Education of the University for the year 1996-97, and from the University and affiliated Colleges for 1999-2000 and thereafter are valid. These students shall be at liberty to make appropriate representations to the Director, State Council of Educational Research and Training, U.P. Lucknow along with copy of this judgement and their particulars which shall be decided in accordance with directions issued in these judgements within four weeks of such communication.

Case law discussed:

2002 (8) SCC-228
2001 (8) SCC-676
1996 (9) SCC-495
1995 (Supply) 2 SCC 348
(2000) 9 SCC-477
2002 (2) All. M.R. 752
1991 Supp. (i) 287
AIR 1982 SC-933
(1998) 2 SCC-449
1991 (1) AWC-3949
2000 (7) SCC-746
2000 (9) SCC-391
2002 (8) SCC-228
1992 (4) SCC-435
1994 (1) SCC-175

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

1. The Sampurnanand Sanskrit University, Varanasi (in short the University) and the students who have been awarded 'Shiksha Shastri' degree by the University, which is the examining body, from the Faculty of Education of the University at Varanasi, and five affiliated Colleges namely (1) Sri Adarsh Bharati Mahavidyalaya Khetasarai, Jaunpur, (2) Shrimat Paramhans Sanskrit Mahavidyalaya Teekar Mafi, Sultanpur, (3) Shri Sachcha Adhyatma Sanskrit Maha Vidyalaya, Arai, Allahabad, (4) Shri Sankirtan Bramhacharya Sanskrit Mahavidyalaya, Jhunsi, Allahabad, and (5) Sri Mahaveer Vidyapith Pachhami Vihar, New Delhi, have filed these writ petitions with prayers to issue a writ of mandamus commanding the respondents to treat their certificates of "Shiksha Shastri" as equivalent to B.Ed, for the purpose of admission to the Special B.T.C. Course, 2004 designed by the State Government with the approval of the National Council of Teachers' Education for the purpose of employment as Assistant Teachers in Basic Schools in the State of Uttar Pradesh. The University has also challenged the vires of Section 14 of the National Council of Teachers Education Act 1993.

2. I have heard Sri Anil Tiwari for the University; Sri Manish Goel in writ petition No. 47765/2004 and Sri Jagdish

Pathak in writ petitions no. 29217/2004, 29236/04, 30444/04 and 30449/04 and other counsel for the petitioners and Sri Rajeev Joshi for NCTE and Standing Counsel for the State respondents.

3. The facts briefly stated giving rise to this batch of writ petitions are that the Sampurnanand Sanskrit University, Varanasi is a recognised State University under the U.P. State Universities Act, 1973. The Statutes of the University are framed under the provisions of the Act. The University is conducting 'Shiksha Shashri' course as teachers' training course since prior to 1973, after getting sanction and permission from the State and the Association of Indian Universities, New Delhi. This course is of one year's duration and is recognised by the State Government vide its order dated 12.1.1973 as equivalent to B.Ed, and also by the Association of the Indian Universities, New Delhi vide its order dated 15.3.1974.

4. The National Council of Teachers' Education Act 1993 (in short the NCTE Act 1993) was enacted with reference to Entry-66 of the list-1 of the VIIth Schedule appended to Constitution of India to achieve the planned and coordinated development of teachers' education and for regulating and maintaining proper norms and standards in the teachers' education. The National Council of Teachers Education established under the Act alone is now competent to lay down the norms, guidelines and standard to be maintained by the institutions involved in teachers education and training. The validity of the Act was upheld by the Apex Court in **Union of India vs. Shah Goverdhan L. Kalra Teachers College (2002) 8 SCC 228**. The Act received assent of the President on December 19, 1993 and came into force on 01.7.1995. The National Council of Teachers Education was established on 17.8.1995, which is the 'appointed day' as defined under Section 2 (a) of the Act. Section 14 of the Act provides for recognition of the institutions offering or intending to offer a course or training in teachers education. Sub Section 1 of Section 14, relevant for the purse of this Act is quoted as below;

"14. **Recognition of institutions offering course or training in teacher education.-** (1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations.

Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be entitled to continue such course or training for a period of six months, if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee."

5. The Regional Committees under Section 20 (1) (iii) of the Act were constituted on 6.1.1996. The regulations prescribing the standard for granting recognition were made on 29.12.95 and published on 24.2.1996, and the institutions offering teachers training course were required to apply for recognition upto 1.4.1997. This date was extended by the Council upto 18.8.1997, by a notification issued by National Council of Teachers Education and

published in National Dailies informing that more than 90% of the existing institutions have submitted their applications to NCTC Regional Committees during the last three years and only a small number of institutions have still not submitted their applications. The council notified all such institutions that they may submit their applications in prescribed proforma along with the necessary documents under the NCTE Regulations to the concerned Regional committees up to 31.3.1999. Any institutions approaching the Regional Committees after 31.3.1999 will be treated as an institution "not existing" on the appointed day and will be required to fulfil the requirement as new institutions under the NCE Regulations including the applications of a no objection certificate from the concerned State or Union Territory Government.

6. The University sent an application for recognition of its faculty and all the six affiliated colleges on 24.5.1997. The Affiliated Colleges on their own did not submit any application. On 14.10.1997 the University/Institutions were informed vide letters issued by the Council, not to admit any students for the session 1997-98 without recognition/permission of NRC, NCTE. On 25.8.1998 once again an information was sent not to admit any students for academic session 1998-99 as the institution (Faculty of Education) did not have the required number of teachers. On 30.6.1999 the permission for 90 seats of B. Ed. Course was granted for academic session 1999-2000 to the faculty of education. The NRC granted recognition vide its letter dated 31.7.2000 for annual intake of 90 students in B.Ed. (Shiksha Shashtri) course for academic session in 2000-2001. With regard to the Faculty of Education and the five affiliated colleges the relevant dates as set out in the counter affidavit on behalf of NRC, NCTE Jaipur are detailed as below;

1. <u>SAMPURNANAND SANSKRIT VISHVIDYALAYA, (FACULTY OF EDUCATION) VARANASI</u>.

Session	Date	Status of Recognition
1996-97	24.05.1997	Application for recognition received
1997-98	14.10.1997 15.10.1997	The concerned institution/university were informed vide letters no. F-3/UP-261/97/5546 not to admit any student for the session 1997-98 without recognition/permission of NRC, NCTE, Jaipur
1998-99	25.8.1998	Institution was informed further not to admit any students for the academic session 1998-99 without recognition/permission of NRC, NCTE, Jaipur.

Session	Date	Status of Recognition
1999-2000	30.06.1999	Permission for 90 seats of B.Ed. Course granted for academic session 1999-2000 vide lettr no. UP/B.Ed./99/8822-25
2000-01	31.07.2000	Recognition granted vide letter No. F-3/UP-128/B.Ed./2000 dated 31.07.2000 for annul intake of 90 students in B.Ed. (Shiksha Shastri) Course from the academic session 2000-2001.

2. SHRI SACHCHA ADHYATMA SANSKRIT MAHAVIDYALAYA, ARAIL, NAINI, ALLAHABAD.

Session	Date	Status of Recognition
1996-97		No application for recognition was received for this session
1997-98	30.12.1997	Application for recognition was received
1998-99	04/02/99	Vide letter No. F-3/13/UP/99/6052-54, the institution was allotted 50 seats in B.Ed. With the condition that the examination being conducted after completion of minimum 190 working days
1999-2000	23.07.1999	Permission for 60 seats of B.Ed. Course for academic session 1999-2000 was granted
2000-2001	22.08.2000	Recognition granted vide letter No. F-3/UP-128/B.Ed./2000/9806-13 for annul intake of 60 students in B.Ed. (Shiksha Shastri) Course from the academic session 2000-2001.

3. ADARSH BHARTI MAHAVIDYALAYA, KHETASARAI, JAUNPUR

Session	Date	Status of Recognition
1996-97		No application for recognition

Session	Date	Status of Recognition
		was received for this session
1997-98	30.12.1997 04.11.1997	Application for recognition was received Letter no. F-3/UP-266/97/6227-28 was issued to the institution for not admitting any students in the academic session 1997-98
1998-1999	14.12.1998	Vide letter No. F-3/UP/266/98/5124, the institution was informed in case one teacher is appointed than permission for 60 seats for the academic session 1998-99 in B.Ed. Course be granted but the permission was not given as the institute failed to fulfil the condition
1999-2000	27.07.1999	Permission for 60 seats of B.Ed. Course

Session	Date	Status of Recognition
1997-98	30.12.1997 04.11.1997	Application for recognition was received Letter no. F-3/UP-266/97/6227-28 was issued to the institution for not admitting any students in the academic session 1997-98
1998-1999	14.12.1998	Vide letter No. F-3/UP/266/98/5124, the institution was informed in case one teacher is appointed than permission for 60 seats for the academic session 1998-99 in B.Ed. Course be granted but the permission was not given as the institute failed to fulfil the condition
1999-2000	27.07.1999	

Session	Date	Status of Recognition
		for academic session 1999-2000 was granted vide letter no. F-Seat 99-2000/UP/B.Ed./9313-21
2000-2001	24.7.2000	Recognition granted vide letter No. F-3/UP-7/B.Ed./2000/4230-37 for annul intake of 60 students in B.Ed. (Shiksha Shastri) Course from the academic session 2000-2001.

4. **SHRI SANKIRTAN BRAHAMACHARYA ASHRAM SANSKRIT MAHAVIDYALAYA, JHUNSI, ALLAHABAD**

Session	Date	Status of Recognition
1996-97		No application for recognition was received for this session

Session	Date	Status of Recognition
2000-2001	24.7.2000	Recognition granted vide letter No. F-3/UP-7/B.Ed./2000/4230-37 for annul intake of 60 students in B.Ed. (Shiksha Shastri) Course from the academic session 2000-2001.

4. **SHRI SANKIRTAN BRAHAMACHARYA ASHRAM SANSKRIT MAHAVIDYALAYA, JHUNSI, ALLAHABAD**

Session	Date	Status of Recognition
1996-97		No application for recognition was received for this session

Session	Date	Status of Recognition
1997-98	29.09.1997 05.11.1997	Application for recognition was received Letter No. F-3/UP-265/97/6248 was issued to the institution for not admitting any students in the academic session 1997-98
1998-1999		No permission was granted to institution to run B.Ed. Course for academic session 1998-99.
1999-2000	09/08/99	Permission for 60 seats of B.Ed. Course for academic session 1999-2000 was granted vide letter No. F-3/UP/265/99/9925-9927
2000-2001	24.07.2000	Recognition granted vide letter No. F-3/UP-128/B.Ed./2000/9806-13 for annul intake of 60 students in B.Ed. (Shiksha Shastri) Course from the academic session 2000-2001.

5. **SHRI SHRIMAT PARAMHANS SANSKRIT MAHAVIDYALAYA, TIKARMATI, AMETHI, SULTANPUR (UP)**

Session	Date	Status of Recognition
1996-97		No application for recognition was received for this session
1997-98	14.08.1997 23.08.1997	Application for recognition was received Letter No. F-3/UP-247/97/3490-91 was issued to the institution for not admitting any students in the academic session 1997-98

Session	Date	Status of Recognition
1998-99		The institution was not permitted to run B.Ed. Course for academic session 1998-99.
1999-2000	07.07.1999	Permission for 60 seats of B.Ed. Course for academic session 1999-2000 was granted vide letter No. NRC/Seat 9-2000/B.Ed./UP/99/8943-49
2000-01	24.07.2000	Recognition granted vide letter No. F-3/UP-116/B.Ed./2000/3946-3971 for 60 seats of B. Ed. (Shiksha Shastri) Course from the academic session 2000-2001.

6. **SHRI MAHAVEER VISHWA VIDYAPEETH, PASCHIM VIHAR, NEW DELHI**

Session	Date	Status of Recognition
1996-97		No application for recognition was received for this session
1997-98	29.11.97 11.12.97	Application for recognition was received Letter No. F-3/DL-68/97/6947 was issued to the institution for not admitting any students in the academic session 1997-98
1998-99		Institution was not permitted to run B. Ed. Course for academic session 1998-99.
1999-2000	24.08.99	Permission for 60 seats of B.Ed. Course for academic session 1999-2000 was granted vide letter No. F-3/DL-67/99/12059-10262
2000-01	31.07.2000	Recognition granted vide letter No. F-3/dh-11/B.Ed./2000/5244-51 for 60 seats of B.Ed. (Shiksha Shastri) Course from the academic session 2000-2001.

7. It is agreed between the parties that there is no dispute with regard to the recognition of the course both for the

Faculty of Education and the five Affiliated Colleges for the academic session 1995-96 as the session had started before 17.8.1995 when NCTC was established and for the academic year 1999-2000 when NCTC granted permission for the number of students detailed in the counter affidavit and set out above. For the year 2000-2001 the recognition was granted by NRC, NCTE, Jaipur to the Faculty of Education of the University as well as all the six Affiliated Colleges. The dispute as such is confined only to the academic sessions 1996-1997, 1997-98, 1998-99 when it is admitted that the NRC, NCTE, Jaipur neither gave permission nor recognition for the course. The counsels for the petitioners have also raised a dispute with regard to dates of application for recognition given to the Faculty of Education, Varanasi and the affiliated Colleges and the consequences thereof under the proviso to Section 14 (1) of the NCTE Act, 1993.

8. Sri Anil Tiwari appearing for the University submits that the expression 'Institution' and the 'University' have been defined under Section (e) and (m) of Section 2 of the NCTE Act. An institution under section 2 (e) means an institution which offers course or training in teachers' education. The 'examining body' under Section 2 (d) means a university agency or authority to which an institution is affiliated for conducting examinations in teachers' education qualification and the 'University' under Section 2 (m) means university defines in Clause (f) of Section 2 of the University Grants Commission Act 1956 (in short, the UGC Act 1956) and includes an institution deemed to be university under Section 3 of the Act. The University under Section 2 (f) of the UGC Act 1956 means a university established and incorporated under a Central Act, Provincial Act or a State Act and includes any such institution as may in consultation with the University concerned be recognised by the Commission in accordance with the regulations made in this behalf under the Act. Whereas the University Grants Commission Act 1956 has been enacted to make provisions for coordination and determination of standards for the universities and for that purpose to establish the University Grants Commission, the National Teachers' Education Act 1993 has been enacted to provide for establishment of National Council Teachers Education with a view to achieve, plan and coordinate development for the teacher education system through out the country, the regulation and proper maintenance of norms and standards in the teacher education system and for matters connected therewith. He submits that Section 14 of the Act providing for recognition of the institution offering course and training in teachers education provide for recognition of institutions and not university. Where the university is running teachers education course by its department and unit which is adjunct to the university itself. Both these acts operate in the same field and have been enacted with reference to same entries in the union list and on the concurrent list. The language adopted in the enactment makes it absolutely clear that the University which is an examining body and maintains its own standard is not required to seek recognition for offering a course and training in teachers' education. He has relied upon **Bharthidasan University and another vs. All India Council for Technical Education and**

others (2001) 8 SCC 676, in which the Supreme Court was considering AICTE Act which is pari materia with NCTE Act. Section 10 of the AICTE Act makes it clear that whenever the Act refer a University the same has been specifically provided in the provision of the Act. The definition of technical institution cannot include a University. There is a clear intention of the legislature that an institution whether university or otherwise is to be treated as technical institutions by the Act and thus the power to grant approval for starting new technical institution and for introduction of new course or programme does not cover university but only technical institution.

9. Sri Anil Tiwari further submits that so far as five affiliated Colleges are concerned the university had initially made an application for granting recognition to these colleges on 15.5.1997. This application according to him should be treated under the proviso to Section 14 (1) of the Act and thus the University and the institutions were entitled to continue with the courses of teachers' education. The 'Shiksha Shashti' course was recognised by University Grants Commission Act 1956 and was included at Serial No. 38 of the Schedule under Section 22 (3) of the Act. The Council made an advertisement providing a last date for making application for recognition upto 31.3.1999. The University as well as all affiliated colleges had made their applications for their recognition upto November, 1997 and thus they could pursue the courses. Each of the colleges was affiliated to the university and was maintaining standards for running the teachers training classes fixed by the university which is an old and established institution. The permission granted for the academic session 1999-2000 and the recognition granted to all the colleges for the year 2000-2001 cured any defect in making applications and also established that the colleges had infrastructure and other standard for teaching and these students in these colleges who were not at a fault should not be deprived of public employment and opportunity to take the special B.T.C. course 2004 for appointment as Assistant Teachers in Junior High Schools run by the Basic Education Board in U.P. He has also relied upon judgement in **J.N. Gantara vs. Morvi Municipality 1996 9 SCC 495** in submitting that where statute prescribing the manner in which powers has to be exercised the power must be exercised in that manner alone for the proposition that until Regional Committees were constituted and the guidelines were framed, the application for recognition had no meaning whatsoever and that the proviso to Section 14 (1) to that extent should be read down to extend the dates until regulations were framed by the Council for granting recognition. He has also relied upon judgement in **P. Kashi Lingan vs. P.S.G. College of Technology 1995 Supp. 2 SCC 348; Dental Council of India vs. Subharti K.K.V. Charitable Trust and others (2000) 9 SCC 477 and Ambika Shikshan Sansthan vs. Vice Chancellor 2002 (2) ALL. M.R. 752** (Nagpur Bench of Bombay High Court) holding that the provisions of NCTE Act 1993, will become applicable to institution only after regulations were framed in 1998 and that the earlier general regulations of 1995 will not apply to educational programme and technical education.

10. Sri Manish Goel appearing for Hemlata Gaur with degree in Shiksha Shashtri (B.Ed.) in the year 1998-99 from the Faculty of Education of Sampurnanand Sanskrit University, Varanasi submits that it is not necessary in the University to obtain recognition under the NCTE Act 1993, which has same purpose to achieve. The scheme of NCTE Act 1993 discloses that the University is a separate entity from the institutions. It has a role of the examining body. The Institutions are affiliated to a University. Where the university is itself imparting teachers' education, it could not be treated to be an affiliated institutions. The scheme of the Act does not provide any University running teachers' training courses to obtain recognition. So far B.Ed. is concerned the conditions of recognition were extended under the regulations for distance education. There are different norms and standard of institutions offering B.Ed. course and institution offering correspondence education and open and distance learning education. the Shiksha Shashtri (B.Ed.) by the Faculty of the University is duly recognised by the U.G.C. Act 1956. The petitioner as such cannot be denied public employment and that the provisions of Section 17 (4) of NCTE Act 1993 do not come into play in the matter where the degree has been awarded from the University. He has relied upon judgements in **Dr. Arun Kumar Agarwal vs. State of Bihar 1991 Supp 1 SCC 287** where the Supreme Court held that recognition of the course started by the University with the consent of Medical Council of India and the degree recognised by the State has to be considered for appointment to the post under the State Government and **Dr. B.L. Asawa vs. State of Rajasthan AIR 1982 SC 933, Bhartiya Homoeopathic College Bharatpur vs. Students Council of Homoeopathic Medical College Jaipur (1998) 2 SCC 449.** He has also pleaded the case of students who were taking education in a University in a course which was recognised both the the UGC Act 1956 and the State Government and has invoked equity in that favour of petitioners for public employment.

11. Sri Jagdish Pathak appearing for students of the Affiliated Colleges submits that NCTE Act 1993 does not have power to de recognise the degree of B.Ed. (Shisha Shashtri) awarded by Sampurnanand Sanskrit University and its Affiliated Colleges. Any order/conditions regarding withdrawal /refusal to grant recognition has to be passed by Regional Committee and is to be published in the official gazette under Rule 17 (2) (b) of the NCTE Act 1993 and should be published in official gazette for general information. Since no such information was published, the students cannot be faulted in taking admission in these colleges and pursuing the course. It is the NCTE which is responsible for not warning the students by publishing the refusal of recognition in official gazette. The innocent students, who has passed the entrance test deposited fees and have obtained the degrees after the examination from old and reputed university recognised by the UGC, and the State Government, should not be allowed to suffer. He has relied upon judgements **in Kr. Rohini Singh vs. Visitor B.H.U. Presidents of India and others 1991 (1) AWC 3989; Maharishi Dayanand University vs. M.L.R. Saraswati College of Education 2002 (7) SCC 746; State of U.P. and others vs. Ring Singhal 2000 (9) SCC 391.**

12. The validity of the Act has been upheld in **Union of India vs. Shah Goverdhan L. Kalra 2002 (8) SCCC 228.** The questions arising for consideration in this writ petition are whether the University under the scheme of the NCTE Act 1993, is a separate entity from the Institutions as defined under the Act, and is not required to obtain recognition from the Regional Committee in pursuing the teachers training courses in the department or unit of the university and further whether the colleges affiliated to the university defaulted in applying for recognition and therefore the degrees awarded by them in the year 1996-1997, 1997-98, 1998-99 are valid qualifications in teachers' training course for public employment. Lastly the court has been called upon to adjust equities for the students who had pursued the course recognised by the UGC Act 1956 as these colleges had defaulted in making applications for recognition before the prescribed dates.

13. Sri Rajeev Joshi appearing for National Council of Teachers' Education submits that the University is not a separate entity than the Institutions as defined under the NCTE Act of 1993. He submits that the NCTE Act 1993 even if covers the same field has been enacted subsequent to UGC Act 1956 and operates in a well defined area namely the teachers training and thus even if the course is recognised by the UGC and the State Government after enforcement of NCTE Act 1993, the university was also required to apply and to obtain recognition in accordance with Section 14 (1) of the NCTE Act 1993. He further submits that the University and the clause Affiliated Colleges to university where restrained from admitting students in 1997-98, 1998-99. They were not given permission to run the courses. The period of six months under the proviso to Section 14 (1) is applicable to a course for training in teachers education offered immediately before the appointed day, i.e. 17.8.1995. The Regional Committees were established by notification dated 3.11.1995 with immediate effect. It was published in Official Gazette on 6.1.1996. The regulations for recognition were notified on 29.12.1995. In the present case the University or the colleges did not apply within six months, from the appointed day and thus the degrees awarded to the students contrary to the provisions of the Statute are not valid. The permission was granted for the year 1999-2000 and thereafter recognition was given after satisfaction that the faculty and the colleges were offering courses in accordance with the regulations. The NCTC Act 1993 was enacted with an object to establish National Council of Teachers Education with a view to achieve, plan and coordinate development of the teachers education system throughout the country. The regulations and proper maintenance of norms and standards in the teacher education system and for matters connected thereof. The NCTE Act 1993 defines the 'examining body', the 'institution' and the 'university' under Section 2 (d) (e) and (n) respectively. These definitions, however, are for the purposes of understanding the expressions used in various provisions of the Act. The word 'institutions' in Section 14 is not restricted to the institutions other than University. Section 16 of the Act provides that notwithstanding anything contained in any other law for the time being force no examining body shall on or after the appointed day (a) grant the affiliation whether provisional or

otherwise, to any institution or (b) hold examination whether provisional or otherwise for a course or training conducted by a recognised institutions, unless the institution concerned has obtained recognition from the Regional Committee concerned under Section 14 or permission for a course or training under 'section 15. This restriction of holding examination on the affiliating body in a course of training conducted by the institution other than recognised institutions makes it clear that the University which is affiliating body is not to allow students to admit in any examination unless the course is recognised.

14. Section 14 (3) of NCTE 1993 requires the Regional Committee after receiving an application from the institution concerned to be satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that if fulfils such other conditions required for proper functioning of the institutions for a course of training in teacher education as may be determined by regulations. These regulations have to be applied to all the institutions. If the University running such a course in its own faculty, department or unit does not have the requisites as provided in sub Section (3) (a) of Section 14, it can also be de-recognised by the Regional Committee.

15. In Bharthidasan University and others (supra) the issue involved was with regard to commencement of the course in technology such an information technology and management, engineering and bio-technology etc. The Supreme Court after examining the provisions of AICTE Act found that Section 10 (k) does not cover a University but only technical institutions and that regulations cannot be framed in such a manner so as to apply to Universities and the Act maintained a complete dichotomy between a University and a technical institution. In section 2 (h) of AICTE Act the technical institution is defined to mean an institution not being a University, which offers course of programmes of technical education and shall include such other institutions as the Central Government may in consultation with the Council by notification in the official gazette declare as technical institution. There is no such exclusion of the University in the definition of the word 'institution' in NCTE Ac 1993, and no such dichotomy is maintained between a University as an examining and affiliating body and the institutions affiliated to the university. There is no such provision in NCTE Act 1993 as in the AICTE Act, to make inspections of any department and departments and to advise UGC for declaring an institution imparting technology education as a Deemed University.

16. As discussed above the UGC Act 1956 in a general Act and that NCTE Act 1993 was enacted as special Act to operate in the field of teachers' education. The NCTE Act 1993 does not envisage separate standards for financial resources, accommodation, library, qualified staff, laboratory and curriculum for the Universities and institutions. The power to make regulations under Section 31 of the Council do not provide separate standards in Universities and institutions in order to achieve the objects of the Act. The norms, guidelines and standards under the Guidelines under Section 32 to be framed by the Council have to be common to operate in the entire country.

There is no exemptions or concessions granted to any regional ethos or objects to be achieved by Universities in different parts of the country. The norms, guidelines and standards made by the Council will supersede any standards which may have been made by University Grants Commission or State Government for teachers education in the University and the institutions. Any other interpretation will defeat the object and purpose of NCTE Act 1993.

17. The NCTE Act 1993 clearly visualised that it will take some times in establishment of Council and Regional Committees and to prepare guidelines under Section 32 of the Act. At the same time it was found necessary to enforce the provisions of the Act expeditiously, and thus the institutions offering a course or training in teachers education were provided an opportunity to make applications for recognition, to apply for recognition within six months to the establishment of the regional committees and to continue with the course until the disposal of the application. The word before the appointed day under the proviso to Section 14(1) refers to courses for training in teachers education offered by institutions before that date. It is defined under Section 2 (a) to mean the date of establishment of National Council of Teachers Education i.e. 17.8.1995. These institutions were required to make applications to Regional Committees, which were constituted on 3.11.1995, and notified on 6.1.1996. The constitution and notification of regional committee was within six months of the establishment of the Council. It is relevant to note here that the academic session ordinarily begins in July and continues upto April/May in the next year. The Council was established on 17.8.1995 and Regional Committees were established w.e.f. 3.11.1995. Sri Rajeev Joshi appearing for the Council as such rightly states that those institutions which were offering teachers training courses were entitled to continue with the courses for the academic session 1995-96. They however could only continue with the courses in the next academic session if they had applied for recognition to the Regional Committees, which were fully constituted and were functional from 6.1.1996, unless the application for recognition was rejected. The university as well as affiliated Colleges were fully aware of the provisions of the Act inasmuch as the University had made an application for recognition on 15.5.997 i.e. within six months of the date of establishment of the Regional Committees. The affiliated Colleges could, therefore, have pursued their courses only after application and thereafter until disposal of their applications.

18. There is no such provision in the Act or any Regulations permitting a single application to be made by the University for recognition of the teachers training course of the Faculty of the university and all the affiliated Colleges. The application by the University did not give details of the infrastructure and number of seats and teachers in each of its affiliated Colleges. This application, therefore, was not valid for the affiliated Colleges. At best it could be treated as valid for the Faculty of Education in the university.

19. I find that these affiliated Colleges did not make any application within the period prescribed in the proviso to section 14 (1) of the NCTE Act 1993, and further these affiliated Colleges,

which have their own managements have not approached this court for seeking relief either for themselves or for its students. These institutions were clearly informed by the NRC, NCTE Jaipur not to admit any students in the year 1997-98, 1998-99. The institutions did not care to respond and thus the degrees offered by them for academic sessions 1996-97, 1997-98 and 1998-99 cannot be treated to be recognised. The students having these degrees are not entitled to any public employment in consequence of sub Section (4) of Section 17 of the act. So far the Faculty of Education of the University is concerned, I find that it had applied for recognition for the academic session 1996-97, on 15.5.1997. The Council admits the receipt of the application on 24.5.1997. The NRC, NCTE Jaipur in its several communications to the university on 14.10.1997 informed not to admit the students for the session of 1997-98 without recognition/permission of NRC, NCTE Jaipur, and thereafter similar instructions were sent on 25.8.1998 for academic session 1998-99. The University which had applied for recognition of the course for its Faculty of Education, however, was not restrained or informed not to admit students for 1996-97. The students, who had applied for 'Shiksha Shashtri' course from Faculty of Education Varanasi for the academic year 1996-97, therefore were entitled to continue with the course and their degrees were not de-recognised as the Regional Committee had not rejected and notified the rejection of its application for the year 1996-97. I find that the students of the academic session 1996-97, so far of the Faculty of Education of Sampurnanand Sanskrit University who have successfully completed the course and are were awarded with Shiksha Shastri Degrees are entitled to the benefit of proviso to section 14 (1) and that their degrees are valid for the purpose of public employment.

20. The plea of equity in favour of students is wholly misconceived. The National Council of Teachers Education Act 1993 was notified in the Gazette of India on 30.12.1993. It was enforced w.e.f. 1.7.1995 and the Council was constituted on 17.8.1995. The universities, institutions and students were fully aware and informed of the provisions of the Act.

21. This Court cannot issue a writ of mandamus directing the respondents to act contrary to the provisions of the Act. The violation of law as it stands must be objected by all concerned. The Court under Article 226 of Constitution of India shall not encourage violation of the Statutes on account of equities and in any case these equities have not been properly pleaded and applied. The Apex Court has repeatedly held that the courts shall not on account of such pleadings dilute the provisions of the Act and the standards of education. In **State of Maharashtra vs. Vikas Sahid Rao Ram Dal 1992 4 SCC 435 followed in State of Punjab vs. Renuka Singhal 1994 1 SCC 175** the Supreme court held as follows;

"10. In **Students of Dattatraya Adhyapak Vidyalaya v. Stte of Maharashtra** this Court held thus:

"We are coming across cases of this type very often where allegations are made that innocent students are admitted into unrecognised schools and are made to suffer. Some courts out of compassion occasionally interfere to relieve the hardships. We find that the result of this situation is total indiscipline in the field of regulation."

12. ..... The teacher is adorned as Gurudevabhava, next after parents, as he is a principal instrument to awakening the child to the cultural ethos, intellectual excellence and discipline. The teachers, therefore, must keep abreast of ever-changing techniques, the needs of the society and to cope up with the psychological approach to the aptitudes of the children to perform that pivotal role. In short teachers need to be endowed and energised with needed potential to serve the needs of the society. The qualitative training in the training colleges or schools would inspire and motivate them into action to the benefit of the students. For equipping such trainee students in a school or a college, all facilities and equipments are absolutely necessary and institutions bereft thereof have no place to exist nor entitled to recognition. In that behalf compliance of the statutory requirements is insisted upon. Slackening the standard and judicial fiat to control the mode of education and examining system are detrimental to the efficient management of the education. The directions to the appellants to disobey the law is subversive of the rule of law, a breeding ground for corruption and feeding source for indiscipline. The High court, therefore, committed manifest error in law, in exercising its prerogative power conferred under Article 226 of the Constitution, directing the appellants to permit the students to appear for the examination etc."

22. The Courts cannot issue directions to the authorities to violate their own statutory Rules or Regulations in respect of admissions of students. The compassions should not be a ground to disobey the law. In **Maharishi Dayanand University vs. M.L.R. Saraswati College of Education** (supra) the Supreme Court professed that it is time that the courts evolve a mechanism in awarding damages to the students whose careers are seriously jeopardised by unscrupulous management of colleges/schools which indulge in violations of all Rules. I find that in these petitions the petitioners have not claimed any such reliefs and thus there is no occasion to go into it.

23. For the aforesaid reasons, I find that the course of 'Shiksha Shastri' as equivalent to B.Ed. officered by Sampurnanand Sanskrit University, Varanasi, from the Faculty of Education of the University and its affiliated Colleges is valid qualification up to year 1995-96, before the provisions of NCTE Act of 1993 became applicable and thereafter for academic session 1999-2000 when permission was granted by Northern Regional Committee, Jaipur for running the course in the Faculty as well as affiliated Colleges. The course of study offered by the Faculty of Education of the University is also valid for 1996-97, as it had applied under proviso to Section 14 (1) and NCTE Act 1993 and no restrain order or refusal was communicated to the University. The degrees, however, for the academic year 1996-97, pursued in the affiliated Colleges of the University and for the years 1997-98 and 1998-99 both for the Faculty of Education by the University and the affiliated Colleges is not valid as the University and Colleges were not recognised for these academic sessions. These qualifications shall not be treated to be valid for the purposes of pursuing Special B.T.C. Course 2004 and public employment.

24. The students, who have obtained 'Shiksha Shastri' degree from the University and its Colleges upto 1995-96; from the Faculty of Education of the University for the year 1996-97, and from the University and affiliated Colleges for 1999-2000 and thereafter are valid. These students shall be at liberty to make appropriate representations to the Director, State Council of Educational Research and Training, U.P. Lucknow along with copy of this judgement and their particulars which shall be decided in accordance with directions issued in these judgements within four weeks of such communication.

25. All the writ petitions are accordingly disposed of. There shall be no order as to costs.

Petition Disposed of.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.03.2005

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 5148 of 2005

Vikas ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Vivek Dhaka
Sri V.K. Singh
Sri M.N. Singh

Counsel for the Opposite Party:
Sri B.B. Paul
A.G.A.

Code of Criminal Procedure-S-439- Grant of Bail- offence under Section 498-A, 406 IPC readwith ¾ Dowry Prohibition Act-allegation about demand of Dowry of Rs. 50,000/- and Motor cycle-admittedly the marriage not solemnized F.I.R. lodged on 3.2.2005 at 4.30 PM while the time for arrival of Barat was fixed at 6.00 P.M.-No efforts made by the informant to ascertain the truthfulness of such message-strong possibility of cancellation of marriage by the first informent himself-applicant not within the meaning of husband-No offence under section 498-A made out-held-applicant entitled to be released on bail.

Held: Para 9

In Section 498-A the words are used 'being the husband' so the person can be said a husband only after the marriage and the woman also can be said a wife after her marriage. In the present case, admittedly, the marriage has not taken place, so no offence under Section 498-A I.P.C. is made out. Even as per the allegation made in the F.I.R., there is no fulfillment of the ingredients of Section 406 I.P.C.. The applicant is in jail since 18.2.2005. In such circumstances, without expressing any opinion on the merits of the case, the applicant is entitled to be released on bail.

Case law discussed:
1996 SCC (Crl.) 792

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

1. Heard Sri Vivek Dhaka, Sri V.K. Singh and Sri M.N. Singh learned counsel for the applicant, learned A.G.A. and Sri B.B. Paul, learned counsel for the complainant. The learned counsel for the complainant has filed counter affidavit on behalf of the complainant.

2. This application has been filed on behalf of the applicant Vikas with a prayer to release the applicant on bail in case crime No. 51 of 2005, under Section 498-A and 406 I.P.C. and Section 3/4

Dowry Prohibition Act, Kankar Khera, district Meerut.

3. The facts in brief of the case are that the first informant Ratan Lal lodged an F.I.R. at police station Kankar Khera on 3.2.2005 at 4.30 p.m. in respect of the alleged incident dated 3.2.2005 which occurred at 11.00 a.m., in vicinity of mohalla Sainik Bihar, Meerut against the applicant, his mother, his maternal uncle namely Shreepal, Smt. Nirmala wife of Shreepal and Vinod, the Mausera brother of the applicant, on the basis of the following allegations:-

4. That the marriage of applicant Vikas was settled with Km. Kanchan the daughter of the first informant. The enagagement ceremony was solemnized on 30.1.2005 in which some articles as mentioned in the list, were given to the accused persons. Thereafter, it was settled that the marriage will be solemnized on 3.2.2005. The **Barat** for the same purpose was to come on 3.2.2005 at 6.00 p.m. from the house of the applicant but on 3.2.2005 at about 11.00 a.m. some persons including the maternal uncle, maternal aunt and Mausera brother of the applicant came at the house of the complainant and asked that the mother of the applicant has told that Rs.51,000/- and one motorcycle may be given to them prior to arrival of the **Barat**. If the aforesaid demand is fulfilled, the **Barat** will reach otherwise not. The complainant has shown his inability to fulfill the aforesaid demand and thereafter, the first informant went to the police station and lodged the F.I.R. against the applicant and other co-accused persons on 3.2.2005 at about 4.30 p.m.

5. It is contended by the learned counsel for the applicant that there was no demand of dowry. The marriage was settled without dowry, even in the engagement ceremony the articles shown in the list, were not given to the applicant.

6. The allegation in respect of demand of dowry made by the maternal uncle, maternal aunt and Mausera brother of the applicant is apparently false and baseless, because they have no interest to make such demand and they were not in anywhere benefited by fulfillment of such demand and in the F.I.R. the name of any witness in whose presence such demand of the dowry was made, is not mentioned as such the entire allegations levelled against the applicant and other co-accused persons are false and baseless. The marriage of the applicant was settled with Km. Kanchan the daughter of the first informant. It was scheduled to be solemnized on 3.2.2005, but at the instance of one Surendra the brother-in-law (sister's husband) of Km. Kanchan the first informant made up his mind not to perform the marriage of the applicant with Km. Kanchan because Surendra Singh was having some illicit relations with Km. Kanchan and he wanted to get her married at some nearby place with his close person so that she may be easily available for him to continue his relations. On 3.2.2005 the said Surendra gave telephonic information to the family member of the applicant that the marriage of Km. Kanchan with Vikas will not be solemnized, on that information the maternal uncle, maternal aunt and Mausera brother of the applicant went to the house of the first informant at 11.00 a.m. to know the reasons for denial of the marriage and to persuade him to solemnize the marriage, but the first

finformant demanded the huge amount of money. They refused to accept the demand of the first informant then he lodged the F.I.R., in order to harass and extract the huge amount of money from the family members of the applicant. Such story was published in the daily newspaper 'Dainik Jagran' on 4.2.2005. The F.I.R. is delayed by five hours. The distance of the police station was only one kilometre from the place of the occurrence and there is no plausible explanation of delay in lodging the F.I.R.. It is further contended that admittedly no marriage of the applicant with Km. Kanchan was solemnized. So the applicant cannot be brought within the ambit of definition of the husband, so the offence under Section 498-A I.P.C. is concerned, the first informant has failed to substantiate such allegations. Even in the counter affidavit the list of the articles given in the engagement ceremony no receipt of purchase has been filed, and there is no allegation that the accused have refused to return the articles, so the offence under Section 406 I.P.C. is not made out. The allegations made against the applicant are false and frivolous. The applicant is innocent, he has not committed the alleged offence, so he is entitled to be released on bail because he is in jail since 18.2.2005.

7. The contentions made by the learned counsel for the applicant are opposed by the learned A.G.A. and Sri B.B. Paul learned counsel for the complainant by stating that admittedly the marriage of Km. Kanchan was settled with the applicant and the applicant did not bring the Barat to perform the marriage on 3.2.2005. The demand of dowry was made at his saying by his maternal uncle and others. The demand of the dowry was not fulfilled by the first informant and it is admitted by the applicant that the engagement ceremony was performed. It is submitted that in that ceremony the articles were given, which are mentioned in the list and on the basis of the allegations, the offence under Section 498-A I.P.C. is made out because the applicant was 'proposed husband', for the purpose of Section 498-A I.P.C., the performance of marriage is not necessary. In support of his submission he cited a case of the Apex Court **S. Gopal Reddy Vs. State of A.P. 1996, S.C.C. (Crl.) 792** in which the Hon'ble Apex Court has taken the view that for the purpose of Section 4 of Dowry Prohibition Act the marriage includes the proposed marriage also. So the applicant is not entitled for bail.

8. In view of the facts and circumstances of the case and the submissions made by learned counsel for the applicant, learned A.G.A. and Shri B.B. Paul, learned counsel for the complainant and from the perusal of the record, in the present case it is admitted that the marriage of the applicant was settled with Km. Kanchan, the daughter of the first informant which was scheduled to be solemnized on 3.2.2005 and the time of the arrival of the Barat was also fixed as 6 p.m. on 3.2.2005. It is also admitted that the engagement ceremony was performed. It is also admitted that the marriage was not solemnized. On the date of marriage at about 11 a.m. the maternal uncle, maternal aunt and Mausera brother of the applicant went to the house of first informant and conveyed the message given by the applicant and his mother in respect of demand of dowry and non-fulfillment of demand they refused to bring the Barat. The first informant has

shown his inability to fulfill the said demand and lodged F.I.R. on 3.2.2005 at 4.30 p.m. in which no name of the witness has been mentioned. It was lodged before, the time of the arrival of the **Barat** which was scheduled at 6 p.m. Te first informant did not wait for the time of the arrival of the **Barat** and he did not make any efforts to ascertain truthfulness of the message conveyed to him, even he did not make any effort to pursue the applicant and his family members for bringing the **Barat**, in such circumstances it may be a strong possibility that the first informant himself has cancelled marriage. Even according to the prosecution version there is no allegation that there was any demand of dowry at any stage of negotiation for marriage prior to 3.2.2005 because he is not having sufficient source of income, he is having a small shop of general merchant and living in a small rented house.

9. There is no allegation that any article given by the first informant was demanded by the applicant or any other accused as a consideration for marriage and if any article was given in the engagement ceremony it was a gift for which the demand of return would have been made by the first informant. Any such demand was not made and there is no allegation that the applicant and other accused had refused to return the article given in engagement ceremony so it cannot be said that the applicant and others have misappropriated the article and the money given in the engagement ceremony by the first informant and on the basis of the allegation, made the offence under Section 498-A is not made out, because for the purpose of Section 498-A, it is a necessary ingredient that the marriage must be performed. After the marriage a person can be said a husband of a woman and that woman can be said a husband of a woman and that woman can be said a wife. The view taken by the Apex Court in the case of S. Gopal Reddy (supra) is far the interpretation of Section 4 of Dowry Prohibition Act because the demand of dowry can be raised at any stage of negotiation for marriage, it may be before, at or after the marriage, where such demand is made as a consideration for marriage would attract Section 4 of the Act, for the purpose of this Act the marriage includes the proposed marriage also, because the Dowry Prohibition Act is a piece of social legislation, which aims to check the growing menace of social evil of dowry. For this provision the performance of the marriage is not necessarily required but ***this interpretation cannot give any support to the contention of learned counsel for the complainant because for the interpretation of Section 498-A the intention of the Legislatre is very clear.*** It is for the purpose of protection to the married woman so that after marriage she may not be harassed or subjected to cruelty. In Section 498-A the words are used '**being the husband**' so the person can be said a husband only after the marriage and the woman also can be said a wife after her marriage. In the present case, admittedly, the marriage has not taken place, so no offence under Section 498-A I.P.C. is made out. Even as per the allegation made in the F.I.R., there is no fulfillment of the ingredients of Section 406 I.P.C.. The applicant is in jail since 18.2.2005. In such circumstances, without expressing any opinion on the merits of the case, the applicant is entitled to be released on bail.

10. Let the applicant Vikas involved in case crime no. 51 of 2005, under Sections 498-A and 406 I.P.C. and Section 3/4 Dowry Prohibition Act, P.S. Kankar Khera, District Meerut be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the C.J.M. Meerut.

Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.45091 of 2002

Dheeraj Kumar Dubey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Niraj Tiwari

Counsel for the Respondents:
Sri V.K. Rai
S.C.

Constitution of India- Article 226- Service Law- Right of appointment-69 posts of Gram Vikas Adhikari- advertised out of 67 candidates from the merit list as well 2 posts by the candidates from waiting list occupied- subsequently- 28 post, further advertised- petitioner claimed the same to be ful filled by the candidates from waiting list- held the moment on which the future vacancy advertised- the waiting list comes to an end and cannot be utilized further.

Held- Para 6

The judgment cited by the learned counsel for the petitioner is totally distinguishable. That was a case where the candidates name was found in the select list, but in the present case, the petitioner's name was only found in the waiting list which came to an end upon the filling up of the entire vacancies that were advertised. As stated earlier, once the vacancies are filled up, the waiting list comes to an end and cannot be utilized any further.

Case law discussed:
1996(3) SCC 273
1999(3) UPLBEC 1731
1991(3) SCC-47
2001(6) SCC-380
2003(10) SCC-136
2002 SCC (5) 195
1993(1) SLR-44

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

1. Various posts were advertised in the year 1998 for an appointment of a Gram Vikas Adhikari. The petitioner applied and appeared in the written examination, in which he was successful and thereafter appeared in the interview before the District Committee. A select list was issued in which the petitioner was placed at serial No.2 of the list of the waiting candidates. Out of 69 posts, 67 posts were filled up from the select list and by an order dated 7.8.2001, two persons from the waiting list, namely, Raghvendra Singh and Lal Chandra were appointed. The petitioner contended that by an order dated 28.1.2000, the Additional Commissioner Administration Rural Development, U.P. Lucknow had written a letter to all the District Development Officers in the State of U.P. to indicate the number of vacancies existing on the post of Gram Vikas Adhikari. Pursuant to the said letter, the District Development Officer, Gorakhpur by a letter dated 9.2.2000 intimated that twenty two posts were vacant in his region. The petitioner submitted that when two persons from the waiting list

were appointed on 7.8.2001 and there existed twenty two vacancies, the petitioner should have also been appointed from the waiting list as he was placed at serial No.2 in the waiting list. The petitioner contended that he made various representations to the authorities and, eventually, when no action was taken by the respondents, the petitioner approached this Court and filed the present writ petition praying that he should be appointed on the post of a Gram Panchayat Vikas Adhikari from the waiting list and that the same benefit should be given to him as given to the two persons who were earlier appointed by an order dated 7.8.2001.

2. The respondents have filed a counter affidavit and have submitted that out of the 69 posts that were advertised, 67 posts were filled up from those candidates whose name were found in the select list and subsequently, the two vacant posts were filled up from the candidates in the waiting list. One candidate was taken from the General category from the waiting list and the second candidate was taken from the waiting list of the Scheduled Caste and in this manner, all the 69 posts so advertised, were duly filled up. The respondents submitted that since the petitioner was placed at serial No.2 of the waiting list, he could not be appointed. It was further submitted that since the entire posts so advertised had been filled up, the waiting list came to an end and no further appointment could be made from the waiting list in the subsequent vacancy that came into existence.

3. The learned counsel for the petitioner submitted that since there are vacancies existing, the waiting list should be utilized and that the petitioner should be given an appointment. In support of his submission, the petitioner relied upon a judgment of the Supreme Court in **S. Govindaraju vs. Karnataka S.R.T.C. and another 1996 (3) SCC 273.**

Heard Sri Niraj Tiwari, the learned counsel for the petitioner and Sri V.K. Rai, the learned Standing Counsel for the respondents.

4. The life of a waiting list comes to an end, the moment the vacancies so advertised are filled up. The waiting list cannot be utilised to fill up the vacancies that had not been advertised nor can it be utilised fill up those vacancies which came into existence subsequently after the issuance of the advertisement. In **Indian Airlines Ltd. vs. Samaresh Bhowmick and others, 1999 (3) UPLBEC 1731,** the Supreme Court held that the select list after the expiry of its validity period cannot be made available for filling up future vacancies.

5. In any case, a candidate in the waiting list does not acquire any indefeasible right to be appointed against a vacancy. The mere fact that the petitioner's name was found in the waiting list does not mean that the petitioner has a bonafide right for an appointment. A Constitutional Bench of the Supreme Court in **Shankarsan Dash v. Union of India, 1991[3] SCC 47** held-

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified

candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicates, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons. And it the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in **State of Haryana v. Subhash Chander Marwaha, Neelima Shangla v. State of Haryana, or Jatendra Kumar v. State of Punjab."**

In **All India SC & ST Employees' Association and another v. A. Arthur Jeen and others, [2001]6 SCC 380** the Supreme Court held-

"Merely because the names of the candidates were included in the panel indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies."

Similar view was followed by the Supreme Court in **Ludhiana Central Cooperative Bank Ltd. v. Amrik Singh and others, 2003[10] SCC136**, **S.Renuka and others v. State of A P and another, 2002 SCC [5] 195, Sabita Prasad and others v. State of Bihar and others, 1993 [1] SLR-44**, **State of Andhra Pradesh and others v. D.Dastagiri and others, 2003[3] ESC 291.**

6. The judgment cited by the learned counsel for the petitioner is totally distinguishable. That was a case where the candidates name was found in the select list, but in the present case, the petitioner's name was only found in the waiting list which came to an end upon the filling up of the entire vacancies that were advertised. As stated earlier, once the vacancies are filled up, the waiting list comes to an end and cannot be utilized any further.

7. In view of the aforesaid, I do not find any merit in the writ petition. It is accordingly dismissed. However, there shall be no order as to cost.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 16.05.2005

BEFORE
THE HON'BLE TARUN AGARWAL, J.

Civil Misc. Writ Petition No. 39418 of 2005

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

Counsel for the Petitioner:
Sri A.B. Singh

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Service Law-cancellation of appointment–false declaration given at the time of submitting application form regarding involvement in any criminal case-subsequent acquittal will not

absolve from suppression of material information- cancellation of appointment held- proper.

Held- Para 6

In view of the clear dictum laid down by the Supreme Court, the petitioner having suppressed material information with regard to his involvement in a criminal case at the time of filling up the form, the subsequent acquittal of his involvement in the criminal case will not absolve him from the fact that he had suppressed material information. When a candidate suppresses material information and/or provides false information, he cannot claim any right for an appointment on a post. This being the position enunciated by the Supreme Court in the aforesaid judgment, consequently, the judgment of this Court in Qamrul Hoda's case [supra] is no longer a good law.

Case law discussed:
1997(2) UPLBEC-1201- distinguished
1997 SCC (L &S) 492 relied on
2003 SCC (L & S) -306

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

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

2. It transpires that the petitioner applied for appointment on the post of Constable and was recruited on 3.3.2004. After his recruitment the petitioner filed an affidavit dated 30.10.2004 intimating the authorities that he had been acquitted in a criminal case on 13.9.2004. Based on the affidavit filed by the petitioner, the respondents issued an order dated 12.4.2005 cancelling his appointment on the post of Constable on the ground that he had furnished false information. Consequently, the present writ petition has been filed.

3. The learned counsel for the petitioner submitted that there was no deliberate concealment on the part of the petitioner in suppressing the fact about his involvement in a criminal case. He further submitted that the petitioner has now been acquitted and therefore, there was no wilful concealment on the part of the petitioner. The fact remains that at the time of the recruitment, when the petitioner was required to furnish the information he did not indicate that he was involved in a criminal case. Consequently, when the authorities came to know about his involvement in a criminal case, the appointment of the petitioner on the post of Constable was cancelled for suppressing the information.

4. Learned counsel for the petitioner has placed reliance upon the judgment of this Court in **Qamrul Hoda v. Chief Security Commissioner, N.E. Railway, [1997] 2 UPLBEC 1201** in which it was held that even though, the applicant did not place the correct facts while filling up the declaration form, the crucial fact that now he has been acquitted would entitle him for being appointed on the post of Constable. This court held that concealment of the correct facts in the declaration form was not sufficient for debarring him from being selected to the post of Constable. The petitioner has also made reliance upon another judgment of this Court in Satish Kumar Shukla v. Union of India and others, [2002]1 UPLBEC 610.

In **Delhi Administration through its Chief Secretary and others v. Sushil Kumar, 1997 SCC [L& S] 492**, the Supreme Court held–

"It is seen that verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to a post under the State. Though he was found physically fit, passed the written test and interview and was provisionally selected, on account of his antecedent record, the appointing authority found it not desirable to appoint a person of such record as a Constable to the disciplined force. The view taken by the appointing authority in the background of the case cannot be said to be unwarranted. The Tribunal, therefore, was wholly unjustified in giving the direction for reconsideration of his case. Though he was discharged or acquitted of the criminal offences, the same has nothing to do with the question. What would be relevant is the conduct or character of the candidate to be appointed to a service and not the actual result thereof. If the actual result happened to be in a particular way, the law will take care of the consequences. The consideration relevant to the case is of the antecedents of the candidate. Appointing authority, therefore, has rightly focused this aspect and found it not desirable to appoint him to the service."

In **Kendriya Vidyalaya Sangathan and others Vs. Ram Ratan Yadav, 2003 SCC [L & S] 306** the Supreme Court held –

"The object of requiring information in columns 12 and 13 of the attestation form and certification thereafter by the candidate was to ascertain and verify that character and antecedents to judge his suitability to continue in service. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. The employer having regard to the nature of the employment and all other aspects had the discretion to terminate his services, which is made expressly clear in para9 of the offer of appointment. The purpose of seeking information as per columns 12 and 13 was not find out either the nature or gravity of the offence or the result of a criminal case ultimately. The information in the said columns was sought with a view to judge the character and antecedents of the respondent to continue in service or not. The High court, in our view, has failed to see this aspect of the matter. It went wrong in saying that the criminal case had been subsequently withdrawn and that the offences, in which the respondent was alleged to have been involved, were also not of serious nature."

5. Similar view was again expressed by the Supreme Court in **Secretary, Department of Home Secretary, A.P. and others Vs. B. Chinnam Naidu, [2005] 2 SCC 746.**

6. In view of the clear dictum laid down by the Supreme Court, the petitioner having suppressed material information with regard to his involvement in a criminal case at the time of filling up the form, the subsequent acquittal of his involvement in the criminal case will not absolve him from the fact that he had suppressed material information. When a candidate suppresses material information and/or provides false information, he cannot claim any right for an appointment on a post. This being the position enunciated by the Supreme Court in the aforesaid judgment, consequently, the judgment of this Court in Qamrul Hoda's case [supra] is no longer a good law.

7. In view of the aforesaid, the writ petition is devoid of any merit and is dismissed summarily.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2005

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

Civil Misc. Writ Petition No. 43770 of 2005

Vijai Bahadur Rai ...Petitioner
Versus
State of U.P. through Secretary, Nagar Vikas Mantralaya, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Yogesh Kumar Singh

Counsel for the Respondents:
Sri M.M.D. Agarwal
S.C.

A. U.P. Jal Nigam Engineers of (Public Health Branch Services) Regulation 1978-Reg-31- Age of Superannuation as Junior Engineer with Local Self Government Engineering Department-on 18.6.75 the services stood transferred with Nigam on the same terms conditions-unless other conditions are revised by Nigam-by efflux of time working as Asstt. Engineer by impugned Notice-petitioner made to retire at the age of 58 yrs.-under regulation 31-regulation and government orders meant for government employees-made applicable-hence entitled to continue till attains the age of 60 yrs.

Held: Para 8

Thus, the Fundamental Rule 56-A of U.P. Financial Hand Book applicable to the Government servant in respect of age of superannuation as amended from time to time would automatically apply to the employees of the Nigam including the petitioner who is covered by Regulations 1978. Thus in view of the aforesaid legal position, we are prima facie of the opinion that the aforesaid amended provisions of fundamental rules providing for age of retirement/superannuation of 60 years applicable to the Government employee are also applicable to the petitioner and the petitioner would be entitled to continue in service till he attains his age of superannuation i.e. 60 years instead of 58 years.

B. Constitution of India Article 226-Practice of Procedure-grant of Interim Order-prior stage of counter and rejoinder affidavit-in cases of termination, renewal, dismissal, suspension, reduction in rank, and compulsory retirement interim relief in the nature of final relief should not be granted-but in case superannuation–holding of office enjoying the facilities-attached to the office-channel of promotion on higher post can not be compensated held-distinction should be drawn between the cases in which conduct of employer is subject matter of dispute and the controversy rest on operation of law-hence interim order granted.

Held: Para 11

Although this Court is conscious about the scope of interim order to be passed in the writ petition at admission stage, prior to exchange of counter and rejoinder affidavits between the parties. Normally where the fact can be disputed by the counter affidavit to be filed in the writ petition, the interim relief in the nature of final and main relief is not granted in such situation. Not only this but this Court is also slow in granting any interim order of such a nature in cases of termination, removal, dismissal, suspension, reduction in rank and compulsory retirement of employee etc.

where the grant of interim relief would restore the petitioner in a position of status quo ante on the date of such order passed against him/her but the case in hand is on quite distinct and different footing.

Besides this privilege of holding of office, enjoying facilities, amenities attached to the office, chances of promotion on higher posts cannot always be compensated in the terms of money. Thus a distinction should also be drawn from those cases where very conduct of employee is subject matter of dispute and where the controversy rests on operation of law alone. The case in question falls in later category.

Case law discussed:

AIR 1962 SC 316
AIR 1971 SC-454
AIR 1976 SC-2403
AIR 1978 SC-793
AIR 1989 SC-516
AIR 1991 SCW-3009
AIR 1994 SC-169
AIR 1995 SC-2181
Spl. Appeal No.559 of 05 decided on 10.5.05

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

1. We have heard Sri Yogesh Kumar Singh, learned counsel for the petitioner and Standing counsel for respondent no. 1 as well as Sri M.M.D. Agarwal for respondents no.2 and 3.

2. Counter affidavit on behalf of respondents may be filed within one month. Rejoinder affidavit may be filed within another three weeks.

3. The facts of the case in brief are that the petitioner was initially appointed as Junior Engineer on 10.8.1972 in the Local Self Government, Engineering Department (L.S.G.E.D.) of Government of Uttar Pradesh. While he was serving as Junior Engineer in the aforesaid department, U.P. Jal Nigam was established and constituted under sections 3 and 4 of U.P. Water Supply and Sewerage Act, 1975 (hereinafter referred to as Act). Thereupon the services of employees of the Local Self Government, Engineering Department of the State Government were transferred in the U.P. Jal Nigam (hereinafter referred to as Nigam) under section 37 of the Act from appointed date i.e. 18.6.1975. Consequently the petitioner's services were also transferred in the Nigam, since then he became employee of Nigam and is continuing as such. The services of employees of erstwhile L.S.G.E.D. of State Government were transferred in the Nigam with the condition that the employees so transferred shall hold his office or service therein by the same tenure at the same remuneration and upon same other terms and conditions and with same rights and privilege as to pension, gratuity and other matters as he would have held the same on the appointed date if this Act has not come into force and shall continue until his employment in the Nigam is terminated or until his other terms and conditions of the service are revised or altered by the Nigam under or in pursuance of any law or in accordance with any provision which for time being governs his service. In due course of time the petitioner was promoted on the post of Assistant Engineer. While working as Assistant Engineer in Nigam an office order was issued on 17.3.2005 communicating to the petitioner that on 31.6.2005 he would attain the age of superannuation 58 years and would be retired from service afternoon on that date. Feeling aggrieved by the aforesaid office order the petitioner has filed above noted writ petition inter alia on the grounds mentioned in the writ petition.

4. A bare reading of the relevant provisions of Section 37 of the Act demonstrate that on such transfer of employees of erstwhile L.S.G.E.D. of State Government in the Nigam established under the Act, the terms and conditions of the services of such employees, whose services were not terminated, can be altered by Nigam under or in pursuance of any law or in accordance with any provision which for time being governs his service.

5. Although the Nigam is wholly owned and controlled by the State Government but it is still independent separate legal entity distinct from the Government. The Nigam in exercise of power vested under section 97 (1) (2) (c) of the Act with the previous approval of the State Government has made Regulations for governing the terms and conditions of the services of engineers namely; U.P. Jal Nigam Engineers (Public Health Branch Services) Regulations, 1978. It cannot be disputed that while working on the post of Assistant Engineer in the Nigam, the terms and conditions of service of the petitioner are also governed by the aforesaid Regulation, 1978. The Regulations deals almost various matters in respect of recruitment, promotion, seniority and other conditions of service but does not specifically deals with the condition of age of superannuation/retirement by incorporating any specific word in respect of age of retirement which is also an essential incident and condition of the service of engineers. However, under Regulation 31 of the aforesaid Regulations, it has been specifically provided that except as provided in these Regulations the pay, allowances, pension, leave, imposition of penalties and other conditions of service of the members of service shall be regulated by Rules, Regulations or Orders applicable generally to the Government servants serving in connection with the affairs of state. Thus by virtue of Regulation No. 31, the provisions of Fundamental Rule 56-A contained in U.P. Financial Hand Book Vol. 2 Parts II to IV, which is applicable to the government servant in respect of age of retirement/superannuation is deemed to be adopted by way of reference. The aforesaid Fundamental Rule 56-A as it stood earlier provides age of superannuation of Government employees as 58 years. The aforesaid Fundamental Rule 56-A was amended by Uttar Pradesh Fundamental (Amendment) Rules, 2002 with retrospective effect commencing from 28th November, 2001. By this amendment in Fundamental Rule 56-A the age of superannuation of Government servant has been enhanced from 58 years to 60 years from the date of its commencement.

6. Learned counsel for the petitioner has submitted that since the provisions of Fundamental Rules 56-A, which are applicable to the Government employees in respect of their age of retirement, by virtue of Regulation 31 of the aforesaid Regulations, stood adopted by reference, as such become applicable to the petitioner also by necessary implication of adoption of the rules applicable to the government servants, therefore, every amendment made in Fundamental Rules 56-A automatically apply to the petitioner also on its own force. The submission made by learned counsel for the petitioner prima facie appears to have some substance.

7. Now a moot question arises for consideration in this case as to whether the amendment made in Fundamental Rules 56-A would automatically apply to the petitioner by virtue of Regulation 31 of Regulations, 1978 as adopted legislation by reference or not? The aforesaid question of adoption of legislation by reference is not res integra rather in catena of decisions the question has received consideration of Hon'ble Apex Court. While taking note of earlier decisions rendered in ***Collector of Customs, Madras Vs. Nathella Sampathu Chetty AIR 1962 S.C. 316, New Central Jute Mills Co. Ltd. Vs. Asstt. Collector of Central Excise, Allahabad AIR 1971 S.C. 454, Land Acquisition Officer, City Improvement Trust Board Vs. H. Narayanajah AIR 1976 S.C. 2403, Bajya Vs. Gopikabai AIR 1978 S.C. 793, Ujagar Prints Vs. Union of India AIR 1989 S.C. 516, Barnagoze Jute Factory Co. Vs. Inspector of Central Excise AIR 1991 S.C.W. 3009= (1992) 1 S.C.C. 401*** in para 31 and 32 of decision rendered in ***Gauri Shankar Gaur Vs. State of U.P. & others AIR 1994 S.C. 169,*** Hon'ble Apex Court has held that in case of legislation by incorporation the former Act becomes an integral part and parcel of the later Act, as if it was written with ink and printed in the later Act. Its validity including the provisions incorporated thereunder would be judged with reference to the power of legislature enacting the later Act. It is not by reference. Logically when the provisions in former Act were repealed or amended, they do not, unless expressly made applicable to the subsequent Act, be deemed to be incorporated in it. The later Act is totally unaffected by any amendment or repeal subject to certain exceptions. If a later Act merely makes a reference to the earlier Act or existing law, it is only by way of reference and all amendments, repeals, new law subsequently made will have effect unless its operation is saved by Section 8(1) of General Clauses Act or void under Article 254 of the Constitution. The aforesaid observation made by Hon'ble Apex Court in Gauri Shankar's case (supra) has been reiterated again by the Hon'ble Apex Court in subsequent decision rendered in ***State of Maharashtra and another Vs. Sant Joginder Singh Kishan Singh and others AIR 1995 S.C. 2181,*** wherein in para 10 and 11 of the decision while drawing distinction between adoption of legislation by incorporation and adoption by reference it has been held that since the Legislature had incorporated specific provisions of Central Act, the necessary conclusion is that the Legislature did not intend to apply unspecified provisions of the Central Act to the exercise of power under the Act. In this behalf it is to be remembered that there is distinction between incorporation and adoption by reference. If the Legislature would have merely adopted the Central Act, subsequent amendments to that Act made under Act 68 of 1984 would have become applicable per force.

8. Thus from the aforesaid consistent view of the Hon'ble Apex Court on the question in issue, it leaves no room for doubt for taking different view in the matter. It appears that by necessary implication Regulation 31 of the aforesaid Regulations 1978 has adopted the provisions of Fundamental Rules 56-A, which are applicable to the Government employee generally in respect of their age of retirement. The age of superannuation/retirement has not been specifically dealt with by the aforesaid

Regulations, 1978. This adoption of Legislation cannot be said to be adoption by incorporation of any rules/regulation or Government Order by incorporating actual text of the rules or government order existing at any point of time as if it was written with ink and printed in Regulation 31 by making it integral part and parcel of Regulation 31 of the aforesaid Regulation. Rather it has merely made reference of rules/regulations, Government Orders applicable generally to government servants, serving in connection of affairs of state government. It is clear-cut case of adoption of legislation by reference as held by the Hon'ble Apex Court and it is not a case of adoption of legislation by incorporation. In the aforesaid regulation 31 of the Regulations, 1978 only reference of provisions of rules, regulation or government orders generally applicable to the government employees have been made in the aforesaid regulation. Thus, the Fundamental Rule 56-A of U.P. Financial Hand Book applicable to the Government servant in respect of age of superannuation as amended from time to time would automatically apply to the employees of the Nigam including the petitioner who is covered by Regulations 1978. Thus in view of the aforesaid legal position, we are prima facie of the opinion that the aforesaid amended provisions of fundamental rules providing for age of retirement/superannuation of 60 years applicable to the Government employee are also applicable to the petitioner and the petitioner would be entitled to continue in service till he attains his age of superannuation i.e. 60 years instead of 58 years.

9. The view taken by us also finds support from a recent decision of a Division Bench (comprising of Hon'ble Mr. Chief Justice Ajoy Nath Ray and Mr. Justice Ashok Bhushan) of this Court rendered in ***Chairman, Uttar Pradesh Jal Nigam Vs. State of U.P. & another (Radhey Shyam Gautam)*** in Special Appeal No. 559 of 2005 decided on 10.5.2005 (Annexure No. VI of the writ petition), wherein a Division Bench of this Court has considered the effect and scope of aforesaid Regulation 31 of Regulations 1978 and also earlier decision of another Division Bench of this Court rendered in ***Harwindra Kumar Vs. Chief Engineer, Karmik, U.P. Jal Nigam, Lucknow and others reported in (2002) 2 UPLBEC 1511*** and categorically held that the Division Bench of this Court in Harwindra Kumar's case did not take notice of Regulation 31 of the aforesaid Regulations, 1978, therefore, the decision rendered by aforesaid Division Bench is treated to be per incuriam, we are also of the same opinion. Besides this the decision rendered by earlier Division Bench of this Court in Harwindra Kumar's case (supra) has also not considered the binding precedent as referred herein before on the question of adoption of legislation by reference, therefore, on both the counts the aforesaid decision of Division Bench appears to be a decision in per incuriam, as held subsequently by another Division Bench of this Court.

10. Since we are prima facie of opinion that Fundamental Rule 56-A as amended from time to time applicable to the employees serving in connection of affairs of state and in view of the amended provision of the aforesaid fundamental rules the petitioner being employee of the Nigam is also entitled to continue in service until he attains the age

of superannuation/retirement of 60 years, therefore, office order dated 15.1.2002 (Annexure-4 of the writ petition) issued by Nigam in respect of clarification or application of the aforesaid amended provisions of fundamental rules contained in notification dated 28.11.2001 is ultra vires to the provisions of Act and Regulation 31 of the Regulations, 1978 and beyond the scope of authority under law as such void ab initio. The aforesaid office order of Nigam and any government order issued in respect thereof cannot be permitted to run contrary to the express provisions of Act and Regulations framed thereunder, as indicated herein before. Thus, we are prima facie of opinion that office order dated 15.1.2002 and impugned office order dated 17.3.2005 (Annexure-1 of the writ petition) is wholly without jurisdiction and beyond the scope of authority under law, therefore, nullity and void ab initio and liable to be ignored.

11. Although this Court is conscious about the scope of interim order to be passed in the writ petition at admission stage, prior to exchange of counter and rejoinder affidavits between the parties. Normally where the fact can be disputed by the counter affidavit to be filed in the writ petition, the interim relief in the nature of final and main relief is not granted in such situation. Not only this but this Court is also slow in granting any interim order of such a nature in cases of termination, removal, dismissal, suspension, reduction in rank and compulsory retirement of employee etc. where the grant of interim relief would restore the petitioner in a position of status quo ante on the date of such order passed against him/her but the case in hand is on quite distinct and different footing. It is not a case of such a nature referred above where very conduct/suitability of suspended/dismissed/terminated or reverted employee is involved and by granting interim relief he would be restored back in the service without finally adjudicating his case on merits, which could be done only on exchange of affidavits between the parties after adjudicating his case on merits. But it is not a case where any personal conduct of the petitioner, which led to impugned action taken against him, is subject in issue. Contrary to it, it is a case of simple interpretation of statute/Rules/Regulations on undisputed or indisputable facts involved in it. Besides this privilege of holding of office, enjoying facilities, amenities attached to the office, chances of promotion on higher posts cannot always be compensated in the terms of money. Thus a distinction should also be drawn from those cases where very conduct of employee is subject matter of dispute and where the controversy rests on operation of law alone. The case in question falls in later category.

12. Thus in view of aforesaid discussions in the interest of justice as interim measure, until further order of this Court the respondent no.2 and 3 are directed not to retire the petitioner from service before attaining his age of 60 years and treat the petitioner to continue in service till he attains the age of 60 years and pay him salary month to month as and when it falls due, unless his services are otherwise dispensed with by disciplinary measures in accordance with law.

List the petition in the last week of July, 2005.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 13.06.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 38990 of 2005

M/s Dilip Oil Company ...Petitioner
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri Ashish Kumar Singh
Sri Ajay Kumar Singh
Sri R.N. Singh

Counsel for the Respondents:
Sri Navin Sinha
Sri Arvind Srivastava
S.C. `

U.P. Kerosene Control Order-1962- Petitioner was appointed as whole sale distributors for super kerosene by corporation oil/light diesel oil- under G.O. 19.5.90-by another G.O. 1.12.01 the District Magistrate can permit to continue the earlier distributor provided such block distributor has obtained explosive licence and establish under ground storage tank-despite of the appointment of whole sale dealer by the Indian Oil Corporation-the Respondent 6 obtained licence after 8.3.02–held-not entitled to continue–matter remitted back to the commissioner of any requirement of block distributor- even after the appointment of whole sale dealer.

Held- Para 14 and 19

A reading of the Government Order dated 08.03.2002 would establish that it permits a block distributor to continue provided he fulfills the aforesaid two conditions meaning thereby that the block distributor has to be granted some reasonable time to fulfill the aforesaid two conditions and then the District Magistrate can permit the block distributor to continue as such. Since in the facts of the present case the respondent no. 6 had installed the underground tank and had obtained explosive licence he fulfilled all the requirements of the Government Order dated 08.03.2002 before the date the District Magistrate has cancelled his appointment as block distributor, it cannot be said that the respondent no.6 was not entitled to the benefits of the Government Order dated 8th March, 2002. The Commissioner has correctly interpreted the Government Order dated 08.03.2002 and has rightly held that the conditions imposed under the Government Order dated 08.03.2002 can be complied with prospectively only.

In such circumstances the order dated 05.05.2005 passed by the Commissioner to the extent it permits respondent no. 6 to continue as the block distributor is hereby quashed. The findings recorded by the Commissioner in respect of underground tank and explosive licence are hereby affirmed. The Commissioner is directed to record his finding on the issue as to whether in view of Government Orders dated 01.12.2001 and dated 08.03.2002 and from the material on record, there is a requirement of block distributor being continued in Block Chanewa, district Mirzapur even after appointment of wholesale dealer by the oil company for distribution of kerosene oil in rural areas.

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

1. Heard Sri R. N. Singh Senior Advocate assisted by Sri A. K. Singh Advocate on behalf of the petitioner, Sri Navin Sinha Senior Advocate assisted by Sri Arvind Srivastava Advocate on behalf

of respondent no. 6 and Standing Counsel on behalf of respondent nos. 1, 2, 4 and 5.

2. For the purpose of distribution of Super Kerosene Oil / Light Diesel Oil in rural areas through fair price shop agents the State Government came out with a policy decision as contained in Government Order dated 19.05.1990. Under the said Government Order it was provided that there shall be only one block distribution centre / whole seller for each block and all fair price shop agents / retailers shall obtain supply of kerosene oil from the said wholesale dealer. It was further provided that the whole sellers appointed by the oil companies may be appointed block distributor under the Uttar Pradesh Kerosene Oil Order, 1962. Under the provisions of the said Government Order dated 19.05.1990 M/s Indo Traders Corporation, respondent no. 6, through its Proprietor Sri Bal Krishna Agarwal, was appointed as Block Distributor for Super Kerosene Oil/Light Diesel Oil in respect of Block Chanewa, district Mirzapur vide order dated 24.07.1990 and was authorized to distribute kerosene oil for the said block and accordingly a licence in Form 3-Ka under the U.P. Kerosene Oil Order, 1962 was issued in favour of respondent no. 6. While respondent no. 6 was continuing as Block Distributor as aforesaid an advertisement dated 01.10.1993 was published by the Indian Oil Corporation inviting applications for appointment of wholesale dealers by the oil company in respect of the said block Chanewa. The petitioner applied for appointment as wholesale dealer in pursuance of the said advertisement and was ultimately appointed as wholesale dealer of the oil company vide letter dated 09.02.1999. The petitioner has also been granted a licence for the said purpose under the U.P. Kerosene Oil Order, 1962.

3. On 01.12.2001 a Government Order was issued whereby it was provided that the Government Order dated 19.05.1990 contemplated that in the blocks where wholesale dealers have not been appointed by the oil company, the District Magistrate shall appoint a block distributor under U.P. Kerosene Oil Order, 1962. Therefore, under the Government Order dated 19.05.1990 the block distributor cannot function, a whole-seller is appointed by the oil companies in respect of the block concerned. The Government Order dated 01.12.2001, however, provided that even after appointment of wholesale dealer by the oil company if the District Magistrate considers it necessary to continue with the block distributor appointed by him, earlier for distribution of kerosene in the area, he may do so and the State Government has no objection to it. The aforesaid Government Order dated 01.12.2001 was modified by another Government Order dated 08.03.2002 wherein it was provided that such block distributors who are continuing under the Government Order dated 01.12.2001 should obtain explosive licence and establish underground storage tank, before they can be permitted by the District Magistrate to continue even after appointment of wholesale dealer by the oil company.

4. The petitioner after his appointment as wholesale dealer in respect of Block Chanewa made a representation against continuation of respondent no. 6 as block distributor. A Committee was constituted. The Committee submitted its report on 23.01.2003. The District Magistrate

required the District Supply Officer to take necessary action on the complaint of the petitioner. The District Supply Officer cancelled the block distributorship of M/S Indo Traders Corporation, respondent no. 6 vide order dated 28.04.2003. Against the order of the District Magistrate dated 02.03.2003 M/s Indo Traders Corporation filed Appeal No. 241 of 2003 before the Commissioner, Vindhyachal Division, Mirzapur. The appeal so filed by respondent no. 6 has been dismissed by the Commissioner vide order dated 07.06.2003. Thereafter the respondent no. 6 filed Writ Petition No.26223 of 2003 challenging the order dated 28.04.2003 passed by the District Supply Officer, Mirzapur and the order dated 07.06.2003 passed by the Commissioner in appeal. The writ petition was disposed of with a direction upon the licensing authority to re-consider the claim of respondent no. 6 in accordance with the Government Order dated 08.03.2003 and to pass fresh orders in accordance with law. On the basis of the aforesaid judgment of this Court the District Magistrate (licensing authority) passed the order dated 15.03.2005 rejecting the representation of the petitioner dated 27.12.2004 and held that there was no requirement of any block distributor because of appointment of the petitioner as wholesale dealer. Against the said order of the District Magistrate, Mirzapur dated 15.03.2005 the respondent no. 6 filed an appeal before the Commissioner, Vindhyachal Division, Mirzapur. The appeal was registered as Appeal No. 156 of 2005. Vide order dated 07.04.2005 the Commissioner delegated his power under Section 28 (1) of U.P. Scheduled Commodities Distributor Order, 2004 to the Assistant Food Controller, Vindhyachal Division, Mirzapur, to hear and dispose of the appeals filed under the Public Distribution System Control Order. On 21.04.2005 an interim order was granted in the appeal so filed by respondent no. 6 staying the operation of the order of the District Magistrate dated 26.04.2003 and dated 15.03.2005. The petitioner filed writ petition against the order dated 21.04.2005 passed in appeal and was numbered as Writ Petition No. 34033 of 2005. The writ petition was disposed of by this Court by means of judgment and order dated 28.04.2005 with a direction to the Commissioner to decide the appeal.

5. The commissioner vide order dated 05.05.2005 has allowed the appeal and has held that since respondent no. 6 has obtained explosive licence and has installed an underground tank he is entitled to continue as block distributor in terms of the Government Order dated 08.03.2002, therefore the order passed by the District Magistrate dated 15.03.2005 and 26.04.2003 deserve to be set aside. It is against the order dated 05.05.2005 passed by the Commissioner in the appeal that the petitioner has filed the present writ petition.

6. On behalf of the petitioner it is contended that the District Magistrate in his order dated 15.03.2005 has recorded a specific finding that on the relevant date the date of the Government Order 08.03.2002 the petitioner had not obtained any explosive licence nor he had installed the under ground storage tank and, therefore, the petitioner was not entitled to continue as block distributor. The respondent no.6 had the underground tank and had also obtained explosive licence, he fulfilled the conditions as contained in

the Government Order dated 8th March, 2002.

7. The petitioner submits that the crucial date for determining the right to continue as block distributor would be the date of the Government Order i.e. 08.03.2002 and on the said date the block distributor should have obtained explosive licence and should have installed underground tank.

8. Lastly it is submitted on behalf of the petitioner that while allowing the appeal the Commissioner has not recorded any finding in respect of the issue, namely "Whether the Block Distributor was still required for distribution of kerosene oil in the rural areas after the appointment of whole-seller by the Oil Company or not".

9. On behalf of respondent no. 6 it is submitted that prior to the passing of the Government Order dated 08.03.2002 there was no requirement of any underground tank being installed or an explosive licence being obtained by the block distributor and, therefore, the condition imposed under the Government Order dated 08.03.2002 has necessarily to be applied prospectively and if the block distributor obtains an explosive licence and installs an underground tank in terms of the Government Order dated 8th March, 2002, he would become entitled to continue as block distributor even where a wholesale dealer has been appointed by the oil company. It is, therefore, submitted that the Commissioner has rightly held that since on the date of passing of the impugned order dated 15.03.2005 by the District Magistrate the respondent no. 6 had already installed the underground tank and had also obtained an explosive licence, he fulfilled all the conditions of the Government Order dated 08.03.2002 and was entitled to continue as such.

10. Lastly it is pointed out on behalf of respondent no. 6 that since there was no dispute with regard to distribution of kerosene oil by the respondent no. 6 in the rural areas even after appointment of the wholesale dealer by the oil company no finding was required to be recorded by the Commissioner in respect of the said issue.

11. I have heard learned counsel for the parties and gone through the record of the writ petition.

12. From the facts as emerge from the pleadings of the parties as well as from the contentions raised on behalf of the parties it is apparent that the dispute is confined to the following issues:--

(i) Whether a block distributor should have necessarily installed an underground tank and should have obtained an explosive licence on or before 08.03.2002 i.e. the date on which the Government Order was issued for being permitted to continue as block distributor or else he becomes entitled to continue as block distributor on completing the aforesaid conditions on any subsequent date?

(ii) Whether the terms of the Government Order dated 01.12.2001 and 08.03.2002 are to be read together and it is necessary for the District Magistrate to record a finding/satisfaction that the block distributor is required to continue for distribution of kerosene oil in rural areas even after appointment of

wholesale dealer for distribution of kerosene oil in the block?

Issue No.I:

13. So far as the first issue is concerned suffice it to point out that prior to issuance of Government Order dated 08.03.2002 there was no requirement for the block distributor to have obtained an explosive licence or to have installed an underground tank. The aforesaid two conditions have been imposed for the first time under the Government Order dated 08.03.2002. To install underground tank or to obtain explosive licence would, therefore, take some time.

14. A reading of the Government Order dated 08.03.2002 would establish that it permits a block distributor to continue provided he fulfills the aforesaid two conditions meaning thereby that the block distributor has to be granted some reasonable time to fulfill the aforesaid two conditions and then the District Magistrate can permit the block distributor to continue as such. Since in the facts of the present case the respondent no. 6 had installed the underground tank and had obtained explosive licence he fulfilled all the requirements of the Government Order dated 08.03.2002 before the date the District Magistrate has cancelled his appointment as block distributor, it cannot be said that the respondent no.6 was not entitled to the benefits of the Government Order dated 8th March, 2002. The Commissioner has correctly interpreted the Government Order dated 08.03.2002 and has rightly held that the conditions imposed under the Government Order dated 08.03.2002 can be complied with prospectively only.

Issue No. II:

It would be worthwhile to refer to the order passed by this Court dated 10.12.2004 wherein it was held as follows:--

"From the facts brought on record, there is no dispute that appointment of wholesale dealer has already been made by appointing respondent No.5. The question as to whether petitioner be allowed to continue as block distributor has to be considered in accordance with the Government Order dated 8th March, 2002 and it was for the licensing authority to have applied its mind to relevant criteria and conditions as laid down in the government order, namely (i) as to whether the block distributor has obtained licence from the explosive department, (ii) as to whether the block distributor established underground tank, and (iii) as to whether the block distributor is still continuing distribution of kerosene oil in the rural area."

15. This Court had required the District Magistrate to record specific finding with regard to the three issues as have been noticed hereinabove. From the record of the present case it is apparently clear that neither the District Magistrate nor the Commissioner have recorded any finding in respect of the third issue so directed by this Court.

16. The Government Order dated 08.03.2002 does not supersede the Government Order dated 01.12.2002. The subsequent Government Order dated 08.03.2002 is in continuation of the earlier Government Order dated 01.12.2001 and, therefore, both the Government Orders are necessarily to be

read together. A combined reading of both the Government Orders would establish beyond doubt that continuation of the block distributor subsequent to the appointment of wholesale dealer by the oil company, has been made dependent upon three factors—(a) there is a requirement, to the satisfaction of the District Magistrate for continuation of the block distributor for distribution of the kerosene oil in the block even after appointment of the wholesale dealer by the oil company, (b) the block distributor has installed the underground tank, and (c) the block distributor has obtained explosive licence.

17. So far as conditions (b) and (c) are concerned the controversy does not survive any further in view of the finding recorded by the Commissioner which have been affirmed by this Court hereinabove.

18. As far as condition (a) is concerned the District Magistrate as well as the Commissioner were necessarily required to consider as to whether there is a requirement for continuance of the block distributor for distribution of the kerosene oil in the block even after appointment of the wholesale dealer by the oil company. The requirement of the block distributor to continue even after appointment of the wholesale dealer by the oil company for distribution of kerosene oil in the block is also one of the conditions precedent for continuance of the block distributor under Government Orders referred to above. Normally this Court would have remanded the matter to the District Magistrate for recording a finding in respect of the said issue, however, such a course is not being adopted in the facts of the present case inasmuch as the District Magistrate who is licensing authority on earlier occasion vide order dated 28.04.2003 has held that there was no requirement of continuance of the block distributor subsequent to the appointment of wholesale dealer by the oil company. It would, therefore, be appropriate that the Commissioner may be required to record his finding on the basis of record in respect of the aforesaid issue also before respondent no. 6 can be permitted under law to continue as block distributor.

19. In such circumstances the order dated 05.05.2005 passed by the Commissioner to the extent it permits respondent no. 6 to continue as the block distributor is hereby quashed. The findings recorded by the Commissioner in respect of underground tank and explosive licence are hereby affirmed. The Commissioner is directed to record his finding on the issue as to whether in view of Government Orders dated 01.12.2001 and dated 08.03.2002 and from the material on record, there is a requirement of block distributor being continued in Block Chanewa, district Mirzapur even after appointment of wholesale dealer by the oil company for distribution of kerosene oil in rural areas. The Commissioner shall decide the matter as early as possible, preferably within six weeks from the date a certified copy of this order is filed before him.

The writ petition stands partly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2005

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 12319 of 1982

Badri Narain ...Petitioner
Versus
Deputy Director of Consolidation and others ...Respondent

Counsel for the Petitioner:
Sri N.P. Misra
Sri D.N. Shukla
Sri R.S. Yadav

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

U.P. Consolidation of Holdings Act-Section 11(2), 21 (5), 48 readwith as amended by amending Act 1963-Power of Revision-S.O.C. decided the appeal on 16.1.67-under some misconception on application dt. 17.2.68-D.D.C. allowed the conversion of revision into second appeal maintainable? held-not, whether is the Revision against the order passed by D.D.C. in Second Appeal maintainable before the Director of Consolidation? Held-'No'

Held: Para 12 & 13

From the aforesaid settled legal position, it is clear that after 8.3.1963 no second appeal was maintainable and only a revision could have been filed. The petitioner though initially filed a revision but under some misconceived notion of law got it converted into Second appeal though the same was not maintainable.

The only question is whether the petitioner had a further remedy of filing a revision before the Director of Consolidation against the order dated 12.7.1968 passed by Deputy Director of Consolidation deciding the proceedings treating it to be a Second Appeal. In view of the decision of the larger bench in the case of Gauri Shakar Vs. Sidhnath Tiwari (supra) the revision against the order dated 17.2.1968 would not be maintainable and has rightly been dismissed.

Case law discussed:
1964 AWR-68
1966 A.L.J. 641 (F.B.)
1968 A.L.J. 933 (Larger Bench)

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

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

2. Though the case has been taken up in revised list no one appeared for respondent no.2.

3. Shorn of unnecessary details, the facts relevant for the purpose of the case are that village was notified for consolidation operations in 1962. The petitioner filed an objection under Section 9 of the Act claiming Sirdari rights over the land in dispute which was dismissed by Consolidation Officer. Appeal filed by him was also dismissed by the Settlement Officer Consolidation. Feeling aggrieved the petitioner filed a revision before the Deputy Director Consolidation.

4. Under a misconception that since proceedings were initiated under the unamended Act which provided for a Second Appeal before Deputy Director of Consolidation and thereafter a revision before Director of Consolidation, the petitioner moved an application dated 17.12.1968 for converting the revision into the Second Appeal which was allowed by the Deputy Director of Consolidation and on the same day he

decided the revision treating it to be an appeal. Aggrieved by the said order the petitioner preferred a revision which came to be dismissed vide impugned order dated 5.7.1982 as not maintainable.

5. It has been urged by the learned counsel for the petitioner that since the proceedings were started under the un-amended Act as such they would be governed by the procedure and forum prescribed by the un-amended Act and the revision was wrongly rejected as not maintainable.

6. Under the un-amended Act Section 11 (2) and 21 (5) provided for second appeals to the Deputy Director of Consolidation against the appellate order of the Settlement Officer Consolidation. Section 48 provided for a revision to the Director of Consolidation from the decision of Deputy Director of Consolidation. However, by Amending Act VIII of 1963, the provision for filing second appeal was repealed. Existing Section 48 was also repealed and was re-enacted conferring revisional power on the Director of consolidation to look into the correctness, propriety or legality of the orders passed by subordinate authority.

7. The main question for consideration in this case is whether a revision was maintainable before the Director of Consolidation as was provided by Section 48 of the unamended Act against an order passed by Deputy Director of Consolidation in Second Appeal even after the amendment brought in the statute by amending Act VIII of 1963, or the proceedings would be governed by amended Act and no further revision would be maintainable.

8. In the case of **Lal Singh and another Vs. Commissioner and Director of Consolidation, Meerut Division, Meerut, 1964 AWR 68 of the U.P. Consolidation of Holdings Act** a Division Bench of this Court, while considering the aforesaid question, held that orders passed by Deputy Director of Consolidation before 8th March, 1963 exercising appellate power were amendable to revisional jurisdiction of Director of Consolidation or Deputy Director of Consolidation conferred with the power of Director of Consolidation. However, orders passed after 8th March 1963 were not revisable by the Director.

9. This opinion of the Division Bench was based on the fact that orders passed by Deputy Director of Consolidation before 8.3.1963 were orders passed as subordinate authorities and as such were amenable to revisional jurisdiction conferred upon Director of Consolidation or Deputy Director of Consolidation conferred with the powers of Director of Consolidation, however the orders passed after 8.3.1963 were not revisable by the Directors for after passing of Act VIII of 1963, the Deputy Director of Consolidation were not subordinate to the Directors of Consolidation, in view of notification no. 1502-CH/ I-E- 132-63 issued in exercise of powers conferred by Clause (ii) of Section 44, conferring the powers of Section 48 vested in Director of Consolidation upon all the Deputy Director of Consolidation. The Bench was of the view that after amendment of Section 48 by amending Act VIII of 1963, powers of Director to revise an order was conferred upon the Deputy Director of Consolidation, and there was nothing to suggest that Deputy Director of

Consolidation was subordinate to the Director of Consolidation for the purposes of Section 48 of the amended act.

10. The correctness of the decision in the case of Lal Singh (supra) came up for consideration by a Full Bench in the case of **Prem Chandra Vs Deputy Director 1966 ALJ 641.** The Full Bench held that revision against the order of Deputy Director of Consolidation even after 8.3.1963 would be maintainable and would be governed by un-amended Section 48. The correctness of the decision of the full bench was again considered by a larger bench in the case of **Gauri Shankar Vs. Sidhanath Tripathi 1968 ALJ 933**. The larger bench by a majority overruled the full bench decision rendered in **Prem Chandra Vs. Deputy Director of Consolidation (supra**). Interpretating the transitory provision contained in Section 47 of the amending Act of 1963 the larger bench opined that a decision given by the Settlement Officer Consolidation or Deputy Director of Consolidation on or after 8.3.1963 would be governed by amended act and accordingly a revision and not a second appeal would lie from the order of Settlement Officer Consolidation.

11. In the present case, the settlement Officer consolidation decided the appeal of the petitioner on 16.1.1967 which was initially challenged by him by filing revision. Subsequently, under some misconception the petitioner moved an application dated 17.2.1968 for converting it into an appeal, on the same day Deputy Director of Consolidation converted the revision into an appeal and decided the same.

12. From the aforesaid settled legal position, it is clear that after 8.3.1963 no second appeal was maintainable and only a revision could have been filed. The petitioner though initially filed a revision but under some misconceived notion of law got it converted into Second appeal though the same was not maintainable.

13. In any view of the matter the case of the petitioner was considered by the Deputy Director of Consolidation on merits. It does not make much difference whether it was decided as a Second Appeal or a revision. The only question is whether the petitioner had a further remedy of filing a revision before the Director of Consolidation against the order dated 12.7.1968 passed by Deputy Director of Consolidation deciding the proceedings treating it to be a Second Appeal. In view of the decision of the larger bench in the case of **Gauri Shakar Vs. Sidhnath Tiwari (supra)** the revision against the order dated 17.2.1968 would not be maintainable and has rightly been dismissed.

14. In view of foregoing discussions, I do not find any merit in the writ petition. The writ petition accordingly fails and is dismissed. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2005

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 8056 of 1981

Umesh Chandra ...Petitioner
Versus
Joint Director of Consolidation, Aligarh and others ...Respondents

Counsel for the Petitioner:
Sri S.L. Yadav

Counsel for the Respondents:
Sri R.P. Goyal
Sri Prem Babu Verma
Sri Sudhir Kumar
S.C.

U.P.Z.A. & L.R. Act-S.-134 (1) Acquisition of Bhumidhari Rights-petitioner being Sirdar on 9.6.92 applied for acquisition of Bhumidhari Rights, by depositing 10 time rent-before the grant of certificate-exempted registered sale deed-whether is the execution of sale deed valid? held-'yes' in view of the provision of S-137 (1) the grant of certificates relates back date of application.

Held: Para 10 and 12

In view of the aforesaid legal position it is clear that Smt. Ram Pyari acquired bhumidhari rights on the date i.e. 9.6.1972 when she made application under Section 134 (1) of the Act and deposited the requisite amount. The view taken by the Settlement Officer Consolidation and Deputy Director of Consolidation that since declaration under Section 137 (1) was granted subsequent to the execution of the sale deed and she was only a sirdar on the date of execution of the deed is illegal and cannot be sustained.

Thus the view taken by this court stands overruled by Hon. Apex court. Since the certificate will have retrospective effect and would relate back to the application, the death of tenure holder between the period of making application and issuance of certificate will have no effect and such a tenure holder would be deemed to have required bhumidhar rights on the date of making application, even though he may have died before grant of certificate.

Case law discussed:
2000 (91) R.D. 277
1978 R.D. 183

(Delivered Hon'ble Krishna Murari, J.)

1. Heard Sri S.L. Yadav learned counsel for the petitioner and Sri Prem Babu Verma appearing for the respondents.

2. Briefly stated the facts of the case are that during the consolidation operation the petitioner filed objection under Section 9 –A (2) of the Act claiming bhumidhari rights over the land in dispute on the basis of registered sale deed dated 9.6.1972 alleged to have been executed by Smt Ram Pyari the recorded tenure holder in his favour. The respondent no. 3 also filed objection claiming rights as legal heirs of Smt. Ram Pyari.

3. Smt. Ram Pyari who was recorded as sirdar over the land in dispute made an application on 9.6.1972 under section 134 of the Act for grant of bhumidhari sanad and deposited ten times of the land revenue on the same day as required by the said Section. She also executed a registered sale deed in favour of petitioner on the same date i.e. 9.6.1972. Smt Ram Pyari died on 17.6.1972 whereas bhumidhari sanad was granted on 24.6.1972.

4. Respondent no. 3 filed an application under Section 137 –A of the Act for cancellation of bhumidhari sanad on the ground since Ram Pyari died on 17.6.1972 as such sanad could not have issued in name of a dead person. The application was allowed on 15.7.1973 however an appeal against the said order filed before the Commissioner was abated due to consolidation operation.

5. Consolidation Officer vide order dated 27.2.1976 allowed the claim of the petitioner in respect of disputed plot nos. 69, 70 and 71 and directed that his name be entered as bhumdhar. Feeling aggrieved respondent no. 3 filed an appeal which was allowed by the Settlement Officer Consolidation vide order dated 26.12.1976. The revision filed by the petitioner was dismissed by the Deputy Director of Consolidation on 26.3.1981.

6. The Settlement Officer Consolidation and Deputy Director of Consolidation dismissed the objection of the petitioner on the ground that since Smt. Ram Pyari was dead before grant of sanad and no bhumidhri sanad could be issued in the name of a dead person as such she was only a sirdar on the date of execution of sale deed and thus had no right to transfer the property.

7. The question which arises for adjudication is whether the bhumidhari sanad issued under Section 134 (1) of the act would relate back to the date of making application or would be effective from the date it had been issued.

Section 134 and 137 of the Act as it stood at the relevant time read as under,

"***Section 134***. *Acquisition of bhumidhari rights by a sirdar- (1) If a sirdar belonging to the class mentioned in clause (a) of Section 131 pays or offers to pay to the credit of the State Government an amount equal to ten times the land revenue payable or deemed to be payable on the date of application for the land for which he is the sirdar, he shall, upon an application duly made in that behalf to an Assistant Collector, be entitled, with effect from the date on which the amount has been deposited, to a declaration that he has acquired the rights mentioned in Section 137 in respect of such land:*

Provided that the rights to pay or offer to pay the amount aforementioned shall cease on the expiry of three months from the date to be notified by the State Government.

Explanation 1._ In this sub-section 'land' includes shares in land.

Explanation II.- For the purpose of this section the land revenue payable shall-

(a) in respect of land referred to in the proviso to clause (a) of sub-section (1) of Section 246 be an amount arrived at after all the increases have been given effect to; and

(b) in respect of land to which the proviso to Section 247 applies, be an amount determined at hereditary rates under that section.

(c) The amount referred to in sub-section (1) may be paid in cash or, if the State Government so prescribes, in form of bonds or otherwise."

Section 137. Grant of certificate-

(1) If the application has been duly made and the Assistant Collector is satisfied that the applicant is entitled to the declaration mentioned in Section 134, he shall grant a certificate to that effect.

(2) Upon the grant of the certificate, under sub section (1), the sirdar shall, from the date on which the amount referred to in sub section (1) of Section 134 has been deposited,
a) become and be deemed to be a bhumidhar of the holding or the share in respect of which the certificate has been granted, and
b) be liable for payment of such reduced amount on account of land revenue for the holding or his share therein, as the case may be, one-half of the amount of land revenue payable or deemed to be payable by him therefore on date of application:

Provided further that in the cases referred to in Explanation II of Section 134 the sirdar shall, during the period a reduced amount is payable in accordance with Section 246 or 247, be liable for payment of one-half of the amount payable from time to time.

Explanation:- For the purposes of clause (b) the land revenue payable by a sirdar on the date aforesaid shall, where it exceeds an amount double that computed at the hereditary rates applicable, be deemed to be equal to such amount.

(2-A) Where the amount referred to in sub-section (1) of Section 134 is deposited on a date other than the first day of the agricultural year, the land revenue payable by the bhumidhar under clause (b) of sub-section (2) for the remainder of the agricultural year in which the amount is deposited shall be determined in such manner as may be prescribed".

8. A plain reading of Section 134 indicates that on an application being made and deposit of ten times of land revenue a sirdar becomes entitled to the declaration of having acquired the rights mentioned in Section 137 i.e. bhumidhari right, with effect from the date the amount has been deposited. Similarly, Section 137 (2) provides that upon the grant of certificate under Sub-Section –1, the sirdar shall be deemed to be bhumidhar from the date on which amount referred to in Section 134 (1) has been deposited.

9. A conjoint reading of the two provision shows that point of time when sirdar acquires bhiumidhari right has been fixed by the legislature as being the day when amount required by Section 134 (1) is deposited by him. The date on which the declaration under Section 137 is made is immaterial as the statute prescribes that declaration under Section 137 (1) will have retrospective effect and would relate back to the date of deposit made under Section 134 (1) of the Act. The view finds support from the decision of the **Hon. Apex Court in the case of Dev Narain Vs. Ram Saran, 2000 (91) RD 277.**

10. In view of the aforesaid legal position it is clear that Smt. Ram Pyari acquired bhumidhari rights on the date i.e. 9.6.1972 when she made application under Section 134 (1) of the Act and deposited the requisite amount. The view taken by the Settlement Officer Consolidation and Deputy Director of Consolidation that since declaration under Section 137 (1) was granted subsequent to the execution of the sale deed and she was only a sirdar on the date of execution of the deed is illegal and cannot be sustained.

11. Other ground on which Settlement Officer Consolidation and

Deputy Director of Consolidation have non suited the petitioner is that since Smt. Ram Pyari was dead on the date of grant of declaration under Section 137 (1) of the Act no certificate could have issued in the name of the a dead person. The Settlement Officer and Deputy Director of Consolidation have relied upon the decision of this court. The view taken by this court in the case of **Raghunanadan Singh and another Vs. Vashwant Singh 1978 RD 183** was that in case an applicant dies before the order for grant of certificate is passed, such an order is nullify and no rights or benefits could accrue on its basis. However, Hon. Supreme Court in the case of **Dev Nandan Vs. Ram Saran (supra**) has considered the decision of this court and has taken contrary view. It has been observed by the Hon'ble Apex Court as follows;

In our opinion, the said decisions run counter to the plain language and meaning of Section 134 and 137 as they stood at the relevant point of time. When a certificate is issued under Section 137, it in fact recognizes the position as on the date when the application was made and the payment contemplated under Section 134 (1) was deposited. The certificate, in other words, will have a retrospective effect and would relate back to the date of the application. There was nothing to prevent the revenue authorities from allowing the application filed under Section 134 (1) on the day when it was presented. The underlying intention of the legislature, therefore, clearly is that as and when the said application is accepted and order is passed under Section 137, it must relate back to the date when the application was filed. Such a situation is not unknown to law. Mr. Prem Prasad Juneja, learned counsel for the appellants, as an analogy, has drawn our attention to Order 22 Rule 6, C.P.C. which provides that if any of the parties to a suit dies after hearing has been completed and before the judgment is pronounced, the suit would not abate. The doctrine of relation back has been incorporated in Sections 134 and 137 of the U.P. Zamindari Abolition and Land Reforms Act.

12. Thus the view taken by this court stands overruled by Hon. Apex court. Since the certificate will have retrospective effect and would relate back to the application, the death of tenure holder between the period of making application and issuance of certificate will have no effect and such a tenure holder would be deemed to have required bhumidhar rights on the date of making application, even though he may have died before grant of certificate.

13. Thus the second ground for rejecting the claim of the petitioner by the Settlement Officer Consolidation and Deputy Director of Consolidation also cannot be sustained.

14. In view of the aforesaid discussions the claim of the petitioner on the basis of sale deed executed by Smt. Ram pyari was liable to be allowed and was rightly allowed by the Consolidation Officer. The impugned judgment of the Settlement Officer Consolidation and Deputy Director of Consolidation are unsustainable and are hereby quashed. The writ petition stands allowed. However, there shall be no order as to costs.

Petition Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.05.2005

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE HON'BLE AMAR SARAN, J.

Criminal Appeal No. 435 of 1997

Sobran Singh ...Appellant
Versus
State ...Respondent

Counsel for the Appellant:
Sri Vinay Saran
Amicus Curiae

Counsel for the Respondent:
A.G.A.

U.P. Prisoners (Release on Probation) Act readwith Jail Manual-Para-198-offence under Section-302/307 I.P.C. Criminal Appeal-premature release-appellant found guilty u/s 302 was punished with rigorous imprisonment for 10 yrs. With on year R.I. for offence under section 307- crime committed by accused with the result of misery and object poverty, because of deprivation rather then any depravity- the accused lost his mental balance wen castigated by his wife for stealing words from jungle for buying food for his family-under these circumstances-the Principal Secretary (Home) and the D.I.G.P. (Provision) directed to consider the case of appellant for pre mature release on commutation of sentence-release not to be rejected simply because the appellant has been found guilty for murder of five persons including his wife-held-state itself could be faulted for this situation in not providing food and livelihood to its poorest citizens.

Held: Para 24

In view of this we direct that the Principal Secretary (Home), and the Director General of Police (Prisons), Govt. of U.P. may consider in a sympathetic manner the case of the appellant for releasing him under the U.P. Prisoners (Release on Probation) Act or under paragraph 198 of the Jail Manual, or other applicable provisions whenever the appellant becomes eligible for consideration of his case for premature release or commutation of the sentence, after he has undergone the requisite period of imprisonment. The release of the appellant should not be rejected simply because the appellant has been found guilty for the murders of five persons including his wife, little child, two nephews, his sister-in-law and for causing injuries to his brother Mahendra Singh and his brother-in-law Chhatrapal Singh and thereafter to his own person. The act of the accused appears to be the act of a person who has lost his mental balance as a result of extreme poverty and hunger and in a certain sense the State itself could be faulted for this situation, because of its failure to fulfil its obligation under Article 21 of the Constitution of providing food and livelihood to its poorest citizens.

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

1. This Criminal Appeal has been filed by the appellant Sobaran Singh from jail. It arises from a judgment dated 30.8.97 passed by the Sessions judge, Lalitpur in S.T. No. 26 of 1988 convicting and sentencing the appellant to imprisonment for life under section 302 IPC, to rigorous imprisonment for 10 years under Section 307 IPC, and to rigorous imprisonment for one year under section 309 IPC. The sentences were to run concurrently.

2. We have heard Sri Vinay Saran, Amicus Curiae for the appellant and the

learned AGA, and have perused the entire record.

3. Briefly the prosecution case was that at about 7.30 a.m. Harnam Singh Parmar, a resident of village Gona came to the village Chowkidar Nathoo Ram's house on 4.1.1988 and informed him that his real brother Sobran Singh had some altercation with his wife and the other members of the family about the theft of wood by him from the forest. His wife and the other members of the family had asked him not to indulge in such acts of theft etc. This infuriated Sobaran Singh and he gave axe blows to his wife Smt. Santosh Kunwar, Harnam Singh's wife Smt. Ganesh Kunwar, Rajpal and Dharmendra sons of Harnam Singh. All the four died on the spot. The Chowkidar was also informed that Mahendra Singh, another brother of accused Sobran Singh and Mahendra Singh's brother-in-law Chhatrapal Singh were also given axe blows by the accused and were lying there. Sobaran Singh was roaming about with the axe searching for Harnam Singh and others of the family with intention to cause their deaths also. Nathu Ram, the village chowkidar went to the spot on this information and saw Sobaran Singh roaming about with an axe. Due to fear he could not nab the appellant. The occurrence was seen by Smt. Dev Kunwar, Trilok Singh and several others of the village. The dead bodies were lying on the spot. Leaving the dead bodies on the spot, the village chowkidar Nathoo Ram went to the police station Narhat and gave this information, on the basis whereof a case under sections 302/307 IPC was registered against the appellant Sobran Singh as Case Crime No. 1/88 on 4.1.88 at 8.15 a.m. (vide Ext. Ka 4).

4. The investigation was taken up by Sub-inspector Sahdev Singh, PW 13 who was then Station Officer, police station Narahat. He immediately interrogated the scribe of the first information report, Ram Khilawan who made the G.D. Entry (Ext. Ka 17) on the basis of the report, and also the informant Nathoo Ram. He proceeded to the spot with a police force. There he saw the accused Sobaran Singh roaming around with an axe. The witnesses Munna Lal and Keshav were also present there. The axe which the accused carried with him, was blood-stainted. He tried to catch the appellant but he could not be apprehended and ran away from the spot. He was chased. The appellant ran towards Manua Tal and after reaching there, started administering axe blows to himself on his neck and head with the intention of committing suicide. The police force could succeed in apprehending the accused with the help of the witnesses on the bank of Manua Tal. The axe (material Ext. 1) was seized by the investigating officer and a memorandum was prepared which is Ext. Ka-8. The condition of the accused was serious and, therefore, the investigating officer sent him to Primary Health Centre, Gona along with constables Kalloo Prasad and Kamal Kishore. The investigating officer returned to the spot to learn that the injured Mahendra Singh and his brother-in-law Chhatrapal Singh had already gone to Primary Health Centre with one Jandel Singh for medical aid. On receiving this information the investigating officer went to the Primary Health Centre, Gona. No doctor was available at the Primary Health Centre. The condition of all the injured was serious. He therefore got the injured persons referred to District Hospital, Lalitpur by the compounder. The investigating officer again returned to

the spot. He found the dead bodies of Smt. Santosh Kunwar, Rajpal, Rajendra Singh alias Dharmendra, Smt. Ganesh Kunwar and Km. Baby. Inquest (Exts Ka 18 to Ka 22) were conducted by the investigating officer on all 5 dead bodies in the presence of witnesses. The signatures of the inquest witnesses were obtained on the inquest reports. All the dead bodies were separately sealed. The required papers such as letters for Reserve Inspector, Chief Medical Officer, sample seal, challan nash, photo nash etc. were prepared by the investigating officer with respect to all the dead bodies and marked Exts. Ka-23 to Ka 55. The dead bodies were thereafter entrusted to constables Panna Lal and Hari Shanker along with the concerned papers for being taken to Lalitpur for post-mortem examination. The investigating officer thereafter inspected the spot where the dead bodies wee lying and where they were murdered. He prepared site plan (Ext. Ka-57). Blood-stained and plain earth were collected from the places where all the dead bodies where lying. He prepared recovery memos in respect of the blood-stained and plain earth collected by him. These recovery memos are Ext. Ka-9 to Ka-12. A shawl was found lying near the dead body of Santosh Kunwar. It had cut marks attributable to the axe wielded by the appellant. The investigating officer seized it and sealed it. Ext. Ka-13 is the memorandum regarding recovery of the shawl. An ear ring made of rolled-gold was found near the dead body of Ganesh Kunwar. The investigating officer seized it and handed it over to Harnam Singh, husband of Ganesh Kunwar. The supurdginama prepared on the spot about the ear ring is Ex. Ka-14. The house of accused Sobran Singh was then searched by the investigating officer and a piece of wood was found there which was seized. A seizure memo in respect of this piece of wood was also prepared and was signed by the witnesses. Thereafter the investigating officer went to the *Banch* where the accused Sobran Singh had tried to commit suicide. Blood stained and plain earth was collected from that spot also and was sealed in separate containers. The recovery memo in respect of this collection is Ex. Ka-16. The investigating officer thereafter prepared a site plan of the said spot which is Ex.Ka-58. The blood stained and plain earth collected from the places mentioned above are material Exts. 2 to 9. The shawl is material Ext. 10.

5. On 5.1.88 the witness Harnam Singh was interrogated by the Investigating Officer. The Investigating Officer on 5.1.88 inspected the spot where injured Chhatrapal Singh was assaulted. A site plan of the said spot was prepared and is Ex. Ka-59. Blood stained and plain earth was collected from the said spot also in the presence of witnesses Munna and Shiv Lal. The recovery memo in respect thereof is Ex. Ka-60. The blood stained and plain earth collected from there are material Exts. XIII and XIV. The Investigating Officer thereafter went to the spot where injured Mahendra Singh was given axe blows by the accused. A site plan of the said spot was prepared by the Investigating Officer and is Ex. Ka-69. Blood stained and plain earth were recovered there from and a memrandum was prepared which is Ex. Ka-62. Blood stained and plain earth are material Exts. XV and XVI. The Investigating Officer thereafter returned to the police station and deposited the recovered and collected articles and case property in the Malkhana of the police station. He got his arrival at

the police station recorded in the general diary. The copy of the general diary entry in respect of all this is Ex. Ka-63. On 7.1.88 witness Dev Kunwar and some others were interrogated. On 11.1.1988 the injured Mahendra and Chhatrapal were interrogated. On 16.1.88 witnesses Trilok Singh, Smt. Chanda and Smt. Chandra Kunwar were interrogated by the Investigating Officer. On 21.1.88 witnesses Meharban Singh, Bal Kishan, Chaubey, Ommeda etc. were interrogated. On 25.1.1988 the blood stained clothes of injured Mahendra were taken by the Investigating Officer and memorandum was prepared which is Ex. Ka-64. These clothes consisted of a weater material Ex. XVII and Baniyan material Ex. XVIII. On 27.1.88 witnesses Keshav Prasad, Munna Lal, Munna Rewat etc. were interrogated. On 4.2.1988 the blood stained clothes of injured Chhatrasal was taken into possession of by the Investigating Officer and the recovery memo in respect thereof is Ex. Ka 65. The shirt and the Towel are material Exts XIX and XX. On 6.2.88 witnesses of memorandums and of inquest were interrogated. On 7.2.88 the statement of the Constable who had taken the dead bodies for post-mortem examination, was recorded.

6. Post-mortem examination on the dead body of Smt. Santosh Kunwar wife of accused Sobran Singh aged about 25 years was performed on 5.1.1988 at about 11.30 am by Dr. Udai Pratap Singh, PW 1. The duration of death was about one day at the time of examination. She was a young woman of average built. Rigor mortis was present over all the four limbs. Decomposition had not started. Eyes were semi-open. The doctor found the following ante-mortem injury on her person:

'Incised wound on the left occipital region slightly oblique, 7.5 cms x 2.5 cms x brain deep, 4 cms. Behind the left ear. On opening, occipital bone was found fractured. Membranes were cut, brain matter was coming out, and clotted blood was present.'

Kidneys were congested. Spleen was congested. Bladder was empty. Large intestines contained gases. Small intestine was empty. In the bladder 100 milliliters of watery fluid was found. Membranes were congested. Brain was also congested. In the opinion of the doctor, the death was due to shock and haemorrhage caused by ante-mortem head injury. Ex.Ka-1 is the post-mortem report.

At about 12.10 pm on the same day Dr. Udai Pratap Singh, PW 1 performed post-mortem examination on the dead body of deceased Rajpal Singh aged about 18 years. The duration of death was about one day at the time of examination. In this case also rigor mortis was present on all the four limbs and decomposition had not started. Following ante-mortem injuries were found on his person:

(1) Vertical incised wound on left side on face 7 cms x 2 cms x bone deep, 3 cms. In front of left ear. On opening underlying muscles, bone (mandible) vessels were cut, clotted blood was present.

(2) Vertical incised wound on the upper part of right side of chest 8 cms. Above the right nipple at 2 O'clock position, 7 cms x 4 cms x lung deep. On further opening the right clavicle, Ist and 2nd rings of right side pleura with lung

underneath injury were cut, clotted blood was present, in chest cavity.

Pleura was congested. Lungs were congested. Bladder contained about 200 milliliters of undigested semi-solid fluid. Small intestines were empty. Gases and faecal matter were found present in the large intestines. In the opinion of the doctor, the death was due to shock and hemorrhage as a result of the ante-mortem injuries. Ex. Ka-2 is the post-mortem report in respect of deceased Rampal Singh.

At 12.50 pm post-mortem examination on the dead body of Rajendra Singh son of Harnam Singh aged about 13 years was performed by Dr. Udai Pratap Singh, P.W. 1. The duration of death was about one day. Rigor mortis was present on all the four limbs. Decomposition had not started. Following ante-mortem, injuries were found on his person:

(1) Transverse incised would on the lower part of back of head, 7 cms x 3 cms x brain deep. On opening underlying occipital bone, brain matter coming out, membranes out.

(2) Transverse incised wound 7 cms x 3 cms x spinal cord deep, 1.5 cms below injury no. 1. On opening the underlying Ist cervical vertebrae fractured, spinal cord cut, brain matter coming out.

(3) Slight oblique incised wound on the left side on back, 3 cms. Below lower engle of left scapula 6 cms x 0.5 cm x skin deep.

(4) Slightly oblique incised wound on left side of back, 4 cms. Below injury no. 3 measuring 7 cms x 1 cm x cavity deep. On opening underlying muscles cut, spleen cut underneath injury blood present in abdominal cavity.

7. On internal examination, semi-digested food was found present in the small intestines and gases with faecal matter were found present in the large intestines. Spleen was congested. Brain was congested. Membranes were congested. In the opinion of the doctor, the death was due to shock and hemorrhage caused by ante-mortem injuries. Ex. Ka-3 is the post-mortem report in respect of deceased Rajendra Singh.

8. On the same day i.e. 5.1.1988 at about 1.20 pm, Dr. R.C. Sahu PW 9 performed post-mortem examination on the dead body of Smt. Ganesh Kunwar aged about 35 years wife of Harnam Singh. Duration of death was about one day. She was a young woman of average built. Rigor mortis was present in all the four limbs but had passed off from the face and neck. Decomposition had not started. Following ante-mortem injuries were found on the person of the deceased:

(1) A incised wound 6 cms x 2 cms x bone deep on the left lower jaw 3 cms below from the left angle of mouth, injury places obliquely, clotted blood present.

(2) A shaped incised wound 8 cms x 2 bone deep anteriorly cutting the temporal bone, just posterior to right Ear, on the right temporal area of scalp, clotted blood present.

(3) An incised wound 8 cms. X 3 cms. X muscle deep on the right lateral side of neck, 1 cms. Below from the injury no. 2. Injury placed obliquely. Clotted blood present in and around the injury.

(4) An incised wound 6 cms. X 2 cms. X x deep to larynx in the right lateral side of neck, 0.5 cm. Above and anterior from the injury no. 3 clotted blood present.

9. On internal examination, the doctor found right temporal bone of the skull fractured. Spinal cord was found cut under injury no. 3. The major blood vessels on muscular nerves were also found cut and clotted blood was present. In the small intestines, gases and semi digested food was found present. Large intestines contained gases and faecal matter. In the small intestines contained gases and faecal matter. In the opinion of the doctor, the death was due to shock and hemorrhage caused by ante mortem injuries. Post mortem report in respect of deceased Smt. Gangesh Kunwar is Ex. Ka-5.

Dr. R.C. Sahu PW 9 performed post mortem examination on the dead body of Km. Baby daughter of accused Sobran Singh at 1.50 pm on 5.1.1988. She was aged about 3 months Rigor mortis was present and decomposition had not started. Eyes were closed. Internal examination revealed congestion in the brain. Lungs were congested. No external injury was found on the person of the child. In the opinion of the doctor, the cause of her death was asphyxia due to inhalation of some fluid material whereby breathing power was obstructed. The duration of death in this case was also about one day. The post mortem report is Ext. Ka-6.

Dr. N.N. Saxena PW 16 examined the accused Sobran Singh on 4.1.1988 at District Hospital, Lalitpur and found the following injuries on his person:

(1) Incised wound 10 cms x 2.5 cms x muscle deep at the level of thyroid cartilage, smooth and clean cut margins.

(2) Incised wound 4 cms x 0.25 cm x muscle deep layer 1 cm. from the injury no.1. Smooth and clean cut margins.

(3) Multiple incised wound five in number on occipital area of scalp in the 10 cms x 6 cms x muscle deep of different size about 2 cms x 0.25 cm clean and smooth margins.

(4) Incised wound 4 cms x 5 cms x bone deep on parietal region of scalp, 2 cms from the injury no.3. Smooth and clean cut margins.

(5) Multiple incised wound 4 in number on parietal region of scalp in the area of 8 cms x 6 cms of different size 3 cms x 0.25 cm x muscle deep, 6 cms. from the right eye-brow. Margins were smooth and clean cut.

Ex. Ka-67 is the injury report prepared by him in respect of the injuries found on the person of appellant Sobran Singh. All the injuries were found to be simple and caused by some sharp edged weapon. X-ray was advised and injuries no. 1,3,4 and 5 were kept under observation.

He also examined the injuries sustained by injured Mahendra Singh aged about 24 years at about 12.30 pm on 4.1.1988 and found the following injuries on his person:

Incised wound 4 cms x 2 cms x muscle deep on right side of forehead, 2.5 cms. from the right eyebrow. Margins are smooth, clean cut inverted.

Incised wound 1.5 cms x 1 cm x muscle deep on right parietal region of

scalp, 5 cms from the injury no. 1 Margins are clean, smooth edge.

Incised wound 5 cms x 1.5 cm x muscle deep on posterior point of neck, 12 cms. from the right ear. Margins are smooth and clean cut.

Incised wound 6 cms. X 1 cm x muscle deep on right occipital region of scalp, 13 cms. from the right ear. Margins are smooth and clear cut. Advised X-ray.

All the injuries were found to be simple and caused by some sharp edged weapon like axe. X-ray advised in respect of injury no. 4. The injury report prepared by the doctor is Ex. Ka –68.

Dr. N.N. Saxena, PW 16 examined the injuries sustained by injured Chatrapal Singh on 4.1.88 at about 1 pm. And following injury was found on his person.

Incised wound 15 cms x 3 cms. x muscle deep with traumatic swelling of 8 cms on lower part of wound on right side of face, 1 cm. from the right ear. Margins are smooth, clear cut. Advised X –ray.

The injury was fresh and was caused by some sharp object. X-ray was advised. The injury report is Ex. Ka-69.

On 12.2.88 after completion of the investigation, the Investigating Officer submitted charge sheet Ex Ka –66 against the accused. Sri K.P. Singh, the term CJM, Lalitpur, by his order dated 21.7.1988 committed the case to the Sessions Court for trial.

10. Charges were framed on 7.11.88 against the appellant by the learned Session Judge, under section 302 IPC for causing the death of Smt. Santosh Kumari , Rajpal singh Rajendra Singh alias Dharmendra, Smt. Ganesh Kunwar and Km. Baby, under Section 307 IPC for causing hurt to Chatrapal Singh with an intention to commit his murder, under Section 307 IPC for causing hurt to Mahendra Singh with the intention of committing his murder. On 2.11.88 the learned Sessions Judge separately framed a charge under Section 309 IPC against the appellant for attempting to commit suicide by causing hurt to himself on the date of incident.

11. The prosecution examined Dr. Udai Pratap Singh, P.W. 1, Harnam Singh, PW 2, Trilok Singh PW 3, Nathoo Ram PW 4, Bal Kishan PW 5, Smt. Dev Kunwar PW 6, Mahendra Singh PW 7, Dr. R.C. Sahu PW 9, Smt. Chanda PW 8, Constable Ram Khilawan PW 10, Constable Hari Shanker PW 11 (on affidavit), Keshav Prasad PW 12, Investigating Officer Sahdev Singh PW 13, Constable Vishram Singh PW 14 (on affidavit), Constable Panna Lal PW 15 (on affidavit), Dr. N.M. Saxena P.W. 16 and Raj Kumar Jain PW 17 (on affidavit) as witnesses in this case.

12. As detailed above Dr. Udai Pratap Singh P.W. 1 has conducted the post mortem examinations on the bodies of Santosh, Raj Pal and Rajendra, Dr. R.C. Sahu PW 9 has conducted the post mortem examinations on the bodies of Smt. Ganesh and Km. Baby and Dr. N.N. Saxena PW 16 has medically examined the appellant Sobrain, Mahendra Singh and Chatrapal Singh. The doctors conducting post mortem examinations of the deceased have stated that all the five dead persons would have died at abaout 7 AM or so on 4.1.88. In the opinion of Dr.

N.N. Saxena, PW 16, the injuries found on the person of appellant Sobrain Singh could have been caused at about 9.30 AM on 4.1.88. He also stated that the injuries on the persons of Mahendra Singh and Chatrapal Singh could have been caused at about 7 am. In the morning on the same day. The injuries of all the injured persons could be caused by axe. He, however, stated in para 10 that the injuries found on the person of accused Sobrain Singh could not be self inflicted except injury no. 1. On further questioning, the doctor stated that injury no. 2 also may be self inflicted. He then stated that an axe is a heavy cutting weapon and if the accused Sobrain Singh wanted to injure himself and used a heavy cutting weapon, the injuries found on his person could be caused. When cross-examined, the doctor again stated that injuries no. 3, 4and 5 found on the person of Sobrain Singh could not be self inflicted. When cross examined further, he stated that at the time of examination, Sobrain Singh was conscious but his condition was serious. He did not remember whether Sobrain Singh was unconscious or semi conscious. Since the condition of Sobran Singh was serious, he was referred to Jhansi Medical College.

13. PW 2 Harnam Singh, PW 3 Trilok Singh PW 6 Smt. Dev Kumar are the eye witnesses of the first part of the incident which relates to the murder of Smt. Santosh Kunwar, Rajpal Singh Raendra Singh and Smt. Ganesh Kunwar, which took place in front of the building or in the building in which accused Sobran Singh and Harnam Singh and some of his other brothers resided separately. They stated that at about 6 or 615 am the accused started committing assault on his wife smt.Santosh Kunwar with an axe. Rajpal son of Harnam Singh arrived there and prohibited the accused from be labouring Smt. Santosh Kunwar. This intervention by Rajpal was resented by the accused and he moved towards him and gave axe blows to him. Rajpal fell down, Rajendra, another son of Harnam Singh arrived there by then and the accused did not spare him also. He also assaulted Smt. Gasnesh Kaur causing her death in the presence of the witnesses.

14. The second part is the assault on Chatrapal Singh. This part took place at the house of injured Mahendra Singh, Chatrapal Ssingh was brushing his teeth when Sobran Singh reached the ouse of Mahendra Singh, asked about the whereabouts of Mahendra Singh, and thereafter gave one axe blow to chhatrpal Singh causing injury on the right side of his face. The eye witnesses of this assault was Chanda wife of Jarnel, another brother of the appellant, as the injured Chatrpal himself was not examined.

15. Chanda PW. 8 states that she, injured Mahendra Singh and his wife Chandra Kunwar along with his brother-in-law Chatrapal Singh lived in one and the same house. She also stated that accused is elder brother of her husband Janrel Singh. She witnessed the assault on chatrapal Singh by the appellant at 6.45 am. On the fateful day. She was sweeping the house. Chatrapal Singh was brushing his teeth. Sobran Singh arrived there, asked about Mahendra Singh saying that he had already killed four persons and now Mahendra Singh also shall be done to death. Smt. Chanda PW 8 anfd Smt. Chandra Kunwar wife of Mahendra Singh (who has not been examined) came to the front door of their house and saw Sobrain Singh giving axe blow to Chatrapal

Singh. On the protest by these ladies, Sobran Singh rushed towards them but they bolted the door from inside and were saved.

16. PW 5 Bal Kishan and PW 7 Mahendra Singh are witnesses of the third part of the incident which consists of the assault on Mahendra Singh himself. Bal Kishan gave the time of this assault to be 7 am. Mahendra Singh also stated that it was about 7 or 8 am. In the morning. Both of them stated that Mahendra Singh was waiting for a bus at the Bus stand. This Bus stand was in front of the house of Bal Kishan PW 5 Bal Kishan was at his house and Mahendra Singh was standing on the road waiting for the bus. Bal Kishan saw accused Sobrain Singh coming towards Bus stand. He rushed towards the field of Narain Singh but he fell down near the bushes surrounding the field of Narain Singh. Accused Sobrain Singh thereupon gave axe blows to him. The incident was seem by Bal Kishan PW 5 from his house where he was standing. Mahendra Singh stated that he fell down and became unconscious and thereafter the accused might have committed assault on him by axe but he immediately corrected himself and stated that it was Sobrain Singh who gave axe blows to him, and that he became unconscious after sustaining injuries.

17. The accused admitted in his statement that Harnam Singh, Mahendra Singh, Jandel Singh, Mahendra Singh are real brothers and that he is also their real brother. He admitted that the deceased Ganesh Kunwar was wife of Harnam Singh. He admitted that deceased Rajpal Singh and Dharmendra alias Rajendra were sons of his brother Harnam Singh. He has also admitted that Smt. Santosh Kunwar was his wife and deceased Baby was his daughter. He admitted that Smt. Chandra Kunwar is wife of injured Mahendra Singh and injured Chhatrapal Singh is his (Mahendra Singh) brother-in-law. He stated that he lived with his wife and daughter but it was wrong to say that he was in the habit of stealing wood from the forest and was always in financial trouble. He has also denied that his wife deceased Santosh Kunwar or witness Harnam Singh objected and, therefore, he started harbouring ill will towards them. It is denied by him that he had brought wood from the forest on the date of incident also; and that therefore, he had some altercation with his wife Smt. Santosh Kunwar. He denied that he caused the death of the deceased persons. He also denied that he caused injuries to Mahendra Singh and his brother-in-law Chhatrapl Singh. He also stated that it was wrong to say that the witnesses had seen the incident. He also denied that he made any attempt to commit suicide. He stated that it was wrong to say that the axe was recovered from him. He pleaded ignorance about the collection of blood stained earth and other articles by the Investigating Officer from the spot. He also did not know about the post mortem examination performed by Dr. Udai Pratap Singh and Dr. R.C. Sahu. He also did not know about the medical examination of injured Mahendra Singh and Chhatrapal Singh by Dr. N.N. Saxena. He stated that he did not know that he was examined by Dr. N.N. Saxena, on 4.1.88 and simple axe injuries were found on his person. He did not know anything about the chemical examination of the case property and the result thereof. He stated that he did not know as to why the witnesses deposed against him. He also did not know why he

was prosecuted. His statement was that he was sleeping in his house. While he was asleep someone committee assault on him and he became unconscious. He could regain consciousness in Jhansi Medical College where he remained admitted for several days. In defence no oral evidence was given. Document Ex. Kha 1 is discharge certificate about the accused Sobran Singh issued by the Medical College Jhansi. It shows that the accused was admitted on 4.1.1988 in Jhansi Medical College and was discharged on 15.1.1988. Formal proof of this paper was dispensed with and its genuineness was admitted by the District Government Counsel.

18. Sri Vinay Saran, learned Amicus Curiae has largely reiterated the submissions raised by the appellant's counsel before the trial Court, and has emphasized the plea relating to temporary insanity of the appellant at the time of incident.

From the statement of these witnesses, it is clear that the incident took place between 6 to 7 A.M. on 4.1.88. The statements made by the doctors examined in this case fully corroborate the eye witnesses on the point of time of incident.

19. It appears that in this case, so far as the place of incident is concerned, all the above eye witnesses have categorically described the three places and there is no reason to doubt that the incidents took place at the places alleged. The first part of the incident, i.e. the murder of Smt. Santosh Kunwar, Rajpal, Rajendra and Smt. Ganesh Kunwar, took place at the house or in front of the house in which accused along with his other brothers Harnam Singh etc. lived. The second part, i.e. the assault on Chhatrapal Singh took place at the house of Mahendra Singh which was witnessed by Smt. Chanda P.W. 8 and the third part took place near the field of Narain Singh where the victim Mahendra Singh had fallen down, near the liquor shop where the bus stopped. The investigating officer prepared the site plans of all these three places and collected blood-stained and plain earth therefrom. This collection of blood-stained and plain earth from these places coupled with the statements of the eye witnesses adequately fixes the spots where all three parts of the incident took place. There is nothing in the cross-examination to shake the credit of these witnesses on the question of time and place of the incident. We, therefore, concur with the opinion of the trial Court that the time and place and the date of incident as averred by the prosecution are correct.

20. The medical evidenced corroborates the eye-witness account that the assault on the deceased and the injured was the result of user of axe by the appellant. All the injuries on the five deceased and the two injured persons are incised wounds which can be attributed to the axe wielded by the appellant. This opinion is confirmed by the doctors who stated that the injuries on the victims could be caused by a sharp edged heavy cutting weapon like a *kulhari.* Although an argument was raised that there could be little motive for the appellant to kill his own wife and brother's wife and the nephews. However, in reply it should be pointed out that there could be no reason whatsoever for the witnesses to falsely implicate the appellant. More so, when two of the witnesses are the real brothers, viz. PW 2 Harnam Singh and PW 7

Mahendra Singh, whilst PW 6 Smt. Dev Kunwar and PW 8 Chanda are the sisters-in-law of the appellant. PW 6 Smt. Dev Kunwar is the wife of PW 8 Meharban Singh and PW 8 Chanda is the wife of Jarnel Singh, who are the real brothers of the appellant. PW 3 Trilok Singh was the cousin brother of the appellant and PW 5 Bal Kishan has been described to be an absolutely independent witness. Nothing has been brought out in the testimonies of the witnesses as to why they would depose incorrectly or falsely implicate the appellant. There is, therefore, no reason to disbelieve the testimony of these witnesses.

21. We also find that inconsistent pleas have been taken on behalf of the appellant at different stages. At one point, a plea has been taken that the deceased was sleeping when he was assaulted and he had become unconscious and, therefore, he could not identify the assailants who caused injuries to him and PW 2 Harnam Singh. It was suggested that the appellant had become insane but this suggestion was denied. A plea was also taken that the appellant did not commit any assault which was denied by the witnesses. The suggestion made to PW 6 Dev Kunwar that the home persons (*Ghar Wale)* assaulted the appellant, has been denied and in any case this suggestion is inconsistent with the pleas of the appellant having been assaulted when he was asleep. The learned Sessions Judge has also rightly held that the charge of attempt to commit suicide has also been established against the appellant because there is a clear eye-witness account of PW 13 Sahdev Singh, I.O., and PW 12, Keshav Prasad, who arrested the appellant and recovered the axe. The trial court has rightly discounted the conflicting version of PW 16, Dr. N.N. Saxena, who has admitted to both the possibilities that the appellant's injuries nos. 1 and 2 might have been inflicted but the other injuries are not self-inflicted, by holding that in such circumstances the eye-witness account must be preferred to medical evidence. There is also little reason for concocting this version that the appellant had inflicted injuries on himself. Finally, the last contention of the learned appellant that the incident was the result of a temporary insanity of the applicant, cannot be sustained as we find that inconsistent pleas have been raised on behalf of the appellant. The basis of this argument was that no person in his right mind could have caused the death of his own wife, his three month old baby and thereafter caused the deaths of his own nephews and his elder brother's wives. This plea was not raised in the beginning and the procedure prescribed for examining such a plea in Chapter XXV CPC has not been adopted in this case. Moreover, Bal Kishan and PW 6 Smt. Dev Kunwar have specifically denied that the appellant was insane although PW 7 Mahendra Singh, the injured brother of the appellant has admitted in paragraph 3 of this cross-examination that about a year prior to the incident the appellant had become insane but that madness lasted only for 24 hours. In this view of the matter, the judgment of the trial court convicting and sentencing the appellant as above cannot be assailed, and it is affirmed.

22. However, before parting with this case, this court would like to point out that the crime committed by the accused appears to be more the result of his misery and abject poverty, and he appears to have committed the crime

because of deprivation rather than because of any depravity on the part of the appellant. In this connection the statement of the injured brother of the appellant, PW 7 Mahendra Singh may be usefully perused. In this connection paragraph 3 of his statement when translated in English, read as follows:

"The accused used to bring wood from the jungle and sell it and he also used to work in a quarry. Those days his economic condition was very bad. His family would remain hungry for many days. One year before the incident the accused had become insane. For 24 hours, he remained insane and ran away to the jungle. Before and after that he did not become insane."

23. From this statement, it appears that on account of abject poverty and starvation the appellant seems to have simply lost his mental balance, when he was castigated by his wife for stealing wood from the jungle which he may have been stealing for buying food for his family. He may have treated his wife's criticism as "the unkindest cut of all," and retaliating to her words in a sudden fit of uncontrollable anger he appears to have committed the unfortunate series of murders.

24. In view of this we direct that the Principal Secretary (Home), and the Director General of Police (Prisons), Govt. of U.P. may consider in a sympathetic manner the case of the appellant for releasing him under the U.P. Prisoners (Release on Probation) Act or under paragraph 198 of the Jail Manual, or other applicable provisions whenever the appellant becomes eligible for consideration of his case for premature release or commutation of the sentence, after he has undergone the requisite period of imprisonment. The release of the appellant should not be rejected simply because the appellant has been found guilty for the murders of five persons including his wife, little child, two nephews, his sister-in-law and for causing injuries to his brother Mahendra Singh and his brother-in-law Chhatrapal Singh and thereafter to his own person. The act of the accused appears to be the act of a person who has lost his mental balance as a result of extreme poverty and hunger and in a certain sense the State itself could be faulted for this situation, because of its failure to fulfil its obligation under Article 21 of the Constitution of providing food and livelihood to its poorest citizens.

25. The appeal is dismissed subject to the observations aforesaid.

26. Sri Vinai Saran, amicus curiae, shall be paid Rs. 1500/- only for the assistance rendered by him to this Court on behalf of the appellant.

27. The registry is directed to send a copy of this order to the Principal Secretary (Home), Lucknow, and the D.G.P. (Prisons) U.P. for compliance and necessary action at the appropriate time as indicated above.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.5.2005

BEFORE
THE HON'BLE AJOY NATH RAY, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 557 of 2005

Ex.Sep.No.2974530 Rajendra Prasad Singh ...Appellant
Versus
Union of India and others ...Respondents

Counsel for the Appellant:
Sri B.N. Tiwari

Counsel for the Respondents:
Sri Rajesh Kumar Mishra
Addl. S.C.

Constitution of India Article 226-Writ jurisdiction-Delay about-24 yrs.-Petitioner discharged from service-on the ground of mental trouble-Order of discharge quested after 24 yrs.-held petitioner himself changed the circumstances puts the respondents in a disadvantage position-No public important question involved-dismissal of Writ Petition on the ground of delay-held-proper.

Held: Para 7

Also, in very deserving cases, the Court might feel compelled to exercise judicial discretion, on the basis of sound and well settled judicial principles, when justice requires the matter to be dealt with so urgently and strongly, that the point of delay and delay alone should not be made the guiding factor in decision of the writ the Court condoned large delays. Our case is not such one. The writ petitioner could have appealed at the material time. At, al on ground that the Medical Board had erred and he was in fact mentally sound and fit. The point of time when the mental insanity of the writ petitioner become an issue has long gone by, nobody can now test whether the writ petitioner come with reasonable expedition after the decision had been taken by the respondent authorities, the test could have been carried out and the writ Court would be in a position to judge the matter. Today we cannot, just because a rule of procedure was infringed, assume against the authorities and that the Medical Board had erred. The writ petitioner has changed the circumstances in such a manner by allowing time to lapse, that he puts the respondents in a position of disadvantage today. As such the writ petition should be dismissed on the ground of delay of more than 24 years, we respectfully uphold the judgment passed by the learned Single Judge.

Case law discussed:
AIR 1984 SC-866
AIR 1984 SC-1527
AIR 1989 SC-985
AIR 1977 SC-1979

(Delivered by Hon'ble Ajoy Nath Ray, C.J.)

1. The appeal is taken up and disposed of ex parte in the absence of the respondent, Union of India.

2. The writ petitioner-appellant was discharged from service in 1979 and disability pension withheld from him in or about 1981. The ground therefore was mental unfitness. It is submitted by the appellant that the report of the Medical Board should have been forwarded to him and in case he was not mentally sound, it should have beer forwarded in accordance with the rules to the next of kin so as to allow him the right of appeal.

3. The writ petition has been filed after more than 24 years. Although representations were made, in the meantime, the Hon. Mr. Justice Sunil Ambwani, in his Lordship's impugned

order dated 18.3.2005 has dismissed the writ petition on the ground of laches and delay. We respectfully agree with his Lordship that there was inordinate delay in this case and on that ground alone the writ petition deserves to be dismissed.

The following cases were cited and relied on by the appellant.

AIR 1984 SC 866 ***H.D. Vora versus State of Maharashtra and others***, AIR 1984 SC 1527 ***G.P. Doval and others versus Chief Secretary, Govt. of U.P. and others***, AIR 89 SC 985 ***P.L. Shah versus Union of India and another***.

4. The judgment of the Supreme Court in ***H.D. Vora's*** case was a case in which the requisition of the property was challenged after a lapse of 30 years. The Court repelled the submission that the High Court ought to have dismissed the writ petition on the ground of laches. The Court observed that the challenge urged on behalf of third respondent was on the ground that requisition is by its very nature temporary in character and it cannot ensure for an indefinite period of time and the order of requisition therefore ceased to be valid and effective after the expiration of a reasonable period of time and that it could not under any circumstances continue for a period of 30 years. Thus the writ petition was entertained on the reason that on account of lapse of time, a cause of action arose to declare the requisition as invalid. The above case is clearly distinguishable and has no applicability in the facts of the present case. The next case relied on by counsel for the appellant in ***G.P. Doval's case (supra)***. In the writ petition under Article 32 provisional seniority list was challenged after 12 years. The writ petition was entertained by the Supreme Court holding that the department had neither finalized the provisional seniority list for 12 years nor had given reply to the representation made against in the above circumstances, the writ petition was entertained. The above case also is distinguishable as keeping in the list provisional was a fault of the department for which the petitioners were not to blame. Another case relied on by counsel for the appellant is ***P.L. Shah's case (supra)***. In that case the challenge was made to wrong fixation of subsistence allowance, although suspension was prolonged. The Tribunal rejected the claim on the ground that it had been filed after more than 5 years from the passing of the order fixing the subsistence allowance. The Court held that the cause of action in respect of such prayer arises every month in which the subsistence allowance at the reduced rate was paid, hence there was no laches and the Tribunal ought no to have dismissed the claim on the above ground. This case has also no application in the facts of the present case.

The Supreme Court in AIR SC 1979 ***Naib Subdedar Lachhman Dass versus Union of India and others*** upheld the order of High Court which dismissed the writ petition filed by an army servant after four years of discharge. It was said in paragraph 3 of the judgment.

"3. It may perhaps be that the appellant was misdirected in regard to the remedies which he should have adopted, but what stares one in the face is that it was for the first time in September, 1970 that the appellant invoked the extraordinary powers of the High Court under Article 226 of the Constitution for

challenging the legality of an order dated December 21, 1966. The writ petition was filed after a gross delay for which there is no satisfactory explanation and therefore, the High Court was justified in dismissing it summarily."

5. The judgment of the Supreme Court in ***Naib Subedar Lachhman Dass's case (supra)*** is fully attracted in the facts of the present case. Challenge to the order of discharge after four years was held to be barred by laches and in the present case the order of discharge is sought to be challenged after 24 years.

6. Regarding delay, in writ matters, the Courts usually go by a self imposed rule of treating the matter as barred by time after the lapse of three years which is the usual period of limitation for filing suits. But the rule is not an inflexible one. Delays even large delays can be over looked in special writ matters where questions of public importance are involved. The case of an individual right become a sort of test case, and in such an event the court right see it fit to take up the case even after some excessive delay.

7. Also, in very deserving cases, the Court might feel compelled to exercise judicial discretion, on the basis of sound and well settled judicial principles, when justice requires the matter to be dealt with so urgently and strongly, that the point of delay and delay alone should not be made the guiding factor in decision of the writ the Court condoned large delays. Our case is not such one. The writ petitioner could have appealed at the material time. At, al on ground that the Medical Board had erred and he was in fact mentally sound and fit. The point of time when the mental insanity of the writ petitioner become an issue has long gone by, nobody can now test whether the writ petitioner come with reasonable expedition after the decision had been taken by the respondent authorities, the test could have been carried out and the writ Court would be in a position to judge the matter. Today we cannot, just because a rule of procedure was infringed, assume against the authorities and that the Medical Board had erred. The writ petitioner has changed the circumstances in such a manner by allowing time to lapse, that he puts the respondents in a position of disadvantage today. As such the writ petition should be dismissed on the ground of delay of more than 24 years, we respectfully uphold the judgment passed by the learned Single Judge.

8. After the order is passed and two other matters are disposed of learned counsel of the Union of India seeks to put in appearance. His name might be recorded. We do not invite any submissions from him.

The appeal is, thus dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2005

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No.14185 of 1993

Shiv Sagar Dwivedi ...Petitioner
Versus
State of U.P. and others ...Respondents

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

Counsel for the Respondents:
S.C.

U.P. Officer Subordinate Ranks (Punishment & Appeal) Rules 1991-Section-8-Termination Order-Petitioner a Police Constable place under suspension on the ground of misconduct alleged to be-committed with superior officer-enquiry officer submitted ex-parte report-without giving the copy of inquiry report-nor send any intimation indicating date to participate in enquiry-the only misconduct that he had damaged the fan of the Barak No. 4-No charge found proved-No misconduct held-termination order can not sustained.

Held: Para 13

In view of the aforesaid fact, I am of the opinion that he punishment which has been awarded against the petitioner is disproportionate to the charge levelled against the petitioner. It is clear from the record that the charges leveled against the petitioner has not been proved, therefore, in my view it would be said to be a misconduct as the charge of misconduct has not been proved. The order of dismissal dated 16.6.1992 was stayed by this Court by order dated 19.8.1993 and the petitioner is working on the basis of the interim order and is getting salary.

Case law discussed:
1992 (2) UPLBEC 851
2000 (30) SCC-450?
1998 (3) SCC 192
1995 (6) SCC-749

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

1. By means of the present writ petition, petitioner has approached this Court for issuing a writ of certiorari quashing the order of termination dated 16.6.1992 passed by the Senior Superintendent of Police, respondent No.2 (Annexure 4 to the writ petition) and the appellate order dated 2.4.1993 (Annexure 7 to the writ petition) passed by respondent No.3 and issue a writ of mandamus directing the respondents to reinstate the petitioner with retrospective effect and give all consequential benefits.

2. The fact arising out of the present writ petition are that the petitioner entered into police service as Constable on 1.1.1978 and since then performing his duties with utmost sincerity and to the entire satisfaction of his superior authorities. In the year 1989, while the petitioner was posted at Fatehpur, his service was dismissed by order dated 1.7.1989 on the ground of misconduct, as it has been alleged that the petitioner has misbehaved with R.I. Sri Shyam Bir Singh on 6.4.1989. Against the order dated 1.7.1989, the petitioner has filed a Writ Petition before this Court as Writ Petition No.19745 of 1989 and this Court vide order dated 11.12.1989 was pleased to stay the operation of the order dated 1.7.1989. That while the petitioner was posted at Kanpur at Phoolganj Police Chouki, P.S. Pilkhana, the petitioner was suspended by the Senior Superintendent of Police, Kanpur Nagar vide order dated 8.8.1990 on false charges. Against the order of suspension the petitioner filed another Writ petition No.30524 of 1990 and this Court was pleased to stay the said order of suspension vide order dated 20.11.1990. The petitioner received a charge sheet dated 22.6.1991 with regard to the incident, which has taken place on 6.4.1989 while the petitioner was posted at Fatehpur. A copy of the charge sheet has been filed as Annexure 2 to the writ petition. The petitioner submitted a reply to the charge sheet on 10th July, 1991. Thereafter the petitioner could not receive any information from the side of the

Enquiry Officer. In fact no enquiry proceedings were conducted nor the petitioner was given opportunity to appear in the alleged proceedings. Even the petitioner has not been given an opportunity to cross-examine the witnesses alleged to have been produced on behalf of the department, nor he was allowed to produce his witness. However, the Enquiry Officer submitted an ex-parte report on 2.12.1991. A copy of the enquiry report has been filed as Annexure 3 to the writ petition. On the basis of the aforesaid enquiry report, the petitioner was dismissed from service by order dated 16.6.1992. A copy of the order of dismissal has been filed as Annexure 4 to the writ petition. Aggrieved by the order passed by the disciplinary authority, the petitioner filed an appeal under Rule 20 of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 before the Deputy Inspector General of Police, Kanpur Range, Kanpur. The petitioner submits that the petitioner sent various reminders to the authority concerned for deciding the appeal of the petitioner but the petitioner's appeal was not decided and thereafter the petitioner filed a writ petition before this Court and this Court had passed an order directing the respondents to decide the appeal of the petitioner by order dated 16.2.1993. The appeal of the petitioner had been decided by the respondent No.3 vide order dated 2.4.1993. A copy of the same has been filed as Annexure 7 to the writ petition.

3. It has been submitted on behalf of the petitioner that the order dated 2.4.1993 is ex-facie bad, illegal, arbitrary and without jurisdiction. Rule 4 of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991, deals with the punishment and dismissal from service comes under the major penalty. Rule 8 provides that no police officer shall be dismissed except after proper enquiry and disciplinary proceedings as contemplated by these rules. Rule 14 of the Rules 1991 deals with procedure for conducting departmental proceedings, which lays down that the departmental proceedings in the cases referred under Rule (1) of Rule 5 may be conducted in accordance with the procedure laid down in Appendix –1. The further contention of the petitioner is that Para 478 of the Police Regulation deals with the punishment of dismissal or removal from the force is a major punishment. It provides that punishment may be awarded only after departmental proceedings. In the present case mandatory provisions of law has not been complied with. The petitioner has not been given an opportunity to defend his case and on the basis of the ex-parte enquiry the decision has been taken and the petitioner has been dismissed from service on the basis of irrelevant considerations of false charge sheet. The petitioner has not been given an opportunity to cross-examine Shyam Bir Singh with whom it has been alleged that the petitioner had misbehaved. The order of dismissal and the appellate orders are contrary to the principle of natural justice and it is also contrary to U.P. Police Regulations of U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991. The charge, which has been levelled against the petitioner is of 1989, which alleges that when the petitioner was posted at district Fatehpur in 1989, he had damaged the government fan, which was placed at Barrack No.3 on 6.4.1989 and the said act of the petitioner is loss to the government property and has

also misbehaved with the officer. The further allegation against the petitioner is that when on the day of inspection i.e. 7.4.1989, he was standing below to the damaged fan in the same barrack only to show the broken fan for the purposes of making complaint to the Inspector concerned. The petitioner submits that the charges levelled against the petitioner has not been proved, as such, the services of the petitioner cannot be terminated. It has further been submitted that the witnesses, who has been examined has not supported the case of the petitioner. The statements of Angad Singh and Shyam Bir Singh do not support the case of the respondents that the petitioner has broken the said fan. The statement of Sri Shyam Bir Singh Company Commander, under whom the petitioner was working on the day of the incident has stated that the petitioner has misbehaved but he has not made any complaint to any authority regarding the misconduct of the petitioner, clearly goes to show that the petitioner has falsely been implicated. The statement to this effect that there is a reason to believe that the fan has been damaged or broken by the petitioner cannot be treated to be misconduct and only on this basis the services of the petitioner cannot be dispensed with. The finding of the Enquiry Officer to this effect that the charges levelled against the petitioner has been proved beyond any doubt and such type of indisciplined person should not be retained in service is based on no evidence.

4. The disciplinary authority without any basis has accepted the finding of the enquiry report and has passed an order of dismissal of the services of the petitioner. It has been submitted on behalf of the petitioner that the appeal filed by the petitioner has also been dismissed without affording any opportunity.

5. The further argument of the petitioner is that the order of dismissal is to harsh as the only charge against the petitioner as alleged in the charge sheet is that he has misbehaved with one Shyam Bir Singh. It is clear from the statement given by Sri Shyam Bir Singh that the petitioner has misbehaved with him on 6.4.1989 and as he was alone he went silently from there and has not reported the aforesaid alleged misconduct to any higher authorities. In this way the petitioner submits the incident of 1989 but the charge sheet for the purposes of taking a disciplinary action against the petitioner has been given on 22nd June 1991.

It has further been stated that the punishment, which has been awarded to the petitioner is too harsh and does not commensurate to the offence committed. The main charge against the petitioner regarding misbehavior with Sri Shyam Bir Singh, has not been proved from the statement of Shyam Bir Singh. As Sri Shyam Bir Singh has admitted this fact during the enquiry proceedings that he has not intimated the incident to any higher authority, therefore, it is clear that the aforesaid charge had been levelled against the petitioner after a lapse of two years only to punish the petitioner. It is also not the case of the respondents authorities that due to the act of the petitioner there was any loss to the Government property. Regarding the damage of the fan, which is one of the charge against the petitioner has not been proved during the enquiry proceedings and no witnesses have ever stated in their statement that it has been done by the petitioner. The head constable Angad Singh has also stated the

fact that he does not know any incident, as he was on leave on that day when the alleged incident had taken place. The petitioner contends that the punishment, which has been awarded, is a punishment, which is to harsh as no charges against the petitioner has been proved. The charge levelled against the petitoner was of misconduct has not been proved. Therefore, punishment, which has been awarded by the authorities below is disproportionate.

6. The petitioner placed reliance upon a judgment of the Apex Court reported in ***B.C. Chaturvedi Versus V.C. Union of India and others*** (1995) 6 SCC Page 749 and has placed reliance upon Paras 22, 24, and 23 of the said judgment and has submitted that the High Court would be within its jurisdiction to modify the punishment, penalty by moulding the relief. In a case of dismissal, the Article 21 gets attracted and in view of inter dependence of fundamental rights, the punishment awarded has to be reasonable and if it is unreasonable Article 14 would be violated. If Article 14 were to be violated the High Court can take care of the same by substituting, in appropriate cases, a punishment deemed reasonable by it.

The relevant paras are being quoted below-

22. The aforesaid has, therefore, to be avoided and I have no doubt that a High Court would be within its jurisdiction to modify the punishment/penalty by moulding the relief, which power it undoubtedly has, in view of a long line of decisions of this Court, to which reference is not deemed necessary, as the position is well settled in law. It may, however, be stated that this power of moulding relief in cases of the present nature can be invoked by a High Court only when the punishment/penalty awarded shocks the judicial conscience.

23. It deserves to be pointed out that the mere fact that there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that they have not to do complete justice, and if moulding of relief would do complete justice between the parties, the same cannot be ordered. Absence of provision like Article 142 is no material, according to me. This may be illustrated by pointing out that despite there being no provision in the Constitution parallel to Article 137 conferring power of review on the High Court, this Court held as early as 1961 in Shivdeo Singh Case that the high Courts too can exercise power of review, which inheres in every court of plenary jurisdiction. I would say that power to do complete justice also inheres in every court, not to speak of a court of plenary jurisdiction like a High Court. Of course, this power is not as wide as which this Court has under Article 142. That, however, is a different matter.

24. What has been stated above may be buttressed by putting the matter a little differently. the same is that in a case of a dismissal, Article 21 gets attracted, and, in view of the interdependence of Fundamental rights, which attracted, and in view of the interdependence of fundamental rights, which concept was first accepted in the case commonly known as Bank Nationalization case, which thinking was extended to cases attracting Article 21 in Maneka Gandhi V. Union of India, the punishment /penalty awarded has to be reasonable;

and if it be unreasonable, Article 14 would be violated. That Article 14 gets attracted in a case of disproportionate punishment was view of this Court in Bhagat Ram Vs. State of H.P. also. Now if Article 14 were to be violated, it cannot be doubted that a High Court can take care of the same by substituting in appropriate cases, a punishment deemed reasonable by it.

7. The further reliance has been placed upon the judgment of this Court reported in ***Colour-Chem Ltd Vs. A.L.Alaskurta and others*** 1998(3) Supreme Court Cases 192 and has submitted that the nature of misconduct are passed record of the service if it appears to the Court that the punishment imposed is shockingly disproportionate to the charges held proved against the employee the minor punishment should be awarded.

8. The further reliance has been placed on a judgment of ***UPSRTC Vs. Mahesh Kumar Misra*** 2000 (30) SCC page 450 the counsel for the petitioner placed reliance upon Para 6, 10 and 12 and has submitted that High Court will be in its jurisdiction to interfere upon the finding that the punishment of dismissal is shockingly disproportionate the substitution of reinstatement against the dismissal was justified.

Para 6 is being reproduced below-

6. It was in the background of these circumstances that the high Court exercised its discretion under Article 226 of the Constitution and interfered with the quantum of punishment inflicted by the disciplinary authority. It maybe that the order of dismissal was held to be valid and proper by the U.P. State Public Services Tribunal but the Tribunal also overlooked the fact that though sufficient evidence could have been collected at the spot to indicate that the passengers to whom tickets were issued by the respondent has boarded the bus at the "High Court" and not at "Zero Road" but this was not done. It was a bus plied in the city itself and therefore, the passengers, who were available in the bus, being local passengers, could have been approached at the spot for stating whether they had boarded the bust at the"High Court" or at "Zero Road". Learned counsel for the appellants have placed reliance upon an unreported decision of this Court in UPSRTC Vs. Om Prakash Pandey in which the order of The submission of the learned counsel for the petitioner is that high Court, by which interference was made with the punishment inflicted upon the delinquent employee of the Corporation, was set aside. This case is clearly distinguishable on the ground that a number of passengers were allowed to travel without tickets, and therefore, the misconduct imputed to the employee was serious. This is not the case here as the respondent had issued tickets to all the passengers, who were found traveling in the bus, but the dispute was only with regard to the spot or place at which they had boarded the bus. To put it differently, the dispute was whether they had boarded the bus at "Zero Road" or at the "High Court". In these circumstances, the High Court was justified in interfering with the quantum of punishment."

9. The further reliance has been placed upon by the counsel for the petitioner is ***Girja Shanker Singh Vs. General Manager UPSRTC*** 1992 (2)

UPLBEC Page 851 and it has been held by this Court that High Court has a power to reduce the punishment.

10. In view of the principle laid down by the Apex Court it has been submitted on behalf of the petitioner that as the misconduct has not been proved and the punishment, which has been awarded to the petitioner is too harsh, therefore, the same is liable to be quashed.

11. A counter affidavit has been filed. It has been stated that entire enquiry has been conducted strictly in accordance with the legal provisions and the petitioner was given full opportunity of hearing and no illegality of any kind has been committed in the enquiry. It has further been submitted that after conclusion of the enquiry, the petitioner was found guilty of negligence for holding post and as such, penalty of removal from service is completely legal and justified.

I have heard learned counsel for the petitioner and the learned Standing Counsel and have perused the record.

12. It is clear from the record that earlier a writ petition was filed by the petitioner by which the service of the petitioner was dismissed by order dated 1.7.1989 for some offence and the interim order was granted in favour of the petitioner. Then in the year 1990, the petitioner was suspended and subsequently on the basis of the disciplinary proceedings, the petitioner is dismissed from service. After perusal of the statements of Sri Shyam Bir Singh, it is clear that the incident is of 1989 and the action of that misconduct has been taken after a period of two years. It is also clear from the statement that he has not reported the matter to any authority, which is apparent from his statement. Regarding the damage of the fan of Barrack No.4, one Angad Singh, who was produced as witnesses has not supported the case of the respondents. He himself has stated that he was on leave on that day. Meaning thereby he was not present and no person had seen that the petitioner had damaged the fan. It is not the case of the respondents that the fan had been stolen or it had been taken out by the petitioner. The charge is that some damage is being done with the fan, which was installed at barrack No.4. It has also not been clarified by the respondents that up to what extent the fan was damaged.

13. In view of the aforesaid fact, I am of the opinion that he punishment which has been awarded against the petitioner is disproportionate to the charge levelled against the petitioner. It is clear from the record that the charges leveled against the petitioner has not been proved, therefore, in my view it would be said to be a misconduct as the charge of misconduct has not been proved. The order of dismissal dated 16.6.1992 was stayed by this Court by order dated 19.8.1993 and the petitioner is working on the basis of the interim order and is getting salary.

14. In view of the aforesaid fact, the order passed by the respondents dated 16.6.1992 (Annexure 4 to the writ petition passed by the respondent No.2 and order dated 2.4.1993 (Annexure 7 to the writ petition) passed by the respondent No.3 is hereby quashed. The writ petition is allowed. However, the facts and

circumstances of the case, no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.5.2005

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No.12402 of 2003

Lok Pal Singh and others ...Petitioner
Versus
IInd Additional District Judge, Bijnor and others ...Respondents

Counsel for the Petitioner:
Sri J.P.S. Chauhan

Counsel for the Respondents:
Sri R.K. Shukla

Small Causes of Courts Act-Section -25-Power of Revisional Court-Question of jurisdiction decided by the J.S.C.C.-revisional court reversed the findings of Trial Court-instead of direction to further remand, revisional court illegally dismissed the suit itself-held-not proper-Order passed by the revisional court Quashed-matter remitted back to decide as fresh.

Held: Para 4

This writ petition is, therefore, allowed and the order of the revisional court dated 29.11.2002 is quashed but in the interest of justice instead of remanding back to the revisional court with the direction to further remand back the matter to the trial court, order of the trial court also for the reasons given by the revisional court is quashed. The matter will now go back to the trial court to be decided afresh in accordance with law after affording opportunity to the parties.

Case law discussed:

1981 ARC 545 (D.B.) relied on

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

1. This writ petition has been filed by the plaintiff-landlord who filed a suit before the Judge of Small Cause Court on the ground that the defendant is the tenant of the accommodation in dispute and according to the plaint allegation the construction of the building was completed in the year, 1985. The same was let out to the defendant-tenant in the year, 1986 and since the defendant has committed default in payment of agreed rent, therefore, the plaintiff-landlord filed a suit being Suit No. 62 of 1997 for the ejectment of the defendant-tenant and arrears of rent and damages after terminating the tenancy by the notice under Section 106 of the Transfer of Property Act. The defendant-tenant has contested the aforesaid suit and filed written statement denying the plaint allegation firstly that the land over which the building is constructed, is agricultural land to which the provisions of U.P.Z.A.L.R. Act are applicable and since the land occupied by the plaintiff, over which the building in dispute stands, still retains its character of agricultural land therefore, the court of small causes do not have jurisdiction to entertain the suit. On the question of applicability of the provisions of U.P. Act No. 13 of 1972, the defendant pleaded that the building in question is constructed in the year, 1981, therefore, the provisions of U.P. Act No. 13 of 1972 are applicable and further on the first date of hearing the defendant has complied with the provisions of Section 20 (4) of U.P. Act No. 13 of 1972, the defendant is entitled to the benefit of provisions of Section 20 (4) and no decree for ejectment on the ground of arrears of

rent can be passed and suit therefore, is liable to be dismissed. On the question of default, the trial court found that since the provisions of U.P. Act No. 13 of 1972 are not applicable, therefore the termination of tenancy by a simple notice is sufficient. On the question of default also, the trial court recorded finding in favour of the landlord and decreed the suit. On the question of jurisdiction of the small cause court, the trial court decided the issue in favour of the landlord. The tenant-defendant aggrieved by the decree of the trial court, preferred a revision before the revisional court. On the question of applicability of the provisions of U.P. Act No. 13 of 1972, the revisional court reversed the finding recorded by the trial court and held that the landlord has failed to demonstrate that the building in question was constructed in the year, 1985, therefore, the provisions of U.P. Act No. 13 of 1972 are applicable to the building in question. The revisional court found that the provisions of U.P. Act No. 13 of 1972 are applicable and the defendant had already complied with the provisions of Section 20 (4) of U.P. Act No. 13 of 1972, the view taken by the trial court deserves to the repelled. The revisional court therefore, allowed the revision and set aside the order of the trial court and dismissed the suit No. 162 of 1997 filed by plaintiff landlord.

2. Learned counsel for the petitioner has submitted that in view of the Division Bench decision of this court reported in **1981 ARC page 545; Laxmi Kishore and another Versus Har Prasad Shukla** even if the revisional court reversed the finding of the trial court, it ought to have remanded back the matter to the trial court and should not have dismissed the suit,as has been done by the revisional court. Learned counsel for the petitioner therefore, submitted that this writ petition deserves to be allowed on thus question and the order of the revisional court deserves to be quashed.

3. Learned counsel for the respondent tries to justify the order of the revisional court but in view of the Division Bench decision of Laxmi Kishore (supra) I find force in the submission made by counsel for the petitioner.

4. This writ petition is, therefore, allowed and the order of the revisional court dated 29.11.2002 is quashed but in the interest of justice instead of remanding back to the revisional court with the direction to further remand back the matter to the trial court, order of the trial court also for the reasons given by the revisional court is quashed. The matter will now go back to the trial court to be decided afresh in accordance with law after affording opportunity to the parties. Since the suit is of the year, 1997, I direct the trial court to decide the suit within three months from the date of presentation of certified copy of this order.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.6.2005

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 9825 of 2005

Sri Manohar Lal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Nithil Agrawal
Sri Praveen Kumar Misra

Counsel for the Respondents:
Sri S.C. Dwivedi
S.C.

Code of Civil Procedure-Ord. 8 R-I-written statement filed beyond 90 days from the Service of Summon-objection that it can not be accepted and acted upon-whether the provision of order 8 r. I are mandatory or obligatory?-held in view of law laiddown by the Apex Court in Kailash Nath case-the provisions are obligatory-the court can accept the written statement under the circumstances mentioned in the judgment of Kailash Nath case.

Held: Para 3 and 4

The question as to whether the proviso to Order VIII, Rule 1 of the Code of Civil Procedure, as amended by amending Act of 2002 is mandatory or directory, has been considered by the apex Court in the case of Kailash Vs. Nanhku and others, wherein three Judges Bench in Civil Appeal No. 7000 of 2004, the apex Court has held that the provisions of the Order VIII, Rule 1 of the Code of Civil Procedure are not mandatory but directory in nature. Relying upon the aforesaid judgment, this Court has held in the case of Masroor Ali Vs. Court of In charge District Judge/Additional District Judge, Court No.1, Kanpur Nagar and others [{Civil Misc. Writ Petition No. 25816 of 2005, decided on 19th May, 2005}], that the view that the Court has no power after the expiry of 90 days of the service of summons to accept the written statement in view of proviso to Order VIII, Rule 1 of the Code of Civil Procedure, cannot be said to be straight jacket formula and in the circumstances of the case, the Court can accept the written statement under the circumstances mentioned in the judgement of the apex Court in the case of Kailash Vs. Nanhku and others (supra).

In view of the aforesaid law laid down by the apex Court and followed by this Court in the case of Masroor Ali, this writ petition deserves to be allowed. The order dated 8th December, 2004, passed by the trial Court and the order dated 22nd January, 2005, passed by the revisional Court are quashed. The matter is remanded back to the trial Court for decision afresh on the application filed by the petitioner-tenant for accepting the written statement in accordance with the law laid down by the apex Court and this Court after affording opportunity of hearing to the parties.

Case law discussed:
W.P. No. 25816 of 2005 decided on 19.5.05

(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 order dated 8th December, 2004, passed by the trial Court and the order dated 22nd January, 2005, passed by the revisional Court, copies whereof are annexed as Annexure Nos.'3' and '5', respectively, to the writ petition, whereby application paper No. 40 C filed by the plaintiff-contesting respondent under proviso to Order VIII, Rule 1 of the Code of Civil Procedure has been accepted and the trial Court directed that since the written statement filed by the petitioner-tenant can not be accepted on record, as the same has been filed beyond 90 days of the service of the summons upon the defendant.

2. The facts leading to the filing of the present writ petition are that the contesting respondent filed a suit against

the tenant-defendant, petitioner in this petition, for the arrears of rent and eviction of the shop under the tenancy of the petitioner. The landlord moved an application raising objection that since the written statement filed by the petitioner-tenant is not within the time prescribed under the proviso to Order VIII, Rule 1 of the Code of Civil Procedure. The trial Court vide order dated 8th December, 2004 rejected the petitioner-tenant's application on the ground that the petitioner-tenant is adopting delaying tactics. Aggrieved thereby, the petitioner-tenant preferred a revision before the revisional Court. The revisional Court by the order impugned dated 22nd January, 2005 dismissed the revision filed by the petitioner-tenant. Thus, this writ petition.

3. The question as to whether the proviso to Order VIII, Rule 1 of the Code of Civil Procedure, as amended by amending Act of 2002 is mandatory or directory, has been considered by the apex Court in the case of **Kailash Vs. Nanhku and others**, wherein three Judges Bench in ***Civil Appeal No. 7000 of 2004***, the apex Court has held that the provisions of the Order VIII, Rule 1 of the Code of Civil Procedure are not mandatory but directory in nature. Relying upon the aforesaid judgment, this Court has held in the case of **Masroor Ali Vs. Court of In charge District Judge/Additional District Judge, Court No.1, Kanpur Nagar and others [{Civil Misc. Writ Petition No. 25816 of 2005, decided on 19th May, 2005}]**, that the view that the Court has no power after the expiry of 90 days of the service of summons to accept the written statement in view of proviso to Order VIII, Rule 1 of the Code of Civil Procedure, cannot be said to be straight jacket formula and in the circumstances of the case, the Court can accept the written statement under the circumstances mentioned in the judgement of the apex Court in the case of Kailash Vs. Nanhku and others (supra).

4. In view of the aforesaid law laid down by the apex Court and followed by this Court in the case of Masroor Ali, this writ petition deserves to be allowed. The order dated 8th December, 2004, passed by the trial Court and the order dated 22nd January, 2005, passed by the revisional Court are quashed. The matter is remanded back to the trial Court for decision afresh on the application filed by the petitioner-tenant for accepting the written statement in accordance with the law laid down by the apex Court and this Court after affording opportunity of hearing to the parties.

5. In view of what has been stated above, this writ petition succeeds and is allowed. The order dated 8th December, 2004, passed by the trial Court and the order dated 22nd January, 2005, passed by the revisional Court, Annexure Nos.'3' and '5', respectively, to the writ petition are quashed. The matter is remanded back to the trial Court for decision afresh on the application filed by the petitioner-tenant for accepting the written statement in accordance with the law laid down by the apex Court and this Court after affording opportunity of hearing to the parties.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.4.2005

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 35150 of 1998

Dhananjai Singh ...Petitioner
Versus
Mukhya Suraksha Ayukt (Chief Security commissioner) R.P.F., N.E.R. Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri P.P. Srivastava
Sri Namwar Singh
Sri Sanjiv Singh
Sri S.N. Yadav
Sri Sharad Yadav
Sri D.V. Singh

Counsel for the Respondents:
Sri Lal Ji Sinha

Constitution of India, Article 226-Service Law-Right to appointment–Petitioner-qualifying in Test for the post of Constable-in R.P.F.-but found guilty of false declaration about the criminal cases-inspite of specific column provided in application form-held-not entitled for appointment.

Held: Para 12

After hearing counsel for the parties and after perusal of the record and after consideration of various judgments of the Apex Court as well as this Court, it is clear that the petitioner has concealed the facts regarding the criminal case, which were pending against the petitioner and has not given the correct information in the declaration form, though there was a specific column regarding pendency of any criminal case whether it is pending or whether it was pending and whether the petitioner has been acquitted or not. The petitioner has clearly concealed this fact, as such, he is not entitled for any relief.

Case law discussed:
1997 SCC-492
AIR 1999 SCC-2326
1998 (1) ESC-778
2001 ESC- Raj. 1837 (GB)
J.T. 2003 (2) SC-256

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

1. By means of the present writ petition, petitioner has approached this Court for issuing a writ of certiorari quashing the impugned order dated 3.1.2000 passed by the respondent No.1 and for issuing a writ in the nature of mandamus directing the respondents not to give effect to the order dated 3.1.2000.

2. The fact arising out of the present writ petition, is that the petitioner was selected as constable in Railway Protection Force, Northern Eastern Railway in the pay scale of Rs.825-1200 by the Recruitment Committee constituted under Rule 49.2 of the Railway Protection Rules 1957. A written test and interview was held in the month of July, 1997 in pursuance of the advertisement of the respondent No.2. The petitioner was selected and directed to be present himself on 20.9.1997. The petitioner was directed to fill up the required form before the appointment subject to verification by the police authorities about the character of the petitioner under Rules 52.1 and 52.2 of Railway Protection Force Rules. The petitioner appeared for medical examination and was found fit for appointment. A physical fitness certificate dated 19.9.1997 was also issued and the petitioner was required to fill up the form and there were various clauses to be filled up by the petitioner. Petitioner was

assured that after the verification of the character of the petitioner as provided, the appointment letter will be issued. When the respondent issued appointment letter to the respective selected candidates for training and posting, but no appointment letter was issued in favour of the petitioner then the petitioner had enquired into the matter and then it came to the knowledge of the petitioner that the appointment of the petitioner has been cancelled on the ground that certain criminal cases were pending and the petitioner has not disclosed this fact in the declaration form, as such, the selection of the petitioner has been cancelled. The petitioner submitted a representation, but no orders were passed as the petitioner has been found fit for selection to the post of constable and on the basis of the medical examination, the petitioner cannot be denied training simply because one criminal case of frivolous in nature instituted on account of personal enmity were pending against the petitioner. It has also been submitted that the reports of the District Magistrate, Jaunpur and the Superintendent of Police have not found the character of the petitioner satisfactory as contemplated by Clause 18, therefore, the petitioner has approached this Court.

3. A counter affidavit has been filed by Sri Chandra Shekhar Rajan, who was working as Principal, Training Centre, Railway Protection Force, Gorakhpur, annexing therewith declaration form as Annexure 1 to the said counter affidavit and has submitted that as there was requirement under Clause 12(1)( )( ) regarding pendency of any criminal case or whether any criminal case was pending against the petitioner at any point of time or the petitioner was ever detained by the Civil Police, as thus the specific columns were there and the petitioner has not disclosed correct facts. Subsequently, on the basis of the investigation regarding verification of the character of the petitioner, it was found that various cases were pending against the petitioner bearing Crime no.24 of 1994 under sections 147, 148, 149, 452, 323, 307, 324, 504 and 506 I.P.C. another case No.301of 1995 under sections 328, 504, 506 I.P.C. and Case Crime No.302 of 1995 under section 25 of Arms Act and another Case Crime No.512 of 1995 under section 314 of Goonda Act. It has been submitted on behalf of the respondents that as the petitioner has not declared the correct information and has concealed the fact, therefore, he was denied the appointment.

4. The counsel for the respondents Sri Lalji Sinha has placed reliance upon a judgment of the Supreme Court reported in ***1997 Supreme Court Cases (Labour and Service) 492 Delhi Administration through its Chief Secretary and others Vs. Sushil Kumar.*** The Apex has held that "*Verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to a post under the State. Though the respondent was found physically fit, passed the written test and interview and was provisionally selected, on account of his antecedent record, the appointing authority found it not desirable to appoint a person of such record as a Constable in the disciplined force. The view taken by the appointing authority in the background of the case cannot be said to be unwarranted. The Tribunal, therefore, was wholly unjustified in giving the direction for reconsideration of his case. Though he was discharged or acquitted of the*

criminal offences, the same has nothing to do with the question. What would be relevant is the conduct on character of the candidate to be appointed to a service and not the actual result thereof. If the actual result happened to be in a particular way, the law will take care of the consequences.

Appeal allowed."

5. Another decision, which has been relied upon by the respondents, is the judgment rendered in ***Special Appeal No. 730 of 2003 Shyam Bihari Singh Vs. The Union of India through Ministry of Railways, Government of India, New Delhi, and others*** and has submitted that admittedly a criminal case was pending against the petitioner at the time when the form was filled up and the same was not disclosed. In fact, after selection the petitioner never disclosed the information regarding pendency of the criminal case and it came to the knowledge of the authority after verification, as there was concealment regarding the declaration, as such, accordingly, his selection deserved cancellation.

6. On the other hand, the petitioner has placed reliance upon a judgment reported in ***A.I.R.1999 Supreme Court 2326 Commissisoner of Police, Delhi and another Vs. Dhaval Singh,*** and has submitted that the candidate alleged to have concealed from mentioning in application form against relevant columns about pendency of criminal case against him. Candidate, however, voluntarily conveyed that inadvertent mistake had been committed and has submitted that he was acquitted by the Trial Court. The aforesaid information has not been taken note of by competent authority, therefore, the Apex Court has held that cancellation of candidature is without application of mind.

7. The petitioner has also placed reliance upon a judgment of this Court reported in ***(1998) 1 E.S.C. 778 Ramesh Versus Chief Secretary Commissioner/Railway Protection Force, N.E. Railway Gorakhpur and another*** and decision in ***Civil Misc. Writ Petition No.10256 of 2000 Uma Shankar Vs. State of U.P. and others.*** It has also been submitted by the petitioner that as the petitioner has already been acquitted, therefore, the respondent cannot cancel the appointment of the petitioner.

8. A similar type of controversy has arisen before this Court and the Apex Court in various cases. In a Division Bench of this Court in ***Special Appeal No.1075 of 2002,*** has held that while entering into service if a person has not disclosed about the criminal cases and deliberately concealed the aforesaid facts, and after verification of the said fact, it has came to light, therefore, the cancellation of appointment is valid and cannot be said to be illegal.

9. A similar controversy has already been decided by this Court in ***Civil Misc.Writ Petition No.24341of 2001 Nagendra Kumar Vs. Union of India, through its Secretary Ministry of Home New Delhi and others.*** This Court has held that question before this Court is whether a person joining the armed force of the Union, can be allowed to continue in employment after making a false declaration, though he was discharged in acquittal in criminal case. In ***Delhi Administration Vs. Sushil Kumar and others (Supra)***, a similar question was raised before Supreme Court arising out

of the judgment of Central Administrative Tribunal. In this case admitted position was that the respondent appeared for recruitment for police service. He was found physically fit and passed in written test, interview and was selected subject to character and antecedent verification. These antecedents on verification were not found desirable and his selection was cancelled. The Tribunal allowed the application on the ground that since the respondent had been discharged and/or acquitted from offence punishable under sections 304, 324 and 34 I.P.C., he could not be denied right of appointment to the post under the State. Thereafter Supreme Court allowed the appeal, with following observations:

"The question is whether the view taken by the Tribunal is correct in law? It is seen that verification of the character and antecedent is one of the important criteria to test whether the selected candidate is suitable to a post under the State. Though he was found physically fit, passed the written test and interview and was provisionally selected, on account of his antecedent record, the important criteria to test whether the selected candidate is suitable to a post under the appointing authority found it not desirable to appoint a person of such record as a Constable to the disciplined force. The view taken by the appointing authority in the background of the case cannot be said to be unwarranted. The Tribunal, therefore, was wholly unjustified in giving the direction for reconsideration of his case. Though he was discharged or acquitted of the criminal offences, the same has nothing to do with the question. What would be relevant is the conduct or character of the candidate to be appointed to a service and not the actual result thereof. If the actual result happened to be in a particular way, the law will take care of the consequences. The consideration relevant to the case is of the antecedents of the candidate. Appointing authority, therefore, has rightly focused this aspect and found it not desirable to appoint him to the service."

10. In case of ***2001 E.S.C. Rajasthan Full Bench, 1837 Dharam Pal Singh Vs. State of Rajasthan,*** it has been held that if an appointment of police constable obtained on suppression of fact that he was prosecuted or subjected to investigation on a criminal charge, though acquitted of such charges, it has been held that he has not been entitled for appointment. The employer would be empowered to deny employment of candidate of such kind of character.

11. In case of ***Kendriya Vidyalaya Sangathan and others Vs. Ram Ratan Yadav, Judgment Today, 2003 (2) Supreme Court 256,*** the Apex Court has clearly held that false declaration regarding involvement in criminal cases in attestation of form for obtaining employment if the correct information and making a false statement had a clear bearing on the character and antecedents of the respondent in relation to his continuance in service. Since the information was sought with a view to judge the character and antecedents, therefore, denial of appointment is valid. The Supreme Court has further held "*The purpose of seeking information as per columns 12 and 13 was not to find out either the nature of gravity of the offence or the result of a criminal case ultimately. The information in the said columns was sought with a view to Judge the character*

and antecedents of the respondent to continue in service or not. The High Court, in our view, has failed to see this aspect of the matter. It went wrong in saying that the criminal case had been subsequently withdrawn and that the offences, in which the respondent was alleged to have been involved, were also not of serious nature. In the present case the respondent was to serve as a Physical Education teacher in Kendriya Vidyalaya. The character, conduct and antecedent of a teacher will have some impact on the minds of the students of impressionable age. The appellants having considered all the aspects passed the order of dismissal of the respondent from service. The Tribunal after due consideration rightly recorded a finding of fact in upholding the order of dismissal passed by the appellants. The High Court was clearly in error in upsetting the order of the Tribunal. The High Court was again not right in taking note of the withdrawal of the case by the State Government and that the case was not of a serious nature to set aside the order of the Tribunal on that ground as well. The respondent accepted the offer of appointment subject to the terms and conditions mentioned therein with his eyes wide open. Para 9 of the said memorandum extracted above in clear terms kept the respondent informed that the suppression of any information may lead to dismissal from service. In the attestation form, the respondent has certified that the information given by him is correct and complete to the best of his knowledge and belief, if he could not understand the contents of column nos. 12 and 13, he could not certify so. Having certified that the information given by him is correct and complete his version cannot be accepted. The order of termination of services clearly shows that there has been due consideration of various aspects."

12. After hearing counsel for the parties and after perusal of the record and after consideration of various judgments of the Apex Court as well as this Court, it is clear that the petitioner has concealed the facts regarding the criminal case, which were pending against the petitioner and has not given the correct information in the declaration form, though there was a specific column regarding pendency of any criminal case whether it is pending or whether it was pending and whether the petitioner has been acquitted or not. The petitioner has clearly concealed this fact, as such, he is not entitled for any relief.

The writ petition is devoid of merits and is hereby dismissed.

No order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.5.2005

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Criminal Misc. Application No. 4477 of 2005

Badan Singh ...Applicant
Versus
State of U.P. ...Opposite party

Counsel for the Petitioner:
Sri Ashutosh Tripathi

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

Code of Criminal Procedure-Section 39, readwith section 176 of I.P.C.- Application u/s 156 (3) rejected on the

ground without having any locus standi under specific statutory mandate-information given to magistrate-seeking direction of investigation-cannot be rejected-if the applicant abstains from giving such information virtually commits the offence under section 176 IPC- held rejection of application amounts great illegality. Rejection Order quashed.

Held: Para 7

Whether or not the petitioner was related to the deceased Girdhar or he has one or the other connection with him, if an information of commission of murder of Girdhar has been given by the petitioner to the court, the required directions under Section 156 (3) Cr.P.C. for investigation of the case should in all reasonableness had to be given by the court. The revisional court by rejecting the revision of the petitioner on the aforesaid ground of locus being not available to him for moving the court with a prayer under Section 156 (3) Cr.P.C., appears to be grossly erroneous.

(Delivered by Hon'ble Umeshwar Pandey, J.)

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

2. In this petition the order dated 15.4.2005 of the learned Sessions Judge, Mathura is under challenge.

3. The learned counsel contends that the petition under Section 156 (3) Cr.P.C. was given by the petitioner before the Chief Judicial Magistrate concerned disclosing certain facts, which prima facie projects a story of commission of cognizable offence of murder. The Chief Judicial Magistrate concerned after hearing the petitioner, did not find force with the prayer made for the direction of investigation in the matter and as such he dismissed the petition. Against that order, it is contended that the petitioner went in revision before the Sessions Judge concerned, who on the same ground has rejected the revision stating that the petitioner did not have any locus for putting in his prayer under Section 156 (3) before the Magistrate. It is submitted by the learned counsel that such a reasoning, as given by the courts below, appears to be ridiculous in the light of the provisions of Code of Criminal Procedure. He has referred to the provisions of Section 39 Cr.P.C. and has also drawn the attention of the court to the provisions of 176 of I.P.C.

4. A perusal of the impugned order passed by the revisional court as well as the order passed by the Chief Judicial Magistrate, shows that both the courts have concurrently held that the petitioner did not have any locus for moving the court of Magistrate under Section 156 (3) Cr.P.C. and as such, the petitioner's prayer before both the courts below has been dismissed. In fact, the story as disclosed in the petition and given before the Magistrate under Section 156 (3) Cr.P.C. states that one Girdhar was murdered by his son and other family members, the knowledge of which was had by the petitioner after some time. This offence being a serious offence of cognizable nature, if has come to the notice of the petitioner, he is definitely bound under Section 39 Cr.P.C. to give the information of the same to the competent Magistrate or the Police officer. The extract of the aforesaid Section 39 (1) Cr.P.C. is as below:-

5. ***Public to give information of certain offences*** *– (1) Every person, aware of the Commission of, or of the*

intention of any other person to commit, any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely:……..

(v) section 302, 303 and 304 (that is to say, offences affecting life) ……..
Shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such Commission or intention;

6. In view of the aforesaid specific statutory mandate if the petitioner has come to know of commission of cognizable offence he was bound to give information of the same and thus to make prayer before the competent Magistrate for a direction of investigation under Section 156 (3) Cr.P.C. In case, the petitioner deliberately or without any excuse abstains from giving such information, as stipulated aforesaid under Section 39 (1) Cr.P.C., he virtually commits the offence punishable under Section 176 I.P.C. With this legal position at hand, the petitioner was actually duty bound under the statute to give information to the Magistrate. Such Magistrate, however, is not supposed to reject that information simply on the ground that the petitioner did not have any locus in the matter. In this context, the case law of ***Raja Ram Vs. State of U.P. & others, 2004 (49) A.C.C. 847***, is quite relevant.

7. Whether or not the petitioner was related to the deceased Girdhar or he has one or the other connection with him, if an information of commission of murder of Girdhar has been given by the petitioner to the court, the required directions under Section 156 (3) Cr.P.C. for investigation of the case should in all reasonableness had to be given by the court. The revisional court by rejecting the revision of the petitioner on the aforesaid ground of locus being not available to him for moving the court with a prayer under Section 156 (3) Cr.P.C., appears to be grossly erroneous. The entire relevant legal framework in this context should have been taken into account by the courts below and they should not have passed the orders so cursorily in such a serious matter.

8. In result, the petition is allowed and the impugned order dated 15.4.2005 passed by the Sessions Judge, Mathura, is hereby set aside. It is however, directed that the Sessions Judge concerned shall take up the matter and reconsider it in the light of the aforesaid observations within ten days from the date of production of a certified copy of this order and pass suitable orders in accordance with law.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.06.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 312 of 2003

Indian Oil Corporation Ltd. (Marketing Division), New Delhi and others
...Petitioners
Versus
Assistant Labour Commissioner (Central), Kanpur and others ...Respondents

Counsel for the Petitioners:
Sri Prakash Padia
Counsel for the Respondents:
Sri B.N. Singh, S.C.

Sri Bal Mukund
Sri L.N. Singh
S.C.

(A) Industrial Dispute Act-Ex-Parte award-recall application filed after 30 days of the publication of award-court can not take notice of pendency of such recall application-held-exparte award become final.

Held: Para 9

In view of the aforesaid pronouncement of the Hon'ble Supreme Court and the fact that petitioner has failed to establish that the application for recall was filed within 30 days of the publication of the award, the application filed is legally not maintainable. In view of the aforesaid this Court cannot take notice of pendency of the application for setting aside the ex parte award, which has been filed after more than 30 days of publication of the award nor pendency of such an application is of any consequence. The issue is, therefore, answered against the petitioner.

Case law discussed:
AIR 1991 SC 606
2001 SCC (L&S) 365
2004 (2) AJJ. 180
AIR 1981 SC-606

(B) Constitution of India Article 341-cast certificate-appointment on the basis of certificate issued by Tehsildar-termination order challenged before the labour court-without considering the basic requirement-on the basis of certificate issued by Tehsildar. Labour Court, nor the State Government nor its officer can declare particular cast as S.C./S.T. unless such caste inlisted as notified under Article 341-ex parte award quashed-matter remitted back to decide as fresh in the light of observation made by High Court.

Held: Para 12 & 13

In the opinion of the Court, inclusion of the caste of the workman concerned in the list notified under Article 341 of the Constitution of India was a condition precedent for the workman to claim benefit as a schedule caste candidate and it was obligatory upon the Industrial Tribunal to have satisfied itself with reference to such list.

In view of the aforesaid, the Labour Court has failed to appreciate the basic requirement of the law of the land while conferring the benefit of continuance of service upon the petitioner on the ground of his being member of the scheduled caste and as such the award of the Labour Court cannot be permitted to stand.

Case law discussed:
AIR 2004 SCW 6419

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

1. Heard Sri Prakash Padia Advocate on behalf of the petitioner Sri B.N. Singh and L.N. Singh on behalf of respondent no. 3, Sri Bal Mukund Advocate on behalf of the Union of India.

2. Indian Oil Corporation, a Government Company duly incorporated under the Companies Act, has filed this writ petition against the award of the Labour Court dated 15th October, 2001 passed in Industrial Dispute Case No. 55 of 1999 as also against the order of the Assistant Labour Commissioner, Kanpur dated 16th December, 2002, whereby the petitioner has been directed to immediate/enforce the award or to show case as to why action be not taken against the Corporation under Section 29 of the Industrial Disputes Act read with Section 47-A of the Act.

3. The fact relevant for the purposes of disposal of the present writ petition are as follows:

Respondent no. 3 Sri A.K. Mehra was appointed as temporary Class-3 employee on 2nd April, 1974 in the employment of the Corporation. On the basis of caste certificate submitted by respondent no. 3 to the effect that respondent no. 3 belongs to scheduled case, he was offered regular appointment as clerk. Nearly after 20 years it was brought to the knowledge of the Corporation that the caste certificate produced by the respondent no. 3 was a forged document. Accordingly, the respondent no. 3 was suspended on 21.9.1995 and an enquiry was initiated against him. After service of charge sheet and after holding enquiry, the respondent no. 3 was dismissed from service vide order dated 5.9.1996 on the charge that he has secured appointment on the basis of forged scheduled caste certificate. Feeling aggrieved by the said action of the employers, respondent no. 3 raised an industrial dispute. The dispute was referred for adjudication by the Central Government vide notification dated 11th March, 1999 to the Central Government Industrial Tribunal cum Labour Court, Kanpur. The dispute was registered as Industrial Dispute No. 55 of 1999. the Industrial Tribunal by means of the award dated 15th October, 2001 has held that the workman was deprived from defending himself properly during the course of enquiry by the management and the said enquiry proceedings were in violation of the principles of natural justice on the ground that the copies of documents, on which reliance was placed during the enquiry, had not been furnished to the workman. The Labour Court further held that since the employers have not filed written statement nor they have asked for an opportunity to lead evidence before the Tribunal for establishing the charge against delinquent employee, no such opportunity is being afforded. The Tribunal proceeded to make an award declaring the punishment order to be illegal. The workman has been directed to be reinstated with all consequential benefits.

4. The petitioner moved an application for recall of the aforesaid exparte award on the ground that the applicant Corporation is a big Public Sector Corporation and the notice-issued by the Tribunal, received in the operation department of the Corporation, was forwarded to the Industrial Relation Department of the Corporation. The same was mixed up with some other files and could not be acted upon by the competent authority. On the said application of the Indian Oil Corporation various dates were fixed, however, the application was not decided by the Industrial Tribunal. Taking the benefit of the pendency of the said proceeding, respondent no. 3 approached the Labour Authorities, as a result whereof the letter dated 16the December, 2001 has been issued requiring the petitioner to enforce the award failing which the proceedings under Section 29 of the Industrial Dispute Act shall be initiated. Hence the present writ petition.

5. On behalf of the petitioner it is submitted that in view of the judgment of the Hon'ble Supreme Court reported in 1991 SC 606, the Industrial Tribunal has the jurisdiction to decide the application for setting aside ex parte award and therefore unless and until the recall application is decided, the Deputy Labour Commissioner was not justified in

directing the enforcement of ex parte award. In alternative it is submitted that even the ex parte award made by the Tribunal cannot be legally sustained inasmuch as the Industrial Tribunal has failed to appreciate that the workman could claim benefit of being member of a scheduled caste only, if his caste is included in the list published under Article 341 of the Constitution of India and therefore it was for the workman to have established his right with reference to such a list, failing which the action taken b the management of Indian Oil Corporation, to dismiss the workman from the service on the ground that he had secured regular appointment on the basis of a false certificate obtained from Tehsildar, could not have been interfered with.

6. Counsel for the petitioner submits that the Industrial Tribunal has committed a manifest illegality while recording a finding in the ex parte award to the effect that the certificate issued by the Tehsildar about status of respondent no. 3 being a scheduled caste candidate was genuine inasmuch as the Labour Court has failed to appreciate that a person can be held to be a member of scheduled caste only if he belongs to a caste notified in a list published under Article 341 of the Constitution of India. The Labour Court has not taken into consideration the aforesaid legal aspect of the matter, and therefore vitiates the entire approach of the Labour Court. Lastly it is submitted by the petitioner that in any case the Labour Court has not recorded any reasons for granting full back wages for the period the workman was out of employment and therefore the award to that extent is contrary to the law as laid down by the Hon'ble Supreme Court of India, reported, reported in **2001 SCC (L&S) 365**, *P.G.I. of Medical Education & Research, Chandigarh Vs. Raj Kumar.*

7. On behalf of the workman it is submitted that once it is held that the employer had illegally terminated the services of the workman, the normal relief of reinstatement with full back wages is to be applied. The workman has placed reliance upon the judgment of the Hon'ble Supreme Court, reported in **2004 (2) ATJ 180**, Union of India Vs. Madhusudan Prasad and others. On behalf of the respondent it is submitted that the recall application as filed by the petitioner was legally not maintainable as it was filed after expiry of 30 days of the publication of the award and therefore mere pendency of the said recall application is of no consequence. The award of the Labour Court has to be enforced during the pendency of the said misconceived application. It is further submitted that the award of the Labour Court holding that the caste certificate issued in favour of the workman to be genuine and valid is based on the findings of fact which call for no interference.

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

Issue No. 1

8. The petitioner has contended that his recall application for setting aside the ex parte award is pending before the Industrial Tribunal. Various dates have been fixed in the matter. The application has not been decided and therefore, the enforcement of ex parte award till the disposal of the application for setting aside the ex parte award is legally not

justified. The contention so raised on behalf of the petitioner prima facie appears to be attractive. However, no scrutiny of fact, it is established from record that the recall application has been preferred subsequent to the expiry of 30 days, from the date of publication of the award of the Industrial Tribunal. The Hon'ble Supreme Court in the judgment, reported in **AIR 1981 SC 606**; *Grindlays Bank Ltd. Vs. The Central Government Industrial Tribunal and others*, has specifically held that the Tribunal became functus officio after 30 days of the publication of the award (Reference paragraph 14).

9. In view of the aforesaid pronouncement of the Hon'ble Supreme Court and the fact that petitioner has failed to establish that the application for recall was filed within 30 days of the publication of the award, the application filed is legally not maintainable. In view of the aforesaid this Court cannot take notice of pendency of the application for setting aside the ex parte award, which has been filed after more than 30 days of publication of the award nor pendency of such an application is of any consequence. The issue is, therefore, answered against the petitioner.

Issue No. 2

10. The right of a person to claim benefits of being a member of scheduled caste community is dependent upon the caste, to which he belongs, being notified under a list referable to Article 341 of the Constitution of India. The legal position in that regard has been settled by the Hon'ble Supreme Court in successive judgments including the judgment reported in ***2004 AIR SCW 6419 (E.V. chinnaiah Versus State of Andhra Pradesh and others)***. Having regard to the law laid down by the Hon'ble Supreme Court, this Court has also held that courts of law, the State Legislature or the State Government or any of its officers have no competence to add any caste/sub caste/synonym to the said list as notified under Article 314j of the Constitution of India. The legal position has been explained in judgment of this Court in Writ Petition No. 42348 of 2004, which has since been affirmed by the Division Bench of this Court in the Special Appeal No. 89 of 2005. In view of the aforesaid legal position the respondent no. 3, who has admittedly obtained regular appointment on the basis of his being a member of the scheduled caste, could have claimed relief before the Tribunal only on his satisfying the Tribunal that workman was actually a member of one of the castes included in the such list as notified under Article 341 of the Constitution of India.

11. In the opinion of the Court, the Industrial Tribunal was under legally obligation to appreciate the issue in light of the provisions of Article 341 of the Constitution of India and to see for itself as to whether the workman was able to refer to any item of a list notified under Article 341 of the Constitution of India for the purposes of claiming relief before the Tribunal for continuance in the employment of the Corporation on the ground that workman belongs to the schedule caste. Neither in the written statement filed on behalf of the workman nor in the award of the Industrial Tribunal there is any mention of the caste of the petitioner being included in any list notified with reference to Article 341 of the Constitution of India.

12. In the opinion of the Court, inclusion of the caste of the workman concerned in the list notified under Article 341 of the Constitution of India was a condition precedent for the workman to claim benefit as a schedule caste candidate and it was obligatory upon the Industrial Tribunal to have satisfied itself with reference to such list before declaring as follows in the impugned award:

"From this point of view, the stand taken by the concerned employee that the certificate issued by the Tehsildar about his status as scheduled caste candidate was genuine, appears to be correct and it has been wrongly ignored by the enquiry committee as well as by disciplinary authority."

13. In view of the aforesaid, the Labour Court has failed to appreciate the basic requirement of the law of the land while conferring the benefit of continuance of service upon the petitioner on the ground of his being member of the scheduled caste and as such the award of the Labour Court cannot be permitted to stand.

14. In view of the aforesaid conclusion arrived at by this Court, the issue as to whether Labour Court had rightly proceeded to pass ex parte award and the findings recorded with regards to the disciplinary proceedings being in violation of the principles of natural justice, looses all significance. It is needless to point out that all courts of law including Tribunal have been constituted for furtherance of the interest of justice and substantial justice should not be defeated on technicalities. In such circumstances the award made by the Industrial Tribunal dated 15th October, 2001 is liable to be set aside and the matter is liable to be remanded to the Industrial Tribunal for deciding the dispute afresh in light of the observations made by this Court hereinabove.

Issue No. 3

15. In view of the fact that the ex parte award made by the Tribunal has been set aside by this Court for the reasons recorded hereinabove and the matter has been remanded for fresh adjudication in light of the observations made, the direction with regards to the payment of back wages to the petitioner as such is rendered infructuous inasmuch as the right of the parties shall now be determined afresh by the Labour Court in accordance with law, including the issue of back wages.

16. For the reasons stated above, the writ petition is allowed. The award of Industrial Tribunal dated 15th October, 2001 is hereby quashed. Industrial Tribunal cum Labour Court, Kanpur is directed to decide the dispute in accordance with law in the light of the observations made hereinabove, preferably within four months from the date a certified copy of this order is filed before the Tribunal.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2005

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 40829 of 2005

Mangal Dev and another ...Petitioners
Versus
The State Election Commission and others ...Respondents

Counsel for the Petitioners:
Sri Radha Kant Ojha
Sri Satyanshu Ojha

Counsel for the Respondents:
Sri S.N. Singh
Sri P.N. Rai
Sri M.D. Singh 'Shekar'
Sri C.K. Rai
S.C.

U.P. Panchayat Raj Act 1947-Section 9-(8)-Proviso 2-preperation of electoral roll-name of petitioner alongwith his 3 children was already on previous electoral roll-the authority deleted the name without Notice-behind the back of petitioner-held order dt. 27.4.05 deleting the name of petitioner declared unenforceable and un-executable-their name shall be treated existing on provisional as well as final voter list.

Held: Para 21

In view of the decision of the Constitution Bench judgment of the Hon'ble Apex Court in Udit Narain Singh Malpaharia Vs. Member, Board of Revenue, Bihar, AIR 1963 SC 786, the petitioner no.2 and three children of petitioners have a right to ignore the order passed by the Sub Divisional Magistrate, Meja, as it was passed behind their back. To that extent, the order impugned dated 27.04.2005 is declared to be unenforceable and in-executable and we direct that their names shall be treated to be existing in the provisional as well as in the final voter list.

Case law discussed:
AIR 1966 SC 1942
AIR 1967 SC 1910
AIR 1968 SC 49
AIR 1977 SC 757
AIR 1979 SC-1060
AIR 1984 SC-885
1987 SCC (3) 693
AIR 1990 SC-166
AIR 1991 SC-2288
AIR 1998 SC-2496
AIR 1961 SC-751
AIR 1981 SC 711
AIR 1988 SC-2255
1994 (1) SCC-269
2001 (4) SCC-309
2001 (5) SCC-581
2002 (4) SCC-380
2003 (5) SCC-413
2004 (2) SCC-297
2004 (3) SCC-48
2005 (2) SCC-720

(Delivered by Hon'ble Dr. B.S. Chauhan J.)

1. This writ petition has been filed for quashing the order dated 27.04.2005 (Annex.8) passed by the respondent no.3 by which the names of the petitioners as well as their two sons and one daughter have been deleted from the provisional voter list prepared for the purpose of forthcoming Panchayat Raj elections.

2. The facts and circumstances giving rise to this case are that petitioners claim to be resident of village Bhanjanpur, Gram Panchayat Payagpur Ramgarhwa, Block Manda, Tehsil Meja, District Allahabad. There, they have a house, immovable properties and their family members reside therein. Earlier, names of the petitioners as well as their

children existed in the voter list and they had exercised the right to vote in the last elections for the Parliament as well as the State Assembly. Their names appeared in the voter list prepared for Gram Panchayat election also. The elector roll was published for the purposes of holding the elections of Gram Panchayat on 01.03.2005. The names of petitioners as well as their children appeared in the voter list at Serial Nos. 962, 963, 964, 965 and 966. The election programme was notified by the Election Commission, according to which a schedule was fixed for preparing the final electoral roll. It provided that any objection for inclusion or exclusion of the name of any person in the said provisional voter list would be entertained from 1st March, 2005 to 15th March, 2005. Objections, if any, were to be disposed of from 16th March, 2005 to 1st April, 2005. According to the petitioners, no objection had been filed for exclusion of their names from the provisional voter list during the said stipulated period. Shri Surya Bali Bind, the respondent no.5, impleaded by the Court on the application moved by him, filed objections for exclusion of the names of the petitioners and their three children on 13.03.2005. No notice had ever been served upon any of the petitioners or their children. No opportunity of hearing had ever been given to them. When the petitioner no1. came to know that certain proceedings were pending for exclusion of his name, he filed an affidavit on 23.03.2005 pointing out that the objection filed for exclusion of their names was not based on correct factual position. Subsequently, petitioners did not receive any notice or any information. However, vide impugned order dated 27.04.2005, names of the petitioners and their three children have been excluded from the voter list. Hence, the present petition.

3. Shri Radha Kant Ojha, learned counsel for the petitioners has submitted that neither the statutory provisions provided under the U.P. Panchayat Raj Act, 1947 (hereinafter called "the Act 1947') nor the U.P. Panchayat Raj (Registration of Electors) Rules, 1994 (hereinafter called "the Rules 1994') have been followed. The respondent authority had no competence to entertain the application/objection for exclusion of names of the petitioners and their children after 1st April, 2005. No notice had ever been issued to the petitioners or their children. Therefore, the order impugned is without jurisdiction and is nullity.

4. On the contrary, Shri M.D. Singh "Shekhar", learned counsel appearing for respondent no.5, Shri Surya Bali Bind has submitted that on 10th May, 2005, certain guidelines have been issued by the State Election Commission by which the Authority concerned had the competence to entertain objections even after 01.04.2005. Petitioners had been served notices by U.P.C. (Under Postal Certificate) and also by Dasti service. Notice was sent to the house of petitioner no.1. His wife refused to accept the same, therefore, it was affixed at his house. Law does not provide for giving separate notices to the voters if they are members of the same family whose names are to be deleted. No fault can be found with the procedure adopted by the authority. Petition is liable to be dismissed.

5. Vide order dated 19th May, 2005, we had directed the Authority concerned, the learned Sub Divisional Magistrate, Meja to remain present before this Court

along with the records and in compliance thereof, Shri Anjani Kumar Singh, Sub Divisional Magistrate, Meja is present along with all original records. We have heard him in person as well as Shri C.K. Rai, learned Standing Counsel for the State and Shri P.N. Rai, learned counsel for the State Election Commission.

6. The procedure in this regard is prescribed under the Act, 1947 and Rules, 1994. Section 9 of the Act, 1947 deals with the procedure for preparing the electoral roll for each territorial constituency. Sub-section (7) thereof provides that every person is entitled to be registered as a voter only in one constituency. Sub-section (8) provides that where the State Election Commission is satisfied after making certain enquiry as it may deem fit, whether on an application made to it or on its own motion, that any entry in the electoral roll should be corrected or deleted or that the name of any person entitled to get registered should be added in the electoral roll, it shall, subject to the provisions of this Act and rules and orders made thereunder, correct, delete or add the entry, as the case may be. However, the second proviso thereto provides that no deletion or correction of any entry in respect of any person **affecting his interest adversely without giving him reasonable opportunity of being heard** in respect of the action proposed to be taken in relation to him. Rules, 1994 provide for a detailed procedure. Rule 8 thereof provides for publication of rolls in draft giving wide publicity in the Panchayat area and the copy thereof shall be made available for inspection by the people at large. Rule 9 provides for filing claims for inclusion and exclusion of the names of any person. The objections so filed have to be registered and proper entries are to be made as required under Rule 10. However, Rule 11 reads as under:-

"11. Period for lodging claims and objections.- Every application referred to in Rule 9 or in Rule 10 shall be made within a period of seven days from date of publication of the roll in draft under Rule 8.

7. Rules 13 and 14 provide for procedure for entertaining objections and Rule 15 mandatorily requires for service of notice after being satisfied, prima facie, regarding the genuineness of the objections for inclusion or exclusion of the names. The notice is to be served upon the person along with a copy of the objection and notice is required to be served under sub-rule (3) personally and in default or personal service, shall be served by affixing a copy thereof at the residence. Rule 16 further provides for enquiry into claims and objections. It lays down a procedure for leading the evidence on the issue. Rule 17 provides that any person included inadvertently may be deleted from the electoral roll. Rule 19 provides for final publication of electoral roll.

8. In the instant case, it is admitted by Shri P.N. Rai, learned counsel appearing for the State Election Commission that the draft roll had been prepared on 01.01.2005 and was published on 01.03.2005. There is no dispute that it was published on 1st March, 2005. In view of the statutory provisions contained in Rule 11, objections could be filed only up to 8th March, 2005. We fail to understand as under what circumstances, the Election Commission could fix a date for filing

objections up to 01.04.2005. No explanation could be furnished by the learned counsel appearing for the respondents as under what circumstances and by what authority of law, any objection could be entertained for inclusion or exclusion of the names in the voter list after 8th March, 2005 and even if the direction has been issued by the Election Commission in contravention of the Statutory Rules, that cannot be given effect to.

9. There is no scope of argument that the executive instructions can be issued in contravention of the statutory provisions. The issue as to whether executive instructions can override the statutory Rules is no-more res integra. A Constitution Bench of the Hon'ble Supreme Court, in B.N. Nagarajan & ors. Vs. State of Mysore & ors., AIR 1966 SC 1942, has observed as under:-

"It is hardly necessary to mention that if there is a statutory rule or an Act on the matter, the executive must abide by that Act or Rule and it cannot in exercise of its executive powers under Article 162 of the Constitution ignore or act contrary to that rule or the Act."

10. Similarly, another Constitution Bench of the Hon'ble Supreme Court in Sant Ram Sharma Vs. State of Rajasthan & Ors., AIR 1967 SC 1910, has observed as under:-

"It is true that the Government cannot amend or supersede statutory Rules by administrative instruction, but if the Rules are silent on any particular point, the Government can fill-up the gap and supplement the rule and issue instructions not inconsistent with the Rules already framed."

11. The law laid down above, has consistently been followed and it is settled proposition of law that an Authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory Rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions. (Vide The Commissioner of Income-tax, Gujarat Vs. M/s. A. Raman & Co., AIR 1968 SC 49; Union of India & ors. Vs. Majji Jangammayya & ors., AIR 1977 SC 757; The District Registrar, Palghat & ors. Vs. M.B. Koyyakutty & ors., AIR 1979 SC 1060; Ramendra Singh & ors. Vs. Jagdish Prasad & ors., AIR 1984 SC 885; P.D. Aggarwal & ors. Vs. State of U.P. & ors., (1987) 3 SCC 622; M/s. Beopar Sahayak (P) Ltd. & Ors. Vs. Vishwa Nath & Ors., (1987) 3 SCC 693; Paluru Ramkrishnaiah & ors. Vs. Union of India & Anr., AIR 1990 SC 166; Comptroller & Auditor General of India & ors. Vs. Mohan Lal Mehrotra & ors., AIR 1991 SC 2288; and C. Rangaswamaiah & ors. Vs. Karnataka Lokayukta & ors., AIR 1998 SC 2496).

12. The Constitution Bench of the Hon'ble Supreme Court, in Naga People's Movement of Human Rights Vs. Union of India., AIR 1998 SC 431, held that the executive instructions are binding provided the same have been issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions.

13. Thus, it is settled law that executive instructions cannot amend or

supersede the statutory rules or add something therein. The orders cannot be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law; while statutory Rules have full force of law as held by the Constitution Bench of the Hon'ble Supreme Court in State of U.P. & ors. Vs. Babu Ram Upadhya, AIR 1961 SC 751; and State of Tamil Nadu Vs. M/s. Hind Stone etc. etc., AIR 1981 SC 711.

14. Similar view has been reiterated in Union of India & Ors. Vs. Sh. Somasundaram Viswanath & Ors., AIR 1988 SC 2255; Union of India & Anr. Vs. Amrik Singh & Ors., (1994) 1 SCC 269; Union of India & Ors. Vs. Rakesh Kumar, (2001) 4 SCC 309; Swapan Kumar Pal & Ors. Vs. Samitabhar Chakraborty & Ors., (2001) 5 SCC 581; Khet Singh Vs. Union of India, (2002) 4 SCC 380; Laxminarayan R. Bhattad & Ors. Vs. State of Maharashtra & Anr., (2003) 5 SCC 413; D.D.A. & Ors. Vs. Joginder S. Monga & Ors., (2004) 2 SCC 297; ITW Signode India Ltd. Vs. Collector of Central Excise, (2004) 3 SCC 48; and Pahwa Chemicals (P) Ltd. Vs. Commissioner of Central Excise, New Delhi, (2005) 2 SCC 720, and it has been observed that statutory rules create enforceable rights which cannot be taken away by issuing executive instructions.

15. In the instant case, admittedly, objections were filed on 13th April, 2005, thus it was not within the competence of the Statutory Authority to entertain the same. Therefore, all the proceedings taken by him subsequent thereto are null and void being without jurisdiction for the reason that the Election Commission could not extend the period of limitation for filing objections beyond statutory limit, i.e. seven days as provided under Rule 11 of the Rules, 1994.

16. Even otherwise, the original records reveal that in the proforma where the names of the persons against whom objections have been received, contains eight columns. On the first page, the names of 37 people have been mentioned. In the note thereof, certain remarks have been made. On the next page, the names of five persons, i.e. petitioners and their three children have been mentioned in a different hand writing and there had been further addition in the footnote thereof by the different ink, though in the same hand writing and it had been signed on 29th March, 2005. In column no.3, where the name of the applicant/objector is to be mentioned, the names of the petitioners and their three children have been mentioned. The name of the objector has not been mentioned anywhere. Matter has been referred to the Sub Divisional Magistrate, Meja by the Block Development Officer on 29th March, 2005 along with the documents filed by the parties. Affidavit filed by respondent no.5 Shri Surya Bali Bind has been notarized on 31st March, 2005. We fail to understand that if the papers had been furnished to the Sub Divisional Magistrate, Meja by the Block Development Officer on 29th March, 2005, then how it contained the affidavit attested and verified on 31st March, 2005. There is no doubt that the report submitted by the Block Development Officer to the Sub Divisional Magistrate, Meja is ante dated and it is a clear cut case of maneuvering with the collusion of respondent no.5 to oust the petitioner no.1 from the zone of contesting the election. The Sub Divisional Magistrate, Meja is

present before us and could not furnish any explanation as to how it was possible for the Block Development Officer to forward the documents on 29th March, 2005 if the affidavit of respondent no.5 has been attested on 31st March, 2005. The order impugned dated 27.04.2005 is based on evidence which includes the affidavits filed by the parties. The findings recorded by the Statutory Authority are perverse, being based on wrong, unreliable, manipulated and manufactured evidence.

17. Amendment in the Constitution by adding part IX-A confers upon the local self Government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the constitutional institution besides being outrageous is dangerous to the democratic set-up of this country, therefore, an elected official cannot be permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State adopting a casual approach and resorting to manipulations to achieve a ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the institution.

18. The democratic set-up of the country has always been recognised as a basic feature of the Constitution. Like other features eg. Supremacy of the Constitution; Rule of law; Principle of separation of powers; Power of judicial review under Articles 32, 226 and 227 etc. (Vide His Holiness Keshwananda Bharti Sripada Galvaru & Ors Vs. State of Kerala, AIR 1973 SC 1461; Minerva Mills Ltd., Vs. Union of India & Ors, AIR 1980 SC 1789; R.C. Poundyal Vs. Union of India & Ors., AIR 1993 SC 1804; Special Reference No. 1 of 2002 In re (Gujrat Assembly Election matter) (2002) 8 SCC 237;Union of India Vs. Association for Democratic Reforms, AIR 2002 SC 2112; and People's Union for Civil Liberties Vs. Union of India & Ors., AIR 2003 SC 2363).

19. The right of vote, elect or contest for any post is a statutory right and such rights are subject to the limitations provided therein. (Kabool Singh Vs. Kundan Singh, AIR 1970 SC 340; and Thampanoor Ravi Vs. Charupara Devi, (1999) 8 SCC 74).

20. In view of the above, the Statute confers the right upon every eligible person to vote, elect or contest the election as per the statutory provisions. The rights so conferred is a right of an individual as an eligible elector. Therefore, a person can be deprived of right to vote, contest or elect only as per the requirement of statutory provision and not otherwise.

21. It has been admitted by the Authority concerned and it is proved from the record produced before us that no notice had ever been served upon the petitioner no.2 and three children of the petitioners, whose names stood deleted from the provisional voter list. To that extent, it cannot be held that the order impugned in respect of the entire family can be held to be sustainable in the eyes of law. Thus, so far as the petitioner no.2 and three children of petitioners are concerned, the order impugned is declared to be void ab initio, as the same suffers from non-compliance of the principles of

natural justice. In view of the decision of the Constitution Bench judgment of the Hon'ble Apex Court in Udit Narain Singh Malpaharia Vs. Member, Board of Revenue, Bihar, AIR 1963 SC 786, the petitioner no.2 and three children of petitioners have a right to ignore the order passed by the Sub Divisional Magistrate, Meja, as it was passed behind their back. To that extent, the order impugned dated 27.04.2005 is declared to be unenforceable and in-executable and we direct that their names shall be treated to be existing in the provisional as well as in the final voter list.

22. So far as Shri Mangal Dev, petitioner no.1 is concerned, as per the election schedule, objections for inclusion or exclusion in the voter list could have been filed only by 01.04.2005. Admittedly, objections have been filed by respondent no.5 on 13.05.2005. The procedure required for the purpose has not been followed, as mentioned above. The order is based on manufactured/concocted evidence. The finding is perverse being based on no reliable evidence.

23. In such a fact situation, we have no option but to allow the writ petition and quash the impugned order dated 27.04.2005.

24. The writ petition succeeds and is allowed with the cost of Rs.10,000/- (Rupees Ten Thousand Only) which is to be shared by the State as well as by respondent no.5 equally. The order impugned dated 27.04.2005 passed by respondent no.3 is quashed. The petitioners shall be entitled for all consequential reliefs.

Petition Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.06.2005

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE ARUN TANDON, J.

Criminal Misc. Writ Petition No. 5840 Of 2005

Mukesh and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Gaurav Sharma

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226/227-readwith Code of Criminal Procedure-Section 172/173-accused/ Petitioner-demand of the copy of statement recorded under Section 161 Cr.P.C.-prior to reaching the stage of filing chargesheet-contents of case diary can not be disclosed-otherwise the accused might deter the informant-High Court can not be permitted to weight the evidence under Article 227.

Held: Para 11,30,32,45

The Hon'ble Supreme Court also cautioned not to disclose the contents of the case diary to the accused for the reason that it may disclose the identity of the informant who gave some information which resulted in investigation into a particular aspect. The public interest demands that such an entry is not made available to the accused which might deter the informant from giving any information to assist the Investigating Agency.

Thus, in view of the above, the inference can be drawn that the accused are not entitled to seek the copy of the statement of any witness recorded under

Section 161 Cr.P.C. or any other part of the evidence collected by the Investigating Officer prior to reaching the stage of filing the charge sheet. The accused cannot ask for the copy of the case diary at any stage. He is entitled only for receiving the copy of the documents which are being relied by the prosecution against him.

Thus, in view of the above, the relief sought by the petitioners that the direction be issued to the Court below to furnish them the copy of the case diary cannot be allowed.

Thus, in view of the above, the legal proposition can be summerised that the High Court, in exercise of its powers under Article 226/227 of the Constitution or Section 482 Cr.P.C. is not permitted either to weigh the evidence or examine the adequacy of the evidence for framing of the charges and if it comes to the conclusion that there is some prima facie evidence connecting the accused with the crime, the proceedings cannot be quashed at this stage. However, the Court has to examine that in case the ingredients of the offence alleged against the accused are absent in the fact and circumstances of the case and the trial was nothing but an abuse of the process of the court, the court should not hesitate in quashing the charges/proceedings.

AIR 1969 SC-1014
AIR 1953 SC-107
1996 AWC-469
1988 AWC-1354
1996 G.L.J. 1536
AIR 2003 SC-3357
1993 U.P.Cr.R 260
1996 U.P.Cr.R. 653
AIR 1964 SC-221
AIR 1955 SC-196
AIR 1991 SC-1260
1991 (4) SCC-341
AIR 1989 SC-144
AIR 1954 SC-51
AIR 1933 P.C. 124
(1897) 11 All. 390(G.B.)
AIR 1955 SC-1748
AIR 2001 SC 2637
1988 G.L.J. 1077
AIR 1957 SC-737
AIR 1957 SC 263
AIR 1927 PC-44
AIR 1999 SC-2565
AIR 2002 SC-1644
1996 (4) SCC 453
AIR 1996 SC-2173
AIR 1977 SC-1489
AIR 1995 PC-18
AIR 1982 949
1985 SC-628
AIR 1988 SC-709
AIR 1993 SC-1082
1995 (6) SCC-194
1996 (7) SCC-705
AIR 1998 SC-128
AIR 1992 SC-604
1999 (8) SCC-686
AIR 1999 SC-1216
2005 (1) SCC-122
1999 (8) SCC-508
AIR 1955 SC-785
1994 (4) SCC-142
AIR 2000 SC-665
AIR 2001 SC-556
2002 (8) SCC-161
AIR 2004 SC-517

(Delivered by Hon'ble Dr. B.S. Chauhan, J.)

1. This writ petition has been filed with prayer that a writ, order or direction be issued in the nature of certiorari, commanding the respondents to send the entire record and the proceedings against the petitioners, for quashing the same, as well as for issuing a writ of mandamus commanding the respondents to provide a copy of the case diary and other proceedings related to petitioners, in order to enable them to defend their case.

2. The facts of the case are that a First Information Report (hereinafter called "F.I.R.') in Case Crime No. 60 of 2005, under Section 392 of the Indian

Penal Code (hereinafter called "I.P.C.') was lodged with the Police Station Saidabad, District Hathras (Mahamayanagar) on 13.3.2005. In the F.I.R., two persons were named as accused. The names of the petitioners do not find mention in the said F.I.R. In pursuance of the same, investigation commenced, and it appears that during investigation, the names of the petitioners were also revealed. Accordingly, the police is trying to apprehend the petitioners. In such an eventuality, the Investigating Officer filed an application in the Court of the Judicial Magistrate, Saidabad District Hathras (Mahamayanagar) for permission to proceed under Section 82 of the Criminal Procedure Code, 1974 (hereinafter called "Cr.P.C.'), and that application has been allowed vide order dated 6th May, 2005. Hence this petition for quashing all the proceedings.

3. Shri Gaurav Sharma, learned counsel for the petitioners has submitted that it is a fit case where this Court should issue a writ of certiorari quashing the entire proceedings as petitioners have a right to information as for what offence and in what case they are wanted. The reputation of the petitioners is at stake and that itself is sufficient ground for interference by the writ Court. Entire proceedings against the petitioners are in violation of the provisions of Articles 21 and 22 of the Constitution of India. Thus, this Court should quash the entire proceedings after calling the record.

In support of his contention, the learned counsel for the petitioners has referred to and relied upon a large number of judgments, including, In re Madhu Limaye & Ors, AIR 1969 SC 1014; Vimal Kishore Mehrotra Vs. State of U.P. & Anr., AIR 1956 All 56; The State of Punjab Vs. Ajaib Singh & Anr. AIR 1953 SC 10; Uttarakhand Sangharsh Samiti Vs. State of U.P. & Ors, 1996 AWC 469; Rama Kant Vs. State, 1988 AWC 1354; Vikram Vs. The State, 1996 Cr.LJ 1536; Ashok Kumar Singh Vs. State of U.P. 1998 AWC 604; and State of Bihar Vs. Lal Krishna Advani & Ors, AIR 2003 SC 3357.

4. The writ petition has been filed submitting that petitioners have falsely been enroped in the crime excluding the names of the real accused by the Investigating Officer after taking illegal gratification from them; on 6.5.2005, Judicial Magistrate, Saidabad, District Hathras allowed the application of the Investigating Officer under Section 82 Cr.P.C. On coming to know about the said order, petitioners immediately filed applications to surrender before the said Court. On 18.5.2005 petitioners moved an application before the court concerned to provide the copy of the case diary. The said application has been dismissed. The order of rejection of their prayer for giving them the copy of the case diary is violative of provisions of Sections 21 and 22 (1) of the Constitution of India. Relevant part of the prayer clause reads as under:-

i) issue a writ, order or direction in the nature of **certiorari** commanding the respondents to send the entire records and all the entire proceedings against the petitioners for quashing the same to the extent it relates to the petitioners.

ii) issue a writ, order or direction in the nature of mandamus directing the respondents to provide copy of the **case diary** and other proceedings which relate

to the petitioners so that they may be able to defend their cases.

5. The record reveals that on the application filed by the petitioners for surrender, the Court below asked for the report from the Investigating officer as to whether they were wanted in any criminal case. In pursuance therefore, a report has been submitted on 16.05.2005 by the Investigating Officer that petitioners were wanted in Case Crime No. 60 of 2005, under Section 392, I.P.C., Police Station Sadabad, District Mahamayanagar. The order dated 18.05.2005 passed by the Court below reveals that petitioners did not surrender before the Court as they were not present there and the Court refused to call for the case diary as it was required only at the time of the hearing of bail application and not before that.

6. It is not the case of the petitioners that the proceedings under Section 82 Cr.P.C. had been taken in violation of the mandatory requirement of the statutory provisions. This Court has consistently held that the provisions of Section 82/83, Cr.P.C. can be resorted to only in exceptional circumstances for the reason that every person who is not immediately available, may not necessarily be an absconder. The Court has to record that it is satisfied that the accused has absconded or is avoiding execution of warrant. The provisions can be resorted to only where the warrant is not executed and that is also not necessary in every such case. The provisions of Section 82 are mandatory and require strict adherence. (Vide Devendra Singh Negi alias Debu Vs. State of U.P. & Anr., 1993 U.P.Cr.R 260; and Kapil Muni Karwaria Vs. State of U.P., 1996 U.P.Cr.R 653). However, there are no grounds of challenge to Section 82 proceedings. In Devendra Singh Negi (Supra), this Court has held that in case an accused wants to surrender and makes a proper application before the Court, his prayer should be accepted.

7. In the instant case, the Police has submitted the report that the petitioners are wanted in a criminal case. It is evident from the perusal of the order dated 18.5.2005 that petitioners did not surrender, rather asked for furnishing the information and calling for the case diary.

This petition has been filed in a most casual manner without challenging any specific order or even seeking quashing of the F.I.R. The petition is totally misconceived and issue of right to information etc. is not involved in this fact-situation as the accused cannot claim the right to know each and every thing in respect of the investigation. Provisions of Section 172 Cr.P.C. put an embargo seeking the copy of the case diary by the accused. In case the investigation is complete and the police files the charge sheet against him, he is bound to be supplied the copies of the documents which prosecution wants to rely upon against him in the trial, as required under Section 173 Cr.P.C., and this is not the stage where petitioners can claim copy of the case diary or any other information in respect of the investigation.

8. Section 2 (h) Cr.P.C. defines investigation and it includes all the proceedings under the Code for the collection of evidence conducted by a Police Officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. During investigation, the police has to maintain the case diary keeping the entire

information in respect of the investigation as required under Section 172 Cr.P.C. The investigation comes to an end with the formation of the opinion as to whether on the material collected, there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by filing of a charge sheet under Section 173 Cr.P.C. Therefore, it is evident that the investigation comes to an end only when the police report is submitted before the Court concerned under Section 173 Cr.P.C. and in case the Magistrate further directs the Investigating Agency to investigate the case further in exercise of power under clause (8) of Section 173 Cr.P.C., the collection of evidence in pursuance thereof shall also be a part of the investigation. (Vide H.N. Rishbud Vs. State of Delhi, AIR 1955 SC 196; State of U.P. Vs. Bhagwan Kishore Joshi, AIR 1964 SC 221; and Union of India Vs. Prakash P. Hinduja, AIR 2003 SC 2612).

Section 172 Cr.P.C. deals with the diary of proceedings in investigation and the same reads as under:-

"**172. Diary of proceedings in investigation.-** (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) **Neither the accused nor his agents shall be entitled to call for such diaries**, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply." (Emphasis added).

The provisions of Section 172 Cr.P.C. had been subject matter of consideration before the Courts from time to time.

9. The purpose of maintaining the case diary is that the Court may examine as to whether the investigation has been made promptly/efficiently and in accordance with law. The entries in the case diary are to be made with scrupulous completeness and efficiency. (Shri Bhagwan Singh Vs. Commissioner of Police, Delhi, AIR 1983 SC 826).

Case diary cannot be used as evidence by either side. (Vide State of Bihar Vs. P.P. Sharma, AIR 1991 SC 1260; and Malkiat Singh & Ors. Vs. State of Punjab, (1991) 4 SCC 341).

10. The accused can peruse that particular part of the case diary in the context of Sections 145 or 161 of the Evidence Act–(a) if it is used by the police officer concerned to refresh his memory or (b) if the Court uses it for contradicting the official concerned. (Vide Mukund Lal Vs. Union of India & Anr., AIR 1989 SC 144).

In Mukund Lal (supra), the Hon'ble Supreme Court placed reliance upon the judgment of this Court in Mahabirji Birajman Mandir Vs. Prem Narain Shukla, AIR 1965 Alld. 494, wherein this Court while explaining the nature of case diary has observed as under:-

"These reports are of confidential nature and privilege can be claimed thereof. Further the disclosure of contents of such reports cannot help any of the parties to the litigation, as the report invariably contains the opinion of such officers and their opinion is inadmissible in evidence."

The Hon'ble Supreme Court observed as under:-

"The public interest requirement from the stand point of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the Court, which is the ultimate custodian to the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded. There would be no prejudice or failure of justice to the accused persons since the Court can be trusted to look into the police diary for the purposes of protecting his interest."

11. The Hon'ble Supreme Court also cautioned not to disclose the contents of the case diary to the accused for the reason that it may disclose the identity of the informant who gave some information which resulted in investigation into a particular aspect. The public interest demands that such an entry is not made available to the accused which might deter the informant from giving any information to assist the Investigating Agency.

12. The case diary cannot be used either as substantive or as corroborative evidence in the trial. (Vide Dawarkanath Varma & Anr. Vs. Emperor, AIR 1933 PC 124; and Habeeb Mohammad Vs. State of Hyderabad, AIR 1954 SC 51).

13. The case diary is primarily meant as aid to the Court during the trial.[(Vide Karan Singh & Ors. Vs. Emperor, AIR 1928 All 25; State Vs. Fateh Bahadur & Ors., AIR 1958 All. 1; and K. Abdul Rahiman & Ors. Divisional Forest Officer & Anr., AIR 1989 Ker. 1 (FB)].

The case diary may be used to suggest means for further elucidating by legal evidence points that need clearing up. [(Vide Habeeb Mohammed (supra)].

14. It is the Court and not the accused person or his agent that can use the case diary for the purpose of contradicting the police officer who prepared it. [(Vide (1897) 11 All 390 (FB)].

15. The case diary can be used for the purpose of refreshing the memory and for the purpose of contradicting the Police Officer who prepared it. (Vide Shamsul Kanwar Vs. State of U.P., AIR 1995 SC 1748).

16. The another purpose is that Court may satisfy itself as to whether the investigation has been made in accordance with the required procedure. (Vide P.P. Sharma (supra).

17. Case diary cannot be used by defence to contradict the prosecution evidence. Therefore, the defence cannot place any reliance on it. Nor it is admissible in evidence. [(Vide Malkiat Singh (supra)].

18. In T.T. Antony Vs. State of Kerala, AIR 2001 SC 2637, the Hon'ble Supreme Court held that a "just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expensive power of the Police to investigate a cognisable offence has to be struck by the Court."

19. Article 21 of the Constitution comes to the rescue of an accused to challenge only that investigation has not been done in accordance with the procedure established by law. Thus, the accused has to establish that investigation has not been concluded with due observance of the procedure established by law. [(Vide State of Bihar Vs. P.P. Sharma (supra)].

20. In Mukund Lal (supra), the Apex Court held that in view of the safeguards where the Court itself takes care of the interest of the accused, it cannot be held that the provisions of sub-section 3 of Section 172 Cr.P.C. would fail to meet the test of reasonableness.

21. The Rajasthan High Court has examined the validity of the provisions of sub-section (3) of Section 172 Cr.P.C. in Subash Chandra Vs. Union of India, 1988 Cr.L.J. 1077 and held that when in the enquiry or trial, everything which may appear against the accused has to be established and brought before the Court by evidence other than the diary and the accused can have the benefit of the cross-examination of the witnesses and the Court has power to call for the diary and use it, of course not as evidence but in aid of the enquiry or trial, the provisions under Section 172 (3), cannot be said to be unconstitutional.

22. In Darya Singh Vs. State of Punjab, AIR 1965 SC 328, the Court held that in case the Court start scrutinising the case diary and preparing the list of witnesses whom the prosecutors must examine, is virtually to suggest that the Court should itself take the role of a prosecutor. Therefore, the case diary cannot be held to be a much relevant document for trial unless the prejudice is caused to the accused. The diary can be used even by the Court for a very limited purposes as explained hereinabove.

23. The provisions of Section 173 Cr.P.C. provide for filing the report of a Police Officer on completion of investigation and the relevant part for our purpose reads as under:-

"173. Report of police officer on completion of investigation.- (1) ....

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate alongwith the report –

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;
(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.
(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5)."

24. The statutory requirement is that when the investigation stands concluded and the police report is submitted only at that stage the accused or the complainant shall be entitled to have the copies of the documents which are to be relied upon by the prosecution during the trial.

25. In Gurbachan Singh Vs. State of Punjab, AIR 1957 SC 623, the Hon'ble Apex Court explained the scope of the provisions of Section 173 Cr.P.C. observing that the documents to be relied upon by the prosecution, are bound to be supplied to the accused and the object of this provision is to put the accused on notice of what he has to meet at the time of enquiry or trial.

26. In Narayan Rao Vs. State of Andhra Pradesh, AIR 1957 SC 737, the Hon'ble Supreme Court again considered the scope of provisions of Section 173 read with section 207 Cr.P.C. and held that the provisions are not even mandatory and are directory. Non-compliance of the provisions would not vitiate the proceedings rather it is merely an irregularity which can be rectified and once the documents to be relied upon by the prosecution against the accused have been supplied to him, the trial will proceed further and the evidence etc. shall be recorded. While deciding the said case, the Hon'ble Supreme Court placed reliance upon the judgment of the Privy Council in Abdul Rehman Vs. Emperor, AIR 1927 PC 44, wherein it had been held that such an omission was merely an irregularity which could be rectified under the provisions of Section 537 Cr.P.C.

27. In Jogendra Nahak & Ors. Vs. State of Orissa & Ors., AIR 1999 SC 2565, the Hon'ble Supreme Court again explained the scope of the provisions of Section 173 observing as under:-

"Section 173 says that on completion of investigation, the officer-in-charge of police station shall forward a report to the Magistrate, stating, inter-alia, the names of the persons who appear to be acquainted with the circumstances of the case. Sub-section (5) of Section 173 requires that the police officer shall forward to the Magistrate alongwith the said report (a) all documents or relevant extract thereof on which the prosecution proposes to rely, and (b) the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses. Even when a further investigation, as required under sub-section (8) is conducted by the police, they have to comply with all the requirements contained in the preceding sub-sections."

28. A similar view has been reiterated by the Apex Court in Central Bureau of Investigation Vs. R.S. Pai, AIR

2002 SC 1644, wherein explaining the scope of sub-sections (5) and (8) of Section 173 Cr.P.C., the Court held that the word "shall" used in sub-section (5) for requiring the Police Officer to forward to the Magistrate all documents is directory and not mandatory. If some mistake is committed in not submitting all the documents at the time of submitting the charge sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court at a later stage. The Court held that there is no statutory bar for the prosecution to file the documents which could not be filed at the earlier stage, later on.

29. A Constitution Bench of the Hon'ble Supreme Court in Assistant Collector of Customs, Bombay & Anr. Vs. L.R. Melwani & Anr., AIR 1970 SC 962, elaborately examined the scope of Chapter XIV of the Cr.P.C., which also contains Section 173, and held that the requirement of the provisions of Section 173 is to provide a fair trial to the accused as by furnishing the documents which can be relied upon against him, so that he may defend himself effectively. Unless there are compelling circumstances, the High Court should not exercise its discretion in such a case and the trial Court should be permitted to proceed in accordance with law otherwise it would unnecessarily impede the progress of the trial. However, the High Court must interfere in a case where it comes to the conclusion that omission on the part of the Investigating Agency or the Court below has caused prejudice to the accused.

30. Thus, in view of the above, the inference can be drawn that the accused are not entitled to seek the copy of the statement of any witness recorded under Section 161 Cr.P.C. or any other part of the evidence collected by the Investigating Officer prior to reaching the stage of filing the charge sheet. The accused cannot ask for the copy of the case diary at any stage. He is entitled only for receiving the copy of the documents which are being relied by the prosecution against him.

31. The relief sought herein cannot be granted as it would be in contravention of the statute itself. The Court has no competence to issue a direction contrary to law. (Vide Union of India & Anr. Vs. Kirloskar Pneumatic Co. Ltd., (1996) 4 SCC 453; State of U.P. & Ors. Vs. Harish Chandra & Ors., AIR 1996 SC 2173; and Vice Chancellorl University of Allahabad & Ors. Vs. Dr. Anand Prakash Mishra & Ors., (1997) 10 SCC 264).

In State of Punjab & Ors. Vs. Renuka Singla & Ors. AIR 1994 SC 595, dealing with a similar situation, the Hon'ble Apex Court observed as under:-

"We fail to appreciate as to how the High Court or this Court can be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory rules and regulations."

Similarly, in Karnataka State Road Transport Corporation Vs. Ashrafulla Khan & Ors., AIR 2002 SC 629, the Hon'ble Apex Court has held as under:-

"The High Court under Article 226 of the Constitution is required to enforce rule of law and not pass order or direction which is contrary to what has been injected by law."

32. Thus, in view of the above, the relief sought by the petitioners that the direction be issued to the Court below to furnish them the copy of the case diary cannot be allowed.

33. It is settled legal proposition that whatever may be the law, if on factual matrix, the petitioner is not entitled for relief sought by him, no interference is required in writ jurisdiction. (Vide Km. Chitra Ghosh & Anr. Vs. Union of India & Ors., AIR 1970 SC 35; Dr. N.C. Singhal Vs. Union of India & Ors., AIR 1980 SC 1255; & Khalid Hussain Vs. Commissioner & Secretary, Government of Tamil Nadu, Health Department, AIR 1987 SC 2074).

34. Be that as it may, the case requires to be considered as to whether the instant case presents special feature which may warrant quashing of the F.I.R., though not sought specifically by the petitioners.

35. Legal maxim "Quando Aliquid Mandatur, Mandatur Et Omne Per Quod Per Venitur Ad Illud"- means if anything is commanded, every thing by which it can be accomplished is also commanded. But the inherent power of quashing the criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R. or complaint and the extraordinary and inherent powers of Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. The same can be resorted to for correcting some grave errors that might be committed by the subordinate courts or where the complainant, at the instance of somebody else wants to settle his score with other party and uses deliberately the machinery of the Court for oblique purpose and the party is likely to be subjected to unnecessary harassment for facing criminal proceedings or where the Court is satisfied that in case the proceedings are not quashed, there will be gross miscarriage of justice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can "soft-pedal the course of justice" at a crucial stage of investigation/ proceedings. The High Court should be loath to interfere at the threshold to thwart the prosecution exercising its inherent power under Section 482 of the Code or under article 226 or 227 of the Constitution of India, as the case may be, and allow the law to take its own course. For the purpose of determining whether there is sufficient ground for proceeding against an accused the court possesses a comparatively wider discretion in the exercise of which it can determine the question whether the material on record, if unrebutted, is such on the basis of which a conviction can be said reasonably to be possible. (Vide Emperor Vs. Khwaja Nazir Ahmed, AIR 1945 PC 18; State of Karnataka Vs. L. Muniswami AIR 1977 SC 1489; State of West Bengal Vs. Swapan Kumar Guha, AIR 1982 949; Pratibha Rani Vs. Suraj Kumar & Anr., AIR 1985 SC 628; Madhavrao Jiwaji Rao Scindia Vs. Sambhajirao Chandrojirao Angre & Ors., AIR 1988 SC 709; Janta Dal Vs. H.S. Chowdhary & ors., AIR 1993 SC 892; Union of India Vs. W.N. Chadha, AIR 1993 SC 1082; Rupan Deol Bajaj & Anr. Vs. Kanwar Pal Singh Gill & Anr., (1995) 6 SCC 194; State of U.P. Vs. O.P. Sharma, (1996) 7 SCC 705; M/s.

Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & ors., AIR 1998 SC 128; G. Sagar Suri & Anr. Vs. State of U.P. & ors., (2000) 2 SCC 636).

36. In Smt. Nagawwa Vs.Veeranna Shivalingappa Konjalgi, AIR 1976 SC 1947, the Hon'ble Supreme Court held as under:-

"(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
(2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;... ....."

37. The Court's power is limited only to examine that the process of law should not be misused to harass a citizen and for that purpose, the high Court has no authority or jurisdiction to go into the matter or examine the correctness of allegations unless the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion and that there is sufficient ground for proceeding against the accused but the Court, at that stage, cannot go into the truth or falsity of the allegations. The inherent power of the High Court are limited to very extreme exceptions. A criminal prosecution can be short-circuited in rarest of rare cases, and even in a case of breach of contract, not only civil remedy is attracted but a person can be held responsible for criminal prosecution and under no circumstance "civic profile' can out-way the "criminal out fit.' (Vide State of Haryana & ors. Vs. Ch. Bhajan Lal & ors., AIR 1992 SC 604; Rajesh Bajaj Vs. State N.C.T. of Delhi, AIR 1999 SC 1216; Rajesh Agarwal & ors., (1999) 8 SCC 686; The Nagpur Steel and Alloys Pvt. Ltd. Vs. P. Radhakrishna, (1997) SCC (Crl.) 1073; Dr. Sharma's Nursing Home vs. Delhi Administration, (1998) 8 SCC 745; and M/s. Medchl Chemical & Pharma (P) Ltd. Vs. M/s. Biological E. Ltd. & Ors., AIR 2000 SC 1869).

While considering the issue of mala fides in such a case, the Apex Court in Ch. Bhajan Lal (supra), held as under:-

"At this stage, when there are only allegations and recriminations on no evidence, this Court could not anticipate the result of the investigation and rendered a finding on the question of mala fides on the materials at present available. Therefore, we are unable to see any force in the contentions that the complaint should be thrown over board on the some unsubstantiated plea of mala fides."

In Sheonandan Paswan Vs. state of Bihar, AIR 1987 SC 877, the Hon'ble Apex Court while dealing with the issue of mala fides in criminal law observed as under:-

"It is well established proposition of law that a criminal prosecution, if otherwise, justifiable and based upon adequate evidence does not become vitiated on account of mala fides or political vendetta of the first informant or the complainant."

Similarly, in State of Bihar Vs. J.A.C. Saldanna, AIR 1980 SC 329, the Apex Court has held as under:-

"It must, however, be pointed out that if an information is lodged at the police station and an offence is registered, the mala fide of the informant would be of secondary importance if the investigation produced unimpeachable evidence disclosing he offence."

38. In Zandu Pharmaceutical Works Ltd. & Ors. Vs. Mohd. Sharaful Haque & Anr., (2005) 1 SCC 122, the Hon'ble Supreme Court held that when an information is lodged and the offence is registered, the mala fides of the informant would be of secondary importance as it is a material collected during the investigation and evidence led in Court which decides the fate of the accused persons. The allegations of mala fide against informant are of no consequence and cannot, by themselves, be the basis for quashing the proceedings. While deciding the said case, reliance had been placed on the earlier judgment in State of Bihar Vs. P.P. Sharma, AIR 1991 SC 1260.

39. In Sarjudas & anr. Vs. State of Gujarat, (1999) 8 SCC 508 the Hon'ble Supreme Court held that there must be cogent evidence of mala fides or malicious intention of the informant or the complainant for taking note of the allegations of mala fide. The bald statement in this respect is not sufficient.

Similar points have been formulated by the Apex Court in State of West Bengal Vs. Mohammed Khalid, AIR 1995 SC 785; State of Delhi Vs. Gyan Devi & ors., AIR 2001 SC 40).

40. In Minakshi Bala Vs. Sudhir Kumar, (1994) 4 SCC 142, the Hon'ble Apex Court held that once the charge had been framed Under Section 240 Cr.P.C., the high Court, in exercise of its revisional jurisdiction, is not justified in invoking its inherent power to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. Similar view has been reiterated by the Hon'ble Supreme Court in State of Madhya Pradesh Vs. S.B. Johri, AIR 2000 SC 665.

41. In Ram Kumar Laharia Vs. State of Madhya Pradesh & Anr., AIR 2001 SC 556, the Supreme Court considered the scope of exercise of revisional powers and held that at this stage, the Court is not permitted to weight the evidence. Whatever is permissible in law is that the court can assess the improbability or absurdity of the statement of witnesses. In case the evidence so collected prima facie suggests direct contact with the accused, the court cannot interfere with the order of framing the charge.

42. In Smt. Om Wati & Anr. Vs. State through Delhi Admn. & Anr., AIR 2001 SC 1507, the Apex Court held that in exercise of the revisional jurisdiction, the High Court is not permitted to interfere at initial stage of framing the charges merely on hypothesis, imagination and far-fetched reasons.

43. In Sanju alias Sanjay Singh Sengar Vs. State of Madhya Pradesh & ors. , AIR 2002 SC 1998, the Hon'ble Apex Court quashed the charges for the reason that the appellant therein had been charged of the offence of abetment and after considering the evidence, the Apex Court recorded the finding that the

ingredients of abetment were totally absent in the facts and circumstances of the case. Similarly, in Ram Ekbak Missir Vs.Ram Niwash Pandey & ors., (2002) 8 SCC 161, the Hon'ble Supreme Court quashed the criminal proceedings wherein the cognizance of the offence was taken after twenty-one years of lodging the first information report and the case had been dragged for more than two decades without any fault on the part of the accused. Moreso, the Apex Court also came to the conclusion that the cognizance had been taken in a mechanical manner. It has further been observed that neither the victim nor the accused should suffer by the mischief of the investigating agency or the staff of the court and such a delay was found to be a ground for quashing the charges.

44. In State of M.P. Vs. Awadh Kishore Gupta & Ors., AIR 2004 SC 517, the Hon'ble Supreme Court explained the scope of inherent powers of the Court to quash the proceedings observing as under:-

"Exercise of power under Section 482 of the Code in a case of this nature is an exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. In envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice on the principle quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint,

the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

45. Thus, in view of the above, the legal proposition can be summerised that the High Court, in exercise of its powers under Article 226/227 of the Constitution or Section 482 Cr.P.C. is not permitted either to weigh the evidence or examine the adequacy of the evidence for framing of the charges and if it comes to the conclusion that there is some prima facie evidence connecting the accused with the crime, the proceedings cannot be quashed at this stage. However, the Court has to examine that in case the ingredients of the offence alleged against the accused are absent in the fact and circumstances of the case and the trial was nothing but an abuse of the process of the court, the court should not hesitate in quashing the charges/proceedings.

46. If the case of the petitioners is examined in the light of the aforesaid settled legal proposition, the relief sought by the petitioners cannot be granted. The petitioners has made allegations of mala fides that the real accused persons have been ousted from the scope of trial by the Investigating Officer taking illegal gratification. There is nothing on record to support the said bald allegation. Such a bald statement of taking bribery cannot be accepted in a writ jurisdiction. More so, a person against whom allegations of mala fide has been made is not impleaded by name. The ratio of the judgments, referred to and relied upon by the petitioners' counsel is not applicable in the instant case as the facts of those cases had been quite distinguishable. It is the duty of the Court to protect the right and interest of the petitioners in view of the statutory provisions of Sections 172 and 173 Cr.P.C. Thus, their grievance that their rights under Articles 21 and 22 of the Constitution are violated, is not worth consideration.

47. Petitioners have annexed the documents wherein they have been furnished the information that they are wanted in Case Crime No. 60 of 2005, under Section 392 I.P.C., Police Station Saidabad, District Mahamayanagar, in pursuance of the F.I.R. dated 13.05.2005, therefore, it is not the case where the petitioners have not been informed as in what case, for what offence they are wanted. In view of the above, they cannot be permitted to agitate that their right to information has been defeated or any of their rights guaranteed under Articles 21 and 22 of the Constitution is being defeated.

48. Petition is accordingly dismissed. However, if the petitioners surrender before the Court below and move application for bail, we request the Court concerned to proceed in accordance with law laid down by this Court in Smt. Amrawati & Anr. Vs. State of U.P. 2004 (50) ACC 742.

Petition Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.06.2006

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE DILIP GUPTA, J.

Special Appeal No. 718 of 2005

Murari Singh Sisodia ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the petitioner:
Sri A.N. Tripathi

Counsel for the Respondents:
Sri Hemendra Kumar

A. Constitution of India, Article 225-Service Law-Transfer order-given effect to can be recalled-writ court should not interfere with such order unless the allegations of mala-fide or the violation of Rule exist.

Held: Para 10

Thus, it becomes abundantly clear from the aforesaid judgment that even if the transfer order has been given effect to, the employer has a power to recall the same and unless the allegations of mala fides are alleged or violation of the Rules are shown, the Writ Court should not generally interfere.

B. Constitution of India, Article 226-Service Law-Transfer order-posting of two officers at the same post-held not proper court expressed its great concern-direction issued of action against the authority be taken-who passed such order-but both the officer should not be posted at the existing place.

Held: Para 13

The question that also draws attention is as to whether salary to two persons can be ordered for being paid as against one post. A single post in our opinion cannot have a double occupancy simultaneously. One post can be occupied by only one person at a time. A post carries with it a designation and a financial burden on the State. There is no rule, brought to our notice, which may contemplate payment of salary to two persons simultaneously against one post.

Case law discussed:
AIR 1991 SC 1605
AIR 1993 SC 2444
AIR 1992 SC 519
AIR 1995 SC-813
1995 (Supply) 3 SCC-214
1995 (Supply) 2 SCC-151
1994 SCC (6) 578
1995 (Supply) 4 SCC-169
AIR 2001 SC 1748
2001 (8) SCC-574
AIR 2002 SC 77
AIR 2003 SC-1115
2003 (7) SCC-403
AIR 2004 SC 4121
2004 (4) SCC-245
AIR 1989 SC-1433
1994 (2) UPLBEC-1030
1987 (5) LCD 253
W.P.No. 2028/85 decided on 10.5.85
W.P.No. 2205/05 decided on 20.5.2005
1995 (2) UPLBEC 1128
1958 ALJ 283
AIR 2004 SC-4272
AIR 1998 SC-925

(Delivered by Hon'ble Dr. B.S. Chauhan, J.)

1. This Special Appeal has been filed against the judgment and order of the learned Single Judge dated 12.05.2005, by which the writ petition of the present appellant against the impugned transfer order has been dismissed, though the petition of the respondent no.5 has been allowed.

2. The facts and circumstances giving rise to this case are that vide order dated 10.07.2004, Dharam Pal Singh, the respondent no.5 was transferred from Agra to Etah. By the same transfer order, the present appellant was transferred from Etah to Jhansi on the post of Farm Superintendent. Appellant filed a writ petition before the Lucknow Bench of this Court challenging his transfer order from Etah to Jhansi dated 10.07.2004. However, the same stood dismissed as withdrawn. The appellant, then made a representation before the State Government and succeeded in getting the transfer order dated 10.07.2004 cancelled vide order dated 27.10.2004. On the basis of the siad order, it is submitted that the appellant tried to join at Etah but by that time, the respondent no.5 had already joined. Being aggrieved, the respondent no.5 filed Writ Petition No.47069 of 2004 challenging the order dated 27.10.2004 on the ground that the order dated 10.07.2004 had already been given effect to as he had joined at Etah on 3rd August, 2004. This Court, vide interim order dated 05.11.2004 stayed the operation of the order dated 27.10.2004. Subsequently, a fresh order dated 09.11.2004 was passed transferring the respondent no.5 from Etah to Jhansi but it was also not given effect to. It was clarified vide order dated 09.02.2005 that the appellant as well as the respondent no.5 would remain at Etah and both will get their salary but the charge and work would be done only by the appellant. The orders dated 09.11.2004 and 09.02.2005 were also challenged by the respondent no.5 moving an amendment application in the said writ petition. The administration again vide order dated 05.03.2005 clarified that the appellant as well as the respondent no.5 would stay at Etah and shall draw their salary but work would be done only by respondent no.5. The appellant challenged the said order by filing Writ Petition No. 23266 of 2005. Respondent no.5 also filed Contempt Petition No. 5371 of 2005 raising the grievance of non-compliance of the order passed by this Court on 05.11.2004 and the said contempt petition was entertained by a detailed order dated 23.02.2005. Both the writ petitions were heard and disposed of by the learned Single Judge taking a view that once the earlier transfer order dated 10.07.2004 had been given effect to, there was no occasion for the State authorities to pass order dated 27.10.2004 nullifying the same as the transfer order stood exhausted. Hence this appeal.

3. The issue of transfer and posting has been considered time and again by the Apex Court and entire law has been settled by catena of decisions. It is entirely upon the competent authority to decide when, where and at what point of time a public servant is to be transferred from his present posting. Whether a transfer order is in the public interest or on administrative ground requires factual adjudication, which is not permissible to be made in a writ jurisdiction. Transfer is not merely an incident of service but a condition of service and is to be passed in public interest and for efficiency in public administration. No employee can claim a right to remain posted at a particular place or for a further period unless his appointment itself is made specifically on a non-transferable post. The writ Court cannot interfere against a transfer order unless shown as an outcome of mala fide exercise of power or in violation of statutory provisions. In absence of these two conditions, the transfer order cannot be a subject matter of judicial scrutiny.

(Vide Union of India Vs. S.L. Abbas, AIR 1993 SC 2444; Shilpi Bose Vs. State of Bihar, AIR 1991 SC 532; Union of India Vs. N.P. Thomas, AIR 1991 SC 1605; Bank of India Vs. Jagjit Singh Mehta, AIR 1992 SC 519; Chief Manager (Tel.) N.E. Telecom Circle Vs. Rajendra Ch. Bhattacharjee, AIR 1995 SC 813; State of U.P. Vs. Dr. V.N. Prasad, 1995 (Suppl) 2 SCC 151; Union of India & ors. Vs. Ganesh Dan Singh, 1995 (Suppl) 3 SCC 214; N.K. Singh Vs. Union of India & ors., (1994) 6 SCC 98; Abani Kante Ray Vs. State of Orissa, 1995 (Suppl) 4 SCC 169; State Bank of India Vs. Anjan Sanyal & Ors., AIR 2001 SC 1748; National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan, (2001) 8 SCC 574; V. Jagannatha Rao Vs. State of A.P. & Ors., AIR 2002 SC 77; Public Service Tribunal Bar Association Vs. State of U.P. & Ors., AIR 2003 sc 1115; State of Rajasthan Vs. Anand Prakash Solanki, (2003) 7 SCC 403; State of U.P. Vs. Gobardhan Lal, AIR 2004 SC 4121; State of U.P. Vs. Siya Ram, AIR 2004 SC 4165; Union of India Vs. Janardhan Debanath, (2004) 4 SCC 245).

4. An employee holding a transferable post cannot claim any vested right to work on a particular place as the transfer order does not affect any of his legal rights and Court cannot interfere with a transfer/posting which is made in public interest or on administrative exigency. In Gujarat Electricity Board Vs. Atma Ram Sungomal Poshani, AIR 1989 SC 1433, the Hon'ble Supreme Court has observed as under:-

"Transfer of a Government servant appointed to a particular cadre of transferable posts from one place to the another is an incident of service. No Government servant or employee of public undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration."

In Union of India Vs. H.N. Kirtania, AIR 1989 SC 1774, the Hon'ble Apex Court observed as under:-

"Transfer of a public servant made on administrative grounds or in public interest should not be interfered with unless there are strong and pressing grounds rendering the transfer order illegal on the ground of violation of statutory rules or on ground of malafide."

5. In view of the above, it is not possible for the writ Court to interfere against an impugned transfer order unless it is shown to have been passed in mala fide/colourable exercise of power or in violation of statutory provisions or it was not required in administrative exigency rather has been passed arbitrarily.

6. Learned counsel for the respondent no.5 placed a very heavy reliance upon the judgment of this Court in Natthi Lal Vs. Director, Rajya Krishi Utpadan Mandi Parishad & Ors., (1994) 2 UPLBEC 1030 wherein it has been held that once the transfer order has been executed, their remains nothing for the State to consider and the transfer order cannot be changed/modified or cancelled nor a fresh transfer order can be passed. The said judgment was delivered by the learned Single Judge of this Court placing reliance upon earlier Division Bench

judgments in Smt. Beena Tripathi Vs. State of U.P. & Ors., 1987 (5) Luck. Civil Decisions, 253; Writ Petition No.2028 of 1985, Indra Bahadur Singh Vs. Basic Shiksha Parishad & Ors. decided on 10.05.1985; and Writ Petition No. 2205 of 1985, Hans Raj & Anr. Vs. Basic Shiksha Parishad & Ors. decided on 20.05.2005, wherein it had been held that after the employee has joined the place to which he was transferred, it was not open to the government to cancel the transfer order.

7. It is a very sorry state of affairs that the learned counsel for the respondent no. 5 is not aware that the said judgment and order has been orverruled by a Full Bench in Director, Rajya Krishi Utpadan Mandi Parishad Vs. Natthi Lal, 1995 (2) UPLBEC 1128, wherein this Court has held that in view of the provisions of Section 21 of the U.P. General Clauses Act, 1904, if an authority has a power to transfer an employee, it has a power to re-transfer or cancel the transfer order and in such a situation, the writ Court has to keep its hands off unless it is proved that the transfer order is in violation of the statutory provisions or has been passed on mala fides. There is no bar for the authority to transfer an employee even if he has joined at the transferred place. The Full Bench placed reliance upon the earlier judgment of this Court in Suraj Narain Vs. The District Magistrate, Kanpur, 1958 ALJ 283, wherein while dealing with the powers of the Statutory Authority under the U.P. (Temporary) Control of Rent and Eviction Act, 1947, it was observed as under:-

"No exception can be taken to the general proposition that the power in an administrative officer to pass an order includes the power to reconsider or cancel it."

The Full Bench explained the law observing as under:-

"We specifically hereby clarify that an order, even if it has been implemented, can be cancelled on other grounds too, including administrative considerations and exigencies of service. An order cancelling the order of transfer, after it has been implemented, would of course, be open to challenge for reasons akin to those on which an order of transfer may be questioned."

8. It is shocking that the learned counsel for the respondent no. 5 has not made any attempt to find out as to whether the judgment referred and relied upon by him still holds the field. In State of Orissa Vs. Nalinikanta Muduli, AIR 2004 SC 4272, the Apex Court expressed its concern about the falling standard of bar and deprecated the practice of citing the overruled judgments observing as under:-

"Members of the bar are officers of the Court. They have a bounden duty to assist the Court and not mislead it. Citing judgment of a Court which has been overruled by a larger Bench of the same High Court or this Court without disclosing the fact that it has been overruled is a matter of serious concern..... All this shows that the matter was dealt with very casually..... It was certainly the duty of the Counsel .....to bring to the notice of the Court that the decision relied upon by the petitioner before the High Court has been overruled by this Court. It was the duty of the learned counsel appearing for the

petitioner before the High Court not to cite an overruled judgement. .....We can only express our anguish at the falling standards of professional conduct."

9. In State of U.P. Vs. Ashok Kumar Saxena, AIR 1998 SC 925, the Hon'ble Apex Court examined the facts of a case where the employee had been transferred vide order dated 07.10.1995; the order was challenged before the High Court and the writ petition was dismissed on 16.10.1995; immediately thereafter, the transfer order dated 07.10.1995 after being implemented/executed, was recalled. This Court had taken a very serious view of the matter and initiated contempt proceedings against the State for disturbing the posting order duly approved by the Court. The Hon'ble Supreme Court after placing reliance upon large number of its earlier judgments, held that "interference by judicial review is justified only in cases of mala fides or infraction of any prospective claim or principle, or where career prospects remain unaffected and no detriment is caused to the concerned employee challenging the transfer order, challenge to the transfer order must be eschewed. The transfer, being an incident of service, is not to be interfered with by the Courts unless it is shown to be clearly arbitrary." The Court further observed as under:-

"The High Court had not and could not have taken-over the administration of the State..... There was, therefore, no bar against the Government or appellant **withdrawing, altering or modifying the order of transfer** passed on 7.10.95..... The High Court was so much obsessed with that idea, it became over-anxious to see that its order, as understood by it, was carried out and the appellant, who had stayed the order of transfer dated 7.10.95, was punished." (Emphasis added).

10. Thus, it becomes abundantly clear from the aforesaid judgment that even if the transfer order has been given effect to, the employer has a power to recall the same and unless the allegations of mala fides are alleged or violation of the Rules are shown, the Writ Court should not generally interfere.

11. It is evident from the judgment and order impugned that the appellant is under suspension and the learned counsel for the appellant is not in a position to deny the said factual position.

12. Be that as it may, it is astonishing that the so-called State Administration has been issuing directions time and again that on one post, two person shall be posted and they shall be paid their salary etc. We fail to understand as under what authority of law, such an order could have been passed and it is a case which requires thorough investigation. The Hon'ble Supreme Court in Chinnasamy P.K. Vs. Govt. of Tamil Nadu & Ors., AIR 1988 SC 78, has laid down that it is most improper to allow a person to be paid salary and other benefits and take no work to him.

13. The question that also draws attention is as to whether salary to two persons can be ordered for being paid as against one post. A single post in our opinion cannot have a double occupancy simultaneously. One post can be occupied by only one person at a time. A post carries with it a designation and a financial burden on the State. There is no rule, brought to our notice, which may

contemplate payment of salary to two persons simultaneously against one post. The word "Pay" has been defined in the Uttar Pradesh Fundamental Rules, contained in Chapter II of Part III of Financial Handbook Volume 2, Part II to IV as follows:-

"21. Pay means amount drawn monthly by a Government servant as –

(i) the pay, other than special pay or pay granted in view of his personal qualifications, which has been **sanctioned for a** post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre."

14. A perusal of the first sentence clearly connotes **"a"** Government Servant granted pay for **"a"** post held by him substantively/officiating or by reason of his position in a cadre. Thus, the rules clearly define payment to **"a"** government servant against **"a"** post which conversely amounts to prohibiting payment to two persons against one post. The stand taken by the respondents of paying salary to two persons and taking work only from one is a clear defiance of logic and rules as well.

Thus, in view of the above, we dispose of this appeal with the following directions:-

(1) An officer not below the rank of Special Secretary of the Department of Agriculture, Government of Uttar Pradesh, Lucknow shall hold a full-fledged enquiry as under what circumstances, any officer of the State could pass an order that on one post two persons shall be posted and paid their salary and one of them shall not work, and would take appropriate action against the said officer who was responsible for passing such an illegal order.

(2) The reasoning given by the learned Single Judge is not supported by law. Therefore, the appeal succeeds to the extent indicated above. The judgment and order impugned dated 12.05.2005 is hereby set aside.

(3) As this seems to be a case where the parties are fighting for ego satisfaction and large number of writ petitions as well as contempt petition have been filed by the appellant as well as the respondent no.5, making the Court a battle ground to achieve their purpose, it is desirable that both the officers be placed somewhere else.

(4) We request the so-called administration to transfer the appellant as well as the respondent no.5 from district Etah to different districts forthwith.

15. A copy of this order be sent by the Registrar of this Court directly to Special Secretary of the Department of Agriculture, Government of Uttar Pradesh, Lucknow for compliance.

Appeal Disposed of.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2005

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

Government Appeal No.646 of 1982

State of U.P. ...Appellant
Versus
Bharthu and six others ...Respondents

Counsel for the Appellant:
Sri R.S. Sengar
A.G.A.

Counsel for the Respondents:
Sri P.N. Misra
Sri Apul Misra
Sri Mahendra Pratap

(A) Indian Penal Code-S-149/325 offence-un law full assembly-cause of death-fatal blunt weapon injuries inflicted-according to eye witnesses Lathi blow not repeated-inference drawn about the common object of unlawful assembly was not murder but to caused the gravies injuries.

Held: Para 22

It is to be noted that lathi blow was not repeated on the head of the deceased, though simple injuries were caused to the three injured witnesses who had come to the rescue of Ram Karan. So, considering all these facts, it should justifiably be inferred that common object of the unlawful assembly was not murder, but only to cause grievous injuries (to Ram Karan). However, a single forceful blow of lathi landed on the head of Ram Karan and he happened to die.

(B) U.P. Children Act 1951-S-2 (4), 27- at the time of occurrence-the age of accused was below 16 years at the time of hearing the appeal about 41 years-No question of sending him approved school-despite of the finding of guilty-entitled to the benefit of children Act.

Held: Para 26

In the instant case also, the benefit of Children Act should be afforded to the appellant Chandradhari. Though the accused respondent Chandradhari was under 16 years of age at the time of incident, but must be about 41 years of age presently. Therefore, there can be no question of sending him to an approved school now. So, we would convict the accused respondent Chandradhari under Sections 147 I.P.C., 325 I.P.C. read with Section 149 I.P.C. and 323 I.P.C. read with Section 149 I.P.C. but no sentence would be passed against him as he is entitled to the benefit of Children Act.

Case law discussed:
1997 SCC 720

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

1. Seven accused respondents were tried in Sessions Trial No.354 of 1980 before the VII Additional Sessions Judge, Azamagarh. They were (1) Bharthu, (2) Bhuwal, (3) Bechoo, (4) Chandradhari, (5) Chander, (6) Sheobaran and (7) Chulli. All of them faced charges under Sections 302 read with Section 149 I.P.C. and 323 I.P.C. Three of them, namely, Bharthu, Bhual and Sheobaran were charged for the offence of rioting under Section 148 I.P.C. as they were allegedly armed with spears and rest under Section 147 I.P.C. being armed with lathis. Bharthu and Bhuwal are real brothers being sons of Bhusi and Chandradhari is the son of Bharthu. All of them were acquitted whereagainst the State has preferred this appeal.

2. One Ram Karan died in the incident. He was the nephew of Raja Ram, informant PW 1, who also happened to be an injured of the felony. Antu PW 2 and Munesar PW 3 also received injuries in the incident which occurred on 5.7.1980 at about 11A.M. in village Chandpur Khalsa, P.S. Nijamabad, District Azamgarh. The report was lodged by Raja Ram PW 1 (nephew of the deceased) the same day at 2.05 P.M. The distance of the police station from the place of occurrence was about 5 miles.

3. The case in its broad essentials, as revealed from the F.I.R. and the evidence adduced in the court was thus: On the fateful day and time, the informant Raja Ram PW 1 was at his house. His uncle Ram Karan was taking the bullocks to his grove for tying them after doing work in his paddy field. On account of earlier litigation and enmity, Bharthu and Bhuwal accused appeared there armed with spears and stopped his uncle Ram Karan from going towards the grove along with bullocks, saying that it was not the Rasta from abadi land. There was heated exchange of words between Ram Karan on the one hand and Bharthu and Bhuwal on the other. Raja Ram also reached on the spot. Meanwhile, the remaining accused respondents also reached there out of whom Sheobaran was armed with spear and rest had lathis. Ram Karan shouted for help and his uncles Antu and Munesar rushed up for his help. The accused persons started launching assault on Ram Karan with lathis and spears. When Raja Ram tried to come to his rescue, he, too, was assaulted by lathis as also Antu and Munesar. Ram Karan injured fell down. Baldhari, Sukhai, Dilram PW 3 etc. reached there and intervened. The accused persons then went away. The condition of Ram Karan was serious. He was removed on a cot, but succumbed to his injuries on the way to police station. Therefore, with the dead body, Raja Ram went to police station and lodged the F.I.R. On the basis of it check report was prepared and the case registered.

4. Dr C.P. Singh PW 6 medically examined Raja Ram, Munesar and Antu in the evening of 5.7.1980 from 6.30 P.M. to 7.10 P.M. The details of their injuries are given below:

Raja Ram:

1. *Contusion measuring 6 cm x 1.5 cm on the right shoulder 10 cm lateral to base of the neck with red colour and local tenderness.*
2. *Contusion measuring 11 cm x 1.5 cm on the outer aspect of the right shoulder joint with red colour and local tenderness.*
3. *Contusion measuring 21 cm x 2 cm on the left side of the back continuing on the right side also, 5.5 cm parallel to medial border of the scapula extending from left flank obliquely upwards, medially with red colour and local tenderness.*
4. *Contusion measuring 10 cm x 1 cm on the left shoulder along the upper border of the left scapula with red colour and local tenderness.*
5. *Abrasion 1 cm x 1 cm on the left side of the chest 2 cm below mid of the left clavicle bone.*
6. *Contusion measuring 4 cm x 1 cm on the dorsum of the left palm bone base of the ring, middle and index finger with red colour and local tenderness.*

All the injuries were simple in nature. Injuries no.1, 2, 3, 4 and 6 were caused by blunt object and injury no.5 was caused by friction. They were fresh.

Munesar:

1. *Contusion 6 cm x 1.5 cm on the outer aspect of right upper arm 12 cm below outer prominence of the left shoulder joint with red colour and local tenderness.*
2. *Contusion measuring 5 cm x 1 cm on the outer border of the left elbow joint with red colour and local tenderness.*

3. *Contusion measuring 7 cm x 1.5 cm on the front of the right forearm, 11 cm below mid of the right elbow joint with red colour and local tenderness.*
4. *Abrasion on the Ist phalangial joint of the middle and ring finger with dried serum on the surface.*

All the injuries were simple in nature. Injuries no.1, 2 and 3 were caused by blunt object and injury no.4 by friction. They were fresh.

Antu:

1. *Contusion 4.5 cm x 2 cm on the outer aspect of the mid of the left upper arm with red colour and local tenderness.*
2. *Contusion 3 cm x 1.5 cm on the dorsum of the base of the left palm just near the base of the index and middle finger with red colour and local tenderness.*
3. *Contusion measuring 17 cm x 2 cm on the mid of the back lying transversely with red colour and local tenderness.*

All the injuries were simple in nature and caused by blunt object. They were fresh.

5. The investigation was taken up by S.I. Narendra Prasad Tripathi PW 7. He inspected the dead body and prepared the inquest report including other necessary papers. After being sealed, the dead body was sent for post-mortem. The spot was inspected by him on 6.7.1980. The investigation was conducted as usual and there is nothing particular to say about it.

6. The post-mortem over the dead body of the deceased was conducted on 6.7.1980 at 3 P.M. by Dr K.C. Chakrabarti PW 5. The deceased was aged about 65 years and about one day had passed since he died. The following ante-mortem injuries were found:

1. *Lacerated wound 2 cm x 1 cm x skull deep on the front of head, 15 cm above bridge of nose.*
2. *Traumatic swelling 38 cm x 30 cm involving left cheek, left temporal, whole scalp (head), right temporal, right side of head and back side.*
3. *Abrasion 3 cm x 2 cm in front of right ear associated with traumatic swelling of right temporal.*
4. *Abrasion 2 cm x 2 cm on the top of right shoulder joint.*

7. On internal examination, clotted blood was found in the skull. Frontal, both temporal and parietal as also occipital bones were fractured. Membranes were ruptured and brain contained clotted blood.

8. The defence was of denial. Bharthu claimed possession over the disputed land. The witnesses were said to belong to one party and on account of enmity, they had allegedly joined hands against them (accused).

9. At the trial, the prosecution examined eight witnesses out of whom Raja Ram PW 1, Antu PW 2, Dilram PW 3 and Munesar PW 4 were witnesses of fact. Three of them, namely, Raja Ram PW 1, Antu PW 2 and Munesar PW 4 were themselves injured. Rest were Doctors, Investigating Officer etc.

10. The trial judge, in the main, held that the witnesses, being connected with each other, were not independent. He

found them to be untrustworthy and their testimony inconsistent with medical evidence. According to him, the investigation was also faulty. He held that the case could not be deemed to be proved.

11. We have heard Sri R.S. Sengar, learned A.G.A. from the side of the State and Sri P.N. Misra, learned Senior Advocate for the accused respondents.

12. Learned A.G.A. has argued that the trial judge committed error in doubting the eyewitness account rendered by the four eyewitnesses out of whom three were themselves injured. He, according to him, also wrongly held that the statements of the eyewitnesses were not consistent with the medical evidence and that the investigation of the case was not fair. It has been urged that the participation of seven accused respondents in the commission of this crime in murdering Ram Karan and causing injuries to three others, namely, Raja Ram, Antu and Munesar was proved to the hilt. The offences, he urged, were committed in the prosecution of the common object of an unlawful assembly having been formed by them. On the other hand, the learned counsel for the accused respondents has tried to support the acquittal. It has been submitted by him that three accused respondents had allegedly wielded spears, but no spear injuries were sustained either by the deceased or the injured persons. So, the manner of assault as spoken by the eyewitness was surrounded in dubious circumstances. He also urged that the accused respondent Chandradhari was less than 16 years of age at the time of the alleged incident and, in any case, he was entitled to the benefit of Children Act.

13. The record of the case is before us and we have carefully examined it to cross check the findings of the trial judge and to weigh the worth of the arguments advanced from the two sides.

14. We find that Raja Ram PW 1, Antu PW 2, Dilram PW 3 and Munesar PW 4 rendered eyewitness account of the incident. Raja Ram PW 1 is the informant. He and the eyewitnesses Antu PW 2 and Munesar PW 4 are injured also. Raja Ram PW 1 is the nephew of the deceased Ram Karan and Antu PW 2 and Munesar PW 4 are the real brothers of the deceased. Dilram PW 3 is an independent witness resident of the same village whose name finds place in the F.I.R. too. Raja Ram PW 1 narrated the prosecution case as set out earlier that on the fateful day at about 11 A.M. his uncle Ram Karan was taking the bullocks to his grove for tying them. On account of enmity and the dispute over the land, the accused respondents Bhartu and Bhuwal (brothers) appeared armed with spears and stopped his uncle from going towards the grove along with bullocks, saying that it was not Rasta. There was exchange of hot words between Ram Karan on the one hand and Bharthu and Bhuwal on the other. He also reached there. His uncles Antu and Munesar also reached there. Meanwhile Sheobaran, Bechu, Chandradhari, Chandar and Chulli also came there. Out of them, Sheobaran was armed with spear and rest had lathis. All of them started attacking his uncle Ram Karan with their weapons. He tried to save, but was assaulted by lathis. Ram Karan was injured and fell down. Antu and Munesar were also assaulted by the accused with lathis. Then Baldhari, Sukhai, Dilram etc. reached there and intervened. He gave topography too that

the grove of his family was in the north eastern side of the abadi land through which Ram Karan was taking the bullocks to the grove. He and his uncle were residing in the same house separately, the door of which was in the west. Towards north was the abadi land. In between, there were two houses. Through the abadi land, there was passage and cattle used to pass through it from before the occurrence. His Madai was in the north and that of Bharthu accused was towards west and both of them had possession over this land from before the occurrence. There was a civil case also regarding this land. Bharthu used to ask him to remove the Madai but he was not inclined to oblige him and the relations between the two sides were strained.

15. As we said, Raja Ram PW 1, Antu PW 2 and Munesar PW 4 are also injured having been assaulted by the accused respondents by lathis. We have set out the details of the injuries in the earlier part of the judgment. As would appear, all of them received blunt weapon injuries which were simple. Dilram PW 3 had his house about 60 paces away in west southern side of abadi land, having exit and Sehan in northern side. He clarified that the disputed land was visible from his house and the same was in the use of the villagers in general. He further stated that Madais of Ram Karan and Bharthu were there on this land. Hearing shouts, he had reached the spot and witnessed the incident. He was seemingly an independent witness. It could not be shown by the accused respondents that either he was thick with the prosecution side or inimical to them. His presence was probablised by the fact that his house was quite nearby. The eyewitnesses Raja Ram PW 1, Antu PW 2 and Munesar PW 4, being themselves injured, their presence at the spot could not be doubted at all. It is of no consequence that they were closely related inter se and also qua the deceased Ram Karan. Rather, their testimony inspires judicial confidence that they rushed up to the rescue of Ram Karan when the exchange of hot words took place between him on the one hand and the accused respondents Bharthu and Bhuwal on the other over issue of taking of bullocks by Ram Karan deceased through abadi land.

16. However, it is noted from the testimony of all the eyewitnesses that the deceased did not sustain any spear injury. The deceased Ram Karan as also the three injured witnesses Raja Ram PW 1, Antu PW 2 and Munesar PW 4 sustained only lathi injuries. It would be recalled that as per the prosecution, Bharthu, Bhuwal and Sheobaran were armed with spears.

17. So far as Bharthu is concerned, he was the root cause of the incident. His presence at the spot as participant of the incident is beyond question. We note that he had even lodged an F.I.R. on that very day against Raja Ram PW 1, Antu PW 2, Siya Ram and Ram Karan deceased under Sections 323, 504/506 I.P.C. (Ext. Ka-16) and it was proved on record by Constable Rajbali Mishra PW 8. This report was lodged on 5.7.1980 at 12.15 P.M. showing the time of incident as about 8 A.M. To come out of the difficult situation, the defence even denied to have lodged any such F.I.R. as per the suggestion made to Rajbali Mishra PW 8. We have not the slightest doubt that after committing this crime with others as claimed by the prosecution, he (Bharthu) hurriedly lodged the F.I.R. Ext Ka-16 against Antu, Siya Ram, Raja Ram and

Ram Karan showing the incident of 8 A.M. He did so to create false defence. Later on, however, he retreated on legal advice. The lodging of this F.I.R. was disowned. So, to come to the point, the presence and participation of Bharthu in this incident is not to be doubted at all. May be that the spear held by him could not be used from the right side to strike Ram Karan or the other three injured of the felony. But, it is doubtless that he was one of the members of the unlawful assembly committing the offences in the prosecution of common object of such assembly. However, the other two allegedly spears wielding accused respondents Bhuwal and Sheobaran deserve to be afforded the benefit of doubt because of the absence of any spear injury. It was likely that when five persons participated in the assault, four (Bechu, Chandradhari, Chandar and Chulli) were armed with lathis and one (Bharthu) was armed with spear (though no spear injury was sustained by the deceased or three injured). But it would be too strange coincidence to believe that three out of seven assailants wielded spears but no spear injury was sustained either by the deceased or by the remaining three injured persons. It should be observed at the risk of repetition that the presence of Bharthu in the incident is beyond pale of doubt.

18. We do not see that there was any inconsistency between the ocular testimony and medical evidence. The post-mortem report of Ram Karan shows that he received a forceful lathi blow on his head. The impact was so tremendous that underneath frontal, temporal, parietal and occipital bones were fractured. The ante-mortem injury no.2 was swelling 38 cm x 30 cm on left cheek and temporal region which could be owing to the impact of lathi injury. Injuries no.3 and 4 were abrasions. To be short, the fatal injury was the single forceful lathi blow that landed on the head of the deceased. As pointed out earlier, the remaining three injured Raja Ram PW 1, Antu PW 2 and Munesar PW 4 received blunt weapon injuries capable of being caused by lathis. So, the question of any inconsistency between ocular version and medical evidence does not arise at all. The finding of the trial judge to the contrary has no basis.

19. The finding of the trial judge as to the alleged faulty investigation also did not produce any adverse effect on the veracity of the witnesses and the prosecution case. The trial judge has recorded in his judgement that the Investigating Officer did not take in possession the blood stained clothes of the injured; on check report there was no signature and date of the C.O.; the letter for medical examination showed that the crime number was mentioned in different ink and there appeared to be interpolations, he did not take search of the houses of the accused persons; the case diary did not show as to where he halted in the night of 5/6.7.1980. We are sure that these and other like insignificant aspects did not make a dent in the prosecution case justifying the throwing away the testimony of the eyewitnesses overboard and to discard the prosecution case in toto. The Supreme Court has repeatedly emphasized that faulty investigation should not be a ground of acquittal. In the case at hand, the lapses in investigation recorded by the trial judge do not even go to the root of the matter. There were three eyewitnesses themselves injured of the felony and the fourth one

was an independent witness residing nearby the place of incident whose name found place in the F.I.R. also.

20. It is the duty of the court to separate the grain from the chaff of exaggerations by carefully scrutinizing the evidence brought on record. Letting the guilty escape is not doing justice according to law. Justice cannot be rendered sterile by exaggerated devotion to the concept of benefit of doubt. By process of intelligent reasoning, the court is required to act upon acceptable part of the evidence and to impart justice accordingly.

21. On careful and cautious scrutiny of the evidence on record, the conclusion is inescapable that the five accused respondents Bharthu, Bechu, Chandradhari, Chandar and Chulli formed an unlawful assembly in the prosecution of common object of which complained offences were committed by them. It follows from the above discussion that the participation of the two accused respondents Bhuwal and Sheobaran being doubtful, they are entitled to be given the benefit of doubt. Out of the remaining five named above (Bharthu, Bhechu, Chandradhari, Chandar and Chulli), Bharthu was armed with spear and thus committed the offence of rioting under Section 148 I.P.C. It matters not that no injury of spear was inflicted either on the deceased or three injured. Nonetheless, he was one of the members of an unlawful assembly in prosecution of the common object of which the offences in question were committed. The remaining four, namely, Bechu, Chandradhari, Chandar and Chulli committed the offence of rioting punishable under Section 147 I.P.C. as they were armed with lathis, the injuries of which were inflicted on the deceased and three injured.

22. We now intend to consider as to what offences, other than of rioting, have been committed by the accused respondents Bharthu, Bechu, Chandradhari, Chandar and Chulli. It is obvious that the deceased Ram Karan received a fatal blunt weapon injury on his head which resulted in his death. It is not known as to who amongst the accused was the author of that injury. But Section 149 I.P.C. relates to vicarious liability. To say in other words, all the members of the unlawful assembly are liable to punishment for any or every offence committed by any or more members of that unlawful assembly. The requirement is that the commission of the offence must have been in contemplation of the unlawful assembly either directly or impliedly. In the present case, excluding 'two accused Bhuwal and Sheobaran whose participation in the incident is found to be doubtful, five accused formed an unlawful assembly and participated in this incident. Bharthu had a spear and remaining four, namely, Bechu, Chandradhari, Chandar and Chulli were armed with lathis. Blunt weapon injuries were inflicted on the deceased and three injured witnesses. It is to be noted that lathi blow was not repeated on the head of the deceased, though simple injuries were caused to the three injured witnesses who had come to the rescue of Ram Karan. So, considering all these facts, it should justifiably be inferred that common object of the unlawful assembly was not murder, but only to cause grievous injuries (to Ram Karan). However, a single forceful blow of lathi landed on the head of Ram Karan and he happened to die.

23. Now, we wish to deal with the case of the accused Chandradhari. The learned counsel has argued that he was a child as per U.P. Children Act, being under age of 16 years at the time of incident and as such he cannot be sent to jail even on conviction. We find sufficient force in this argument. It would be noted that the incident took place on 5.7.1980. The statement of the accused respondent Chandradhari was recorded in the trial court on 26.6.1981 in which he gave his age as 16 years. In point of fact, the specific question no.1 was also put to him under Section 313 Cr.P.C. as to what was his age i.e., *'Aap Ki Umra Kya Hai*?' His reply was to this effect: *'Lagbhag 16 Varsh Hai.'* There is no observation/remark of the trial judge with regard to his age.

24. U.P. Children Act, 1951 would be applicable for an incident taking place in 1980. Section 2(4) of the Uttar Pradesh Children Act, 1951 (U.P. Act 1 of 1952) defines a child to mean a person under the age of 16 years. Section 27 of the aforesaid Act says that notwithstanding anything to the contrary in any law, no court shall sentence a child to imprisonment for life or to any term of imprisonment. Section 29 provides, insofar as it is material, that if a child is found to have committed an offence punishable with imprisonment, the court may order him to be sent to an approved school for such period of stay as will not exceed the attainment by the child of the age of 18 years. The Apex court has held in the case of *Bhola Bhagat Vs. State of Bihar (1997) SCC* page 720 that the benefit of Children Act should not be refused on technical grounds. In the instant case also, the benefit of Children Act should be afforded to the appellant Chandradhari. Though the accused respondent Chandradhari was under 16 years of age at the time of incident, but must be about 41 years of age presently. Therefore, there can be no question of sending him to an approved school now. So, we would convict the accused respondent Chandradhari under Sections 147 I.P.C., 325 I.P.C. read with Section 149 I.P.C. and 323 I.P.C. read with Section 149 I.P.C. but no sentence would be passed against him as he is entitled to the benefit of Children Act.

25. In the above circumspectus, we are in judgment that apart from that of rioting as held a little above, the other accused Bharthu, Bechu, Chandar and Chulli also committed the offence under Section 325 I.P.C. read with Section 149 I.P.C. so far as the deceased Ram Karan was concerned and offence under Section 323 I.P.C. read with Section 149 I.P.C. for the injuries caused to Raja Ram, Antu and Munesar.

In view of the foregoing discussion, we partly allow this Government Appeal with the following order of conviction and sentences, quashing the acquittal recorded by the trial judge:

(1) The acquittal of the accused respondents Bhuwal and Sheobaran is affirmed.

(2) The accused respondent Bharthu is convicted for the offence of rioting under Section 148 I.P.C.

(3) The accused respondents Bechu, Chandradhari, Chandar and Chulli are convicted for the offence of rioting under Section 147 I.P.C.

(4) All these five accused respondents are convicted under Sections 325 I.P.C. read with Section 149 I.P.C. and 323 I.P.C. read with Section 149 I.P.C.

(5) As accused respondent Chandradhari was a child as per U.P. Children Act, 1951 at the time of incident, no sentence is passed against him and he is afforded the benefit of Children Act which was then in force.

(6) The accused respondent Bharthu is sentenced to undergo rigorous imprisonment for one year under Section 148 I.P.C. Accused respondents Bechu, Chandar and Chulli are sentenced to undergo six months' rigorous imprisonment under Section 147 I.P.C. Each of these four accused respondents are sentenced to undergo three years' rigorous imprisonment under Section 325 I.P.C. read with Section 149 I.P.C. and to pay a fine of Rs.10,000/- each. In default of payment of fine, each of them shall undergo further rigorous imprisonment for one year. All these four are also sentenced to undergo six months' rigorous imprisonment under Section 323 I.P.C. read over Section 149 I.P.C.

If the fine is realized, half of it i.e. Rs.20,000/- shall be paid as compensation to the wife of the deceased Ram Karan. In case she is not alive, such compensation shall be paid to the other nearest relative of Ram Karan deceased as per Hindu Succession Act, 1956. The remaining amount of fine of Rs.20,000/- shall go to the State exchequer.

(7) Substantive sentences of imprisonment shall run concurrently, but that imposed in default of payment of fine has to be undergone separately.

(8) The accused respondents, namely, Bharthu, Bechu, Chandar and Chulli are on bail. The Chief Judicial Magistrate, Azamgarh shall cause them to be arrested and lodged in jail to serve out the sentences passed against them. He shall report compliance within two months from the date of receipt of this order.

Judgment be certified to the lower court immediately.

Appeal Partly Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2005

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

Civil Misc. Writ Petition No.975 of 2004

Kumar Stone Works & others ...Petitioners
Versus
State of U.P. and others ...Respondents

Alongwith

Civil Misc. Writ Petition Nos.26734, 29568 and 35857 of 2002, and 947, 976, 985, 993, 995, 998, 1003, 1010, 1016, 1021, 1022, 1027, 1030, 1036, 1040, 1041, 1049, 1051, 1055, 1056, 1057, 1060, 1063, 1068, 1079, 1080, 1082, 1083, 1084, 1102, 1109, 1126, 1128, 1140, 1151, 1153, 1163, 1207, 1232, 1234, 1253, 1265, 1278, 1284, 1285, 1288, 1290, 1363, 1364, 1373, 1381, 1390, 1392, 1405, 1412, 1413, 1457, 1460, 1466, 1494, 1495, 1514, 1515, 1524, 1541, 1542, 1547, 1558, 1559, 1598, 1607, 1629, 1661, 1682, 1683, 1700, 1707, 1726, 1784, 1807, 1816, 1817, 1818, 1821, 1838, 1843, and 1850 of 2004

Counsel for the Petitioners:
Sri Shashi Nandan
Sri M.L. Srivastava
Sri W.H. Khan
Sri B.P. Singh
Sri N.C. Gupta
Sri A.K. Gaur
Sri B.K. Narayan

Counsel for the Respondents:
Sri S.M.A. Qazmi
Sri S.P. Kesharwani
C.S.C.

(A) Forest Conservation Act-Section 2 (1)-forest includes-mines and quarries-remained beneath the surface of earth with minerals, Stones and other produce-lockup in the land.

Held: Para 46

From the aforementioned cases, it would be seen that the word "forest' would include all that goes with it and even the mines and quarries which remained beneath the surface of the earth with minerals, stones and other products locked up in the land, will form part of the forest. They are being brought from the forest as during transportation they cross the forest.

(B) U.P. (Transport of Timber and others Forest Produce) Rules 1978-as amended by first Amendment Rules 2004 Rule-5-Transit Fee-petitioner Transporting Stone Chips, Stone grit, Stone ballast, sand, morrum, coal, lime stone etc. in different part of U.P. for sale-whether are they liable to pay the transit fee held-"yes" all goods specified under 2 (4) (1)(iv) are covered under definition of forest-realization of Transit fee held proper.

Held: Para 47

Applying the principles laid down in the aforesaid cases to the facts of present cases, we find that under sub-clause (iv) of clause (b) of sub-section (4) of Section 2 of the Act all the goods in question would be covered as forest produce. All of them are being brought from the forest. In the districts of Sonebhadra, Chitrakoot, Saharanpur and Bijnor, which are major districts where the present petitioners deal with the goods, there are large forest and it cannot be believed that the goods are not being brought from forest land. Even the roads constructed by the Public Works Department pass through forest and, therefore, the goods would be covered under the definition "forest produce' referred to above. Thus, they are liable to transit fee. The decision in the case of Indian Mica Micanite Industries (supra), relied upon by Sri N.C. Gupta, wherein the Apex Court has held that services are to be rendered and should broadly corelate with the fee charged would not be applicable in the present case inasmuch as the Apex Court in Sitapur Packing Wood Suppliers (supra) has already held the transit fee leviable under the Rules as regulatory in nature and no quid pro quo is required to be established.

Case law discussed:
2002 (II) ACJ 1170
1971 (2) SCC-236
AIR 1969 Tripura-62
AIR 1978 Bom. 110 (FB)
AIR 1999 Alld. 222
1997 (2) SCC-267
1976 (1) SCC-834
1994 (1) SCC (Supply)413
2000(5) SCC-511
1996(10) SCC-397
2000(3) SCC-525
2003 (1) SCC-70

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

1. In this batch of writ petitions, the petitioners have challenged the realisation of transit fee on transport of stone chips, stone grit, stone ballast, sand, morrum, coal, lime stone, dolomite etc., which they transport within the State of U.P. and sell

to different purchasers. The petitioners have also challenged the validity of the notification dated 14.6.2004 issued by the Government of Uttar Pradesh amending the U.P. (Transport of Timber and other Forest Produce) Rules, 1978 (hereinafter referred to as "the Rules").

2. Civil Misc. Writ Petition No.975 of 2004 is being treated as the leading petition. Briefly stated, the facts of the aforementioned petition are as follows:-

3. According to the petitioners, they have been granted mining lease by the District Magistrate, Sonebhadra, for excavation of boulders, rocks, sand and morrum in the district of Sonebhadra from the plots situated on the land owned by the State Government which do not come within any forest area. The petitioners allege that they do not carry on any mining operation in the forest area. After excavation of boulders, rocks, sand and morrum etc., they transport the goods from the site to the destination by truck. The petitioners convert the stone and boulder into Gitti. It is the case of the petitioners that while transporting the goods, it does not pass through the forest area and they are not using any forest road for the purpose of transportation of their goods. They pay royalty to the State Government under the provisions of the U.P.Minor Minerals Concession Rules, 1963 @ Rs.30/- per cubic metre. Prior to the amendment in the Rules, by notification dated 14.6.2004, a fee of Rs.5/- per tonne of lorry load on timber and other forest produce was payable by the person carrying or transporting the forest produce which the petitioners were paying. However, vide notification dated 14.6.2004, the Rules have been amended and a fee of Rs.38/- per tonne has been levied. The increase of the fee from Rs.5/- to Rs.38/- is under challenge in the present batch of petitions.

4. In the counter affidavit filed by Sri R.P.Mall, Assistant Conservator of Forest, Chopan, Forest Division Obra, district Sonebhadra, on behalf of the respondents 1 to 6, it has been stated that the petitioners are procuring the grit, boulder etc. from the land of village Billi Markundi notified under Section 4 of the Indian Forest Act, 1927 (hereinafter referred to as "the Act"). They are carrying out mining operations in the forest land. It has also been stated that the petitioners of Civil Misc. Writ Petition No.28290 of 2004 are procuring river sand of river Son from the land village Patwah/Chopan and Sasnai notified under Section 4 of the Act. In respect of the writ petitions of the district of Sonebhadra, it has been stated that the notification under Section 4 of the Act was issued in the year 1969-70 and forest settlement process started. However, during the course of the settlement, the Hon'ble Supreme Court in the case of Vanwasi Sewa Ashram's case, vide judgment dated 20.11.1986, directed the forest authorities to decide the legitimate rights of Adiwasis and Girijan living in south of Kaimur hills on their ancestral land holdings. The petitioners have been granted mining leases/permits by the District Magistrate and after the promulgation of the Forest Conservation Act, 1980, the Forest Department strongly opposed the mining operation and the permits were stopped. One Dharmendra Kumar Singh holding a mining lease in village Billi Markundi, filed Civil Misc. Writ Petition No.1126 of 2004 in which it was held that the Forest Conservation Act, 1980 was not applicable to the area notified under

Section 4 of the Act. The State of U.P., feeling aggrieved, filed Civil Appeal No.4956 of 1989 before the Apex Court and the Apex Court, vide judgment and order dated 11.10.1989, had set aside the order passed by this Court. It has held that the Forest Conservation Act, 1980 is applicable and the application for mining permit is to be decided in the light of the provision of the said Act. Subsequently, the Court of the Forest Settlement Officer/Additional District Judge decided the cases holding the land of the area belonging to the State Government without noticing the fact that these lands were notified under Section 4 of the Act. Consequently, a review application was filed by the Forest Department in the Court of the Forest Settlement Officer/Additional District Judge, Anpara, stationed at Obra, district Sonebhadra and vide judgment and order dated 31.5.2003 the Court of the Additional District Judge had upheld the claim of the Forest Department for being a reserved forest area notified under Section 4 of the Act. The order dated 31.5.2003 passed by the Additional District Judge is the subject matter of various writ petitions before this Court in which interim order has been passed to the effect that the Forest Department will not raise any objection or hindrance in the mining operation of the petitioners provided mining lease and mining rights are subsisting. Thus, according to the State respondents, grit, boulder and sand being procured and transported by the petitioners, are found in or brought from the forest and as such the same are forest produce within the meaning of Section 2(4) of the Act. Even the source of river sand is the forest area from where by the flow of water, stones are converted into small particles and accumulated in the river bed and as such sand is also undisputedly forest produce within the meaning of the aforesaid provision. It has also been stated that the Rules was enacted in the year 1978 and Rule 5 thereof initially provided for realisation of transit fee on the forest produce @ Rs.5/- per tonne. Its validity was challenged before this Court. The matter ultimately went up to the Apex Court and in the case of **State of U.P. v. Sitapur Packing Wood Suppliers**, JT 2002 (4) SC 341, the Apex Court has held the levy of transit fee. Since 1978 the transit fee @ Rs.5/- per tonne remained the same till the amendment carried out in the year 2004, i.e., after more than 25 years, whereby the transit fee has been increased to Rs.38/- per tonne.

5. In the rejoinder affidavit filed by Virendra Bahadur Singh, who is one of the petitioners, it has been stated that as far back as on 23.6.1998 the State Government has issued notice stopping of mining operation in the area which comes within 100 meters of the reserved forest area. The notice was challenged before this Court by means of Civil Misc. Writ Petition No.21008 of 1998 which has been allowed vide judgment and order dated 27.1.1999 and this Court has held that the lease being not on the forest land, cannot be cancelled. Further, only those leases which have been granted within 100 meters of the forest land in future can be cancelled. Special Leave Petition filed against the judgment and order dated 27.1.1999, has been got dismissed by the State Government as withdrawn on 14.12.2001. Thereafter, the State Government has taken a decision for allotting an area of 98.200 hectares of the land to the Forest Department in lieu of the disputed 50 hectares of land which has been transferred. According to the writ

petitioners, the Apex Court had permitted the appellate authority to review its earlier decision but such review was to be filed within a period of 30 days from 10.5.1991 and vide order dated 18.7.1994 a direction was issued by the Apex Court that the appellate authority shall function only till 30.9.1994 by which date he was to conclude the hearing of all the appeals and review petitions. Pursuant to the aforesaid order of the Apex Court, the appellate authority had passed an order on 30.9.1994 deciding all the appeals and confirming the finding recorded by the Forest Settlement Officer and as thereafter no review was maintainable in view of the direction given by the Apex Court and no review could have been filed by the Forest Department after 30.9.1994.

6. As there is some variation in the facts of other writ petitions, we deem it proper to briefly state the facts of other writ petitions argued by the learned counsel for the petitioners.

7. In Civil Misc. Writ Petition No.985 of 2004, the petitioners have established stone crushers in rural area of district Saharanpur. They do not have any mining lease. They purchase boulders, stone papples, from the mining lease holders who have been granted mining lease under the provisions of the U.P. Minor Mineral Concession Rules, 1963. According to the petitioners, they are purchasing the aforesaid goods which are raw materials from M/s Abdul Wahid & Company and M/s G.M.V.N., village Banjarawal which is in the State of Uttaranchal. After crushing the stone boulders and stone papples, they get converted into stone grit, stone chips and stone dust which are sold to different purchasers in the State of U.P. They are being transported in vehicles. According to the petitioners, the stone boulders and stone papples which are extracted from the mines under the valid mining lease held by their sellers, are not situate in any forest land and, on the other hand, it is situate on the Government owned revenue land and, therefore, the extracted minor mineral cannot be said to be forest produce. It is the case of the petitioners that they do not use any forest land while transporting the goods and, therefore, the transit fee is not leviable.

8. In Civil Misc. Writ Petition Nos.1010 and 1460 of 2004, the petitioners purchase limestone from different lease holder who are located in Himachal Pradesh and Dehradun (Uttaranchal). The lease-holders excavate limestone from the mines and after its purchase, the petitioners transport it in trucks. According to the petitioners, limestone which is excavated from the mines, is not situate in any forest land and they do not pass through any forest land while in transit and, therefore, the transit fee is not leviable.

9. In Civil Misc. Writ Petition No.1843 of 2004, the petitioner is holding a mining lease in Tehsil Mau, district Chitrakoot. She excavates sand, stone boulders, grit, building stone etc. from her own mining lease area and thereafter sells the same to other persons. According to the petitioners, while in transit/transportation, it is not passing through the reserved forest area or any forest land and, therefore, the transit fee is not leviable.

10. In Civil Misc. Writ Petition No.1607 of 2004, the petitioners hold

mining lease of limestone in the district Sonebhadra. They excavate limestone/dolomite which are major minerals and are used in steel plant, cement factory, chemical and other core industries. The area of lease for mining operation operated by them are outside the forest area and, according to the petitioners, these areas have been given after proper clearance from all concerned departments including Forest Department. After excavating the limestone and dolomite, they send them to various customers. According to the petitioners, they do not use the forest land. They are neither working on the forest land nor utilising their land for any purpose whatsoever and, therefore, the demand of transit fee is wholly illegal.

11. In Civil Misc. Writ Petition No.993 of 2004, the petitioner is engaged in the business of sale and purchase of coal from various dealers within the State of U.P. as also from outside the State of U.P. According to the petitioners, it is not doing any business in any forest produce nor is using the forest land for transportation of its commodity, thus, denying its liability for payment of any transit fee.

12. In Civil Misc. Writ Petition No.1838 of 2004, the petitioners are engaged in the business of trading stone, ordinary sand, Bajari and limestone at Najibabad, district Bijnor. They purchase the minor minerals from Uttaranchal Van Vikas Nigam and after paying all dues and taxes, transport it to their principal place of business at Najibabad, district Bijnor from where the goods are sold to individual buyers. It is alleged that they do not use any forest land and, therefore, there is no liability for payment of transit fee.

13. We have heard Sarvasri Shashi Nandan, learned Senior Counsel, assisted by Sri M.L.Srivastava, W.H. Khan, B.P.Singh, N.C. Gupta, A.K. Gaur, B.K.Narayan, on behalf of the petitioners, and Sri S.M.A.Qazmi, learned Chief Standing Counsel, assisted by Sri S.P. Kesarwani, on behalf of the respondents.

14. Sri Shashi Nandan, learned Senior Counsel, who led the arguments, submitted that admittedly the notification under Section 4 of the Act was issued some times in the year 1969-70 and thereafter no notification under Section 20 of the Act has been issued. Thus, he submitted that land in question from where the mining activities are being carried out by the petitioners in the district of Sonebhadra for which necessary mining lease/permits have been granted, cannot, by any stretch of imagination, be called a reserved forest. He further submitted that in paragraphs 11 and 13 of the writ petition it has been specifically averred that the petitioners are not using any forest land and, therefore, the transit fee under the Rules is not applicable.

15. Sri W.H. Khan, learned counsel who appeared for the petitioner in Civil Misc. Writ Petition Nos.985, 1010, 1460 and 1625 of 2004, submitted that the petitioners are transporting the goods and are not using any forest land. It cannot, by any stretch of imagination, be treated as a forest produce so as to levy the transit fee under the Rules. Sri Khan has relied upon a decision of this Court in the case of **Sonebhadra Miner Mineral Lease Permit Holders Association and others**

v. State of U.P. and others, 2002(II) Allahabad Civil Journal 1170, for the submission that sand is not found in or brought from forest and, therefore, no transit fee is chargeable.

16. Sri B.P. Singh, learned counsel who appeared for the petitioner in Civil Misc. Writ Petition No.1126 of 2004, adopted the arguments advanced by Sri Sahshi Nandan and Sri W.H. Khan, as it related to stone ballast made from stone and boulder excavated under the mining lease/permit from the mines in the district of Sonebhadra.

17. Sri A.K. Gaur, learned counsel who appeared for the petitioner in Civil Misc. Writ Petition No.1607 of 2004, submitted that the limestone and dolomite after excavating under a valid mining lease from the mines in the district of Sonebhadra, which the petitioners are transporting, is outside the purview of the forest produce and no transit fee is payable.

18. Sri B.K. Narayan, learned counsel who appeared for the petitioner in Civil Misc. Writ Petition No.1838 of 2004, submitted that the petitioners are required to pay more fee as compared to other goods which is discriminatory. In the aforesaid case, the petitioners are transporting sand and Bajri excavated from the sites for which the mining lease/permits have been given.

19. Sri N.C. Gupta, learned counsel who appeared for the petitioner in Civil Misc. Writ Petition No.993 of 2004, submitted that the petitioner brings coal from outside the State of U.P. and does not use any forest land. Further, no services are being rendered as the petitioner is not liable to pay any transit fee. He has relied upon a decision of the Apex Court in the case of **Indian Mica Micanite Industries v. The State of Bihar and others**, (1971) 2 SCC 236

20. Sri S.M.A. Qazmi, learned Chief Standing Counsel, submitted that under Section 41 of the Act, the State Government has been empowered to make rules to regulate the transit fee on all timbers and other forest produce. Under clause (a) of sub-section (2) of Section 41 of the Act, the State Government has been empowered to make Rules to prescribe the route by which alone timber or other forest produce may be imported, exported or moved into, from or within the State. Under clause (c), the State Government has been empowered to provide for the issue, production and return of such passes and for the payment of fees therefore. The State Government has further been empowered to make Rules under Section 76 of the Act. According to him, the Rules have been framed under the aforesaid provisions. Rule 3 of the Rules provides for regulation of transit of forest produce by means of passes. Rule 4 specifies the officers and persons who shall have power to issue the passes under the Rules. Rule 5 provides for the fee payable for different classes of passes. According to him, since the year 1978, a fee of Rs.5/- per tonne of capacity was payable on a lorry load of timber and other forest produce, which has been amended and increased to Rs.38/- per tonne by the U.P. Transit of Timber and other Forest Produce (First Amendment) Rules, 2004, published in the Gazette on 14.6.2004, (hereinafter referred to as "the first amendment Rules"). He submitted that the validity of the Rules have been

upheld by the Apex Court in the case of **Sitapur Packing Wood Suppliers** (supra). All the petitioners had been paying the transit fee @ Rs.5/- per metric tonne of lorry load without any protest or difficulty. After more than 25 years, the fee has been revised upwards to Rs.38/- per metric tonne, which cannot be said to be arbitrary. The fee is regulatory in nature and, therefore, rendering of any service or the existence of quid pro quo is not required. He submitted that under Section 2(4) of the Act, "Forest Produce' has been defined. It has been given an inclusive meaning. It does not speak of any forest land and, therefore, the plea of the petitioners that they do not use forest land, is irrelevant for deciding the issue. According to him, under clause (a) of sub-section (4) of Section 2 of the Act, timber, charcoal, coutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, myrabalans and rhinoceros horns are to be treated as forest produce whether they are found in or brought from a forest or not. However, under clause (b) of sub-section (4) of Section 2 of the Act, the items mentions in sub-clauses (i) to (iv) when found in or brought from a forest, are treated as forest produce. They are –

"(i) trees and leaves, and fruits and all other parts or produce not herein before mentioned of trees,
(ii) plants not being trees (including grass, creepers, reeds, and moss), and all parts of produce of such plants,
(iii) wild animals and skins, tusks and horns other than rhinoceros horns, bones, silk, cocoons, honey and wax, and all other parts or produce of animals, and
(iv) peat, surface oil, rock and minerals (including limestone, laterite, mineral oils and all products of mines and quarries."

21. He submits that the goods in question are all covered under sub-clause (iv) of clause (b) of sub-section (4) of Section 2 of the Act and, therefore, they are to be treated as forest produce and liable to transit fee. In support of his aforesaid submissions, he has relied upon the following decisions:-

(i) **Nipendra Chandra Dutta Majumder and others v. Administration of Tripura and others**, AIR 1969 Tripura 62;
(ii) **Janu Chandra Waghmare and others v. The State of Maharashtra and others**, AIR 1978 Bombay 110 (FB);
(iii) **M/s Indian Wood Products Co. Ltd. v. State of U.P. and another**, AIR 1999 Allahabad 222, and
(iv) **T.N.Godavarman Thirumulkpad v. Union of India and others**, (1997) 2 SCC 267.

22. At the outset it may be mentioned here that the validity of the Rules have not been challenged by any of the petitioners and rightly so as its validity has been upheld by the Apex Court in the case of **Sitapur Packing Wood Suppliers** (supra). In the aforesaid case, the Apex Court has held that the transit fee under Rule 5 is clearly regulatory and, thus, it was not necessary for the State to establish quid pro quo.

23. Having given our anxious consideration to the various submissions made by the learned counsel for the parties, we find that the forest produce has been defined in sub-section (4) of Section 2 of the Act as follows:-
"(4) "Forest Produce' includes –

(a) the following, whether found in, or brought from, a forest or not, that is to say-
timber, charcoal, coutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, myrabalans and rhinoceros horns, and
(b) the following when found in or brought from a forest, that is to say –
(i) trees and leaves, and fruits and all other parts or produce not herein before mentioned of trees,
(ii) plants not being trees (including grass, creepers, reeds, and moss), and all parts of produce of such plants,
(iii) wild animals and skins, tusks and horns other than rhinoceros horns, bones, silk, cocoons, honey and wax, and all other parts or produce of animals, and
(iv) peat, surface oil, rock and minerals (including limestone, laterite, mineral oils and all products of mines and quarries."

24. The phrase "that is to say" occurring in clause (b) is exhaustive and indicates the intention of the Parliament to limit the restriction to those goods alone as are specifically mentioned therein, as held by the Apex Court in the case of **State of Tamil Nadu v. M/s Pyare Lal Malhotra**, (1976) 1 SCC 834; **Rajasthan Roller Flour Mills Association and another v. State of Rajasthan and others**, 1994 Supp (1) SCC 413; **Telangana Steel Industries and others v. State of A.P. and others**, 1994 Supp (2) SCC 259; and **Commissioner of Sales Tax, M.P. v. Popular Trading Company, Ujjain**, (2000) 5 SCC 511. Thus, only the items mentioned in various sub-clauses of clause (b) of sub-section (4) of Section 2 would be forest produce when found in or brought from forest.

25. From a reading of the aforesaid provision, it would be seen that there is no reference to any reserved forest area. Any of the items mentioned in clause (a) of the aforesaid provision would constitute a forest produce whether found in or brought from a reserved forest area or not. However, under clause (b) of the aforesaid provisions, any of the items mentioned in the various sub-clauses would be a forest produce if found in or brought from a forest. Thus, the plea advanced by Sri Shashi Nandan, learned Senior Counsel, that the petitioners excavated the goods/items from the mines/areas which are not situate in a reserved forest area, is of no consequence. The challenge to the order passed by the Forest Settlement Officer/Additional District Judge, Sonebhadra on the review applications filed by the Forest Department will also not have any material bearing on the issue involved in the present writ petitions. To set the record straight, it may be mentioned here that this Court in the case of **Smt. Pyari Devi v. State of U.P. and others,** 2003 (5) AWC 3945, has upheld the powers of the Additional District Judge to correct a mistake which was apparent in the order dated 23.2.1992. In the aforesaid case, the application made by the Forest Department, being Review Application No.2180 of 1992, Forest Department v. Mahendra Singh and others, has been allowed and an order directing for constituting a reserved forest under Section 4 of the Act has been upheld, which order has been passed pursuant to the directions given by the Apex Court in Writ Petition No.1081 of 1992, Banwasi Sewa Ashram v. State of U.P. and others.

26. We find that in the case of **Suresh Lohiya v. State of Maharashtra and another**, (1996) 10 SCC 397, the Apex Court while considering the definition clause of sub-section (4) of Section 2 of the Act, has held that the legislature having defined "forest produce', it is not permissible for us to read in the definition something which is not there. It has held as follows:-

"7. The legislature having defined "forest-produce", it is not permissible to us to read in the definition something which is not there. We are conscious of the fact that forest wealth is required to be preserved; but, it is not open to us to legislate, as what a court can do in a matter like at hand is to iron out creases; it cannot weave a new texture. If there be any lacuna in the definition it is really for the legislature to take care of the same"

27. It may be mentioned here that the Apex Court in the case of the **Commissioner of Sales Tax, U.P. v. Lal Kunwa Stone Crusher (P) Ltd.,** (2000) 3 SCC 525, has held that the stone boulders crushed into stone chips and gittis and stone ballast still continues to be stone and they are not commercially different goods to be identified differently for the purposes of sales tax. The Apex Court has held that the stone as such and gittis and articles of stone are of similar nature though by size they may be different. The aforesaid decision has been followed subsequently by the Apex Court in the case of **State of Maharashtra v. Mahalaxmi Stores,** (2003) 1 SCC 70. Thus, the conversion of stone and boulder into Gitti Bajari etc. would remain stone and would come under sub-clause (in this view of the matter,) of clause (b) of sub-section (4) of Section 2 of the Act being products of mines and quarries.

28. From a reading of the provisions of sub-section (4) of Section 2 of the Act, as reproduced hereinbefore, we find that while under clause (a) certain types of produce have been declared to be a forest produce, whether they are found in or brought from a forest or not, under clause (b), in various sub-clauses, the items have been mentioned and for them being a forest produce, it is necessary that they should be found in or brought from a forest.

29. The goods in question do not fall under clause (a) of sub-section (4) of Section 2 of the Act. The can come under clause (b) of sub-section (4) of Section 2 of the Act only if the goods in question are either found in a forest or brought from a forest. The stone quarries situated in the district of Sonebhadra, which are being operated by the petitioners under a valid lease, are in the forest. Even it is assumed that the stone quarries are not in the forest, they would still fall under clause (b) of sub-section (4) of Section 2 of the Act in case the goods are not found but have been brought from a forest. The words "brought from' have not been defined under the Act or the Rules. In order to ascertain its true meaning and real concept, we have to take recourse to various dictionaries and the meaning ascribed therein.

30. In **Collins Cobuild Advanced Learner's English Dictionary, New Edition, the New Shorter Oxford English Dictionary on Historical Principles. Volume I, A-M**, the **World Book Dictionary, Volume I, A-K**, the **Concise English Dictionary, and the**

Random House Dictionary of the English Language, Unabridged Edition, the word "brought' means the past tense and past participle of bring. Thus, we have to see the meaning of the word "bring' as the word "brought' is the past tense and past participle of "bring'.

31. In **P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition (Extensively Revised and Enlarged) Volume 1 A-C, 2005**, the word "brought' means taken; carried.

32. In **Merriam-Webster Online Dictionary**, the word "bring' means to convey, lead, carry, or cause to come along with one towards the place from which the action is being regarded.

33. The **New Shorter Oxford English Dictionary on Historical Principles. Volume I, A-M,** various meanings have been given to the word "bring'. One of the meanings given is "cause to come from, into, out of, to, etc., a state or condition, to an action" and "cause to come or go into a certain position or direction".

34. In the World Book Dictionary, Volume I, A-K, the word "bring' means to come with (something or person) from another place; take along to a place or person; to cause (a ship etc.) to come or go into a certain position or direction.

35. In the **Concise English Dictionary**, the word "bring' has been given the meaning as to cause to come alongwith oneself, to bear, to carry.

36. In the **Random House Dictionary of the English Language, Unabridged Edition**, the word "bring' means to carry, convey, conduct or cause (someone or something) to come with or to or toward the speaker.

37. In **Black's Law Dictionary, Revised Fourth Edition, 1968**, the word "bring' means to convey to the place where the speaker is or is to be, to bear from a more distant to a nearer place, to make to come, procure, produce, draw to, to convey, carry or conduct, move. Frederick v. Great Northern Rly. Co., 207 Wis. 234, 240 N.W. 387, 390. The doing of something effectual; the bringing of someone to account, or the accomplishment of some definite purpose. Landrum v. Fulton, 47 Ohio App. 376, 191 N.E. 917, 918. The word "brought' has been given the meaning as "Taken, carried. United States v. Townsend, D.C.N.Y., 219 F. 761, 762. Past tense of "bring". Frederick v. Great Northern Rly. Co., 207 Wis. 234, 240 N.W. 387, 390, 80 A.L.R. 984."

38. In **Words and Phrases, Permanent Edition, 1658 Todate, Volume 5A, Boatable - B Zone**, the word "brought" is defined as the past tense of "bring", which is defined as to convey to the place where the speaker is or is to be, to bear from a more distant to a nearer place, to make to come, procure, produce, draw to, to convey, carry or conduct, move. Lessee's assumption of all risks of damage or loss to property "brought" upon or in proximity to premises affected only property so brought after execution of lease. Frederick v. Great Northern Rly. Co., 240 N.W. 387, 390, 207 Wis. 234".

39. Thus, from the various meanings given to the word "brought' in various dictionaries, referred to above, it is

absolutely clear that it is a verb and past tense and past participle of the word "bring'. Further, if a thing is being carried from a particular place, it will be taken to have been brought from that place. The dictionary meaning of the word "bring', as given in various dictionaries, referred to above, also conveys the same meaning.

40. The goods involved in the present case are mentioned in sub-clause (iv) of clause (b) of sub-section (4) of Section 2 of the Act as the said clause (b) of sub-section (4) of Section 2 of the Act deals with all surface soil, rock and minerals including lime stone and all produce of mines or quarry. Each of the goods involved in the present petitions are products of either surface soil, rock or minerals or produce of mines or quarries. The only requirement of their being forest produce would be as to whether they are found in a forest or being brought from a forest. So far as the goods involved in the writ petitions relating to district Sonebhadra are concerned, we find that all the items are found in forest except sand. The words "brought from forest" necessarily implies that it passes through the forest. In any event, they are being brought from forest. Similar is the case in respect of the goods involved in other writ petitions which relate to other districts.

41. In the case of **Sonebhadra Miner Mineral Lease Permit Holders Association** (supra), this Court has held that if the minor mineral excavated or not found in or brought from the forest, as defined under the Act, no transit fee can be charged from the petitioners.

42. In the case of **Nipendra Chandra Dutta Majumder** (supra), the Gauhati High Court has held that the expression "forest produce' is defined in sub-section (4) of Section 2 of the Act to include timber whether found in or brought from a forest or not. Hence, it can be stated without demur that the Chief Commissioner is possessed of ample powers to make rules relating to the transit of all timber and other forest produce whether found in or brought from reserved forests or private land.

43. In the case of **Janu Chandra Waghmare** (supra), the Full Bench of the Bombay High Court has held that the expression "forests' in its normal and popular connotation includes all that goes with it, such as, tress with fruits on them, shrubs, bushes, woody vegetation, undergrowth, pastures, honey-combs attached to trees, juices dried on trees, things embedded in the earth like mines and quarries with their produce locked up in the land, wild and stray animals (excluding domestic animals like cows, buffaloes, goats, sheep etc.) living in the forest. The Full Bench of the Bombay High Court has given a wide meaning to the term "forest'. It has held that if the mines and quarries remain beneath the surface of the earth with minerals, stones and other products locked up in the land, these will form part of the forest. While referring to the dictionary meaning given in Oxford English Dictionary, Vol. IV at page 422, the Full Bench has held that even the dictionary meaning clearly shows that forest means an extensive tract of land together with the trees and undergrowth which covers such tract and also includes pastures which intermingled with such tract.

44. In the case of **M/s Indian Wood Products Co. Ltd.** (supra), this Court has held that the State Government is

possessed of ample powers to make rules relating to transit fee on timber and other forest produce, whether found in or brought from the reserved forest or private land.

45. In the case of **T.N. Godavarman Thirumulkpad** (supra) the Apex Court has held that the word "forest" must be understood according to its dictionary meaning which description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purposes of Section 2 (1) of the Forest Conservation Act.

46. From the aforementioned cases, it would be seen that the word "forest' would include all that goes with it and even the mines and quarries which remained beneath the surface of the earth with minerals, stones and other products locked up in the land, will form part of the forest. They are being brought from the forest as during transportation they cross the forest.

47. Applying the principles laid down in the aforesaid cases to the facts of present cases, we find that under sub-clause (iv) of clause (b) of sub-section (4) of Section 2 of the Act all the goods in question would be covered as forest produce. All of them are being brought from the forest. In the districts of Sonebhadra, Chitrakoot, Saharanpur and Bijnor, which are major districts where the present petitioners deal with the goods, there are large forest and it cannot be believed that the goods are not being brought from forest land. Even the roads constructed by the Public Works Department pass through forest and, therefore, the goods would be covered under the definition "forest produce' referred to above. Thus, they are liable to transit fee. The decision in the case of **Indian Mica Micanite Industries** (supra), relied upon by Sri N.C. Gupta, wherein the Apex Court has held that services are to be rendered and should broadly corelate with the fee charged would not be applicable in the present case inasmuch as the Apex Court in **Sitapur Packing Wood Suppliers** (supra) has already held the transit fee leviable under the Rules as regulatory in nature and no quid pro quo is required to be established.

48. It may be mentioned here that under Rule 5 of the Rules, fee is payable at the check chowki or depot established under Rule 15 and specified under proviso (ii) to clause (b) of sub-rule (1) of Rule 4 of the Rules. The Divisional Forest Officers in the authorisation specifies the period during which the authorisation shall remain in force and the route to be adopted and the check chowki or depot through which the produce must pass. If a forest produce is being brought from a forest while in transit, the fee is payable, as it is regulatory in nature.

49. So far as the coal which is being imported from outside the State of U.P. or being transported within the State of U.P. is concerned, it may be mentioned here that during its transportation, it does pass through the forest in Sonebhadra. Thus, the transit fee is leviable.

50. So far as the challenge to the fee of Rs.38/- per metric tonne being arbitrary and discriminatory is concerned, it may be mentioned here that a uniform fee has been levied on all forest produce when it is brought by lorry load. It simply turns out to be 38 paise per Kg. which, in the

present case, can hardly be said to be excessive or exorbitant or prohibitive. No details have been given by the petitioners to establish that the levy of transit fee @ Rs.38/- per metric tonne is prohibitive or confiscatory. Thus, the challenge to it being arbitrary and discriminatory has no substance.

51. In view of the foregoing discussions, we do not find any merit in these petitions. They are dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.5.2005

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 34278 of 2004

Smt. Krishna Bembi ...Petitioner
Versus
Appellate Authority U.P. under the Payment of Gratuity Act, 1972 and others ...Respondents

Counsel for the Petitioner:
Sri Y.S. Bohra

Counsel for the Respondents:
Smt. Sunita Agrawal
S.C.

Payment of Gratuity Act 1972-Section-2(e)-work man-whether a teacher retired from an institution controlled and run by registered society comes within the definition of workman? Held- 'No' even if by order dt. 27.11.70 by wage Board-gratuity become payable to the staff of educational institution.

Held: Para 11

Thus in view of law laid down by the Hon'ble Apex Court, it is clear that the petitioner who was employee/teacher of the institution run by a society registered under the Societies Registration Act of Mawana Sugar Works, Mawana, Meerut can not be held to be covered under the "expression" of "employee' as given in definition clause of the Act even if by the order of Wage Board dated 27th November, 1970 the gratuity payable to the workmen or employees of factory has been made payable to the staff of the educational institution also as contained in Annexure-17 of the writ petition. Thus being a retired teacher of the institution the petitioner is not entitled for gratuity under the provisions of the Act.

Case law discussed:
2004 (100) FLR 601
1988 (9) SCC 42
AIR 1988 SC-1700
1996 (4) SCC-225

(Delivered by Hon'ble Sabhajeet Yadav, J.)

By this petition, the petitioner has challenged the order dated 15.6.2004 passed by appellate authority under the Payment of Gratuity Act, 1972(herein after referred to as Act) whereby the order dated 6.12.2003 passed by Controlling Authority in favour of the petitioner under the aforesaid Act has been set aside.

2. The brief facts of the case are that while working as officiating Head Mistress in Sri Ram Junior High School, Mawana, District Meerut the petitioner was retired from service on attaining her age of superannuation on 1.7.2002. Initially the petitioner has joined the service as teachers in Mawana Sugar Works Primary School run by Mawana Sugar Works, Mawana, district Meerut on 1.11.1966. Later on in the year 1974 Mawana Sugar Works Primary School was transferred under the management of Shri Ram School Society, Mawana.

Consequently a letter dated 29.6.1974 was sent to the petitioner by the Chairman of Shri Ram School Society, Meerut indicating the terms and conditions of the service and option was sought regarding the existing terms and conditions of services of the petitioner mentioned in the letter. Later on another letter to the same effect was also sent to the petitioner on 20.8.1974 whereby the petitioner was asked to give option as to whether the petitioner wants to accept the new terms and conditions of the service or would continue on the old terms and conditions. In pursuance thereof on 22.8.1974 the petitioner wrote a letter to General Manager, Mawana Sugar Works, Mawana giving here option that she would like to remain with Mawana Sugar Works, Mawana on the same terms and conditions of employment. The petitioner did not opt for new terms and conditions of service indicated in the letter referred earlier. Thereafter General Manager, Mawana Sugar Works wrote a letter on 26.9.1974 to the petitioner in pursuance of her option dated 22.8.1974 indicating therein that petitioner would continue under the existing terms and conditions of the service and there would be no change in the existing terms and conditions of service of petitioner. A true copy of letter dated 26.9.1974 is on record as Annexure-5 to the writ petition. On 1.11.1974 the petitioner wrote a letter to the General Manager, Mawana Sugar Works, Mawana mentioning therein that she would remain on the payroll of factory on the same terms and conditions of service. A true copy of the aforesaid letter is on record as Annexure-6 of the writ petition. On 23.11.1988 the petitioner was promoted as Head Mistress of Shri Ram Primary School, Mawana and on 29.8.2001 she was appointed as officiating Head Mistress of Shri Ram Junior High School without any change in the terms and conditions of employment of the petitioner. True copy of the aforesaid letters are on record as Annexures-7 and 8 respectively of the writ petition. It is also stated that the petitioner was being paid salary from Mawana Sugar Works, Mawana and the last cheque issued to the petitioner after retirement was signed by the official of Mawana Sugar Works, Mawana from the accounts of the factory. A Photostat copy of cheque dated 16.7.2002 is on record as Annexure-9 of the writ petition. The petitioner has further stated that she was member of DCM Employees Provident Fund Trust under Mawana Sugar Works, Mawana in which the petitioner's provident fund was deducted from her salary and equal amount was deposited by Mawana Sugar Works, Mawana.

3. After retirement of the petitioner on attaining her age of superannuation the respondents no. 2 and 3 did not pay any gratuity to her. In circumstances, the petitioner has approached the Controlling Authority under the Act and moved an application on 22.7.2002 for payment of gratuity, which was numbered as PGA Case No. 130 of 2002. A true copy of the application dated 22.7.2002 is on record as Annexure-10 of the writ petition. The employer respondents no.2 and 3 filed their written statement inter alia alleging that Shri Ram School Society, Mawana was running the school and in view of the Supreme Court decision a "teacher" is not an "employee" as defined in Section 2(e) of Act and accordingly a "teacher" is not entitled for payment of gratuity under the Act. The written statement filed by the respondents no. 2 and 3 is on record as Annexure-11 of the writ petition. The

petitioner filed her rejoinder affidavit denying the allegations made by respondents no. 2 and 3 in the written statement and reiterated that she was covered by the provisions of Act and was entitled for the Payment of Gratuity under the Act. In support of her case the statement of petitioner was also recorded on 17.2.2003 before the Controlling Authority. After going through the material on record the Controlling Authority vide order dated 6.12.2003 allowed the application of petitioner and directed to pay the petitioner Gratuity amounting Rs.1,71,346.15 with 10% interest thereon since the date of superannuation of the petitioner till the payment is made to her. Feeling aggrieved against the order dated 6.12.2003 the respondents no.2 and 3 filed appeal before the respondent no.1 on 7.1.2004 under Section 7 (7) of the Act, before the appellate authority i.e. Additional Commissioner, Kanpur which was numbered as PGA Appeal No. 5 of 2004. The petitioner has filed objection before the appellate authority. Along with the objection the petitioner filed U.P. State Sugar Wage Board Order dated 27.11.1970, which was published in the gazette on 27.11.1970. According to para 1 (iv) of which the educational staff was covered by the order. According to para 8 all the sugar factories were required to introduce the scheme of payment of gratuity to their employees. The appellate authority has allowed the appeal and set aside the judgement and order passed by Controlling Authority vide impugned judgement and order dated 15.6.2004 hence this writ petition.

4. On behalf of respondents two detailed counter affidavits have been filed in the writ petition; one on behalf of respondent no.2 and another on behalf of respondent no.3. The replies made in both the counter affidavits are substantially the same. Before making parawise reply of the writ petition in para 2, 5 and 6 of the counter affidavit certain facts have been stated which are relevant for the question in controversy involved in the case as such the contents of para 2,5 and 6 of the counter affidavit filed by Sri R.K. Jha on behalf of respondent no. 3 is reproduced as under :

"2.a. That the deponent has read and understood the contents of the writ petition (hereinafter referred to as the petition) and is in a position to reply to the same. However, before giving parawise reply to the contents of the writ petition the preliminary objections are as follows:

*b. That admittedly the petitioner was a teacher in Sri Ram Junior High School, Mawana, District Meerut. The school is run by a society namely Sri Ram School Society Registered under the Societies Registration Act, 1860. The petitioner being a teacher is not entitled to gratuity as the "teacher" does not fall under the definition of "Employee" as contained in Section 2 (e) of Payment of Gratuity Act, 1972. The question has already been decided by the Hon'ble Supreme Court in the case of "**Ahmedabad Pvt. Primary Teachers Association Vs. Administrative Officer**". In view of the same, the instant writ petition is liable to be dismissed on this ground alone.*

c. That so far as contention of the petitioner regarding applicability of the U.P. Sugar Wage Board award dated 27.11.1970 is concerned, it is pertinent to mention here that the Sugar Wage Board dated 27.11.1970 is not applicable to a School or a Teacher. It is only applicable in the case of Sugar Industries. The Wage

Board notification under Section 3 of U.P. Industrial Dispute Act, 1947 is not applicable in the case of School. Moreover, the petitioner has not raised said plea before the Controlling Authority under the Payment of Wages Act nor pleaded the same before even the appellate Authority. The petitioner is estopped from raising the said plea for the first time in the instant petition and there by trying to build a new case. It is further submitted here that the Sugar Wage Board order dated 27.11.1970 has been superceded by the recommendation of third wage board published in the Gazette date 31.01.1991. It may be that recommendation of third wage board for the Sugar Industries were adopted and enforced by the State Govt. under sub clause (b) of Section 3 of U.P. Industrial Disputes Act, 1947 and same was published vide Notification dated 31.01.1991. As such the instant petition is liable to be dismissed on this ground alone.

d. That it is further relevant to mention here that the appointment letter dated 29.06.1974 issued to the petitioner by the society consequent upon the transfer of school under the management of Sri Ram School Society Mawana, District Meerut, clearly states as under :-

CONTINUITY OF SERVICE: *In case any Gratuity Scheme is sanctioned to the teaching staff of our school, you will be given benefit of your previous service with Mawana Sugar Works in this regard i.e. from Ist November, 1966 to 30th June, 1974.*

GENERAL: *You will abide by rules and regulations issued by the Society from time to time.*

The aforesaid condition of payment of gratuity was accepted by the petitioner without protest, the petitioner is estopped from raising such a clean now. It is pertinent to mention here that no benefit of payment of gratuity was given by the answering respondent to any of its teaching staff. The instant petition is frivolous in nature and is liable to be dismissed with cost through out."

"5. That with regard to the contents of paragraphs 3 and 4 to the petition it may be stated that Mawana Sugar Works Primary School, as it was then know was transferred with effect from 22.3.1974 under the Management of Sri Ram School Society, Mawana, which was a society registered under the Societies Registration Act 1960. Consequent upon the transfer of the School under the management of Sri Ram School Society, Mawana, the Society issued another appointment letter dated 29.6.1974 to the petitioner. Vide appointment letter dated 29.6.1974, the petitioner was appointed afresh as Assistant Teacher in Sri Ram Junior High School, Mawana w.e.f. 01.07.1974. The appointment letter was duly signed by the General Manager of Mawana Sugar Works, a Unit of Mawana Sugarns Limited, Mawana who was Ex-Officio Chairman of Sri Ram School Society, Mawana. The appointment letter issued by the Society was accepted by the petitioner. It is incorrect to suggest that any option was sought from the petitioner regarding the acceptance of terms and conditions of the appointment letter dated 29.06.1974."

"6 That the contents of paragraphs 5,6 and 7 of the petition call for no specific reply. However, in this behalf it may be stated that so far as option

exercised by the petitioner to continue to remain in the then existing terms and conditions of Mawana Sugar Works, a Unit of Mawana Sugarns Limited, Mawana is concerned, it my be stated that the said option is not at all relevant so far as claim of the petitioner for gratuity is concerned. By giving option to continue with the old terms and conditions of service, the petitioner would not be entitled for gratuity. At this state it is relevant to mention here that the teachers are not covered with in the definition of "employee" as contained in Section 2 (e) of payment of gratuity Act and hence can raise no claim to gratuity under the Act."

5. The petitioner has also filed rejoinder affidavit against the aforesaid counter affidavits filed by the respondents no. 2 and 3. Since the affidavits have been exchanged between the parties and the case is ripped for final disposal, therefore, the case has been heard finally with the consent of the counsels appearing for both the sides. I have heard Sri Y.S. Bohra, learned counsel for the petitioner and learned Standing counsel for respondent no.1 as well as Smt. Sunita Agarwal for respondents no. 2 and 3 and have also gone through the records.

6. The main submission of learned counsel for the petitioner is that while attaining the age of superannuation as Head Mistress the petitioner was on payroll of Mawana Sugar Works, Mawana as an employee of the aforesaid unit and in view of U.P. State Sugar Wage Board order dated 27.11.1970 which was applicable to the employees of Mawana Sugar Works, Mawana has also covered the educational institution thereunder, therefore, the petitioner is also entitled for payment of gratuity in view of the aforesaid order of Wage Board, under the provision of the Act. Contrary to it learned counsel appearing for respondents has vehemently contended that in view of various pronouncement of the Hon'ble Apex Court since the "teachers" are not covered under the definition of "employees" described in definition clause of the Act, therefore, the petitioner was not entitled for payment of gratuity under the aforesaid Act. Thus the order passed by controlling authority under the Act was wholly erroneous, misconceived without jurisdiction and same was rightly set aside by the Appellate Authority under the Act. In support of her submission learned counsel for respondents has relied upon the decision of the Hon'ble Apex Court rendered in **Ahmedabad Private Primary Teachers' Association Vs. Administrative Officer and others reported in 2004(100) FLR 601**.

7. In view of rival submissions of the learned counsel for the parties a moot question arises for consideration of this Court as to whether the expression "teacher" is covered under the definition of "employee" given under section 2 (e) of the Act or not and as to whether the petitioner who was teacher retired from an institution run and controlled by a registered society of respondent no.2 and 3 is entitled for payment of gratuity under the provisions of Act or not? And further whether it would make any difference on account of fact that institution in question was run and managed by a society registered under the Societies Registration Act or by the Mawana Sugar Works, Mawana which is a factory under the Factories Act, 1948.

8. In order to answer this question it is necessary to point out that an identical

question has received consideration of Hon'ble Apex Court in case of Ahmedabad Private Primary Teachers' Association (supra). In para 7 of the aforesaid decision the Hon'ble Apex Court has taken note of earlier decision rendered in **A. Sundarambal Vs. Government of Goa, Daman and Diu reported in 1988 (4) SCC 42 = AIR 1988 S.C. 1700**, wherein Hon'ble Apex Court had negatived the claim of teachers that they are covered by the definition of "workman' under the Industrial Disputes Act irrespective of the fact that the educational institution was treated to be an Industry yet the teachers were not treated to be workmen. In para 8 of the judgement the reference of **Haryana Unrecognised Schools' Association Vs. State of Haryana reported in 1996 (4) SCC 225** has been made where the Apex Court has considered the definitions of "employee' as contained under Section 2(i) of the Minimum Wages Act, 1948 and held that as "teachers" are not employed for any "skilled", "semi-skilled" or "unskilled", manual or clerical work, it is not open to the State Government to include their employment as a scheduled employment under the Minimum Wages Act. In para 12 of the decision Hon'ble the Apex Court has taken note of the notification dated 3rd April, 1997 issued in exercise of powers under Section 1(3) (c) of the Payment of Gratuity Act, 1972 whereby the provisions of Gratuity Act was extended to educational institutions in which ten or more persons are employed or were employed on the day preceding 12 months. In para 13 of the decision it is held that the teaching staff being not covered by the definition of "employee' can get no advantage merely because by notification educational institutions as establishments are covered by the provisions of the Act. In para 14 of the decision it is held that even on plain construction of the words and expression used in definition Clause under Section 2(e) of the Act, "teachers' who are mainly employed for imparting education are not intended to be covered for extending gratuity benefits under the Act. Teachers do not answer the description of being employees who are "skilled", "semi-skilled" or "unskilled". In concluding part of the decision it is held that the teachers are not entitled for any gratuity benefits under the aforesaid Act.

9. For ready reference para 7, 8, 12, 13 and 14 of the aforesaid decision are reproduced as under:

"*7. The definition of "workman' contained in section 2(s) of the Industrial Disputes Act, 1947 meaning "any person employed in any industry to do any skilled or unskilled manual, supervisory, technical, operational, or clerical work' came up for consideration before this Court when teachers claimed that they are covered by the definition of the Industrial Disputes Act. In the case of* ***A. Sundarambal Vs. Government of Goa, Daman and Diu****, this Court negatived the claim of teachers that they are covered by the definition of "workman' under Industrial Disputes Act thus:-*

"Even though an educational institution has to be treated as an "industry', teachers in an educational institution cannot be considered as workman.

The teachers employed by educational institutions whether the said institutions are imparting primary, secondary, graduate or postgraduate

education cannot be called as "workman' within the meaning of Section 2(s) of the Act. Imparting of education which is the main function of teachers cannot be considered as skilled or unskilled manual work or supervisory work or technical work or clerical work. Imparting of education is in the nature of a mission or a noble vocation. The clerical work, if any, they may do, is only incidental to their principal work of teaching."

"8. The definition of "employee' as contained in section 2(i) of the Minimum Wages Act, 1948 came up for consideration before this Court in the case of ***Haryana Unrecognised Schools' Association Vs. State of Haryana, 1996 (73) FLR 1086 (SC)=1996 (4) SCC 225****. In Section 2(i) of the Minimum Wages Act, the word "employee' is defined to mean: "any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates of wages have fixed'. This Court held that as teachers are not employed for any skilled or unskilled, manual or clerical work, it is not open to the State Government to include their employment as a scheduled employment under the Minimum Wages Act. The relevant observations need to be quoted:-*

"A combined reading of sections 3, 2(i) and 27 of the Minimum Wages Act, 1948 and the Statement of Objects and Reasons of the legislation makes it explicitly clear that the State Government can add to either part of the Schedule any employment where persons are employed for hire or reward to do any work skilled or unskilled, manual or clerical. If the persons employed do not do the work of any skilled or unskilled or of a manual or clerical nature then it would not be possible for the State Government to include such an employment in the Schedule in exercise of power under Section 27 of the Act. Since the teachers of an educational institution are not employed to do any skilled or unskilled or manual or clerical work and therefore, could not be held to be an employee under Section 2(i) of the Act, it is beyond the competence of the State Government to bring them under the purview of the Act by adding the employment in educational institution in the Schedule in exercise of power under Section 27 of the Act. Hence, the State Government in exercise of powers under the Act is not entitled to fix the minimum wage of such teachers. The impugned notifications so far as the teachers of the educational institution concerned are accordingly quashed."

"12. It is not disputed that by notification dated 3rd April, 1997, issued in exercise of powers under section 1(3) (c) of the Payment of Gratuity Act, 1972, the Gratuity Act is extended to educational institutions in which ten or more persons are employed or were employed on any day preceding 12 months. The relevant part of the notification reads as under:-

APPLICABILITY OF THE PAYMENT OF GRATUITY ACT, 1972 IN EDUCATIONAL INSTITUTIONS

"NOTIFICATION NO. 5-42013/1/95-SS II. DATED 3rd APRIL, 1997*.- In exercise of the powers conferred by Cl. (C) of sub-clause (3) of section 1 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specifies the educational institutions in*

which ten or more persons are employed or were employed on any day preceding 12 months as a class of establishments to which the said Act shall apply with effect from the date of publication of this notification:

Provided that nothing contained in this notification shall affect the operation of the notification of the Ministry of Labour S.O. 239 dated 8th January, 1982."

"13. An educations institution, therefore, is an "establishment' notified under section 1(3) (c) of the Payment of Gratuity Act, 1972. On behalf of the Municipal Corporation, it is contended that the only beneficial effect of the Notification issued under section 1(3) (c) of the Act of 1972, is that such non-teaching staff of educational institutions as answer the description of any of the employments contained in the definition Clause 2 (e), would be covered by the provisions of the Act. The teaching staff being not covered by the definition of "employee' can get no advantage merely because by notification "educational institutions', as establishments are covered by the provisions of the Act."

"14. Having thus compared the various definition clauses of word "employee' in different enactments, with due regard to the different aims and objects of the various labour legislations, we are of the view that even on plain construction of the words and expression used in definition Clause 2(e) of the Act, "teachers' who are mainly employed for imparting education are not intended to be covered for extending gratuity benefits under the Act. Teachers do not answer description of being employees who are "skilled', "semi-skilled' or "inskilled'"

10. Thus from a close analysis of law laid by Hon'ble Apex Court in case of **Ahmedabad Private Primary Teachers' Association and other** decisions referred therein it is clear that even if the institution is treated to be industry as held by Hon'ble Apex Court in **A. Sundarambal case (supra)** and in view of the fact of **Ahmedabad Private Primary Teachers' Association case** (supra) wherein in para 12 of the decision Hon'ble Apex Court has noticed the notification dated 3rd April, 1997 issued in exercise of powers under Section 1(3) (c) of the Payment of Gratuity Act which has extended the Act to the educational institutions also in which ten or more persons are employed nevertheless Hon'ble Apex Court has held that since the expression "teachers" do not answer the description of "employee" given in definition clause of Section 2(e) of the Act, therefore, the teachers would not be entitled to get the benefit of provisions of Act despite the provisions of Act has been extended to the educational institution also. Thus I am of considered opinion that even if the order of Wage Board dated 27th November, 1970 has been made applicable to the employees of school or educational staff of the factory, the same cannot confer any benefit of Payment of Gratuity under the Act upon the teacher. It is immaterial that the institution is run and controlled by the society registered under the Societies Registration Act or it is a part and parcel of the Mawana Sugar Works, Mawana which is a factory under the Factories Act.

11. Thus in view of law laid down by the Hon'ble Apex Court, it is clear that the petitioner who was employee/teacher of the institution run by a society registered under the Societies Registration

Act of Mawana Sugar Works, Mawana, Meerut can not be held to be covered under the "expression" of "employee' as given in definition clause of the Act even if by the order of Wage Board dated 27th November, 1970 the gratuity payable to the workmen or employees of factory has been made payable to the staff of the educational institution also as contained in Annexure-17 of the writ petition. Thus being a retired teacher of the institution the petitioner is not entitled for gratuity under the provisions of the Act.

12. Thus on the basis of discussion made herein before the order passed by appellate authority under the provisions of the Act impugned in the writ petition is perfectly justified in given facts and circumstances of the case and cannot call for any interference under writ jurisdiction under Article 226 of the Constitution of India. Since this court has been called upon to decide the validity and legality of orders passed by Controlling Authority and Appellate Authority under the provisions of Act and not the whole entitlement of the petitioner for payment of gratuity under any other statute or law if applicable to such teachers, therefore, I should not be understood to have decided the entitlement of petitioner in respect of payment of gratuity to the petitioner, if she is entitled for payment of gratuity otherwise in any other statute or law applicable to her. Therefore, observations made herein above will not preclude the petitioner for claiming gratuity benefits, if the petitioner is otherwise entitled for the same under any other law, enactment or rules applicable to the teachers like the petitioner at appropriate forum. Thus in view of the aforesaid discussions and observations made, the writ petition fails hence dismissed.

13. There shall be no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2005

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Criminal Appeal No. 3980 of 2002

Abdul Husain @ Soni ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri P.K. Singh (Amicus curiae)

Counsel for the Respondents:
A.G.A.

Practice of Procedure-offence under Section 307/34 IPC Trail Court passed conviction order based upon pleading guilty to the charged offence-Court has to find out-such statement is voluntary, unqualified, unambiguous and untended-accused has not disclosed about the target to when intended to kill to any particular person, individual or group of person-Period in the air towards sky with intent to commit murder not amount the commission of offence of attempt to murder-Trail court is duty bound to observe all precautions to ascertain that the admission of guilt is wholly voluntary and untainted. Held-conviction can not sustained-case remanded for fresh Trail in accordance as the law.

Held: Para 11

Besides the aforesaid lacuna appearing in the case I further find that these 4-5 lines statement of the accused has been

recorded quite cursorily by the trial court. Upon the basis of this statement only the court had awarded punishment after holding him guilty, of rigorous imprisonment of long seven years. This demonstrates to the fact that the court below has taken the whole matter with extreme callousness and no serious thought has been given for recording the conviction of appellant. The court in such cases is duty bound to observe all precautions for the purposes to ascertain that the statement about the admission of guilt given by the accused is wholly voluntary and untainted. In order to test that such statement of admission of guilt is without any pressure etc. the court has to put collateral questions to such accused and find out that such admission of guilt is an intelligent admission. The court has to caution the accused also that the statement of admission of guilt so given by him would render and make him liable for commission of the offence which might result into award of severe punishment against him by the court. If these tests have not been observed by the court, the statement so recorded, cannot be treated as voluntary and intelligent admission of guilt.

Case law discussed:

J.T. 1992 (4) SC 73
1995 NUC-(Alld.) (Vol.42)
1977 Crl.LJ 738

(Delivered by Hon'ble Umeshwar Pandey, J.)

1. Heard Sri Prashant Kumar Singh, learned Amicus Curiae appearing for the accused-appellant and the learned A.G.A.

2. This jail appeal arises out of the judgment and order dated 30th August, 2001 passed by the Addl. Sessions Judge (Court No.4), Allahabad.

3. The appellant was charged for the offence punishable under Section 307 read with Section 34 I.P.C. on the allegations that on 17.10.1994 the police had received information from certain informer (Mukhbir) that two persons were sitting in suspicious state at the railway crossing near Peeer Baba Temple. On this information the police party, headed by the complainant Umesh Chandra Pandey, proceeded for the spot. The police informer was also accompanying them. On their arrival near the aforesaid temple, the informer (Mukhbir) indicated the police party towards the two miscreants, who on getting the clue of the arrival of police became alert.

4. After finding themselves surrounded by the police, they took out their country-made pistols. The police party warned them and asked them to stand up, but the miscreants started firing and running towards the railway crossing. While running also the accused persons fired at the police party, but no one was injured. The police apprehended them at the railway line and on enquiry they disclosed their names as Abdul Husain @ Soni (the appellant) and the second one identified himself as Gulshan. They were taken in custody and on search illicit arms and ammunitions were found from their possession. They were brought to the police station and on the basis of the recovery memo F.I.R. was lodged. After completion of the investigation charge-sheet was submitted in the case, whereupon the accused were committed to the court of Sessions for trial for the offence punishable under Section 307/34 I.P.C.

5. The appellant-accused Abdul Husain @ Soni was charged for the offence punishable under Section 307/34 I.P.C. along with other accused and they pleaded not guilty to the charge and claimed to be tried. Later on the appellant

Abdul Husain @ Soni moved an application before the trial Judge on 20.7.2001 stating that he was pleading guilty to the charged offence and he may be pardoned. On the basis of this plea of being guilty taken by the appellant in his aforesaid application before the trial court, the Addl. Sessions Judge recorded his statement on 30.8.2001. The English rendering of the same is as below:

"Stated on oath that on 17.10.99 at about 18.50 hours at A.D.C. Railway Crossing in the circle of Police Station Kydganj, I, with intention to cause murder, fired from my pistol, but it did not hit anyone. I may be punished suitably."

6. On the aforesaid plea of the accused the trial Judge held that the offence punishable under Section 307 read with Section 34 I.P.C. was fully established and he accordingly convicted him for the offence and sentenced him to undergo rigorous imprisonment for a term of seven years and also to pay a fine of Rs. 10,000/-. The accused Abdul Husain @ Soni thereafter preferred this appeal from jail which has been heard at length and the record of the trial court has also been perused.

7. This conviction is based purely on the plea of the accused admitting himself as guilty of the charged offence. No other material available on the record has been proved nor taken into consideration by the trial Judge for recording his conviction. The learned Amicus Curiae appearing in this case has very precisely submitted that in such cases where the accused pleaded guilty upon which his conviction has been recorded the court has to be very circumspect while passing the conviction order and awarding the sentence. The court has to be satisfied that the admission of the guilt made by the accused in his statement given before it is voluntary, unqualified, unambiguous and untainted. It is further to be found out if the statement so given for pleading the guilt of the offence covers all the ingredients, which are required to be proved by the prosecution. In case the ingredients are not complete, the court ought not to record conviction of the accused, rather it should direct recording of the evidence of the prosecution in the case and to proceed with the normal course of trial. The learned Amicus Curiae has further submitted that in the present case while giving statement of pleading to the guilt the accused appellant has not disclosed as to who was his target and whom he intended to murder. This ambiguity appearing in the statement being so obvious the court below should not have treated it as a complete statement of plea of guilt for recording conviction for the offence under Section 307/34 I.P.C. The murder is to be intended in a case for attempt to murder. If the intention of commission of murder is not demonstrated, the offence under Section 307 I.P.C. would not be made out. In the aforesaid context the learned Amicus Curiae has cited the case law of State of Maharashtra through C.B.I. Vs. Sukhdev Singh @ Sukha & another, reported in JT 1992 (4) SC 73 and Smt. Legeshri Vs. The State, AIR 1955 NUC (Allahabad) 2749 (Vol. 42). He has also cited an American case Robert J. Henderson Vs. Timothy G. Morgan, 1977 Cr. L.J. 738 (1977-49 L. Ed. 2d 108).

8. In the present case the trial court with the above referred statement of the accused has though recorded conviction

of the appellant, but it appears that it has not observed the due care which ought to be taken by the court while recording a confessional statement. If the accused intends to advance a plea of the guilt to the charged offence, the court is required to take certain precautions before it records the conviction in that case. It has to find out that such admission is clear, unequivocal and unambiguous. Besides, the court must also find out that the statement so given by the accused for pleading himself as guilty is sufficient to cover all the ingredients of the offence. Only upon such unqualified and unconditional statement, the court has to record the conviction and not otherwise. In the aforesaid case of Sukhdev Singh (supra) the Hon'ble Apex Court held that the court has to find out if the plea of such admissions of guilt actually tantamount to an admission of all the facts constituting the offence. The observations of the Hon'ble Supreme Court are, "***It is, therefore, essential that before accepting and acting on the plea the Judge must feel satisfied that the accused admits facts or ingredients constituting the offence. The plea of the accused must, therefore, be clear, unambiguous and unqualified and the Court must be satisfied that he has understood the nature of the allegations made against him and admits them. The Court must act with caution and circumspection before accepting and acting on the plea of guilt. Once these requirements are satisfied the law permits the Judge trying the case to record a conviction based on the plea of guilt."***

9. In the light of the aforesaid observations of the Hon'ble Apex Court if the plea of the accused taken in the statement given before the trial court is tested it becomes obvious that the aforementioned statement of the applicant does not contain the fact as to who was intended by him as his target of murder. The statement of the accused recorded on 30.8.2001 is only to the effect that he fired with an intention to kill which did not hit anybody. It is quite clear that the accused has not disclosed his target whom he intended to shoot and kill. Section 300 of the I.P.C. gives the definition of murder and for convenience it may be reproduced as below:

"300. Murder. - Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly. - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

3rdly. - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

4thly. - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

10. There are four conditions, either of which if admitted or demonstrated on record makes the act of the accused covered within the definition of murder. In the present case the appellant was

charged for the attempt of murder. If his act so alleged is not such whereby either of the aforesaid conditions of the murder is covered, it will not amount to an offence of attempt to murder. For committing the offence of attempt to murder the offender has to either cause the injury with intention to cause death or he knows that by the act so done he is likely to cause death of the person targeted or the act done with intention to cause bodily injury to any person intended to be inflicted is sufficient in ordinary course to cause death or he knows that the act is so imminently dangerous that it must, in all probabilities, cause death or such bodily injury as is likely to cause death and he commits such act without any excuse for incurring the risk of causing death or such bodily injury to such individual or group of individuals. The appellant accused if has stated that he fired with an intention to commit murder, such statement does not admit to the fact that any particular person, individual or group of persons was there whom he intended to murder. A statement given by the accused that he fired in air towards the sky with an intention to commit murder, will not amount to commission of an offence of attempt to murder. The words and the sense which appear from the statement of accused given before the court by way of pleading guilt of the charged offence have to be weighed very meticulously and precisely by the courts before the conviction is recorded against him. In this case as has been submitted by the learned Amicus Curiae, the statement of admission of guilt given before the court does not disclose the ingredients of the offence and as such the court should not have recorded his conviction. I find sufficient force in such arguments of the learned Amicus Curiae. The accused has not disclosed the person whom he intended to kill and thus, to commit his murder. This statement of the appellant should not have been treated as sufficient by the trial court to record his conviction under the aforesaid offence punishable under Section 307/34 I.P.C.

11. Besides the aforesaid lacuna appearing in the case I further find that these 4-5 lines statement of the accused has been recorded quite cursorily by the trial court. Upon the basis of this statement only the court had awarded punishment after holding him guilty, of rigorous imprisonment of long seven years. This demonstrates to the fact that the court below has taken the whole matter with extreme callousness and no serious thought has been given for recording the conviction of appellant. The court in such cases is duty bound to observe all precautions for the purposes to ascertain that the statement about the admission of guilt given by the accused is wholly voluntary and untainted. In order to test that such statement of admission of guilt is without any pressure etc. the court has to put collateral questions to such accused and find out that such admission of guilt is an intelligent admission. The court has to caution the accused also that the statement of admission of guilt so given by him would render and make him liable for commission of the offence which might result into award of severe punishment against him by the court. If these tests have not been observed by the court, the statement so recorded, cannot be treated as voluntary and intelligent admission of guilt. Such circumspection and caution has to be necessarily observed by the court before accepting and acting up on the plea of guilt. The observance of these essential formalities for assessing

that the plea of guilt given is wholly voluntary and with full intelligence at the command of the accused, if has not been done by the court, such plea of guilt recorded cannot be treated as sufficient for recording conviction of the accused. In the present case the learned trial Judge has failed to observe all these formalities and in a slip-shod manner has accepted the laconic statement of the accused recorded as admission of the guilt, upon which he has based the impugned judgment of conviction and sentence. In these circumstances, the judgment under challenge in the present appeal cannot sustain in the eye of law and has to be set aside.

12. In result, the appeal is allowed. The impugned judgment and order dated 30.8.2001 is set aside.

13. The case is sent back to the trial court for being taken up for trial and to proceed in accordance with law. It shall, however, be open to the trial court not to reject any fresh plea of guilt by way of admission of the offence if given by the accused-appellant, but it shall observe all these formalities before recording the admission of guilt of the accused and before accepting it for recording conviction against him.

14. Office is directed to send back the record at once to the trial court where the case shall proceed in accordance with law.

Appeal Allowed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2005

BEFORE
THE HON'BLE VIKRAM NATH, J.

Civil Misc. Writ Petition No. 37601 of 2000

Smt. Shail Shukla ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.B. Singhal

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

U.P. Police officers of the Subordinate Rank (Punishment of Appeal) Rules 1991-rule-14-readwith Constitution of India, Article 311 (2)-Service Law-disproportionate punishment-Petitioner a lady police constable-main charge not wearing proper uniform while on duty-Petitioner given her explanation due to injuries sustained in her body due to accident-could not wear the uniform-even then being member of police force could not be dispense with the wearing of proper uniform-No prior permission from superior authority produced-held-guilty of charges-but punishment of dismissal appears to harsh and disproportionate-dismissal order quashed-direction issued for lesser punishment.

Held: Para 21 & 22

In so far as the other charge with regard to not wearing proper uniform while on duty even though the petitioner had tendered explanation that on account of injuries sustained in her body in the accident she could not wear the uniform I am of the view that even though the inquiry has been held to be vitiated but still as the petitioner has not been able

to fully justify her misconduct with regard to the said charge the petitioner being member of police force which requires certain standards of discipline to be maintained could not be allowed to dispense with the wearing of proper uniforms unless permitted in writing by competent authority which admittedly she did not possess. Therefore, without prior permission from superior authority she could not flout the general discipline of the department. The petitioner is therefore, held guilty of the said charge.

Coming to the next question with regard to quantum of punishment, in view of the peculiar facts and circumstances of the case it would be appropriate that petitioner be saddled with a punishment, which may be proportionate to the charge of not wearing uniform on duty. Punishment of dismissal for the said charge appears to be too harsh and disproportionate. In the circumstances, the respondents may consider awarding any minor punishment to the petitioner as she has been found repeatedly not wearing the uniform despite warning given by the officer during inspection.

Case law discussed:

1999 (2) SCC 10

(Delivered by Hon'ble Vikram Nath J.)

1. This writ petition has been filed for quashing the order dated 8.5.2000 dismissing the petitioner from service and the order dated 3.7.2000 passed by the appellate authority dismissing the appeal of the petitioner.

2. Petitioner was lady police constable in U.P. Civil Police since 1980. It is alleged that the petitioner met with a serious accident and had to undergo surgery twice with regard to the fracture in left hand and in the hip joint. The petitioner was suspended on 30.10.98 against which she preferred writ petition in this Court being Writ Petition No. 36557 of 1998, which was disposed of on 26.11.1998 with the direction to conclude the enquiry within a period of three months failing which the petitioner would be entitled for reinstatement. The respondents did not complete the enquiry within the time allowed nor considered the request of reinstatement of the petitioner, as such, the petitioner preferred Contempt Petition No. 716 of 1999 which was disposed of on 11.03.1999 and thereafter she was reinstated. It is alleged that on account of this contempt petition the respondent got annoyed and decided to teach her a lesson. The impugned order of dismissal is an out come of the annoyance of the respondents. The charge sheet was issued to the petitioner only on 15.6.99 after the order in the contempt petition had been passed and the petitioner had been reinstated which itself shows the conduct of the respondents that for a period of eight months no enquiry was initiated against the petitioner till the order in contempt petition had been passed and the petitioner had been reinstated.

3. The charge sheet was issued to the petitioner on 15.6.99 with the allegations that the petitioner was assigned the duty to produce the inmates of the jail for remand before the Magistrate and while performing the said duty the petitioner was not wearing the proper uniform and also allowed the inmates to interact with outsiders and as such she was negligent in her duties. It was further alleged that she deliberately flouted the orders of the superior Officer. The charge as framed was vague and did not refer to any specific incident. Further the charge sheet relied upon six witnesses namely (i) Ram Surat Verma Constable

Civil Police, (ii) Jamuna Prasad Constable Civil Police, (iii) Deo Nath Tiwari Head Constable, (iv) Shyam Sundar Singh Constable Civil Police, (v) Sri R.N. Upadhya Senior Superintendent Central Jail, Naini for proving his report/letter dated 30.10.98 and (vi) Sri Vikram Thakur Asstt. Superintendent, Central Jail, Naini to prove the preliminary enquiry report. The petitioner submitted her reply to the charge sheet and requested for cross-examining the witnesses and further to submit her defence after cross-examining the prosecution witnesses. The inquiry was entrusted to Sri Jugal Kishor, Circle Officer (City II) Allahabad.

4. In the inquiry all the witnesses except one were examined. The main witness R.N. Upadhyay on whose report action was taken was not examined. The inquiry officer submitted his report dated 28.2.2000. The Disciplinary Authority thereafter issued show cause notice dated 29.3.2000 proposing to award punishment of dismissal from service. Petitioner submitted a detailed reply to the show cause notice. However, The Disciplinary Authority not being satisfied with the show cause submitted by the petitioner passed the impugned order of dismissal dated 8.5.2000. Aggrieved by the same, the petitioner preferred the departmental appeal to the Deputy Inspector General of Police, Allahabad Region, Allahabad on 10.5.2000, which also did not find favour and was dismissed by the appellate authority vide order dated 30.7.2000. Aggrieved by the same the present writ petition has been filed.

5. I have heard Sri R.B. Singhal, learned counsel for the petitioner and Sri R.K. Tiwari learned Standing Counsel representing the respondents and have perused the record.

Learned counsel for the petitioner has raised the following points:

(1) The enquiry conducted by the enquiry officer was contrary to the principles of natural justice and fair play and in violation of the statutory provisions for conducting departmental proceedings in as much as the main witness Sri R.N. Upadhyay mentioned in the charge sheet who was also the complainant to prove his report, was not examined in the inquiry thereby vitiating the same and despite request the petitioner was not afforded opportunity to cross-examine him.
(2) The punishment of dismissal awarded to the petitioner was a malafide action and predetermined on account of petitioner having filed contempt petition; and this ground further finds support from the fact that the inquiry Officer was a lower grade/ subordinate Officer to the Officer who had made the complaint and thus the inquiry was biased and influenced by superior officer.
(3) The punishment awarded to the petitioner was disproportionate to the charge leveled against her and was too harsh and excessive.
(4) The disciplinary authority and the appellate authority while awarding the punishment had relied on certain charges alleged to have been proved which were not even mentioned in the charge sheet and no enquiry in that regard had been conducted and the petitioner had no opportunity to defend herself against the said

charges as they were not part of the charge sheet.

(5) The evidence on record before the enquiry officer was not at all sufficient to prove the petitioner guilty of the alleged charges.

(6) The evidence of the prosecution witness Smt. Sarita Chaudhary had been ignored which clearly disproved the charge relating to permitting the inmates to interact with outsiders.

6. Learned Standing Counsel representing the respondents has contended that this Court under Article 226 of Constitution cannot review the decision taken after full departmental proceeding and findings based upon appreciation of evidence could not be interfered with. The order of dismissal and the appellate order confirming the punishment are legal and valid and do not fall within the scope of judicial review under Article 226 of the Constitution.

7. Departmental proceedings were initiated pursuant to the confidential report dated 30.10.98 of R.N. Upadhyay Senior Superintendent, Central Jail Naini, Allahabad in which it was apparently alleged that the petitioner had not been wearing uniform while on duty and had allowed one of the inmates of the jail while being produced on remand before the Magistrate to interact with outsiders and was therefore, guilty of dereliction of duty and also gross negligence. In the charge sheet dated 15.6.99 in the list of evidences/ witnesses at Sl.No.5 the name of R.N. Upadhyay Senior Superintendent, Central Jail, Naini, Allahabad is mentioned and he had to prove his report dated 30.10.98. In reply to the charge sheet the petitioner in her letter had specifically requested to cross-examine all the witnesses who were to be produced on behalf of the prosecution.

8. It needs to be mentioned that the enquiry report incorporates certain facts which itself establish that the enquiry was not conducted in accordance with law and in fair manner.

9. It has been recorded that after close of the prosecution evidence on 6.1.2000 the delinquent petitioner was asked to submit her defence and also to produce any witness or documentary evidence, which she may prefer. In response to the said request the petitioner submitted reply dated 16.1.2000 wherein she specifically requested that R.N. Upadhyay Senior Superintendent, Central Jail, Naini on whose report the entire proceedings were initiated and was also the vital witness has not been produced even though his name is mentioned in the charge sheet as a witness nor the petitioner has been allowed to cross-examine the witness. It was further alleged in the reply that in the absence of the said witness the entire enquiry proceeding stood vitiated and the charge alleged against the petitioner was not proved at all. Having recorded the request of the petitioner, enquiry officer proceeds to mention that Sri R.N. Upadhya the then Senior Superintendent Central Jail Naini on whose report the enquiry had been initiated, was presently posted in the office of Inspector General Lucknow has informed vide letter dated 30.7.99 that his report dated 30.10.98 may be treated to be his statement and therefore, the enquiry officer recorded that the contention of the petitioner that R.N. Upadhya has not been produced is incorrect and on strength of the letter dated 30.7,99 it was held that his statement has been validly recorded. No

reasons were given as to why the petitioner was being deprived of cross-examining the said witness Sri R.N. Upadhyay.

10. The inquiry officer without getting the report of R.N. Upadhya proved in the inquiry proceeded not only to rely upon the report and also relied upon the letter which was annexed with the report dated 30.10.98 on the basis of which it was held that petitioner was helping Km. Anju to meet one person Sunil. The said report was not proved and therefore, no reliance could be placed upon the same not only on this ground but also for the reason that the petitioner despite request did not get any opportunity to cross examine the said witness. On the contrary the inquiry officer relying upon the said report held the petitioner guilty of the said charge and recommended for dismissal of the petitioner from service.

11. The Disciplinary Authority issued show cause notice dated 29.03.2000 as to why petitioner may not be dismissed from service. The petitioner submitted a detail reply to the show cause notice, again reiterating her stand that R.N. Upadhyay Senior Superintendent, Central Jail, Naini was not produced nor opportunity was allowed to cross examine him. Further it was alleged that no evidence had been brought in the inquiry to establish that petitioner had ever allowed any inmate of the jail to meet any stranger.

12. The disciplinary authority proceeded on the same lines as the enquiry officer and relying upon the report of the Senior Superintendent, Central Jail, Naini agreed with the finding of guilt, of not only the charge mentioned in the charge sheet but also proceeded and recorded the findings that the petitioner had been guilty of insubordination and disobedience and was also coming on duty under effect of intoxication. It may be noted that the charge sheet did not mention of being present on duty under effect of intoxication.

13. The rules relating to holding of disciplinary inquiry provide for giving opportunity to the petitioner for cross-examining the witnesses and also to allow the request for producing witnesses. The procedure for holding disciplinary proceedings is provided under Rule 14 and the Appendix I attached to the U.P. Police Officers of the Subordinate Rank (Punishment & Appeal) Rules, 1991 (in short referred to as the Rules) The same are reproduced below for sake of convenience.

"14. Procedure for conducting departmental proceedings.-(1) Subject to the provisions contained in these Rules, the departmental proceedings in the cases referred to in sub-rule (1) of Rule 5 against the Police Officers may be conducted in accordance with the procedure laid down in Appendix 1.

Appendix-1
Procedure relating to the conduct of departmental proceedings against Police Officer.
(See Rule 14 (1)]

Upon institution of a formal enquiry such Police Officer against whom the inquiry has been instituted shall be informed in writing of the grounds on which was proposed to take action and shall be afforded an adequate opportunity of defending himself. The grounds on

which it is proposed to take action shall be used in the form of a definite charge or charges as in Form 1 appended to these Rules which shall be communicated to the charged Police Officer and which shall be so clear and precise as to give sufficient indication to the charged Police Officer of the facts and circumstances against him. He shall be required, within a reasonable time, to put in, in a written statement of his defence and to state whether he desires to be heard in person. If he so desires, or if the inquiry Officer so directs an oral enquiry shall be held in respect of such of the allegation as are not admitted. At that enquiry such oral evidence will be recorded, as the Inquiry Officer considers necessary. The charged Police Officer shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish: provided that the Inquiry Officer may, for sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the finding and the ground thereof. The Inquiry Officer may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged Police Officer.

14. Further Article 311(2) of the Constitution also provides for a reasonable opportunity to the employee in any departmental proceedings where major penalty is proposed. The inquiry officer having declined either to produce Sri R.N. Upadhyay or to allow opportunity of cross-examination to the petitioner clearly violated the statutory provisions for holding the disciplinary proceedings thereby vitiating the inquiry.

15. It has however been mentioned in the order of dismissal that the petitioner was given opportunity to cross-examine the other witnesses and therefore, even if Sri R.N. Upadhyay had not been produced and had not been cross-examined the petitioner could not disprove the charge. The observations are totally contrary to the fundamental principles of departmental proceeding, and also contrary to the statutory procedural safe guards in awarding major punishment. The burden is on the department to prove the charge. The petitioner cannot be asked to disprove unless the prosecution discharges its burden of proving the charge.

16. On behalf of the prosecution Constable 323 Shyam Sundar Singh, Head Constable 55 Sri Jamuna Prasad, Constable 1733 Ram Surat Verma, H.C. 215 Deo Mani Tiwari, Asstt. Superintendent Central Jail Nani Sri Vikram Thakur who had made the preliminary investigation and lady constable 710 Smt. Sarita Chaudhari had been produced. The first four witnesses had only deposed to the effect that the petitioner had not been wearing uniform on duty. Sri Vikram Thakur had proved his preliminary enquiry report and lady constable Smt. Sarita Chaudhary had also deposed only about not wearing of proper uniform. At best the only charge for which evidence was available on record was with regard to not wearing the uniform while on duty. The other charge with regard to the jail inmates being allowed to interact with outsider was based on the report of Sri R.N. Upadhyay. The said report had neither been proved nor petitioner was given opportunity to cross-examine Sri R.N. Upadhyay. The said charge therefore could not have been

held to be proved as there was no admissible evidence in that regard. In the circumstances, the only evidence available on record was with regard to the charge of not wearing proper uniform while on duty. Such a charge even if found proved could not result into punishment of dismissal from service.

17. The procedure adopted in the inquiry, the observations made by the inquiry officer, the observations and findings recorded in the impugned orders do not inspire confidence that everything was done in a fair and impartial manner. There are clear indications that it was case as if decision had been taken before conducting the inquiry and it was only a show of formalities. The dates referred to in the beginning of this judgment with regard to suspension, stay by the High Court, notices issued in contempt, revocation of suspension, thereafter issue of charge sheet, inquiry by an officer lower in rank to the officer making the complaint, denial of opportunity in the inquiry if taken up together lead to the inescapable conclusion that the inquiry was not fair and impartial. It was not conducted in accordance with the procedure provided under law.

18. Learned counsel for the petitioner has relied upon the decision of the Apex Court in the case of **Kuldeep Singh Vs. Commissioner of Police and others reported in 1999(2) SCC page 10**. This case also related to lady police constable and is somewhat similar with the facts of the present case. The main complainant was not produced in departmental enquiry and the evidence with regard to the charge was lacking. In the circumstances Supreme Court set aside the order of punishment holding as follows in paragraphs 32 and 42 of the judgment.

32. *Apart from the above, Rule 16(3) has to be considered in the light of the provisions contained in Article 311(2) of the Constitution to find out whether it purports to provide reasonable opportunity of hearing to the delinquent. Reasonable opportunity contemplated by Article 311(2) means "hearing" in accordance with the principles of natural justice under which one of the basic requirements is that all the witnesses in the departmental enquiry shall be examined in the presence of the delinquent who shall be given an opportunity to cross-examine them. Where a statement previously made by a witness, either during the course of preliminary enquiry or investigation, is proposed to be brought on record in the departmental proceedings, the law as laid down by this Court is that a copy of that statement should first be supplied to the delinquent who should thereafter be given an opportunity to cross-examine that witness.*

42*. The enquiry officer did not sit with an open mind to hold an impartial domestic enquiry, which is an essential component of the principles of natural justice as also that of "reasonable opportunity" contemplated by Article 311(2) of the Constitution. The "bias" in favour of the Department had so badly affected the enquiry officer's whole faculty of reasoning that even non-production of the complainants was ascribed to the appellant, which squarely was the fault of the Department. Once the Department knew that the labourers were employed somewhere in Devli Khanpur, their presence could have been procured and*

they could have been produced before the enquiry officer to prove the charge framed against the appellant. He has acted so arbitrarily in the matter and has found the appellant guilty in such a coarse manner that it becomes apparent that he was merely carrying out the command from some superior officer who perhaps directed "fix him up".

19. In view of what have been stated above and also considering the law laid down by Supreme Court in the case of **Kuldeep Singh (Supra)** the facts of which are similar to the present case, the enquiry proceedings stands vitiated and could not have been made basis for awarding punishment of dismissal.

20. It has also come in the inquiry report that the petitioner who had claimed to be not physically fit on account of an accident in which she had suffered fracture of the hip joint and in the left hand and a rod had also been implanted to support the bones of the left hand and that she had fainted twice while performing her duty of producing the inmates before the Chief Judicial Magistrate as she had difficulty in climbing five stories of building and on account of which, she had been admitted in the Government Civil Hospital.

21. In the circumstances there being no evidence with regard to the charge of allowing inmates of the jail to interact with outsider the punishment on that charge cannot be upheld. In so far as the other charge with regard to not wearing proper uniform while on duty even though the petitioner had tendered explanation that on account of injuries sustained in her body in the accident she could not wear the uniform I am of the view that even though the inquiry has been held to be vitiated but still as the petitioner has not been able to fully justify her misconduct with regard to the said charge the petitioner being member of police force which requires certain standards of discipline to be maintained could not be allowed to dispense with the wearing of proper uniforms unless permitted in writing by competent authority which admittedly she did not possess. Therefore, without prior permission from superior authority she could not flout the general discipline of the department. The petitioner is therefore, held guilty of the said charge.

22. Coming to the next question with regard to quantum of punishment, in view of the peculiar facts and circumstances of the case it would be appropriate that petitioner be saddled with a punishment, which may be proportionate to the charge of not wearing uniform on duty. Punishment of dismissal for the said charge appears to be too harsh and disproportionate. In the circumstances, the respondents may consider awarding any minor punishment to the petitioner as she has been found repeatedly not wearing the uniform despite warning given by the officer during inspection.

23. Accordingly, the writ petition succeeds and is allowed. The impugned order of dismissal dated 8.5.2000 and order of appellate authority dated 30.7.2000 are set aside. It would however be open to the respondents to award any lesser punishment as observed above.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2005

BEFORE
THE HON'BLE VIKRAM NATH, J.

Civil Misc. Writ Petition No. 9209 of 2002

Satendra Kumar Sharma ...Petitioner
Versus
State of U. P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Jaiswal

Counsel for the Respondents:
S.C.

U.P. Police officers of the Subordinate Rules (Punishment of Appeal) Rules 1991-Rule 14 (5) Appendix-I- formal enquiry-petitioner a Police Constable-subjected to face disciplinary proceeding for unauthorized absence from duty-Notice to face the disciplinary proceeding-regarding personal hearing given by providing 3 days time would be reasonable 15 days time would be reasonable period-enquiry in contravention of the Rule-vitiated-dismissal order Quashed.

Held: Para 14

In the inquiry the petitioner would have had the opportunity to establish their correctness. Since there has been no finding by the Inquiry Officer on the genuineness or otherwise of the medical certificates their rejection by the disciplinary authority amounts to denial of opportunity.

Case law discussed:
1998 (7) SCC-569

(Delivered by Hon'ble Vikram Nath, J.)

1. This writ petition is directed against the order dated 15.05.2000, whereby the petitioner was dismissed from service and also the order dated 10.01.2002, whereby the appeal against the order of dismissal has also been dismissed.

2. The petitioner, who was working on the post of Sub Inspector, Civil Police at the relevant time, was posted at Mathura. By order of the DIG Kanpur Zone, dated 29.04.1999 the petitioner was transferred from Mathura to Etawah. According to the petitioner, he was relieved on 11.05.1999, whereas according to the department he was relieved on 05.05.1999. Whatever the case may be, the petitioner was to join within one week from the date he was relieved. After being relieved from Mathura the petitioner did not join at Etawah and remained absent without any intimation or notice to the department. The respondents, after giving warning and notice to the petitioner suspended him vide order dated 23.02.2000. Thereafter, charge sheet was issued to the petitioner on 26.02.2000, which was sent at his residence in district Bulandshahr, but he was not available and, therefore, the notice was affixed at his house in district Bulandshahr. Thereafter, again on 06.03.2000, another copy of the charge sheet was sent at his residence in village Nevada, Post Office Chandel, Police Station Kotwali Dehat, District Bulandshahr. When the petitioner was not found at his residence, again the notice was affixed at the main entrance of the house in presence of local witnesses. The Enquiry Officer initiated proceedings and fixed 22nd March 2000 for evidence for which again intimation was sent on 16.03.2000 at Bulandshahr address. Notice was again affixed at the main entrance on 17.03.2000. The petitioner

still did not turn up. The next date fixed for recording evidence was 28.03.2000, for which again notice was sent first at Bulandshahr address when his brother Prem Dutt Sharma informed the special messenger that the petitioner was residing at house No. 100, Suhag Nagar, Awas Vikas Colony, Firozabad and, therefore, it was transmitted there. When the special messenger reached at Firozabad address the petitioner was not available. However, the petitioner's daughter Km. Swati Sharma was served with the notice on 26.03.2000. Again on 28.03.2000 the petitioner did not appear, therefore, the Enquiry Officer proceeded with recording of the evidence of the prosecution witnesses namely, Constable Sushil Kumar, ASI Ram Vishal Singh, and Circle Officer police lines, Etawah Sri Aditya Prakash Sharma.

3. Witness constable Sushil Kumar stated in his statement that he had taken notice for service and prove the service of notice. ASI Ram Vishal Singh deposed that the petitioner had been relieved on 05.05.1999 and also confirmed the statement given by him in the preliminary enquiry. Sri Aditya Prakash Sharma, Circle Officer Etawah, deposed that after being relieved on 05.05.1999, the petitioner could have reported latest by 13.05.1999, but he did not report at Etawah, thereafter, he was assigned the preliminary enquiry and he submitted his report on 29.01.2000.

4. The Enquiry Officer despite the evidence having concluded on 28.03.2000 again gave one more opportunity to the petitioner by sending a notice dated 31.03.2000 calling upon him to submit any defence, which he may propose to file in respect of the charge sheet and enquiry report on or before 10.04.2000. The special messenger Narendra Singh served this notice personally upon the petitioner on 07.04.2000, but still the petitioner did not turn up. Thereafter, Enquiry Officer proceeded to submit final report dated 13.04.2000.

5. The report of the Enquiry Officer dated 13.04.2000 was forwarded to the petitioner along with show cause notice dated 23.04.2000, which was served upon the petitioner on 28.04.2000. The petitioner submitted reply dated 04.05.2000 in which he only stated that after being relieved on 11.05.1999 the petitioner fell seriously ill and was admitted in the Nursing Home of Dr. Rakesh Narain Gupta in Agra and the intimation of his illness was sent by his wife, the entire action was taken against him without his knowledge and notice was sent at wrong address and he prayed for being pardoned on account of financial and health difficulties. The disciplinary authority, after considering the reply of the petitioner came to the conclusion that despite personal service the petitioner had not appeared, further that he had absented without any intimation and neither any medical certificate nor any intimation of his illness was submitted either to the SSP, Etawah or Mathura. He however, recorded finding that when the petitioner appeared before him on 04.05.2000 he did not appear from any angle that he was ill for such a long time from 11.05.1999 to 13.04.2000, rather it was apparent that he had deliberately absented himself in violation of the rules and accordingly dismissed the petitioner from service vide order dated 15.05.2000. Aggrieved by the same, the petitioner filled an appeal before the IG

Police, Kanpur Zone, which has also been dismissed vide order dated 10.01.2002.

Aggrieved by the aforesaid two orders the present writ petition has been filed.

6. I have heard Sri S.K. Jaiswal, learned counsel for the petitioner and the learned Standing Counsel for the respondents.

7. It has been alleged by learned counsel for the petitioner that the entire enquiry proceedings have been taken behind back of the petitioner without affording any opportunity and, therefore, the same is vitiated. The second contention is that the petitioner was suffering from Hepatitis and back bone pain and he was advised rest and treatment for 6 months from 11.05.1999 and that his wife had sent intimation also and, therefore, the order of dismissal passed against him was in violation of principle of natural justice and fair play.

8. In the counter affidavit the stand taken in the impugned order dated 15th May 2000 has been reiterated giving details of the various/ several efforts made to serve the notice upon the petitioner, but he repeatedly continue to remain absent and, therefore, left with no other alternative, the enquiry proceedings were held after his suspension and he was found guilty of serious misconduct as enumerated in paragraphs 381, 382 & 383 of the Police Regulations of gross negligence and dereliction of duty and discipline and as such has been rightly dismissed from service.

9. The counsel for the petitioner has contended that in the present case the charge sheet was not served personally upon the petitioner and further no effort was made to send the charge sheet by registered post or get it published in the newspapers. The Apex Court in the case of ***Union of India versus Dina Nath Shantaram*** reported in ***1998 (7) SCC 569*** has laid down that in matter of service of charge sheet the theory of "communication" cannot be involved and "actual service" must be proved. To quote:

"Where the disciplinary proceedings are intended to be initiated by issuing a charge-sheet, its actual service is essential as the person to whom the charge-sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. So also, when the show-cause notice is issued, the employee is called upon to submit his reply to the action proposed to be taken against him. Since in both the situations the employee is given an opportunity to submit his reply, the theory of "communication' cannot be invoked and actual service' must be proved and established."

10. It further held that charge sheet should be served personally, and if not served, then it should be send under registered cover and if still not served then it may be published in the newspaper.

11. In the present case a perusal of the inquiry report and also the counter affidavit it is clear that before proceeding with the inquiry the charge sheet was served only through affixation. There is no mention that it was send by registered post or was published in the newspapers. The inquiry would therefore stand vitiated

as charge sheet was not served personally on the petitioner before stating the inquiry. However, after the evidence in the inquiry was concluded on 28.03.2000 another notice (with charge sheet) was issued on 31.03.2000 by the Inquiry Officer calling upon the petitioner to answer the charge sheet and give his reply/ evidence on or before 10.04.2000. This notice was served upon the petitioner, personally on 07.04.2000. The Inquiry Officer after waiting till 10.04.2000 when the petitioner did not turn up proceeded to submit his report on 13.04.2000 holding the petitioner guilty of the charge.

12. The question would be even if the charge sheet had been personally served upon the petitioner after close of evidence whether he was granted reasonable and sufficient time to defend himself and to file reply and lead evidence and cross examine the prosecution witnesses. The procedure for conducting departmental proceedings is laid down in Rule 14 of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (in short referred to as 1991 Rules. The said rule also refers to Appendix I. The same are quoted hereunder:-

Rule 14 (1) of the U.P.P. Officers of the Subordinate Ranks (P. and A.) Rules 1991 *quoted below:-*

14. Procedure for conducting departmental proceedings.-(1) *Subject to the provisions contained in these Rules, the departmental proceedings in the cases referred to in sub-rule (1) of Rule 5 against the Police Officers may be conducted in accordance with the procedure laid down in Appendix 1.*

Appendix-1

Procedure relating to the conduct of departmental proceedings against Police Officer.

(See Rule 14 (1)]

Upon institution of a formal enquiry such Police Officer against whom the inquiry has been instituted shall be informed in writing of the grounds on which was proposed to take action and shall be afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be used in the form of a definite charge or charges as in Form 1 appended to these Rules which shall be communicated to the charged Police Officer and which shall be so clear and precise as to give sufficient indication to the charged Police Officer of the facts and circumstances against him. He shall be required, within a reasonable time, to put in, in a written statement of his defence and to state whether he desires to be heard in person. If he so desires, or if the inquiry Officer so directs an oral enquiry shall be held in respect of such of the allegation as are not admitted. At that enquiry such oral evidence will be recorded, as the Inquiry Officer considers necessary. The charged Police Officer shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish: provided that the Inquiry Officer may, for sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the finding and the ground thereof. The Inquiry Officer may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged Police Officer.

13. From a perusal of the Appendix it is clear that a reasonable time is to be allowed to the employee to submit his written statement and also to inform regarding personal hearing. In my opinion three days time cannot be said to be reasonable time and all the more when the petitioner was in a different district, where the charge sheet was served on 07.04.2000 and 10.04.2000 was the date fixed. Even the Inquiry Report was submitted on 13.04.2000 in less than a week from the date of service. A reasonable time in my opinion would be at least 15 days or two weeks time. In my view reasonable time from the date of service of charge sheet was not allowed to the petitioner to submit his written submission and to defend himself. He could therefore not avail of the further opportunity of personal hearing, producing witnesses and documents and also to cross-examine the prosecution witnesses in the inquiry. The inquiry is therefore, vitiated in law being in contravention of the procedure prescribed under Rule 14 and Appendix I of the 1991 Rules.

14. The contention of the learned Standing Counsel that petitioner did not even furnish any proper explanation to the show cause notice issued to him cannot be accepted in as much as the scope of defence in the inquiry and in the scope in reply to show cause are quite distinct and different. In the inquiry the petitioner would have had the opportunity to lead evidence, to prove his illness and also cross-examined the prosecution witnesses to disprove the charge levelled against him. It would still be possible that the Inquiry Officer may still have found the petitioner guilty of the charge but it would be a different satisfaction based upon evidence of both sides. The disciplinary authority has rejected the medical certificates as fake without opportunity to the petitioner to prove their correctness. In the inquiry the petitioner would have had the opportunity to establish their correctness. Since there has been no finding by the Inquiry Officer on the genuineness or otherwise of the medical certificates their rejection by the disciplinary authority amounts to denial of opportunity.

15. As a result of the inquiry being vitiated the order of dismissal and also the appellate order also stands vitiated and are liable to be set aside.

16. Accordingly, the writ petition succeeds and is allowed. The impugned order dated 15.05.2000 and 10.01.2002 are set aside. It would however, be open to the respondents to proceed in accordance with law and pass appropriate orders afresh. There shall be no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26TH MAY, 2005

BEFORE
THE HON'BLE VIKRAM NATH, J.

Civil Misc. Writ Petition No. 473 of 2001

Shridhar Dwivedi ...Petitioner
Versus
State of U.P. and others ...Respondents
With
Civil Misc. Writ Petition No. 2740 of 2001

Dheer Singh Gihar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh
Sri Vinod Kumar Singh
Sri Yogesh Kumar Saxena

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

Constitution of India-Article 14, 16-Reservation for O.B.C.-Vacancies for the post of village Development officer advertised-considering the excess strength of Backward Cost candidates-reservation for S.C./S.T. candidates only provided-after final selection-cancellation by government on the pretext-No reservation for OBC given-subsequent advertisement providing 27% reservation to O.B.C. also by abolishing the quota of S.T.-held-illegal-considering sufficient representation-applicability of further reservation increasing representation ignoring the meritorious candidate-appointing less meritorious-merit is prime and cannot be ignored-except accordance with law.

Held: Para 19 & 22

It appears that the respondents while issuing the advertisement considered the representation of each category in the existing strength and accordingly provided for the required reservation in Schedule Caste and Schedule Tribes. There is no dispute that vacant post of Village Development Officer in district Auraiya were being filled up for the first time after the applicability of the 1994 Act. Reservation policy is meant for providing sufficient representation to the Other Backward Class or the other reserved categories but where there is already sufficient representation, the applicability of reservation to increase the representation cannot be applied by appointing less meritorious candidates. The consistent stand is that merit is prime and cannot be ignored except in accordance with law.

In my considered opinion once an advertisement has been issued then the selection have to be made strictly in accordance with the terms of the advertisement until and unless the same is contrary to the Rules. It has been sought to be argued that if advertisement has been issued contrary to the Act or Rules then it cannot be sustained and the Act or Rules will prevail. In my view the advertisement was in accordance with the Act and Rules and which have to be read and interpreted in the light of the constitutional provisions as held in the case of R.K. Sabharwal (supra) Indra Sawhney (supra) and Bal Mukund Sah (supra) The advertisement had been correctly issued taking into consideration the strength of the cadre of the Village Development Officers in district Auraiya. In the present case, the number of total posts remained the same; the reservation for Other Backward Class could not have been introduced nor the post reserved for Schedule Tribe could be cancelled otherwise it would be doing violence to the fundamental principles of reservation as on the one hand there would be excessive representation of Other Backward Class and on the other hand there would never be any representation of the Schedule Tribes.

Case law discussed:
2000 (1) SCC-168
2000 (4) SCC-640
1995 (2) SCC-747
1994 (3) AWC-1292
2002 (8) SCC-98
2002 (10) SCC-269

(Delivered by Hon'ble Vikram Nath J.)

1. Both the above writ petitions have challenged the same selection and are therefore being heard and decided together.

2. Writ Petition No. 473 of 2001 has been filed for quashing the selection dated 22.12.2000 by the District Development

Officer, Auraiya in so far as it relates to the selection of respondents no.5 to 8 in the Other Backward Class quota and further for a direction that the petitioner may be appointed as Village Development Officer pursuant to the selection dated 22.12.2000.

3. Writ Petition No. 2740 of 2001 has been filed for quashing the same selection for the post of Village Development Officer in so far as it relates to increasing the number of posts reserved for schedule caste category from 3 to 4 and cancelling the one post reservation for schedule tribes category.

4. An advertisement was issued by the District Development Officer Etawah on 10.08.1998 for filling up the posts of Village Development Officer in District Etawah and Auraiya. The present petitions are confined only to the selection relating to the District Auraiya. In respect of district Auraiya the advertisement mentioned total vacancy of 18 posts out of which three were reserved for Schedule Caste candidates and one post reserved for Schedule Tribe candidate. There was no reservation for Other Backward Class. This clearly indicated that there were 14 posts to be filled up from amongst the general category candidates.

5. Pursuant to the advertisement the petitioner in Writ Petition No. 473 of 2001 applied as a general category candidate and the petitioner in Writ Petition No. 2740 of 2001 applied in the Schedule Tribe category. They received letters dated 10.02.1999 to appear before the selection committee for interview on 25.2.1999. The petitioners appeared before the selection committee and were found suitable. The result was published on 13.3.1999 in which the petitioner Shridhar Dwivedi was found selected at Sl. No.7 in general category and petitioner Dheer Singh Gihar was selected in Schedule Tribe category. The results of all the 18 posts were declared. There were 14 candidates in general category, three in Schedule Caste category and one in Schedule Tribe category.

6. This selection dated 13.3.1999 was cancelled by the State Government vide order dated 10.05.1999 on account of alleged irregularities in the interview and direction was issued to hold fresh interview of the candidates who had qualified in written examination held on 13.12.1998 through a newly constituted Selection Committee. This cancellation was challenged before this Court in Writ Petition No. 24307 of 1999 and Writ Petition No.23161 of 1999. This Court vide judgment dated 25.05.2000 dismissed both the writ petitions and directed that the selection process be completed within a period of four months from the date of receipt of the judgment as directed by the State Government from the stage of interview.

7. Fresh interview letter was issued on 14.09.2000 and the interviews were held on 22.09.2000. Pursuant to the interview held on 22.09.2000 results were declared in which petitioner Shree Dhar Dwivedi was placed at Sl.No.2 in the waiting list of general category candidates. A perusal of the result indicates that in the general category 9 candidates have been selected (instead of 14); there is a waiting list of two candidates of general category; five candidates have been selected in the Other Backward Class and there is a waiting list of one candidate. Four candidates were

selected in Schedule Castes category, and one candidate in waiting list and a note has been made in the end that there could not be any reservation for Schedule Tribe category.

8. The petitioner in Writ Petition No. 473 of 2001 has challenged the selection of five Other Backward Classes candidates made in the result dated 22.12.2000 mainly on two grounds; firstly that as per the advertisement there was no reservation made for the Other Backward Class and therefore, the selection of respondents 5 to 8 in the Other Backward Class even though they had lesser marks than the petitioner was illegal and secondly that out of total sanctioned cadre of 75 posts of Village Development Officer, in district Auraiya, representation of perons of the Other Backward Class already working was in excess of the maximum reservation quota and therefore, selection of additional five under reserve category further increased their representation and it thus violated the fundamental principles of reservation and was also violative of Article 14 and 16 of the Constitution.

9. Counter affidavit has been filed by respondents 5 to 8 and also the State respondent. The defence taken by the respondents is that in the advertisement it was mentioned that the number of posts could be decreased or increased, therefore, the reservation for Other Backward Class for five posts could be made and has been rightly made. It is stated by the respondent in the counter affidavit that out of total 18 posts advertised applying 27% reservations, 5 posts would fall in the Other Backward Class quota and therefore, rightly these posts have been reserved for Other Backward Class.

10. The petitioner in Writ Petition No. 2740 of 2001 has challenged the impugned action of the respondents in abolishing the reservation for the Schedule Tribe category on the ground that once reservation is made and an advertisement is issued the same cannot be abolished; secondly the reservation for Schedule Tribe candidates had been made keeping in mind the total strength of the cadre of Village Development Officer further the petitioner was called for interview even in the second round along with three other candidates and therefore while declaring the result the reservation could not have been done away with.

11. Heard learned counsel for the petitioner in both the writ petitions and learned Standing Counsel for State respondents and also the counsel appearing for respondents 5 to 8 in Writ Petition No. 473 of 2001.

12. There is no issue with regard to the number of posts or merit of the candidate or that any procedural irregularity having been committed in making the selection. The only question is as to whether pursuant to the advertisement dated 10.08.1998, which did not provide for any reservation for any Other Backward Class, respondents could make reservation for Other Backward Class and secondly cancel the reservation of one post of Schedule Tribe and add it in the posts already reserved for Schedule Castes thereby increasing the number of posts from 3 to 4, while declaring the result after taking fresh interview pursuant to the order of State Government. It is admitted that even the

order of State Government dated 10.05.1999 canceling the previous selection in which there was no reservation for Other Backward Class candidates, did not direct that five seats be reserved for Other Backward Class or increase the number of posts reserved for Schedule Caste. In case the State Government wanted to alter the vacancies in accordance with the reservation policy in that event it would have cancelled the previous advertisement and would have directed to issue fresh advertisement or would have directed in the order dated 10.5.1999 itself that as the reservations had not been correctly made, therefore, the same may be applied in accordance with the vacancies advertised and not the strength of the cadre which clearly indicates that the reservation had been correctly indicated in the advertisement. But the State Government did not pass any order in this respect.

13. In continuation of the same contention it may be noted that with regard to Schedule Tribe reservations also there was no such indication of doing away with the reservation. It is only at the foot of the impugned results that a note has been made that reservation cannot be applied.

14. The learned counsel for the private as well as the State respondents have sought to argue that reservation in accordance with U.P. Act No. 4 of 1994 i.e. U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (in short referred to as the 1994 Act) was being applied for the first time in the selection of the Village Development Officer as after coming of the said Act of 1994 no selection for the post of Village Development Officer had taken place and the present selection was the first selection and therefore by mistake the reservation for Other Backward Class could not be made and it is for this reason that in the final results the quota was rightly applied to the vacancies advertised.

15. The concept of reservation at the first instance has to take into consideration the candidates of the reserved category already working. If there is already sufficient representation when reservation is being introduced the manner and method of calculating the reserved seats should take into consideration the entire strength of the cadre and not apply directly on the vacancies available. This should be necessarily followed for two reasons. Firstly that there is already sufficient representation therefore to avoid any excessive representation of any particular class would be violative of Article 14 and 16 of the Constitution. Secondly to make sure that while filling up the vacant posts more meritorious candidates are not left behind and candidates with lesser marks and merit are given appointment, as this would again be violative of Articles 14 and 16 of the Constitution. It is only when once the cadre is represented as per the reservation and the roster/ quota rota is settled the vacancies arising subsequently may be filled up accordingly. Merit cannot be ignored to give advantage of excessive reservation.

16. This view finds support from the decision of the Apex Court in the case of **Indra Sawhney Vs. Union of India reported in 2000(1) SCC 168** (para 50 and 65) and **State of Bihar Versus Bal**

Mukund Sah reported in 2000(4) SCC 640 (para 23).

17. In both the above judgments the Apex Court has held that the same principle underlying Article 335 of the Constitution will apply to Other Backward Class. Efficiency of administration is paramount and cannot be ignored. It flows from Article 14 and 16 of the Constitution.

Further the Apex Court in the case of R.K. Sabharwal Versus State of Punjab reported in 1995(2) SCC 747 in clear terms provides the principles for application of reservation vis a vis cadre and vacancies. Para 6 of the said judgment reads as under:

"6. The expressions "posts' and "vacancies', often used in the executive instructions providing for reservations, are rather problematical. The word "post' means an appointment, job, office or employment. A position to which a person is appointed. "Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a "post' in existence to enable the "vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts, which form the cadre-strength. The concept of "vacancy' has no relevance in operating the percentage of reservation."

Further the Apex Court explained in detail in para 10 of the said judgment the law relating to filling up vacancies. It reads as under:

"10. We may examine the likely result if the roster is permitted to operate in respect of the vacancies arising after the total posts in a cadre are filled. In a 100 point roster, 14 posts at various roster points are filled from amongst the Scheduled Caste / Scheduled Tribe candidates. 2 posts are filled from amongst the Backward Classes and the remaining 84 posts are filled from amongst the general category, suppose all the posts in a cadre consisting of 100 posts are filled in accordance with the roster by 31.12.1994. Thereafter in the year 1995, 25 general category persons (out of the 84) retire, again in the year 1996, 25 more persons belonging to the general category retire. The position which would emerge would be that the Scheduled Castes and Backward Classes would claim 16% share out of the 50 vacancies, if 8 vacancies are given to them then in the cadre of 100 posts the reserve categories would be holding 24 posts thereby increasing the reservation from 16% to 24%. On the contrary if the roster is permitted to operate till the total posts in a cadre are filled and thereafter the vacancies falling in the cadre are to be filled by the same category of persons whose reirment etc, caused the vacancies then the balance between the reserve category and the general category shall always be maintained. We make it clear that in the event of non-availability of a reserve candidate at the roster point it would be open to the State Government to carry forward the point in a just and fair manner."

18. Thus it is clear that the advertisement had been correctly issued

showing the reservation on the whole strength / cadre. If any contrary view is taken without filling up the roster there will never be any reservation for Schedule Tribes.

19. It is also not the case of the respondents that there was a calculation mistake in fixing the number of reservation category posts and therefore, because of this calculation mistake there was change in the number of reserved category post. In the present case, 27% reservation has been introduced in the results being calculated on the total number of vacancies advertised. There are already more than 27% Other Backward Class candidates working against the total strength of Village Development Officer in District Auraiya. There was no justification to bring in 27% further from the advertised vacancies. The State Government in its counter affidavit has not disputed regarding there being sufficient representation. However, the State has tried to make out the case that since the other 22 Village Development Officer appointed earlier and working were not selected as reserved category candidate but as general category candidate, therefore, out of 18 advertised post the reservation of 27% for Other Backward Class has been rightly applied. The Standing Counsel has referred to certain correspondence after the second round interview had been held, whereby State made queries regarding reservation for Other Backward Classes. The said correspondence is of no help in view of the law laid down by the Apex Court in ***R.K. Sabharwal (supra)***. This argument cannot be accepted. It is directly in conflict with the concept of reservation as enshrined in the Constitution as well as the ratio laid down by the Apex Court It appears that the respondents while issuing the advertisement considered the representation of each category in the existing strength and accordingly provided for the required reservation in Schedule Caste and Schedule Tribes. There is no dispute that vacant post of Village Development Officer in district Auraiya were being filled up for the first time after the applicability of the 1994 Act. Reservation policy is meant for providing sufficient representation to the Other Backward Class or the other reserved categories but where there is already sufficient representation, the applicability of reservation to increase the representation cannot be applied by appointing less meritorious candidates. The consistent stand is that merit is prime and cannot be ignored except in accordance with law.

20. The other contention raised by learned counsel for the private respondents is that as the advertisement itself contained a stipulation that the number of vacancies could be increased or decreased therefore the respondents were fully justified in making reservations for the Other Backward Class by adjusting four posts of general category and one post of Scheduled Tribes. In reply the contention of learned Counsel for petitioner is that this change in the result did not either increase or decrease the vacancies but was in fact application of the reservation for Other Backward Class which did not figure in the advertisement nor did the government issue any direction in that regard. It is further urged that this was malafide exercise of power to favour a particular class and increase their representation in the cadre beyond the sanctioned and permissible limit.

21. Learned counsel for the respondent relied upon the following decisions in support of the above contention:

(1) 1994(3) AWC 1292
(Rakesh Kumar Tripathi V. High Court of Judicature)
(2) 2002(8) SCC 98
(Indian Railway class II Officers Federation V.Anil Kumar Singh)
(3) 2002 (10) SCC 269
(Suvidya Yadav v. State of Haryana)

None of these decisions apply to the facts of the present case. In all these cases the total number of vacancies was varied. In none of the cases there was change in the applicability of the reservation policy. Even otherwise in view of the discussion made in the earlier question this contention looses its significance.

22. In my considered opinion once an advertisement has been issued then the selection have to be made strictly in accordance with the terms of the advertisement until and unless the same is contrary to the Rules. It has been sought to be argued that if advertisement has been issued contrary to the Act or Rules then it cannot be sustained and the Act or Rules will prevail. In my view the advertisement was in accordance with the Act and Rules and which have to be read and interpreted in the light of the constitutional provisions as held in the case of ***R.K. Sabharwal (supra)Indra Sawhney (supra) and Bal Mukund Sah (supra)*** The advertisement had been correctly issued taking into consideration the strength of the cadre of the Village Development Officers in district Auraiya. In the present case, the number of total posts remained the same; the reservation for Other Backward Class could not have been introduced nor the post reserved for Schedule Tribe could be cancelled otherwise it would be doing violence to the fundamental principles of reservation as on the one hand there would be excessive representation of Other Backward Class and on the other hand there would never be any representation of the Schedule Tribes. .

23. In view of the facts and circumstances, I do not find any justification for applying 27% reservation against the same advertisement in second round selection when in the first round there was no such reservation and neither any candidate challenged the same nor the State Government directed for introducing reservation. That apart undisputedly there was sufficient representation of the Other Backward Class in the cadre of Village Development Officer already working in District Auraiya.

In the result, the Writ Petition No. 473 of 2001 succeeds and is allowed. The selection of respondents 5 to 8 pursuant to the result dated 22.12.2000 in the Other Backward Class reserved quota is set aside and the respondents are directed to fill up the vacancy by general category candidate as per the advertisement dated 10.08.1998 strictly in accordance with the merit of the general category. However if any of the respondents 5 to 8 fall in the merit and qualify for appointment they may be continued and their seniority shall stand in accordance with the merit list. Since admittedly, the petitioner was at Sl.No.2 in the waiting list of the general category candidate he is declared selected and may be given appointment against the said selection.

24. The connected Writ Petition No. 2740 of 2001 filed by Dheer Singh who was a Schedule Tribe candidate and had been selected in the first selection in 1999 but in the second selection, the reserved post itself has been converted into schedule caste post also deserves to be allowed and respondents are directed to declare the result for one schedule tribe post pursuant to the interview held in September 2000 and if the petitioner is found successful he shall also be entitled to be appointed against the same selection.

There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2005

BEFORE
THE HON'BLE VIKRAM NATH, J.

Civil Misc. Writ Petition No. 52752 of 2000

Ram Das Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri N.K. Saxena
Sri Deepak Saxena

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Date of Birth-Petitioner's date of birth recorded in service record as 26.2.1939-subsequently corrected by the Executive Engineer in pursuance of direction issued by the writ court-Executive Engineer by order dt. 2.9.98 informed the petitioner about the age of Superannuation on 28.2.99-Superintending Engineer after the retirement held the correction made by executive engineer without any basis-hence corrected as 26.2.1939-held-without Notice-the change in date of birth cannot be made-direction issued for entire consequential benifits.

Held: Para 7

Having considered the submissions made and also the facts and circumstances of the case in my opinion once the petitioner has retired from service on 28.02.1999 treating his date of birth to be 26.02.1941 and the order correcting the date of birth having admittedly been passed by the Executive Engineer after enquiry and upon consideration of the material placed before the Executive Engineer, there is no justification for again changing the date of birth after retirement of the petitioner and that to without notice to the petitioner. The order dated 17.02.2001 has been passed after retirement of the petitioner and without notice to the petitioner, therefore, cannot be sustained and is liable to be set aside.

(Delivered by Hon'ble Vikram Nath, J.)

1. This petition has been filed seeking direction to the respondents to pay pension, gratuity, GPF Transfer allowance already sanctioned and other post retiral benefits due to the petitioner.

Heard learned counsel for the parties.

2. The petitioner was working as Seench Paryavekshak in the irrigation department. According to him his date of birth is 26.02.1941 and, therefore, under the Service Rules he was to retire on 28.02.1999 being the last date of the month in which he completed the age of superannuation. This date of birth had not been correctly recorded in the service records accordingly the petitioner made a representation to the respondent no. 4 for correction of the date of birth. However as

this representation was not being decided by the concerned authority (respondent no. 4) petitioner filed writ petition before this Court being Civil Misc. Writ Petition No.40390 of 1996, which was disposed of by this Court vide order dated 17.12.1996 with a direction to the Executive Engineer (respondent no. 4) Fatehpur Division, Lower Ganga Canal, Fatehpur, to look into the matter and disposed of the petitioner representation by a speaking order to be passed and communicated to the petitioner within one month from the date of production of certified copy of the order.

3. It appears that the date of birth was corrected thereafter. It has been stated in paragraph 2 to the writ petition that subsequently respondents issued notice dated 02.09.1998 informing the petitioner that he would be completing age of superannuation on 28.02.1999. It is thus clear that the respondents held that date of birth of the petitioner is of the year 1941 and not 1939. The petitioner accordingly retired on 28.02.1999 and has been thereafter pursuing his claim for the post retiral benefit, The benefit legally due having not been paid the petitioner has filed the present writ petition.

4. Counter affidavit has been filed in which it is alleged in paragraph 13 that the Superintending Engineer vide order dated 17.02.2001 (Annexure 5 to the counter affidavit) held that correction of the date of birth of the petitioner made by the Executive Engineer was not based on clear reasons and, therefore, the post retiral benefits of the petitioner may be calculated treating his date of birth to be as 26.02.1939

5. The contention of the petitioner is that this order of the Superintending Engineer is without notice to the petitioner and has been passed subsequent to the filing of this petition and secondly he has not been paid any dues even if his date of birth is taken to be of 1939. It is also contended that after retirement of the petitioner the date of birth cannot be changed.

6. Learned Standing Counsel has sought to argue that the date of birth of the petitioner could not have been corrected by the Executive Engineer and that in view of the order passed by the Superintending Engineer the petitioner would be entitled to post retiral benefits treating his date of retirement as 28.02.1997 and not 28.02.1999. However, there is no explanation as to why the undisputed post retiral benefit treating the date of retirement as 28.02.1997 have not been paid to the petitioner.

7. Having considered the submissions made and also the facts and circumstances of the case in my opinion once the petitioner has retired from service on 28.02.1999 treating his date of birth to be 26.02.1941 and the order correcting the date of birth having admittedly been passed by the Executive Engineer after enquiry and upon consideration of the material placed before the Executive Engineer, there is no justification for again changing the date of birth after retirement of the petitioner and that to without notice to the petitioner. The order dated 17.02.2001 has been passed after retirement of the petitioner and without notice to the petitioner, therefore, cannot be sustained and is liable to be set aside.

8. The petitioner is entitled to all the post retiral benefits treating his date of birth as 26.02.1941 and his date of superannuation as 28.02.1999 as mentioned in the notice issued by the office of the Assistant Engineer, Fatehpur, dated 02.09.1998. The entire exercise for determination of the post retiral benefits due to the petitioner shall be made within a period of three months from the date of production of certified copy of this order and payment due upon such determination shall be made within further one month from the date of determination. The petitioner would also be entitled to 8% simple interest on the amount due for the delayed period from the date it became due till date of actual payment as he had been denied post retiral benefits at least treating his date of birth to be of 1939 for no reason and without any fault.

The writ petition is accordingly allowed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: 9.5.2005

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 28388 of 2005

Sri Aman Singh and others ...Petitioners
Versus
State of U.P. and others ...Respondents

AND

Civil Misc. Writ Petition No. 30011 of 2005
Bijendra Pandey and others vs. State of U.P. and others

AND

Civil Misc. Writ Petition No. 30437 of 2005
Ram Prasad vs. State of U.P. and others

AND

Civil Misc. Writ Petition No. 30697 of 2005
Gauri Shanker Singh & others vs. State of U.P. and others

AND

Civil Misc. Writ Petition No. 31396 of 2005
Rajesh Kumar and others vs. State of U.P. and others

AND

Civil Misc. Writ Petition No. 31932 of 2005
Khusi Ram vs. U.P.S.R.T.C. and others

AND

Civil Misc. Writ Petition No. 31735 of 2005
Brijesh Kumar and others vs. State of U.P. and others

AND

Civil Misc. Writ Petition No. 32645 of 2005
Dinesh Kumar Rai and others vs. Managing Director & others

AND

Civil Misc. Writ Petition No. 33328 of 2005
Mohammad Naeem and others vs. U.P.S.R.T.C. and others

AND

Civil Misc. Writ Petition No.33484 of 2005
Bhawani Shanker & others vs. State of U.P. and others

AND

Civil Misc. Writ Petition No. 34295 of 2005
Takesh Pandey & others vs. Managing Director & others

AND

Civil Misc. Writ Petition No. 34233 of 2005
Deena Nath Singh& others vs. State of U.P. and others

AND

Civil Misc. Writ Petition No. 34277 of 2005
Kamlesh Kumar Chaurasiya & ors vs. State of U.P. and others

AND

Civil Misc. Writ Petition No. 34248 of 2005
Dhaneshwar Das & others vs. State of U.P. and others

AND

Civil Misc. Writ Petition No. 35056 of 2005
Shri Sant Kumar vs. U.P.S.R.T.C. and others

AND

Civil Misc. Writ Petition No. 34705 of 2005
Rakesh Kumar vs. Managing Director and others

AND

Civil Misc. Writ Petition No. 35597 of 2005
Raj Nath Yadav and others vs. State of U.P. and others

AND

Civil Misc. Writ Petition No. 35605 of 2005
Awadhesh Kumar Misra & others vs. State of U.P. & others

Counsel for the Petitioners:
Sri V.K. Singh
Sri A.K. Singh

Counsel for the Respondents:
Sri Sameer Sharma, S.C.

Constitution of India, 226- Locus Standi-contract drivers working since 8 years-during ban period on fresh appointment-on direction of High Court-a Sub Committee constituted-report of committee challenged-Petitioners no where disclosed in their petition in what manner they are going to be affected-unless P.I.L.-petition can not be maintained- held- the report as well as advertisement are with regards to such class of persons- in which the petitioners being working as driver on contract basis–can be affected by the action of corporation- hence it is the right of petitioner to get the issue decided on merit–preliminary objection rejected.

Held- Para 16 and 17

Thus the law on the subject is clearly to the effect that the party approaching this Court is entitled to substantial and real justice. The procedure, which is viewed as handmaid of justice, should not hamper the ends of justice. It should be liberally construed to make it workable and advance the cause of justice. The Courts, while dealing with such issues, should take a positive and constructive approach. It has to break the shackles of technicalities and reach out to the real issues and if the cause demands, proceed to adjudicate the case on merits instead of getting entangled in the hyper technicalities of law.

Admittedly, the report which has been submitted and the advertisement, which has been issued, are with regard to the contract drivers, a class of persons in which all the petitioners fall. Thus, the petitioners, being contract drivers, are the persons who are affected by such action of the corporation.

Case law discussed:
1977 (2) SCC-148
2002 (4) SCC-34
AIR 1998 SC-3104
AIR 1988 SC- 2181
AIR 1966 SC-81
AIR 1984 SC-802
2002 (I) SCC-33
2004 (6) SCC-254
2005 (i) UPLBEC- 268

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

1. This bunch of writ petitions is a sequel to the earlier set of writ petitions, decided by this Court on 22.2.2005, and of which writ petition no. 48316 of 2004 was treated as the leading writ petition. The issue involved earlier also was with regard to the rights of the petitioners who were engaged by the corporation as drivers on the basis of contract. Such drivers had continued to work with the respondent- Corporation for a period ranging from 2 to 8 years. Their engagement had been made on contract basis because there was a ban imposed by the State Government on regular appointments of any fresh drivers. Undisputedly the corporation needed working hands for drivers their buses and it was at that time when, after adopting a selection process, the Corporation had selected drivers who were engaged on contract basis. After the posts of drivers were sanctioned by the State Government, the Corporation issued an advertisement dated 28.10.2004 for filling up the posts in which the petitioners claimed that they ought to have been given some relaxation and/or preference. By the judgment and

order dated 22.2.2005 rendered in writ petition no. 48316 of 2004, this Court had issued directions for looking into the grievances of the petitioners for which a joint committee of the State Government and the corporation was to be constituted, and which was to submit its report regarding the relaxation and /or preference which was to be granted to the contract drivers within the ambit of Regulations of 1981.

2. In terms of the said judgment dated 22.2.2005, the respondents had constituted a Committee which gave its report dated 14.3.2005. The same was forwarded by the Principal Secretary, Transport Department, Government of U.P. to the Managing Director of the Corporation on 24.3.2005 for necessary compliance. Thereafter the Corporation issued the advertisement dated 31.3.2005 inviting applications from amongst the contract drivers who were also to be considered for appointment as drivers. Aggrieved by the report of the Joint Committee and the terms of the advertisement, the petitioners have filed these writ petitions.

3. After a short counter affidavit had been filed by the contesting respondent-U.P. State Road Transport Corporation (hereinafter referred to as the Corporation), to which a short rejoinder affidavit had also been filed, the matter was heard on merit on 25.4.200and 26.4.2005. However, thereafter on 28.4.2005 Sri Sameer Sharma, learned counsel appearing for the corporation, raised a preliminary objection that the petitioners have no locus standi to file this writ petition, as in the pleadings they have not stated as to how they are prejudiced by the action of the respondents which is under challenge in these writ petitions.

4. Although no such objection had been raised by the corporation in its short counter affidavits filed in some of these writ petitions, but considering the fact that it goes to the root of the matter, on the request of the learned counsel for the Corporation, this court agreed to first take up the preliminary objection, on which the parties were heard on 2.5.2005 and 3.5.2005.

5. The objection of the Corporation is that in none of the writ petitions, have the petitioners stated as to how they are prejudiced by the report of the committee or the advertisement issued, which are both under challenge. Sri Sameer Sharma has submitted that unless any cause of action is disclosed in the pleadings, these writ petitions, not being in the nature of Public Interest Litigation, cannot be entertained by this Court. In support of his submissions he has relied on several decisions and the relevant ones shall be considered at the stage of deciding the issue.

6. Learned counsel for the petitioners have placed reliance only on the pleadings of writ petition no. **28388 of 2005** Aman Singh and others vs. State of U.P. and others and writ petition no. **30437 of 2005** Ram Prasad vs. State of U.P. and others. In paragraph 9 of writ petition no. 28388 of 2005 it has been stated that the petitioners had in their earlier writ petition, annexed their driving licenses, School leaving/Transfer certificates for certification of their date of birth etc. and thus the aforesaid certificates which were already on record in the previous writ petition were not

being annexed, and if this Court so required, the same would be filed. In paragraph 23 it has been stated that when the petitioners initially joined as contract drivers in the year 1998 they were 32 years of age and now a few of them have become overage in terms of the advertisement dated 28.10.2004. It has been submitted that since in the advertisement dated 31.3.2005, it has only been stated that since in the advertisement dated 31.3.2005, it has only been stated that the applicants (contract drivers) ought to have been within the prescribed age limit at the time of their initial recruitment, without specifying the age limit for recruitment in the year 1998 when they were engaged, they could not be sure as to whether they would be eligible for making the application in terms of the advertisement dated 31.3.2005. It has further been submitted that by the advertisement dated 31.3.2005, the requirement is to furnish a certificate of the applicant working in the Corporation at present, i.e. on 31.3.2005, whereas the Judgment dated 22.2.2005 had specified that their case was to be considered as on the date of creation of the posts, which was 25.10.2004. In this regard in paragraphs 29 and 30 of the writ petition it has been stated that since after the advertisement dated 28.10.2004, for certain reasons, almost all of the petitioners were restrained from working with the Corporation, hence they could not have obtained the certificate of' working with the corporation at present'. The petitioners thus claim that by such action of the respondents in only allowing those persons who continued to work on the date of the advertisement and not on the date of creation of posts, prejudice had been caused to them. It was submitted that in this light it was to be considered by this Court as to whether any prejudice was actually caused to the petitioners or not.

7. In paragraph 7 of writ petition no. 30437 of 2005 filed by Ram Prasad alone, it has been stated that the said writ petition was being filed in the representative capacity to espouse the cause of contract drivers, for whom a general direction had been issued by this Court vide Judgment and order dated 22.2.2005. Earlier writ petition no.48316 of 2004 had been filed by Ram Prasad alongwith several other persons.

8. The petitioners claim that since the Corporation has grossly violated the directions issued by this Court vide judgment and order dated 22.2.2005, and there are a large number of ambiguities in the report of the Committee as well as the subsequent advertisement of the Corporation dated 31.3.2005, which are both under challenge in these writ petitions, these writ petitions would be maintainable and ought to be heard and decided on merits, and the preliminary objection raised by the respondent-Corporation be rejected.

9. Sri Sharma, learned counsel appearing on behalf of the Corporation, has relied upon the decision of the Apex Court in the case of **D. Nagaraj and others vs. State of Karnataka and others** (1977) 2 SCC 148 wherein it has been held that "*it is also well established that a person who is not aggrieved by the discrimination complained of cannot maintain a writ petition"*. There the Court was dealing with the case of those who had not applied for appointment as Village Accountants in response to a Notification for recruitment and did not also possess the prescribed qualifications

and in such circumstances it was held that they were not the parties aggrieved and could not complain or have a right to maintain the writ petition.

In the case of **Ashutosh Gupta vs. State of Rajasthan and others** (2002) 4 SCC 34 the Supreme Court has observed that *"Where the challenge is made to a statutory provision being discriminatory, allegations in writ petition must be specific, clear and unambiguous. There must be proper pleadings and averments in the substantive petition before the question of denial of equal protection of infringement of fundamental right can be decided"*. In the said case the Court was dealing with the validity of certain rules framed by the State Government and in that context it was held that the burden of proof of presumption of the unequal treatment would lie on the person complaining of such treatment as there is always a presumption in favour of the constitutionality of an enactment.

In **Rani Laxmibai Kshetriya Gramin Bank vs. Chand Behari Kapoor and others** AIR 1998 SC 3104 it was held that "*It is too well settled that the petitioner who approaches the Court invoking the extra-ordinary jurisdiction of the Court under Article 226 must fully aver and establish his rights flowing from the bundle of facts thereby requiring respondent to indicate its stand either by denial or by positive assertions. But in the absence of any averments in the writ petition or even in the rejoinder affidavit it is not permissible for a Court to arrive at a conclusion on a factual position merely on the basis of submissions made in course of hearing."*

In **Bharat Singh vs. State of Haryana** AIR 1988 S.C. 2181 it has been held that *"In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter affidavit, as the case may be, the court will not entertain the point."*

10. In my view the ratio of the aforesaid cases as relied upon by the learned counsel for the Corporation are distinguishable on facts and would not be applicable to the present case. There can be no doubt that the burden to prove his case would lie on the person approaching the Court. There should be sufficient material available before the Court to see whether the challenge to the action of the respondents is there or not.

11. From a plain reading of the writ petitions at hand, it cannot be said that necessary facts relating to the cause of action of the petitioner is not there. The objection of the Corporation is that even though such material may be there for deciding the issues involved, but the petitioners have not specified the prejudice which has been caused to them by the action of the respondents, and thus these petitioners should be dismissed on the preliminary objection itself.

12. In the case of **Dwarka Nath vs. Income Tax Officer, Special Circle D-Ward, Kanpur and another** AIR 1966 SC 81 while considering the powers of

the High Court under Article 226 of the Constitution of India it was held that *"This Article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found"*. It is well settled that the jurisdiction of the High Court under Article 226 is much wider than the jurisdiction under Article 32 of the Constitution of India because the High Courts are required to exercise this jurisdiction not only for the enforcement of fundamental rights but also for the enforcement of any legal right and there are many rights conferred on the poor and disadvantaged which are the creation of statute and they need to be enforced as urgently and vigorously as fundamental rights, vide **Bandhua Mukiti Morcha vs. Union of India and others** AIR 1984 SC 802.

13. In the case of **Ghulam Qadir vs. Special Tribunal & others** (2002) 1 S.C.C. 33 the Supreme Court, while dealing with the legal proposition of the rights of a person to approach the High Court under Article 226 of the Constitution of India, held that *"The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid article. The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea change with the development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dislodging the claim of a litigant merely on hyper technical grounds. If a person approaching the court can satisfy that the impugned action is likely to adversely affect his right which is shown to be having source in some statutory provision, the petition filed by such a person cannot be rejected on the ground of his not having the locus standi. On other words, if the person is found to be not merely a stranger having no righ whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi."*

14. In **Kusum Ignots & Alloys Ltd. vs. Union of India and another** (2004) 6 SCC 254 the Supreme Court has held that *"Cause of action implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitute the cause of action. Cause of action is not defined in any statute. It has, however, been judicially interpreted inter alia to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court."*

15. The Apex Court in the case of **N. Balaji vs. Virendra Singh and others** (2005) 1 UPLBEC 268 has held that *"In the matter of applicability of the procedural rigorous the Constitution Bench of this Court in Sardar Amarjeet Singh Kalra (Dead) by Lrs. And others v. Pramod Gupta (Smt.) (Dead) by Lrs. And others, (2003) 3 SCC 272, has observed that laws of procedure are meant to regulate effectively, assist and aid the object of substantial and real justice and not to foreclose even an adjudication on the merits of substantial rights of citizen under personal, property and other lays. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really*

serve as handmaid, make it workable and advance the ends of justice, technical objections which tend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law inevitably necessitates it. It follows fro m the decision by the Constitution Bench that the procedure would not be used to discourage the substantial and effective justice but would be so construed as to advance the cause of justice."

16. Thus the law on the subject is clearly to the effect that the party approaching this Court is entitled to substantial and real justice. The procedure, which is viewed as handmaid of justice, should not hamper the ends of justice. It should be liberally construed to make it workable and advance the cause of justice. The Courts, while dealing with such issues, should take a positive and constructive approach. It has to break the shackles of technicalities and reach out to the real issues and if the cause demands, proceed to adjudicate the case on merits instead of getting entangled in the hyper technicalities of law.

17. Without making any observation on the merits of the case (as only the preliminary objection has been heard) in the facts of this case, when the material for deciding the case on merits is already there on record, this Court would not like to scuttle the hearing on merits of the case merely on the technical objection raised by the respondents. The grievance of the petitioner with regard to the report of the Joint Committee as well as the advertisement issued by the Corporation is already there in the pleadings. Admittedly, the report which has been submitted and the advertisement, which has been issued, are with regard to the contract drivers, a class of persons in which all the petitioners fall. Thus, the petitioners, being contract drivers, are the persons who are affected by such action of the corporation. It cannot be said that the petitioners are strangers to the proceedings or that they would not be prejudiced or aggrieved if, after hearing on merits, it is found that such action of the corporation was unreasonable. Thus it cannot be said that there is no cause of action for entertaining these writ petitions. Undoubtedly the petitioners have been agitating their claim and had promptly approached this Court in the earlier bunch of writ petitions (leading one being writ petition No.48316 of 2004) which was decided by this Court on 22.2.2005. Again when the Corporation has proceeded to fill up the posts of drivers on the recommendations of the Joint Committee and has also issued the advertisement; within a few days of its issuance, the petitioners have yet again promptly approached this Court by filing these writ petitions. Thus, in my view, substantial justice needs to be done in their cases. For this, it would be necessary or, if I may say so, it is the right of the petitioners, to get the issues involved in these writ petitions decided on merits, after a complete hearing is given to the parties.

18. The preliminary objection raised by the respondent. Corporation is thus rejected. The writ petitions will be heard and decided on merits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2005

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Restoration Application No. 2965 of 2005
In
Civil Misc. Writ Petition No. 11279 of 1990

U.P. State Sugar Corporation Ltd., Deoria and others ...Petitioner
Versus
Labour Court, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri H.S. Nigam
Sri R.D. Khare

Counsel for the Respondents:
Sri K.M. Misra
Sri Tarun Varma
Sri Shyam Narain

Code of Civil Procedure 1988-S-151 C.P.C.-Restoration Application-Petition dismissed in default on 9.1.03-application moved on 6.1.05-reason for non appearance disclosed-prevented from prosecuting the case due to strike call-if a lawyer-holding vakalatnama-abstains from attending the Court on his personal risk-speedy justice included in Article 21-No sufficient and cogent reason disclosed-Application rejected.

Held: Para 9

The contention of the counsel for the petitioner that the delay in moving the restoration application was not intentional has no force as the clerk of his office ought to have noted the orders passed during the strike period. He could have inspected the file even after the strike was over. No sufficient cause and cogent reasons have been given for restoration of the writ petition. The application for restoration has been moved on 6.1.2005. It suffers from laches due to callous attitude of the petitioner.

Case law discussed:
1984 (2) SCC-556
1993 (3) SCC-256
1995 (3) SCC-19
1995 SCC (3) 619
1995 (1) SCC-732
1998 (8) SCC-624
199 (1) SCC-37
2003 (2) SCC-45
1992 (5) SCC-225
1998 (7) SCC-507
W.P.33778 of 97-decided on 10.10.97
1998 (1) UPLBC-587

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

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

This is an application for restoration of the writ petition, which was dismissed by me for want of prosecution on 9.1.2003. The order dated 9.1.2003 is as under:-

"*The lawyers have gone on lightning strike disturbing the court proceedings. List has been revised. Since none appears to press this writ petition the same is dismissed for non-prosecution. Interim order, if any, stands vacated."*

2. The counsel for the petitioner submits that he could not appear due to strike of lawyers on 9.1.2003 and he had no knowledge about the order dated 9.1.2003 till 3.1.2005 when he came to Allahabad with regard to different cases of the unit and made enquiry from the Computer Section about the present case and came to know that the writ petition was dismissed for want of prosecution on 9.1.2003. He further submits that the

delay was not intentional and there was no knowledge about the order and restoration application has been moved on 6.1.2005 without further delay when he acquired knowledge that the writ petition was dismissed on 9.1.2003.

3. On 4.12.2002 the case was passed over on the request of the counsel for the petitioner and was ordered to be listed in the next cause list. Therefore the case came up on the list on 9.1.2003 when the writ petition was dismissed for want of prosecution. Thus, the restoration application has been moved after a lapse of two years.

4. It has been repeatedly held by the Apex Court that the lawyers' strikes are illegal and that effective steps should be taken to stop the growing tendency to go on strikes as they have no right to go on strike. If a lawyer, holding a Vakalatnama of a client, abstains from attending court due to a strike call, he puts himself to personal risk and liability for any action that may be taken by his client.

5. In **Panduran Duttatravs Khandekar Vs. Bar Council of Maharashtra (1984) 2 SCC-556, Tahil Ram Issar Das Sadarangam Vs. Ramchand Issardas Sadarangam (1993) (3) SCC 256; Common Clause A. Registered Society Vs. Union of India (1995) SCC 19; Sanjeev Dutta Vs. Ministry of Information & Broadcasting (1995) 3 SCC 619; Indian Council of Legal Aid & Advice Vs. Bar Council of India 1995 (I) SCC 732; K. Jhon Koshi Vs. Dr. Tarakeshwar Prasad Shaw (1998) 8 SCC 624; Mahabir Prasad Singh Vs. Jacks Aviation (P) Ltd. 1999 (1) SCC 37 and Ex. Captain Harish Uppal Vs. Union of India (2003) 2 SCC-45** it was held by the Supreme Court that the advocates have no right to go on strike and the Courts are under no obligation to adjourn the cases on the board because lawyers are on strike. The Courts are not to be privy to such strikes which amounts to denial of justice to the litigants.

6. The judiciary is accountable to the public and the dispensation of justice cannot be stopped for any reason including strike by lawyers. The apex court has held that right to speedy justice is included in Article 21 of the Constitution of India. In **A.R. Antulay Vs. R.S. Nayak (1992) 1 SCC 225** and **Raj Deo Sharma Vs. State of Bihar, (1998) 7 SCC 507,** it was held that the litigant has a right to speedy justice.

7. Similarly in **Manoj Kumar Vs. Civil Judge, Deoria (Writ Petition No. 33778 of 1997 decided on 10.10.97)**, the Division Bench of this Court has held that:

"*Before parting with this case, we would like to mention that it is deeply regrettable and highly objectionble that there are strikes in District Courts in U.P. in flimsy and frivolous pretexts and some District Courts function only for about 60 or 70 days in a year. This is a shocking state of affairs and will no longer be tolerated by this Court. The judiciary and bar are both accountable to the public and they must behave in a reasonable manner so that cases are decided quickly and thus the faith of the public in the judiciary is maintained. Surely, the public has a right to expect this from us.*"

8. The same view is followed in **M/s Suresh Chandra Varshney & Co. Vs.**

State of U.P. (Writ Petition No. 15342 of 2000 decided on 30.3.2000) and **Siddartha Kumar Vs. Upper Civil Judge, Ghazipur, (1998) 1 UPLBEC 587.**

9. The contention of the counsel for the petitioner that the delay in moving the restoration application was not intentional has no force as the clerk of his office ought to have noted the orders passed during the strike period. He could have inspected the file even after the strike was over. No sufficient cause and cogent reasons have been given for restoration of the writ petition. The application for restoration has been moved on 6.1.2005. It suffers from laches due to callous attitude of the petitioner.

10. The facts of this case are covered by the decision rendered by me while deciding Civil Misc. Restoration Application No. 164294 of 2004 in Civil Misc. Writ Petition No. 13271 of 1986 (Smt. Beena Rani Garg & others vs. Deputy Director of Education, Region I, Meerut & others).

For the reasons stated above, the restoration application is rejected.

Application Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2005

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

Civil Misc. Writ Petition No. 54536 of 2004

Vivek Srivastava ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Yashwant Varma
Ms. Rohma Hameed

Counsel for the Respondent:
Sri S.K. Rai
Sri S.M.A. Kazmi
Sri A. Mishra
Sri I.C. Sinha
Sri Anand Mohan (In Person)
Sri Mohammad Isa Khan
S.C.

A-Cantonment Land Administration Rules 1937-Rule-A-1, 14 (5)-Old Polo ground-classified as class A-1 in the General Register maintained by the Military Estate Officer-except with the previous sanction of Central Government-No buildings of 48 dwelling units can be erected-it is a land an open space-which provides clear, healthy air to ensure the area free from pollution.

Held: Para 29,36,39,45

General Land Register maintained by the Military Estates Officer under the Cantonment Act. No addition or alteration in the register can be made except with the previous sanction of the Central Government. Further no building can be erected on Class A(1) land except with the previous sanction of the Central Government. No evidence has been filed by the respondents to show that the Polo Ground is being actually used or occupied for any of the purposes mentioned in Rule 5. In fact, it has come on record, that Polo Ground was being used by civilians for various functions over a period of time. Since, the land is being used for various purposes apart from military purposes, it is doubtful that the Government had correctly classified this Polo Ground as Class-A land.

Rules 3, 14 (3) and 14 (5) of the Rules mentions the words "previous sanction of the Central Government". Rule 13 states that no alterations in the plans

and schedules shall be made without the previous sanction of the Central Government. In our view, it is mandatory for the respondents to seek previous sanction from the Central Government before making any addition or alteration in Class-A land. Since, previous sanction was not obtained by the military authorities from the Central Government, the action of the respondents in proposing to raise the construction on the Polo Ground is wholly illegal.

The aforesaid principles of law squarely applied to the facts and circumstances of the present case. It is, therefore, clear that if previous sanction is not obtained in the first place, the said defect cannot be removed afterwards by seeking post facto sanction from the Central Government.

In our view, Polo Ground was available to the citizens of Allahabad for the last 100 years initially to play Polo and, later on, for a variety of functions. Polo Ground has carved out its name in history. Why should the use of this land be changed today? There is no reason why the said land should not remain as an open piece of land for the next 100 years. If this land has serviced the citizens by providing for an open space, clean and pure air and beautiful surroundings for the last 10 decades, there is no reason why the status quo should not continue for the next 10 decades. After all, it must not be lost sight of, that today, the land in question is in the heart of the city surrounded and hedged all around by buildings. It has become all the more essential to preserve this land as an open space to provide clean and healthy air and to ensure that the area is free from pollution and other health hazards that may crop up if the constructions are raised.

Case law discussed:

2003 (7) SCC 546
1992 (4) SC- 305
AIR 1982 SC 149
AIR 1991 SC 420
1995 (2) SCC-577

B-Constitution of India, Article 226-Public Interest litigation-allegations regarding violation of Fundamental Rights-a person or the class of person has right to approach the court-No personal grudge or enmity of petitions with the Respondents or the vindication of any personal interest found-petitioner has a locus standi to file PIL

Held: Para 23 & 24

It is now well settled by the Courts, that if there was a violation of the fundamental right or other legal right, a person or a class of person has a right to approach the Court for the enforcement of the fundamental right or to correct a legal injury. We have no material or circumstances to hold that this petition had been filed for the vindication of any personal grudge or enmity of the petitioner with the respondents. In fact, we hold, that the petitioner had bonafidely approached this Court in larger interest and to safeguard the fundamental rights of the residents of the city.

The petitioner has rightly invoked the grievance in a public interest action with regard to the conduct and action of the military authorities in relation to the constitutional and statutory rights of the citizens of this city. We have, therefore, no hesitation in holding that the petitioner has a locus standi to file a Public Interest Litigation and that the writ petition is maintainable.

Case law discussed:

2005 UPLBEC (1) 144 SC
2002 (8) SCC-182
1997 (3) ALR 616
1995 ALL 88
1977 ALJ 341
1997 (1) SCC-388
1999 (6) SCC-464
2004 (6) SCC-588
1995 (2) SCC-580
2004 (5) SCC 182

AIR 1991 SC-1902
2004 (9) SCC-362

(Delivered by Hon.Tarun Agarwala, J.)

1. Does a member of the public and a resident of the city of Allahabad have a right to object to the change in the user of the land which has been in existence as an open piece of land for the last hundred years and which has acted as the lungs of the city? Does the petitioner, being a citizen of this city, have a locus standi to raise issues of ecology, and protection of the environment on account of the change in the user of the land as undertaken by the military authorities in trying to convert the open piece of land into a concrete residential duplex complex? Is the petitioner, being a citizen of this city, aggrieved by such a diversion and construction of residential buildings? Do the citizens of Allahabad have a fundamental right to free and healthy air in eco friendly surroundings for the full enjoyment of life as envisaged under Article 21 of the Constitution of India? These are some of the questions of importance which have arisen for consideration during the course of the hearing of the petition.

Case of the Petitioner:

2. The petitioner claims to be a citizen and a resident of a locality of this historic city of Allahabad and has filed the present writ petition in the form of a Public Interest Litigation contending that the respondents are planning to construct residential buildings in the "Polo Ground" which had remained vacant as an open land for the last hundred years. The petitioner alleged that this ground acted as the lungs for the citizens of Allahabad and if the residential buildings were allowed to be constructed on this land, the lungs would get choked. Not only this, the constructions would disturb the ecology and create a serious imbalance to the environment of the city. The petitioner has contended, that the only open piece of land which is located more or less in the heart of the city would vanish if the construction was allowed to come up. The constructions would not only endanger the quality of life, but would disturb the ecology and the environment which has compelled the petitioner to take recourse to Article 226 of the Constitution of India by filing this writ petition and praying that the decision with regard to the constructions of the residential buildings on "Polo Ground" be quashed and that a mandamus be issued commanding the respondents to maintain a healthy balance between the constructions and the environment conditions of the City as a whole. The petitioner further contended that he has no private gain or interest in it and has filed this petition in public interest to bring on record and apprise the Court of the immense damage which would be caused to the ecology and the environment of the city, if the constructions are allowed to be raised in the expanse of the land which act as the lungs of the city. The petitioner, in his writ petition, has therefore, prayed that the Cantonment Board be restrained from making any constructions on the Polo Ground.

Case of Respondent No.1, 3 and 4 (Union of India and Military Authorities):

3. The Union of India has filed a counter affidavit on behalf of the Ministry of Defence, the Sub Area Commander

and the Defence Estates Officer and submitted that the petitioner had no loucs standi to file the present writ petition, as he had neither shown himself as a public representative nor had shown as to how he was interested in the land belonging to the army authorities. The respondents have further alleged that no public interest was involved nor any issues of public importance or for the enforcement of the fundamental rights had been raised, and, therefore, no writ petition could be filed in the garb of a public interest litigation. The respondents further submitted that the High Court could entertain a writ petition under Article 226 of the Constitution of India under a public interest litigation, if the petition had been filed by a person who was interested in the welfare of the people and who were in a disadvantageous position and who was not in a position to knock the doors of the Court. Since the petitioner had not sought any relief for the benefit of the public at large, the writ petition filed as a Public Interest Litigation was an abuse of the process of the Court and was liable to be dismissed with costs.

4. The respondents have, however, on merits stated that as per the General Land Register (GLR) of the year 1941, the land in question had been described as "Old Polo Ground' which comprises of 22.77 acres of open land and was categorized as "A-1' Defence Land which was exclusively managed and controlled by the Army Authorities and was not governed by any of the provisions of the Cantonment Act. The scope and use of A-1 land was limited as contemplated under Rule 5(1) of the Cantonment Land Administration Rules 1937(hereinafter referred to as the Rules of 1937). Under the said Rules, A-1 land was exclusively managed and controlled by the Army Authorities, which in the present case, is the Sub-Area Commander of the station in question. The respondents submitted that the proposed construction for the residential quarters for the married Army Personnel, being an exclusive army matter, no public interest was involved which required adjudication from a Court of Law. The respondents further submitted that the proposed construction had been sanctioned by the Ministry of Defence and that the construction would not disturb the ecology or the environment of the area.

5. In the supplementary counter affidavit, the respondents submitted that the proposed constructions of the residential quarters, i.e., the Marriage Accommodation Project (MAP) falls under Entry-4 of the Union List. The defence works was entrusted to the Military Engineering Services who plans and executes the same through the Defence Works Procedure. The Ministry of Defence vide letter dated 10.9.2004, granted administrative approval for the construction of 1128 dwelling units, i.e. 60 dwelling units for Majors and above, 72 for JCO's and 996 dwelling units for ORs. at Allahabad Station. While considering the construction of the residential quarters, the location of the land was worked out by the Board of Officers and the sites were prepared as per the Zonal Plan of the Allahabad Station. The zonal plan was made on the basis of the Key Location Plan (KLP) of the station, which works out the requirement of the land as per the land norms, which was based on the strength of the Officers, JCOs, ORs and civilians in the station. According to the respondents, as per the KLP of Allahabad,

there was a net deficiency of 1761.957 acres of land, inspite of which the old Polo Ground had been ear marked as a site for the "MAP' Project. This zonal plan had been made by the Board of Senior Officers and specialized persons basing it on futuristic operation requirements, the considerations of which are kept confidential. The respondents, however, submitted that the zonal planning had been done keeping in view the ecological policy which the respondents have framed and the guidelines issued by the Army Head Quarters. It was alleged that based on the aforesaid guidelines, the Station Commander constituted a Board of Officers, which recommended various sites for the aforesaid constructions and recommended construction of 48 dwelling units for Majors and above at the "old Polo Ground" and that out of 22.77 acres of land, 15 acres of land would be left open to maintain the environment and the ecological balance. The respondents submitted that the norms for calculating the land in the army areas was such that it embraced the ecology and was most ecologically friendly. For instance, the population in a station for KLP was calculated four times the actual military strength and open spaces is calculated 7 acres per thousand population which means 28 acres are required to house 1000 military personel. These averments have been made on the basis of Annexure-1 to the supplementary counter affidavit, which is the land requirement sheet for Allahabad Station as per KLP, which we shall refer to it later at the appropriate stage.

6. The respondents further submitted that as per the guidelines issued vide Army Headquarters' letter dated 22.6.1993, the entire planning has to be done on A-1 defence land. The respondents further contended that the land in question known as old Polo Ground was transferred to the military authorities by the municipal authorities sometimes between the period 1916 and 1941.

Case of Respondent No.2 (Cantonment Board):

7. The Cantonment Board, respondent no.2 in their counter affidavit has stated that the land in question is under the exclusive Management of the military authorities and that the Cantonment Board or the Municipal Authority has no concern with it. The military authority has the exclusive right to construct the residential accommodation for its married military officers and that the petitioner has no locus standi to file the writ petition.

Case of Respondent No.5 (District Magistrate):

8. The District Magistrate, Allahabad appeared and also filed his own affidavit stating therein that the old Polo Ground was utilized in the past for various purposes and public functions as well as for parking of heavy vehicles during the general election and also during the Kumbh Mela. The affidavit stated, that from time to time, request were made by the District Magistrate, Allahabad to the Sub-Area Commander, Allahabad for using the land for official purposes for which permission was being granted by the Sub Area Commander. The affidavit further stated that the road known as Hastings Road or C.S.P. Singh Marg which is also called by the name of Nyaya Marg and which cuts across the

old Polo Ground and the New Polo Ground was now being maintained by the P.W.D. The District Magistrate, Allahabad also stated that the Polo Ground which is situated near the High Court is one of the heritage of Allahabad and is one of the important ground on which government activities had been taking place since long and, that since Independence, on every Lok Sabha and Vidhan Sabha elections, this ground had been used for parking heavy vehicles, and for making arrangement for the poll and dispatching all polling parties to various places and that there was no other suitable place for this purpose in the city of Allahabad except the Polo Ground. The District Magistrate, Allahabad categorically stated that if the Polo Ground was converted for any other purpose it would cause a serious setback to the aforesaid official activities of the administration. The District Magistrate further submitted that from time to time in the past, other functions have been organized at the Polo Ground and if the residential complex was constructed, it would affect the smooth administration of the city and therefore, the old Polo Ground should not be converted into a residential complex.

Case of Respondent No.6 (Allahabad Development Authority):

9. The Allahabad Development Authority, respondent no.6 in their counter affidavit has stated that the land in question is outside their development area. However, under the Master Plan 2001, the permissible density of the Civil Lines area is 400 persons per hectare and that, 5 persons per dwelling unit is taken into consideration for calculating the density of the area and, therefore, the proposed construction would not make a major difference in the density of the population.

Case of Respondents No.7, 8 and 9 (Municipal Commissioner, Mukhya Nagar Adhikari and Divisional Town and Country Planner):

10. The Deputy Municipal Commissioner, Allahabad has filed an affidavit on behalf of respondent nos.7 and 8 stating therein that the old Polo Ground was beyond the territorial jurisdiction of the Nagar Nigam and that the provisions of U.P. Municipal Corporation Act 1959 was not applicable as the Polo Ground came in the Cantonment area. The affidavit further stated that if the residential quarters on Polo Ground are constructed, the ecological balance would be adversely affected and that the Cantonment area does not have any proper sewer system nor there is any adequate arrangement for the disposal of the garbage system.

Similar opinion was also expressed by the Divisional Town and Country Planner, Allahabad, respondent no.7. He, however, further stated, that in the event the construction was made on the land in question, such construction should be subject to the following conditions, namely,

(i) 20 Meters wide green belt had to be ensured all around the residential complex.

(ii) No approach road from C.S.P. Singh Road.

(iii) The approach road must be from the opposite side of C.S.P. Singh Road.

(iv) An alternative side for the Polo Ground had to be proposed on an appropriate side.

(v) No further construction on Polo Ground and remaining area to be kept as an open land.

Case of interveners:

11. During the course of the hearing of the petition, the President of the Bar Association High Court, Allahabad appeared and requested that he may be heard as the petition raises important questions and affects the members of the Bar Association. Sri Anand Mohan, a social activist also appeared in person and filed an application praying that he may be permitted to intervene and be heard as the writ petition raises vital questions on the environment of the city of the Allahabad. By our order, we permitted them to be heard under Chapter XXII, Rule 5-A of the Rules of the Court.

12. Sri Anand Mohan in his application stated that the land in question was earlier under the management of the municipal authorities but pursuant to a Notification No.2465/XI-31-C-1933 dated 8.8.1934, the land was proposed to be included in the Cantonment limits. He submitted that prior to 1934, the land was under the management of the local municipal authority and that Polo used to be played even by the civilians and that even after independence of our country, the land in question had been used by the civil administration for election purposes and that various cultural programmes have also been organized from time to time. Further, the land serves as a "public place" and prayed that the land in question should remain as an open piece of land and that the land in question should revert back to the municipal or local bodies as the case may be.

13. The land in question, known as "old Polo Ground' covers 22.77 acres of open land is an A-1 defence land being managed by the military authorities and which is owned by the Central Government, is located in the heart of the city of Allahabad in the Civil Lines area collocating the High Court of Judicature at Allahabad on the South-West, the Government Press, Directorate of Education, Board of High School and Intermediate Board, Board of Revenue, Police Head Quarters and the Accountant General's Office on the East, the Elgin Road and the Allahabad Bank on the South, and a portion of the residential complex for the Judges of the High Court on the North and further towards North-West by the Radio Station and Circuit House and the Bar Council of U.P. on North East and on the West of old Polo Ground, by a road known as Hastings Road, now called Justice C.S.P. Singh Marg and also called Nyaya Marg, and which is maintained by the Public Works Department. Therefore, the old Polo Ground, an open piece of land measuring 22.77 acres, is, surrounded and collocated by civil areas. In fact, the new cantonment begins from old Polo Ground itself. Consequently, the old Polo Ground is collocated with the civilian areas, being on the border of the municipal and the Cantonment limits.

Preliminary Objections:

14. The Union of India has raised a preliminary objection with regard to the maintainability of the writ petition and submitted that the petitioner had no locus

standi to file the petition under the garb of a Public Interest Litigation. The learned counsel for the respondent submitted that a Public Interest Litigation could be filed only if it raised an issue of public importance, or raised an issue for the enforcement of a fundamental right of a large number of the members of the public which in the present case did not exist nor the petitioner had shown himself as a public representative nor had shown as to how he was interested in the land pertaining to the Army authorities. The learned counsel further submitted that a writ petition under Article 226 of the Constitution of India could only be entertained by a Court from an interested person who was concerned with the welfare of the people and who were in a disadvantageous position and who were not in a position to knock on the doors of the Court. In support of his submission, the respondent had relied upon a decision of the Supreme Court in **Guruvayoor Devaswom Managing Committee and another v. C.K.Rajan and others**, 2003(7) SCC 546 and submitted that the petitioner had not raised any question nor sought any relief for the benefit of the public at large and, that it appeared that the writ petition had been filed at the instance of some interested organization. The learned counsel further submitted that the petitioner was not a resident of the cantonment and had not chosen to stop the mushrooming construction being carried out in the city of Allahabad, nor had challenged the illegal encroachment in and around his locality and therefore, if the veil was lifted, the vested interest would come out which would show that a frivolous writ petition had been filed under the garb of a Public Interest Litigation. The learned counsel submitted that since no public interest was involved, the writ petition should be thrown out with cost.

15. The petitioner, on the other hand contended that he is a citizen of Allahabad and had rightly brought the matter before the Court as the alleged construction was bound to affect the ecology and the environment of the city. The open expanse of land which acted as the lungs of the city would get choked and if the construction is allowed, the ecology of the city would be disturbed thereby creating a serious imbalance to the environment of the city. The petitioner contended that it was not necessary that he should be a resident of the locality where the buildings are going to be constructed. It was sufficient that he was a citizen of the city of Allahabad and had raised an issue with regard to maintaining a healthy balance between the urbanisation and the environment of the city as a whole. The petitioner contended that he had no private interest in the matter and had brought this matter to apprise the Court of the ecological damage that would be caused if the construction were allowed to be raised. The petitioner submitted that the field of Public Interest Litigation had expanded and was not confined to the welfare of the people who are weak and who were not in a position to knock on the doors of the Court. The learned counsel submitted, that where ecological and environmental issues have been raised and where the open expanse of land was acting as the lungs for the citizens of Allahabad for almost 100 years, the alleged construction on it definitely raised issues of public importance which would benefit the public at large and therefore, the writ petition was maintainable and that the

petitioner had a locus standi to raise these questions of public importance.

We have heard Sri Yashwant Varma assisted by Ms. Rohma Hameed, the learned counsels for the petitioner, Sri S.K.Rai for the Union of India and the Military authorities, Sri S.M.A. Kazmi, Chief Standing Counsel, for the District Magistrate, Municipal Commissioner and Divisional Town and Country Planner, Sri A. Mishra for the Allahabad Development Authority and Sri Anand Mohan, in person, as the intervener.

16. Taking up the issue of maintainability of the writ petition and the locus standi of the petitioner in filing the present writ petition, it is well settled, that a person acting bonafide and who has a sufficient interest in the proceedings is competent to file a writ petition and has a locus standi to approach the Court and wipe out the violation of the fundamental rights and/or the infraction of the statutory provisions of law.

What is public interest? Blacks Law Dictionary, Sixth Edition, defines "public interest" as–

"Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government."

In **Janta Dal vs. H.S.Chowdhary, 1992(4) SCC 305**, the Supreme Court held-

"Therefore, lexically the expression "PIL' means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

On the locus standi, the Supreme Court in **Janta Dal's** case (supra) held-

"Though it is imperative to lay down clear guidelines and propositions; and outline the correct parameters for entertaining a Public Interest Litigation-particularly on the issue of locus standi yet no hard and fast rules have yet been formulated and no comprehensive guidelines have been evolved. There is also one view that such adumbration is not possible and it would not be expedient to lay down any general rule which would govern all cases under all circumstances.

Be that as it may, it is needless to emphasise that the requirement of locus standing of a party to be litigation is mandatory; because the legal capacity of the party to any litigation whether in private or public action in relation to any specific remedy sought for has to be primarily ascertained at the threshold."

and further held-

"In contrast, the strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives the right of locus standi to any member of the public acting bonafide and

having sufficient interest in instituting an action for redressal of public wrong or public injury, but who is not a mere busybody or a meddlesome interloper; since the dominant object of PIL is to ensure observance of the provisions of the Constitution or the law which can be best achieved to advance the cause of community or disadvantaged groups and individuals or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration but acting bonafide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like actio popularis of Roman Law whereby any citizen could bring such an action in respect of public delict."

17. The Supreme Court in various decisions has held that a person, acting bonafide and having sufficient interest in the proceedings, would have a locus standi. The Supreme Court also cautioned to be extremely careful and ensure that a vexatious petition under the garb of a Public Interest Litigation was not brought before the Court for vindicating any personal grievance. The Supreme Court further held that the Courts should not allow a busybody or a meddlesome interloper to misuse the process of the Court for private gain.

18. The parameters of Public Interest Litigation have been indicated by the Supreme Court in a large number of cases. The guidelines so laid down by the Supreme Court has to be applied to the facts of each case. In defining the rule of locus standi, no rigid litmus test can be applied since the law relating to Public Interest Litigation is still developing. In this context, the Supreme Court in **S.P.Gupta and others vs. President of India and others, AIR 1982 SC 149** held-

"The Court has to innovate new methods and device new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions....."

19. Thus, keeping in mind the development of the doctrine of Public Interest Litigation and the rule governing the locus standi, as enunciated by the Supreme Court in various decisions, it would be appropriate to revert to the facts of the instant case and examine them to find as to whether the petitioner has a locus standi to file this petition and whether this petition falls within the ambit and scope of Public Interest Litigation.

20. The sum and substance (as gathered from the averments made in the writ petition, supplementary affidavit and rejoinder affidavit) is, that the petitioner, who is a resident of the city has come forward and filed the writ petition in public interest and prayed for intervention and drawing the attention of this Court, to the detrimental effect which the construction could cause on the ecology and environment of the city as a whole. The petitioner has alleged that this open piece of land available is acting as the lungs of the city, and that these open spaces are necessary to maintain the ecological balance of the city. The petitioner has alleged that if the construction is permitted, the open expanse of land would vanish which in

turn would create a serious imbalance to the environment of the city. The petitioner has further stated that he has no private gain or interest in this litigation and, as the citizen of this city, had filed this petition in public interest to restrain the respondents from the immense danger that would be caused if the construction was allowed on the land in question. The petitioner has complained that the open space of land existing for years would vanish and that the lungs of the city would be choked if the constructions were permitted on this land.

21. We have given our thoughtful consideration and, we find that every citizen has a right to breathe clean and pure air. Right to life is enshrined in Article 21 of the Constitution of India, and, as held by the Supreme Court in **Subhash Kumar vs. State of Bihar and others**, *A.I.R.1991 SC 420.*

"right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of the pollution free water and air for full enjoyment of life."

Article 48-A of the Constitution of India enjoins that the State shall endeavor to protect and improve the environment. The right to breathe, thus inheres the Directive Principles of the State Policy.

22. Under Article 51-A of the Constitution, it is the fundamental duty of every citizen to strive, protect and improve the natural environment. The object of Part-IV-A of the Constitution of India is that every citizen must feel that it is his duty to achieve the objects laid down under Article 51-A and one such duty is to protect the natural environment.

In **Virender Gaur and others vs. State of Haryana and others**,*(1995)2 SCC 577*, the Supreme Court held-

"Article 48-A in Part IV (Directive Principles) brought by the Constitution 42nd Amendment Act, 1976, enjoins that "the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country". Article 47 further imposes the duty on the State to improve public health as its primary duty. Article 51-A (g) imposes "a fundamental duty" on every citizen of India to "protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures". The word "environment' is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance". It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity

without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment."

23. Thus, in our view, an issue relating to the enforcement of the fundamental rights, and the Directive Principles, which is of public importance, is clearly involved in the present petition. An issue relating to the urbanization and the expansion of the city and its effect on the ecology and the environment has been raised which concerns the residents of Allahabad. Therefore, the submission of the learned counsel for the respondents, that a Public Interest Litigation was only for the enforcement of the fundamental right of those people who were in a disadvantageous position and who were themselves not in a position to knock on the doors of justice, in our view, a hyper technical approach raised only to defeat the ends of justice and the objects enshrined in Part III and IV of the Constitution. It is now well settled by the Courts, that if there was a violation of the fundamental right or other legal right, a person or a class of person has a right to approach the Court for the enforcement of the fundamental right or to correct a legal injury. We have no material or circumstances to hold that this petition had been filed for the vindication of any personal grudge or enmity of the petitioner with the respondents. In fact, we hold, that the petitioner had bonafidely approached this Court in larger interest and to safeguard the fundamental rights of the residents of the city.

24. If anything endangers or impairs the quality of life in derogation of the laws, the petitioner had an equal right, like any other citizen to come forward for the prevention of the damage that could be caused by the alleged construction to the lungs of the city and its impact on the ecology and the environment. The petitioner has rightly invoked the grievance in a public interest action with regard to the conduct and action of the military authorities in relation to the constitutional and statutory rights of the citizens of this city. We have, therefore, no hesitation in holding that the petitioner has a locus standi to file a Public Interest Litigation and that the writ petition is maintainable.

Relevant Statutory Provisions:

25. Before proceedings further, it would be relevant to place a few provisions of the Cantonment Land Administration Rules 1937 (hereinafter referred to as the Rules). These Rules were framed under section 280 of the Cantonment Act 1934. Chapter II of the said Rules deals with the classification and transfers of land. Rules 3,4,5, 7 and 9 of Chapter II of the Rules of 1937 which are relevant for the purpose of this case, are quoted hereunder:

"3. General Land Register (1) The Military Estates Officer shall prepare, in the form prescribed in Schedule I, a

General Land Register of all lands in the Cantonment-

(a) inside bazaars; and

(b) outside bazaars.

(2) No addition or alteration shall be made in the General Land Register except with the previous sanction of the Central Government or such other authority as the Central Government may appoint for this purpose or in accordance with the provisions of rules 10 and 45.

4. Classification of land for the purposes of the General Land Register prescribed by rule 3-

(a) Land in the cantonment which is vested in the Government shall be divided by the Central Government, or such other authority as the Central Government may empower in this behalf, into two classes, namely-

(i) **Class "A"** land which is required or reserved for specific military purposes: and

(ii) **Class "B" land** which is not so required, or reserved, but which is retained in the cantonment for the effective discharge of the duties of the Central Government in respect of military administration: and

(b) Land which is vested in the Board under Section 108 of the Act shall be called class "C" land.

5. Class "A" land- Class "A" land shall be divided by the Central Government, or such authority as they may empower in this behalf, into the following sub-classes namely-

(i) Class "A" (1) land which is actually used or occupied by the Military Authorities, for the purposes of fortifications, barracks stores, arsenals aerodromes, bungalows for military officers which are the property of Government, parade grounds, military recreation grounds, rifle ranges, grass farms, dairy farms, bricks fields, soldiers and hospital gardens as provided for in paragraphs 419, 421 and 425 of Regulations for the Army in India and other official requirements of the Military Authorities.

(ii) Class "A"(2) land which is not actually used or occupied by the Military Authorities, but to the use or occupation of which for any other purpose, except temporarily, there exist specific military objections.

Explanation- For the purposes of this rule-

(a) Specific military objections shall be deemed to exist to the use or occupation of land the reservation of which is declared to be desirable by the Central Government in the interest of the discipline, health or welfare of the military forces, or the safety or defence of the cantonment and its inhabitants; and

(b) military recreation grounds means recreation grounds the management and control of which vest exclusively in members of the military forces.

7. Transfer of land from one class to another- No alteration in the classification of land which is vested in the Government or in the Board shall be made except by the Central Government, or by such other authority as they may empower in this behalf, and the

conditions on which land may be transferred from one class to another shall be governed by the orders of the Central Government or by the provisions of any law or rule for the time being in force which may be applicable: provided that land in class "B"(4) may be transferred to class "B" (3) by the authority, and subject to the conditions, prescribed by rules 15 to 48.

9. Management of land-(1) The management of Class "A" (1) land, except for such areas or classes or areas as may from time to time be declared by the Central Government to be under the immediate management of the Military authorities themselves, shall be entrusted to the Military Estates Officer.

(2) The management of Class "A" (2) land shall vest in the Military Estates Officer.

Chapter III of the Rules relates to the management of the land by the Military Estates Officer. Rule 10 and 12 of Chapter III of the Rules of 1937 are quoted hereunder:

"10. Maintenance of General Land Register--(1) The Military Estates Officer shall maintain the General Land Register prepared under rule 3 in respect of all land, other than land in bazaars the management of which has been entrusted to, or vests in, the Board, and shall register all mutations in column 1 thereof, and shall enter therein.
.....
(ii) every grant of such right or interest made by the Central Government.
.....
(vi) every interdepartmental transfers of class "A" land and every transfer of class "A" land, from one service of the Army to another under the control of the same head of a department sanctioned by the Central Government.
(vii) every alternation in classification of land sanctioned under rule 7."

12. The Military Estates Officer's Land Revenue Register- The Military Estates Officer shall maintain a register, in the form prescribed in Schedule III, of all lands in Class "A" (2) and "B" (3) which are entrusted to his management and from which revenue is derivable. This register shall be known as the Military Estates Officer's Land Revenue Register, and shall be prepared annually with effect from 1st April, so as to show annual demand in the shape of rent from building sites, agricultural land and other land.

Chapter IV of the said Rules related to special Rules for Class-A land. Rules 13 and 14 of the said Rules are quoted hereunder:

13. Schedules of Class "A" Land - (1) The Military Estates Officer shall maintain plans and schedules of land in class "A(1) and A(2)" for each cantonment in which land is entrusted to his management.

(2) No alteration in the plans and schedules shall be made without the sanction of the Central Government.

14. Special Rules for Class "A" Lands-(1) The administrative control of Class "A" (1) Land including the detection and prevention of encroachments thereon, shall vest in the Military Authorities for the time being in occupation of the land. The administrative control of Class "A" (2) land shall vest in the Central Government.

(2) The Military Estates Officer shall conduct his management of Class "A" (1) Land (which shall include the development of the resources of the land, the disposal of usufruct and the planting and maintenance of trees) in consultation with and under the general supervision of the Officer commanding the Station, at whose discretion expenditure will be incurred within the allotment made to the Military Estates Officer and in accordance with the Military regulations in force regarding the planting of trees and the cultivation of land in military areas.

(3) Land in Class "A"(1) shall not be used or occupied for any purpose other than those stated in sub-rule (1) of Rule 5 without the previous sanction of the Central Government or such authority as they may appoint in this behalf:

.....

(5) No building of any kind either permanent or temporary, shall be erected on class "A" land except with the previous sanction of and subject to such conditions as may be imposed by, the Central Government or by such other authority as the Central Government may appoint for the purpose.

26. As per Rule 9 of the Rules of 1937, a notification dated 11.4.1940 was issued by which various areas of Class-A(1) land in the Cantonment were declared to be under the immediate management of the military authorities, one of which included the military recreation grounds. The Government of India, Defence Department issued a Notification No.975-LC/D.4 dated 23.3.1938 and Notification No.1282-LC/D.4 dated 17.4.1940 wherein instruction with regard to the preparation and maintenance of the General Land Register were issued (See: Cantonment Laws, Vol.II by J.P. Mittal, 2nd Edition, Page 414 and 417), which stated that whenever a sanction was required for an alteration in the existing entries or for making an entry in the Register, the sanction for any addition or alteration of the entries in the register was required to be accorded by the Central Government or by such authority as the Central Government may appoint in sub rule (2) of Rule 3.

27. Under Rule 3 of the 1937 Rules, the Military Estate Officer is required to prepare a General Land Register entering all kind of land belonging to the Cantonment Board or military authorities. Rule 4 classifies the land of the Cantonment into three types, namely, Class-A, Class-B and Class-C land. Class-A land has been specified as a land which is required or reserved for specific military purposes. Rule 5 sub divides Class-A land into Class-A (1) and Class-A (2) land. Class-A (1) land are such land which are actually used or occupied by the military authorities for various purposes as specified therein and includes military recreation grounds and bungalows for military officers. Rule 7 provides that no alteration in the classification of the land shall be made except by the Central Government. Rule 9 provides that Class A (1) land shall be managed by the military authorities except such area or classes of areas as may be declared by the Central Government from time to time. Rule 10 of the Rules provides for maintenance of the General Land Register and under Rule-13, the Military Estates Officer is required to maintain the plans and schedules of land in Class-A(1) and Class-A(2) land in each cantonment and that no alteration in the

plans and the schedule could be made except with the sanction of the Central Government. Sub clause (3) of rule 14 provides that the land in Class-A(1)land shall not be used or occupied for any other purpose other than those stated in sub Rule (1) of Rule 5 without the previous sanction of the Central Government. Sub clause (5) of Rule 14 provides that no building shall be erected on Class-A land except with the previous sanction of the Central Government.

28. From a perusal of the aforesaid Rules, especially Rules 3, 5, 7, 10, sub clause (vi) and (vii) of Rule 10 read with Rule 13(2) and sub clause (3) and (5) of Rule 14, makes it abundantly clear beyond a reasonable doubt, that no addition or alteration in the General Land Register could be made except with the previous sanction of the Central Government and that no building of any kind, either permanent or temporary, can be erected on Class-A land, except with the previous sanction and subject to such conditions as may be imposed by the Central Government.

29. Admittedly, the old Polo Ground has been classified as Class-A(1) land in the General Land Register maintained by the Military Estates Officer under the Cantonment Act. No addition or alteration in the register can be made except with the previous sanction of the Central Government. Further no building can be erected on Class A (1) land except with the previous sanction of the Central Government. No evidence has been filed by the respondents to show that the Polo Ground is being actually used or occupied for any of the purposes mentioned in Rule 5. In fact, it has come on record, that Polo Ground was being used by civilians for various functions over a period of time. Since, the land is being used for various purposes apart from military purposes, it is doubtful that the Government had correctly classified this Polo Ground as Class-A land.

First Question:

30. The question which now arises for consideration is, whether previous permission had been taken or not by the military authorities from the Central Government to construct the residential complex known as Marriage Accommodation Plan (MAP) on the Polo Ground which is A (1) defence land ? According to the respondents, no previous sanction was required to be obtained from the military authorities. According to the respondents previous sanction was only required from the Central Government when the user of the land was being changed from Class-A land to Class-B land, but where the land was classified as Class A(1) land and was being used for another purpose which also came under the category of Class A(1) land, in that case, no previous sanction was required from the Central Government. In the present case, the land in question is described as "old Polo Ground', which according to the respondents, comes under the category of "Military Recreation Ground". The said land is proposed to be used for the construction of a residential complex, which is also covered under Class A(1) as a "bungalow' and therefore, according to the respondents, previous sanction was not required for converting the military recreation ground into a residential complex. The contention of the respondent is that, "bungalows" and "military recreation grounds" are both

classified as Class-A (1) land and since the use of the land was being converted from a military recreation ground to a residential purpose, under the same category, no previous sanction was required to be taken from the Central Government.

31. On the other hand, the petitioner contended that in view of the aforesaid provisions of the Cantonment Land Administration Rules, previous sanction was required to be obtained from the Central Government.

32. In our view, from the a reading of the various provisions of the Cantonment Rules, 1937 and the notifications issued from time to time, it is clear, beyond a reasonable doubt, that previous sanction is required to be obtained before any building either permanent or temporary is erected on a Class-A land or any addition or alteration is made in the General Land Register, even though the usage of the land remained as Class-A(1) land. Previous sanction is required from the Central Government even if there is a change in the usage of the land.

33. There is another aspect which needs to be considered. Whether the constructions of 48 dwelling units on the land in question, namely, Duplex Units can be said to be covered by the expression "bungalow" as used in Rule 5(1) of the Rules. The word "Bungalow', normally and apparently cannot be extended to cover multistoried complex. The word "Bungalow' is defined as a "one storey house, lightly built" and cannot partake a shape of a duplex unit. Therefore, if the military authorities intended to or proposed to construct a multistoreyed complex with Duplex flats for residential purposes for its military officers on Class-A (1) land, they are required to obtain previous sanction from the Central Government.

34. The submission of the learned counsel for the respondents that the Central Government had granted permission for the construction of the residential complex on the land in question is baseless. From a perusal of the letters dated 13.11.2003, 10.9.2004 and 19.10.2004 sanction had been given for the project in question but the Central Government has not given any sanction for changing the use of the land.

35. During the course of the hearing of the petition the learned counsel for the respondents submitted that if it was imperative for the military authorities to take previous sanction from the Central Government, in that event, the respondents may be permitted to obtain the sanction from the Central Government and further submitted that, in this regard they had already moved the Central Government to grant the requisite sanction. Be that as it may, it is clear that at the present moment, no prior sanction as required under the statutory rules was ever sought nor it had been given by the Central Government till date. Before starting the construction on the land in question, it was imperative and mandatory for the respondents to take previous sanction from the Central Government.

36. Rules 3, 14(3) and 14(5) of the Rules mentions the words "previous sanction of the Central Government". Rule 13 states that no alterations in the plans and schedules shall be made without the previous sanction of the Central

Government. In our view, it is mandatory for the respondents to seek previous sanction from the Central Government before making any addition or alteration in Class-A land. Since, previous sanction was not obtained by the military authorities from the Central Government, the action of the respondents in proposing to raise the construction on the Polo Ground is wholly illegal.

37. In **Nandkishore Ganesh Joshi vs. Commissioner, Municipal Corporation of Kalyan and Dombivali and others**, *(2005)1 UPLBEC 144*, the Supreme Court while construing the provision of clause (c) of Section 73 of the Mumbai Provincial Municipal Corporation Act, 1949, held that although the Commissioner was entitled to execute the contract on behalf of the Corporation but a statutory embargo was placed upon him by Clause (c) of Section 73 of the Act which required that before executing a contract, the Commissioner was required to seek previous approval of the Standing Committee. The Supreme Court further held-

"It is, thus, not a case where an action taken by a statutory authority requires approval which may be granted at a later stage. The approval of the Standing Committee, a bare perusal of clause (c) would show, is required to be granted before any contract is entered into. The approval of a contract and that too with previous approval by the Standing Committee cannot, thus, said to be an empty formality. The Standing Committee is required to perform its functions in terms of the provisions of the said Act. A statutory authority has also a duty to act in public interest as also fairly and in a reasonable manner."

In **Kaiser vs. National Textile Corporation and others**, *2002(8) SCC 182*, the Supreme Court held-

"14. In view of the aforesaid requirements, before obtaining the assent of the President, the State Government has to point out that the law made by the State Legislature is in respect of one of the matters enumerated in the Concurrent List by mentioning entry/entries of the Concurrent List and that it contains provision or provisions repugnant to the law made by Parliament or existing law. Further, the words "reserved for consideration" would definitely indicate that there should be active application of mind by the President to the repugnancy pointed out between the proposed State law and the earlier law made by Parliament and the necessity of having such a law, in the facts and circumstances the matter, which is repugnant to a law enacted by parliament prevailing in a State. The word "consideration" would manifest that after careful thinking over and due application of mind regarding the necessity of having State law which is repugnant to the law made by Parliament, the President may grant assent. This aspect is further reaffirmed by use of the word "assent" in clause (2), which implies knowledge of the President to the repugnancy between the State law and the earlier law made by Parliament on the same subject-matter and the reasons for grant of such assent. The word "assent" would mean in the context as an expressed agreement of mind to what is proposed by the State.

15. The learned counsel Mr. Ravichandran has rightly pointed out the different meanings given to the word

"assent" in various dictionaries, which are as under:-

Corpus Juris Secundum

Assent (as a noun)- A passive act of concurrence; the act of the mind in admitting or agreeing to anything; the act of agreeing or consenting to accept some proposition; and, by context, "acceptance". It also has been defined as agreement or approval.... *"Assent*" implies knowledge of some kind in the party assenting to that to which he assents; also permission on the part of the party assenting'.....As used in some statutes, however, the term has been held to require affirmative, positive action on the part of the party assenting. It has been said that the term indicates the meeting of the minds of the contracting parties, and that the word is applicable only to conduct before or at the time of the doing of an act and hence does not include an approval after the commission of an act.....

Assent (as a verb)- The verb implies affirmative action of some sort as distinguished from mere silence and inaction; and has been defined as meaning to accept, agree to, or consent, to accord, agree, concede, or yield; to express an agreement of the mind to what is alleged or proposed; to express one's agreement, acquiescence, or concurrence; also to admit a thing as true; to approve, ratify, or conform; and sometimes to authorize or empower.

Shorter Oxford Dictionary

Assent- The concurrence of the will, compliance with a desire. 2. Official, judicial, or formal sanction; the action or instrument that signifies such sanction ME. 3. Accord. 4. Opinion. 5. Agreement with a statement, or matter of opinion; mental acceptance.

Bouvier's Law Dictionary

Assent- Approval of something done. An undertaking to do something in compliance with a request.....

Law Lexicon of British India by P. Ramanatha Aiyar

Assent- The act of the mind in admitting or agreeing to the truth of a proposition proposed for acceptance; consent, agreeing to; to admit, yield, or concede; to express an agreement of the mind to what is alleged or proposed, (as) royal assent or Viceroy's assent to an enactment passed in the Legislative Assembly; Executor's assent to a legacy; assent of a corporation to bye-laws.

Royal assent, in England, the approbation given by the Sovereign in Parliament to a Bill which has passed both Houses, after which it becomes law. This assent may be given in two ways; (a) In person, when the Sovereign comes to the House of Peers, the Commons are sent for, and the titles of all the Bills which have passed are read. The royal assent is declared in Norman-French by the Clerk of Parliament. (b) By Letters Patent, under the great seal signed by the Sovereign, and notified in his or her absence.

Webster's Third New International Dictionary (Vol.1)

"*Assent- 1...common accord: general approval c: concurrence with approval:...2. the accepting as true or*

certain of something (as a doctrine or conclusion) proposed for belief...."

Random House Dictionary

Assent- To agree or concur; subscribe to (often foll. by to); to assent to a statement. 2. To give in; yield; concede; assenting to his demands, she did as she was told--n. 3. Agreement, as to a proposal; concurrence. 4. Acquiescence; compliance.

Words & Phrases Judicial Dictionary--Mitra

"*Assent*- Assent means agreeing to or recognizing a matter...etc. *Wharton's Law Lexicon*."

"73. The assent of the President envisaged under Article 254 (2) is neither an idle or empty formality, nor an automatic event, necessitated or to be given for the mere asking, in whatever form or manner and whether specific, vague, general or indefinite-- in the terms sought for to claim that once sought and obtained as well as published, a curtain or veil is drawn, to preclude any probe or contention for consideration that what was sought and obtained was not really what should and ought to have been, to claim the protection envisaged under clause (2) in respect of a particular State law vis-Ã-vis or with reference to any particular or specified law on the same subject made by Parliament or an existing law, in force. The repugnancy envisaged under clause (1) or enabled under clause (2) to get excepted from under the protective coverage of the assent obtained from the President, is such that there is a legislation or legislative provision(s), covering and operating on the same field or identical subject matter made by both the Union and the State, both of them being competent to enact in respect of the same subject matter or legislative field, but the legislation by Parliament has come to occupy the entire field. Necessarily, in the quasi-federal structure adopted for the nation, predominance is given to the law made by Parliament and in such circumstances only the State Law which secured the assent of the President under clause (2) of Article 254 comes to be protected, subject of course to the powers of Parliament under the proviso to the said clause. Therefore, the President has to be apprised of the reasons at least as to why his assent is being sought, the need or necessity and the justification or otherwise for claiming predominance for the State Law concerned. This itself would postulate an obligation, inherent in the scheme underlying as well as the very purpose and object of seeking the assent under clause (2) of Article 254, to enumerate or specify and illustrate the particular Central law or provision with reference to which the predominance is desired. The absence of any standardized or stipulated form in which it is to be sought for, should not detract the State concerned, to disown its obligation to be precise and specific in the extent of protection sought having regard to the serious consequences which thereby inevitably follow i.e., the substitution of the Union law in force by the State law, in the territorial limits of the State concerned, with drastic alteration or change in the rights of citizen, which it may, thereby bring about."

"In **Shiv Gorakh Nath Charitable Society, Kanpur and others vs. Cantonment Board, Kanpur and others,** *1997(3) ALR 616*, a Division

Bench of this Court held that where constructions were made without prior permission, post facto permission cannot be granted and that the constructions has to be dismantled.

38. From the aforesaid it is clear that seeking previous approval from the Central Government is not an empty formality or an automatic event to be given on the mere asking. The Central Government is required to perform its duties in terms of the provisions contained in the aforesaid Rules of 1937 and the Central Government is also required to act in public interest. The Central Government has to consider the relevant materials and circumstances, such as the factors pointed out by the District Magistrate, Deputy Municipal Commissioner, etc. and, in a given case, the views of the general public. Thus, the statement of the learned counsel for the respondents that the military authorities have now moved the Central Government for the grant of requisite sanction would, in our view, be an empty formality and would not remove the duty that was cast upon the Central Government under the aforesaid Rules. The statute must be construed in such a manner whereby the intent and object of the Act could be given effect to. A discretion to grant sanction conferred on the Central Government must be exercised in public interest and judiciously. Therefore, seeking previous sanction from the Central Government at this stage would serve no useful purpose. In our view by seeking sanction from the Central Government at this stage cannot cure the initial defect.

In **Ms. Shailija Shah vs. Executive Committee, Bharat Varshya National Association and another**, *1995 ALR 88,* this Court held-

"We may point out that expression prior approval and approval connotes different situation, where a statute uses the term prior approval anything done without the prior approval, is nullity. However, where a statutes employs expression approval, in such cases subsequent rectification can make the act valid."

Similar view was expressed by this Court in **A.S.H.P. Association and others vs. Deputy Director of Education and others**, *1977 ALJ 341*.

39. The aforesaid principles of law squarely applied to the facts and circumstances of the present case. It is, therefore, clear that if previous sanction is not obtained in the first place, the said defect cannot be removed afterwards by seeking post facto sanction from the Central Government.

Second Question:

40. The time has come when the public has a right to retain certain lands in their natural state. There is a need to protect the environment and its ecology. The environment is finite. Human needs and activity are infinite. Because of limitations, the environment imposes certain constraints on the activities of human beings and therefore, imposes certain restrictions on human freedom. Urbanisation leads to the growth of the city. The growth of the city stretches the demand on the ecology and the environment to its limit, that is to say, the capacity of the environment to service the growth of the city both in providing the

raw materials and disposal of the waste products is stretched to its limit. Human beings, over the centuries, have changed the environment to suit their needs and comfort. The environment has proved to be malleable and still is. But there is a limit to it all. The environment cannot be taken for granted any longer. Certain types of ecological resources can no longer be destroyed which otherwise, would cause long term ill effects on the environment. Therefore, a time has come to honour, conserve and preserve the laws of nature.

The doctrine of Public Trust has been founded on ideas that certain properties like air, forests, rivers, etc. are held by the Government in trust for the free and unimpeded use of the general public.

In **M.C. Mehta vs. Kamal Nath and others**, *(1997)1 SCC 388 at 407*, the Supreme Court held:-

"The Public Trust Doctrine primarily rest on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject or private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes."

and further went on say-

"Our legal system- based on English common law- includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership."

In **M.I. Builders (P) Ltd. Vs. Shyam Sahu and others**, *1999(6)SCC 464*, at page 518, the Supreme Court held-

"This Public Trust doctrine in our country, it would appear, has grown from Article 21 of the Constitution."

In **M.C. Mehta V/s Union of India and others**, *2004(6) SCC 588 at 615,* the Supreme Court held-

"In the present case, the land cannot be permitted to be used contrary to the stipulated user except by amendment of the master plan after due observance of the provisions of the Act and the Rules. Non-taking of action by the Government amounts to indirectly permitting the unauthorized use, which amounts to the amendment of the master plan without following due procedure."

In **Virendra Gaur and others vs. State of Haryana and others**, *(1995)2 SCC,577 at 580*, the Supreme Court held-

> "Environment is a polycentric and multifaceted problem affecting the human existence. Environmental pollution causes bodily disabilities, leading to non-functioning of the vital organs of the body. Noise and

pollution are two of the greatest offenders; the latter affects air, water, natural growth and health of the people. Environmental pollution affects, thereby, the health of general public"

and further held that the Municipality is enjoined to-

".....frame the Scheme providing environmental and sanitary amenities and obtain sanction from the competent authority to provide, preserve and protect parks, open lands, sanitation, roads, sewage, etc. to maintain ecological balance with hygienic atmosphere not only to the present residents in the locality but also to be future generation."

and that land which is marked out and reserved for a park or for a recreational purpose could not be acquired or allotted for a building purpose, even though, housing was a public purpose.

In **Municipal Corporation, Ludhiana and another vs. Balinder Bachan Singh (Dead) by LRS. and others,** *(2004)5 SCC 182 at 187*, the Supreme Court held-

"For every locality green spaces and green belts have to be provided to provide lung space to the residents of the locality."

In **Bangalore Medical Trust vs. B.S. Muddappa and others**, A.I.R. 1991 SC 1902, the Supreme Court held-

"Protection of the environment, open spaces for recreation and fresh air, play grounds for children, promenade for the residents and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the Act by establishing the BDA. The public interest in the reservation and preservation of open spaces for parks and play grounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens."

and further held-

"The statutes in force in India and abroad reserving open spaces for parks and play grounds are the legislative attempt to eliminate the misery of disreputable housing condition caused by urbanization. Crowded urban areas, tend to spread disease, crime and immorality."

and in para 37, held

"Public parks as a place reserved for beauty and recreation was developed in 19th and 20th century and is associated with growth of the concept of equality and recognition of importance of common man. Earlier it was a prerogative of the aristocracy and the affluent either as a result of royal grant or as a place reserved for private pleasure. Free and healthy air in beautiful surroundings was privilege of few. But now it is a, "gift from people to themselves'. Its importance has multiplied

with emphasis on environment and pollution. In modern planning and development it occupies an important place in social ecology...."

".....Emphasis on open air and greenery has multiplied and the city or town planning or development acts of different States require even private house-owners to leave open space in front and back for lawn and fresh air...."

".... Absence of open space and public park, in present day when urbanization is on increase, rural exodus is on large scale and congested areas are coming up rapidly, may given rise to health hazard."

41. The maintenance of the open piece of land because of its historical importance and environmental necessity is by itself a public purpose and, therefore, the proposed construction of the duplex buildings would not only congest the area but would be prejudicial to the public purpose. By allowing the construction, the residents of the area as well as other citizens of the city would be deprived of the quality of life which they are entitled to under the Constitution. The decision to construct residential buildings on the Polo Ground, in our opinion, is unfair and arbitrary and not in public interest. The military authorities have not considered this aspect of the matter.

42. In the present case, admittedly "Polo Ground' has been in existence for almost 100 years. In Volume XXII of the District Gazetteers of the United Province of Agra and Oudh written by H.R.Nevil (1909 Edition), at page 208, while describing a place, Polo Ground has been mentioned. The passage reads as under:-

"South of the Government Press, stand a large premises of the Allahabad Bank, opposite the Polo Ground."

43. The aforesaid clearly implies, that in 1909 this piece of the land was called the Polo Ground. The word "polo' implies that the game polo was played on this ground at some stage. No doubt, since, independence, no polo has been played and this Polo Ground remained as an open piece of land. But it did not remain unused. This open land was used for multifarious functions. Since independence, this land has been used in every Lok Sabha and Vidhan Sabha election and also during the Kumbha Mela for the parking of the heavy vehicles. Over the years, this ground has been used by the civilian population for a variety of functions, such as, organizing a vintage car rally. Permission was granted by the military authorities to organize a Maruti Carnival. A religious fair is held annually by a particular section of the Society during "Raksha Bandhan' and person from other religions offer prayer every Thursday in the "Mazaar' located inside the Polo Ground. Therefore, it cannot be said that the land was always used for military purposes. No doubt, the land was in the Cantonment limits for the last 60 years, but before that, it was with the municipal authorities and used as a Polo Ground.

44. 'Polo Ground' borders the Municipal and the Cantonment limits. Over the years, the town has grown. Instead of expanding, the town has grown from within consuming the open spaces of land wherever found. The Civil Lines area which boasted of bungalows enclosed by acres of lawns and gardens, are now covered by residential flats and

commercial buildings. Small localities within the Civil Lines area have cropped up in the last two decades on account of the Government policy in converting the lease land into free hold land. Two decades of land exploitation by colonizers have resulted in the erosion of open spaces occupied previously by lawns and gardens which have now been converted into a congested area consisting of a concrete jungle. People are living like guinea pigs in congested areas with no sewer system, inadequate drainage system resulting in water logging during the mansoon. No arrangement of safe water supply has been taken into consideration. The authorities have turned a blind eye on air and noise pollution, caused by the vehicular traffic. All these has definitely resulted in a change in the environment and consequently in the ecology.

45. Polo Ground is one of the few open spaces left in the city and in our opinion, the petitioner was right in suggesting that if the constructions are allowed, the open space which was available for the last 100 years would be lost forever. In our view, Polo Ground was available to the citizens of Allahabad for the last 100 years initially to play Polo and, later on, for a variety of functions. Polo Ground has carved out its name in history. Why should the use of this land be changed today? There is no reason why the said land should not remain as an open piece of land for the next 100 years. If this land has serviced the citizens by providing for an open space, clean and pure air and beautiful surroundings for the last 10 decades, there is no reason why the status quo should not continue for the next 10 decades. After all, it must not be lost sight of, that today, the land in question is in the heart of the city surrounded and hedged all around by buildings. It has become all the more essential to preserve this land as an open space to provide clean and healthy air and to ensure that the area is free from pollution and other health hazards that may crop up if the constructions are raised.

46. No doubt, this piece of land has a historical value for the city of the Allahabad. It is comparable to the "maidan" of Kolkata. Imagine, permitting authorities to make construction in the "maidan' at Kolkata or in an around the "India Gate' in New Delhi.

47. We are aware that construction of residential buildings for the army is for a noble cause and is also for a public purpose and it has its own objective, but it cannot substitute a green belt. When urbanization is on the increase, the emphasis on open spaces, parks, green belts is much more and no Town Planner would prepare a residential scheme without reserving space for parks, green belts, etc.

48. In our opinion, if the residential complex is allowed to be constructed, the open space which was also acting as a green belt will vanish. Absence of green belts, open spaces, parks, etc. would create a health hazard and would have an adverse impact on the environment.

49. The learned counsel for the respondents submitted that more than 50% of the Polo Ground would be left open which will be developed as a park, therefore, the construction on a portion of the land would not have an adverse impact on the environment. The argument of the respondents, in our view, does not

appeal to us. Today, if a duplex building is allowed to come up, it will have some kind of an impact on the density of the area. Tomorrow by the same reasoning, a high rise building would come up which will have a further impact on the density of the area. Therefore, it is not a question of using only a small portion of the land in question. The question is one of maintenance of the open piece of land because of its environment necessity, which in our opinion is supreme. Permitting any construction would deprive further, the quality of life to the citizens of this city.

Chanakya in his "Neeti Shastra" said—

त्याजेदेकं कुलस्यार्थे कुलं त्याजेत।
ग्रांम जनपदस्यार्थे आत्यार्थे पृथवी त्यजेत।।

i.e., an individual be sacrificed to save a "family', a family be sacrificed to save a village/city and a city be sacrificed to save a State.

50. Therefore, we are of the view, that the respondents, i.e., the military authorities could go ahead with their "MAP' project on an alternative site which exist in the cantonment area.

51. In any case, the respondents have a lot of open land in the Cantonment. The petitioner in the supplementary affidavit has categorically stated that the respondents have huge expanse of open land near the Sadar Bazar, land at Teliarganj on Stanley Road between Mumfordganj and Rasoolabad (Old Cantt.) and in and around the Mela area. Judicial notice can also be taken of the fact that large tracts of open land exist in the old and new Cantonment of Allahabad. In reply to the aforesaid, the respondents in their counter affidavit have not pleaded nor proved that Polo Ground was the only land available to them for the implementation of the project in question. In fact, according to the respondents, as per the Key Location Plan, the project had to be planned on A-1 land, and since this land in question was adjacent to the existing married accommodation, therefore, it was administratively convenient to the military authorities to propose the construction of the residential complex, since the existing water and electricity connection would cater for the proposed construction. In our view, the approach adopted by the military authorities makes it clear, that they are only thinking about themselves and are not thinking about the futuristic environmental imbalance that may prevail on account of the proposed construction. It seems that a narrow approach has been adopted by the military authorities. They have not visualized the matter in a broader prospect keeping the whole city in mind. It is, therefore clear that the respondents have a lot of open spaces of land in the Cantonment itself which can easily be utilized in the construction of the residential accommodation for the married officers of the army. It may be stated here that the stand of the respondents that the project can only be made on A-1 land is incorrect. It is always open for the respondents to change the usage of Class-B or C land for residential purposes.

52. The Union of India may be the absolute owners of the land in question. But it cannot ignore the constitutional and statutory mandate, particularly, when it has not appraised of the relevant facts, namely, the views of the State Government, the Town Planner,

Allahabad Development Authority, Nagar Nigam, the District Magistrate, Allahabad etc. and moreover when the land in question is collocated with the Civil Area and is in close vicinity of the High Court, Circuit House, etc.

53. Stoppage of construction would undoubtedly cause hardship to the military authorities, but it is a price that has to be paid for protecting and safeguarding the rights of the people to live in a healthy environment with minimal disturbance of the ecological balance. The Supreme Court has clearly held in Bangalore Medical Trust case [supra] that open spaces which has become the gift for the people cannot be sacrificed by converting it to some other use. Therefore, allowing the construction merely because it was administratively convenient for the military authorities, as an existing married accommodation already existed across the road, in our opinion, would be inviting congestion and consequently a health hazard. It has come on record that there is no sewer system in the Cantonment. If this is allowed, then, every development authority, municipalities and local bodies would be constructing buildings next to the existing buildings because of administrative convenience. In our view, this is not a correct approach for modern planning and expansion of the city. If the city has to grow, it should grow from outside, its municipal limits should be increased. Similar is with the cantonment. If there is shortage of space, the military authority should acquire land outside the town limits, but should not consume the existing spaces inside the city. The respondents have themselves admitted that as per the key location plan (KLP), there is a shortage of land by 1761.957 acres. If this is correct, there is no reason why the respondent should be permitted to increase the shortage of land by increasing the density of the area.

54. Before parting, we would like to add that in order to maintain an ecological balance and protecting human rights, the time has come when every city should be equipped with a disaster management plan. The Supreme Court in **N.D. Jayal and another vs. Union of India and others**, *(2004) 9 SCC 362* at 393 held-

"Disaster management means all aspects of planning, coordinating and implementing all measures which are necessary or desirable to prevent, minimize, overcome or to stop the spread or a disaster upon the people or any property and includes all stages of rescue and immediate relief. It is a proven fact that a lot of human suffering and misery from a larger number of disasters can be mitigated by taking timely action, planning and preventive measures. It is possible only through well-functioning disaster-management framework. This will enable us to minimize, control and limit the effects of disasters and will streamline the disaster-management exercises. Our present relief-centred reactive approach after the striking of disaster needs to be changed into preparedness- oriented proactive attitude. This is the aim of pre-disaster preparations. Disaster-management plans have to play an integral role in this exercise. They are blueprints for the management of disasters. The disaster management plans should contain the aspects of disaster prevention and of ways for its management in the untoward occurrence of a disaster. A proper plan

will place the disaster-management exercise on a more firm foundation."

55. In order to implement a disaster management plan it is necessary that open spaces exist in the city. These open pieces of land could be used for various purposes during an emergency. In times of floods, fire, earthquakes etc., open spaces in the city could be used to minimize and curb the human suffering caused by the natural calamities. Disaster management is an integral part of the development activities and cannot be separated from a sustainable development of the city. For a sustainable development of the city, and for a healthy growth of a city, existence of open spaces, green belt is essential. For the aforesaid reasons, it is necessary to maintain open spaces for disaster management plan.

56. Thus, in view of the aforesaid, we are of the view that the land in question known as "Old Polo Ground' measuring approximately 22.77 acres of land, should not be used for the residential construction for the married accommodation project for the married officers of the Army. The respondents have other large tracts of open land in the Cantonment which could be easily utilized for the construction of 48 dwelling units proposed under MAP on the Old Polo Ground in the Civil Lines area of the city of Allahabad. The existing piece of land which is the lungs of the city should be preserved as such. Consequently, a writ of mandamus is issued to the respondents, restraining them from making any construction on the Polo ground in question and to maintain it as an open piece of land.

57. The respondents had dug up the land at a few places in the Polo Ground and the same was stopped on account of an interim order passed by this Court. Since we have restrained the respondents from making any constructions, we further direct the respondents to restore the land to its original shape within three months from today.

58. The writ petition stands allowed with the directions as given above. In the circumstances of the case, there shall be no order as to cost.

Petition Allowed.
