APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2005

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

Second Appeal 1149 of 2002

Allah Taala ...Appellant
Versus
Maya Devi and others ...Respondents

Counsel for the Appellant:
Sri S. Asraf Ali
Sri Shahid Masood
Sri Rajesh Kumar
Sri M.A. Qadeer

Counsel for the Respondents:
Sri Shamim Ahmad
Sri Faujdar Rai
Sri M.P. Sinha
Sri Sanjay Kumar Singh
Sri Sanjay Rai
Sri S.A. Ali

U.P. Waqf Act No. 43 of 1995-Section-90 (3) Maintainability- of Application-concurrent finding recorded by the courts below-confirmed by High Court in Second Appeal-review application also rejected-finding to the effect that the property in dispute is not waqf property-can not be reopened on were assertions of made by the applicant-held-application not maintainable.

Held: Para 3

In the case at hand, this question was raised at the first instance and an issue was framed and decided in negative, which has also been confirmed by this Court. In the circumstances, I come to the conclusion that this Application is not maintainable and is accordingly rejected.

Case law discussed:
1995 A.C.J. (2) 1159 relied on.

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri M.A. Qadeer, Advocate, appearing on behalf of the U.P. Sunni Central Board of Waqfs, Lucknow. He has filed an application under Section 90 (3) of U.P. Waqfs Act No.43 of 1995 in second appeal no.1149 of 2002, Allah Taala Vs. Smt. Maya Devi and others. Sri Faujdar Rai, Advocate, appearing on behalf of the plaintiff/respondents.

2. Both the counsels have also furnished their written submissions. This application has been challenged on behalf of the plaintiff/respondents raising preliminary objection that the application under Section 90 (3) of U.P. Waqfs Act No.43 of 1995 (hereinafter referred as the Act) is not maintainable. The suit filed by the plaintiff/respondents was decreed on 24.11.1992 in Original Suit No. 101 of 1973 Musamat Bela Devi Vs. Allah Taala. This judgment was confirmed in appeal by the Additional District Judge, court no.1 Ballia in civil appeal no.6 of 1993 and the Second Appeal filed against the judgment and decree 26.8.2002 has also been dismissed by this Court on 3.10.2002. A review application was also filed on 11.11.2002, which was rejected as not maintainable at the instance of a different counsels other than one, who had filed the Second Appeal. The review application was rejected on 12.7.2004. Sri Faujdar Rai, Advocate, has emphatically argued raising this preliminary objection that since the suit has been decreed up till the stage of this High Court, this application at the behest of the Waqfs Board is not maintainable. The property in dispute is not Waqf property as specific issue was framed on this question. Issue no.9 was that:

'Whether the suit is barred by the provision of Section 65 of U.P. Sunni Act 1960'.

3. The said issue was decided by the trial court holding that it has been established that the property in question is not Waqf property. In the circumstances, no right of the Waqfs Board is effected and accordingly, the suit is not barred by Section 65 of the Act. This finding was confirmed in appeal filed on behalf of the defendant/appellants, which was dismissed on 26.8.2002. I have perused the judgment of the lower appellate court. It transpires that the finding of the trial court on issue no.9 was never challenged. The Second Appeal was dismissed by this Court. A review application was also rejected by this Court. It appears that the applicant has resorted to a second inning by filing an application under Section 90 (3) of the Act. The argument advanced by the counsel that the notice to the Waqfs Board is mandatory in respect of the property, which if admittedly is the Waqf property, is not disputed. But in the instant case, specific issue was framed regarding the question as to whether the property in dispute is Waqf property or not? This has been decided that the property in questions belongs to the plaintiffs and is not Waqf property. In the circumstances, the adjudication of the suit up till the stage of the High Court cannot be reopened on a mere assertions made by the applicant that the property is Waqf property. The argument of the counsel for the applicant that in absence of the notice under Sub clause 1 of Section 90 of the Act, the proceedings are liable to be declared as void, if the Board within one month of its knowledge of the proceeding applies to the court on this behalf. The basic question to be decided before any judgment or order is declared as void, is that the subject matter of dispute must necessarily be a Waqf property. In case it is permitted to reopen the controversy without arriving at a substantial and categorical finding to the effect that firstly the property is a Waqf property and secondly that Waqf Board was not given any notice, a piquant situation will arise in every second case. Since there are categorical findings of fact arrived at consecutively by two courts and confirmed in Second Appeal by this Court, mere saying that the property in question is a Waqf property and, therefore, the entire proceedings should be rendered void, is not correct. Counsel for the respondents has placed a decision of this Court Ajodhya Prasad Vs. Additional Civil Judge, Moradabad and others 1995 A.C.J. (2) page 1159, where it has been held that it could never have been the intention of the legislature to cast a cloud on the right, title or interest, of persons who are non Muslims. Counsel for the applicant has also placed reliance on a number of decisions relating to the property which was admittedly a Waqf property. The said decisions are not applicable in the present case. In the case at hand, this question was raised at the first instance and an issue was framed and decided in negative, which has also been confirmed by this Court. In the circumstances, I come to the conclusion that this Application is not maintainable and is accordingly rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2005

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

Civil Misc. Writ Petition No. 3447 of 2002

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

Counsel for the Petitioner:
Sri S.K. Singh

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

Constitution of India, Art. 226-Service Law-Right to appointment-Petitioner being placed at serial No.-2 in the waiting list for the post of U.P. State Universities (centralized) Services Asstt. Registrar Examination 1996-on the ground that two candidates of general category had resigned within the period of One year from the date of joining and the top most candidates of waiting list refused to joine-State Government send requisition vide its letter dt. 26.7.01-The secretary Higher Education Commission by its letter dt. 20.8.01 refused on the in the garb of caused due to of Para 3 of G.O. dt.23.12.97-the vacancy resignation of selected candidate after their joinings- cannot be filled its from the waiting list-held-after joining of selected candidates-such vacancies stood exhausted-being fresh vacancies-to be carried forward for the next selection-No right to claim appointment subsists.

Held: Para 19,20

But if all the selected candidates who had been offered appointment against the vacancies included in the process of process of selection join the post to fill up such vacancies though shortly thereafter any or some of the candidates resign from the post even if during life time or subsistence of select/waiting list, such vacancies stood exhausted on account of such joining of selected candidates and cannot be filled up either from the remaining candidates of select list who ranked lower in order of merit or from the waiting list despite their being included in select/waiting list and life of select/waiting list still subsists.

Thus the vacancies occurred on account of death, compulsory retirement, voluntary retirement, dismissal, removal of any incumbent during the life time of waiting list, can not be filled up from such select/waiting list. In our considered opinion, as indicated herein before, similarly the vacancies arising out of resignation of a selected candidate after his joining would be a fresh vacancy and cannot be filled in from the aforesaid select list, rather to be carried forward for the fresh process of selection and to be filled up by affording opportunity to compete all eligible and qualified candidates. This is crux of the matter.

Case law discussed:
2001 (1) UPLBEC-462
1999 (2) AWC-1230
AIR 1991 SC-1612
1974 (5) SCR 1645=AIR 1973 SC-2216
(1986) 4 SCC-268=AIR 1987 SC-169
(1985) 1 SCR-899=AIR 1984 SC-1850
1994 Supp. (2) SCC-591
(1996) 4 SCC 319
(1984) 1 SCR
AIR 1987 SC-454
(1989) 4 SC-130
1986 (4) SCC-268
1993 Supp. (2) SCC-377
1994 (1) SCC-126
1994 Supp. (2) SCC-591
AIR 1994 SC-765, AIR 1995 SC-1088
1993 (2) SCC-573, AIR 2001 SC-3757
J.T. 1997 (7) SC-537, 1997 (4) SCC-283
1999 (3) SCC-696, 2000 (1) SCC-600
1998 (8) SCC-59,

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

The petitioner has filed this writ petition seeking a direction in the nature of a writ of mandamus directing the respondent no.4 Public Service Commission, Uttar Pradesh, Allahabad, (hereinafter referred to as Commission) to send the name of the petitioner from the waiting list of U.P. State Universities (Centralised) Services Assistant Registrar Examination year 1996, in pursuance of requisition sent by the State Government vide its letter dated 26.7.2001 and further a writ in the nature of mandamus was sought for directing respondents no.2 and 3 to appoint the petitioner forthwith on the post of Assistant Registrar on the vacant post of aforesaid 1996 Examination arising out of resignation of 2 candidates of general category within a period of one year after their joining. The petitioner has also challenged the letter dated 20.8.2001 contained in Annexure-9 of the writ petition whereby the Secretary of the Commission has communicated to the Secretary Higher Education,Government of Uttar Pradesh in pursuance of his letter dated 26.7.2001 stating therein that in view of para 5 of the government order dated 31.1.1994, the period of waiting list has already expired and in view of para 3 of the government order dated 23.12.1997 the vacancy arising out of resignation of selected candidates after joining even during the life time of waiting list cannot be filled from the waiting list.

2. The brief facts having material bearing to the controversy involved in the case are that on 5.8.1996 an advertisement no.A-1/E-1 96-97 was published by the Commission in daily newspapers for holding selection against 11 vacancies on the post of Assistant Registrar in U.P. State Universities (Centralised) Services. Out of the aforesaid 11 vacancies, 6 vacancies were earmarked as unreserved for candidates of general category, 3 vacancies were reserved for other backward class candidates and 2 vacancies were reserved for the candidates belonging to S.C. & S.T. Subsequently thereafter aforesaid vacancies were increased from 11 to 19. The petitioner being fully eligible and qualified, applied for the selection and pursuance thereof, he was permitted to appear in written examination. The petitioner was declared successful in written examination and was called for interview which was held on 29.9.1997. After the interview, the result of aforesaid selection was declared on 30.9.1997 in which total 19 candidates were declared successful. The name of the petitioner did not find place in the main select list. But he was placed at serial no.2 in the waiting list of the candidates belonging to the general category. The names of selected candidates were recommended and forwarded by the Commission to the State Government for appointment and the letters of appointment have been issued to the selected candidates by the State Government on 30.12.1997. The petitioner came to know that 2 candidates of general category, namely Kamlesh Kumar Shukla and Anand Kumar had resigned from service within one year of their selection and appointment on 5.9.1998 and 2.12.1998 respectively as a result of which 2 vacancies on the said post have occurred. Since the aforesaid vacancies arose out of resignations of candidates belonging to the general category,the petitioner, being a general category candidate at serial no.2 in the waiting list, was entitled to be

recommended by the Commission and the State Government was under legal obligation to ask the Commission to send the name of the petitioner for appointment and further to issue letter of appointment to the petitioner on the basis of his placement at serial no.2 in the waiting list amongst the candidates belonging to the general category. The petitioner moved several representations to the authorities concerned for his appointment against one of the aforesaid two vacancies. It is also alleged that the person placed at serial no.1 of the waiting list of general category, namely Sri Rajiv Kumar did not make any effort for appointment on the aforesaid post. In fact it appears that he is not interested in appointment against the said vacancies. It appears that in pursuance of such representations made by the petitioner, the Secretary Government of Uttar Pradesh wrote a letter to the Commission on 26.7.2001 to send the names from the aforesaid wait listed candidates which in turn was replied by the Secretary of the Commission vide his letter dated 20.8.2001 contained in Annexure-9 to the writ petition whereby the request made by the government has been turned down by the Commission on the grounds stated herein above, hence this petition.

3. A detailed counter affidavit has been filed on behalf of the Commission, respondent no.4 whereby the stand taken by it in the impugned order/letter dated 20.8.2001 had been reiterated and supported by placing justification for not recommending the name of the petitioner for appointment against the aforesaid vacancy. For ready reference the averments made in paragraphs 4 and 11 of the counter affidavit are reproduced below:

"That the petitioner Sri Arun Kumar Singh, a general category candidate having Roll No. 404 appeared at the U.P. State Universities (Centralised) Services Assistant Registrar Examination, 1996 but after interview he was not finally declared selected. Subsequently the recommendation of the finally selected candidates for the 19 posts of Assistant Registrar was sent to the govt. vide letter no. 101/2/Misc./E-1/94-95 dated 20th November, 1997 for further action. Then after the expiry of about four years since the aforesaid recommendation was sent, the Commission received the proposal from the govt. vide letter No. Mu. Man. /645/70-1-2001-35 (6)/1999 dated 28 July 2001 to send recommendation from the waiting list for three vacant posts of Assistant Registrar which fell vacant due to non-joining of one of the S.C. candidate as well as the resignation tendered by two candidates from the general category (General merit list). Through this letter the Commission was intimated that one Sri Mool Chandra, an S.C. category candidate who was placed at serial no.17 of the recommendation, did not join his post, hence his candidature was rejected. In the same way two candidates who were placed at serial no.1 a& 2 Sri Anand Kumar (O.B.C.) and Sri Kamlesh Kumar (Gen.) who resigned from their opost after joining, resulting 3 posts of Assistant Registrar vacant for which recommendation was sought by the govt. mentioning the name of the petitioner to be sent. Here it is noteworthy to state that the name from the waiting list for any examination is recommended to the govt. in accordance with the provisions provided in the State govt.'s Office Memo No. 1760-Aa/47-Ka-4-93-28-5-1980,dated 31 January, 1994 in which it is very clearly mentioned in sub

para 5 & 6 that the waiting list would be valid only for one year and if the waiting list is not utilised within the stipulated period of one year, the vacancy would be forwarded for the next selection year. Apart from this the sub para 3 of the Office Memo No. 28-5-60-Ka-4-1997 dated 23 December, 1997 also maintains that the name from the waiting list cannot be recommended for the post falling vacant on account of the resignation tendered by a candidate even if the waiting list is being utilised within the stipulated period of one year. Thus the said proposal of the govt. dated 28 July, 2001 for sending recommendation from the waiting list was found to be "time barred" and against the provisions provided in the aforesaid G.O. Thus the proposal was turned down, and the govt. was informed about this vide office letter no. 74(i)/08/C-1/97-98 dated 27 October 2001. Now the petitioner wants the Commission to act in accordance with the proposal sent by the government and send his name from the waiting list. Hence he has filed the present writ petition which is devoid of merit and is liable to be rejected.

(11) That in reply to the contents of paras 18 and 19 of the writ petition, it is submitted that the name from the waiting list of any examination is recommended to the govt. in accordance with the provisions provided in the state govt. office memo no. 1760-A/347-Ka-4-93-28-5-1980 dated 31 January, 1994 in which it is very clearly mentioned in sub-para 5 and 6 that the waiting list would be valid only for one year and if the waiting list is not utilised within the stipulated period of one year, the vacancy would be carried forwarded for the next selection year. Thus in the light of the provision provided in the said G.O. the proposal of the Govt. to recommend substitutes name from the waiting list is "time barred" proposal because it was sent by the govt. after the gap of about four years since the recommendation for the said examination was sent to the govt. by the commission. Apart from this the sub-para 3 of the office memo no. 28/5/80-Ka-4-1997, dated 23 December, 1997 also provides that the name from the waiting list cannot be recommended for the post falling vacant on account of the resignation tendered by a candidate even if the waiting list is being utilised within the stipulated period of one year. Thus it is quite obvious that the proposal of the govt. to send substitutes name from the waiting list is not at all in keeping with the rules and provisions provided in the aforesaid G.O. thus untenable. Hence the proposal was turned down and the govt. was informed about this vide letter no. 74(1)/08/C-1/97-98 dated 27 Oct. 2001. A true copy of the aforesaid G.O. dated 31 January, 1994, Office memo dated 23 Dec. 1997 are being annexed here with as "Annexure C.A-1 & Annexure C.A.-II" to this counter affidavit."

4. Since the necessary affidavits have been exchanged between the parties and the case is ripe for hearing, it is heard with the consent of the parties.

5. We have heard Sri Sanjay Kumar Singh, learned counsel for the petitioner and learned standing counsel appearing for respondents no.1 to 3 and Sri M.A.Qadeer learned counsel appearing for respondent no.4 and also perused the record.

6. The thrust of the submission of learned counsel for the petitioner is that

since the name of the petitioner finds place at serial no.2 in the waiting list of candidates belong to general category and the person placed at serial no.1 in the waiting list had no interest to join the post which became vacant on account of resignation of 2 candidates of general category within a year after their selection and appointment, therefore, the petitioner being empanelled at serial no.2 in the waiting list is entitled to be recommended and appointed against one of the vacancy caused due to resignation of aforesaid two general category candidates during the life time of waiting list. The action of the respondents in not recommending the name of the petitioner for appointment against the said vacancy in given facts and circumstances of the case is wholly arbitrary, illegal and without any justification under law. In support of his submission the learned counsel for the petitioner has placed reliance on division bench decisions of this court rendered in Ved Prakash Tripathi vs. State of U.P. and others, (2001) 1 UPLBEC 462 and State of U.P. and others v. Ravindra Nath Rai and others 1999 (2) AWC 1230.

7. Contrary to it, Sri M.A.Qadeer, learned counsel for respondent no.4 has submitted that the action taken by the Commission is fully justified in given facts and circumstances of the case. While elaborating his submissions Sri Qadeer submitted that firstly, life of select list/waiting list is 1 year from the date of its preparation and last recommendation made by the Commission to the government in pursuance of such selection and secondly, even if the vacancy is caused on account of resignation of a selected candidate after his joining within one year during the life time of the select list/waiting list, in that eventuality also the name of wait listed candidate cannot be recommended against such vacancy as the select list stood exhausted on account of joining of the candidate of the select list against such vacancy and after his resignation the vacancy caused is to be carried out for the next selection and the candidate of the waiting list cannot be recommended against such vacancy. In support of his submissions Sri Qadeer has placed reliance upon the relevant paragraph of the government order of the year 1994 and 1997, referred herein before and averments made in the counter affidavit, reproduced herein before, filed on behalf of the Commission.

8. On the basis of rival submissions and contentions of learned counsel for the parties a moot question arises for consideration is as to whether a candidate empanelled in the select list/waiting list is entitled for appointment against the vacancy caused due to resignation of selected candidates of the aforesaid select list who joins the post and resigns shortly thereafter or during life time of the said select/waiting list?

9. Before dealing with the question in issue it is necessary to deal with the relevant aspect of the matter having material bearing on the issue which has received consideration of Hon'ble Apex Court on numerous occasions. In this regard a reference can be made to a Constitution Bench decision of the Hon'ble Supreme Court rendered in Shankarsan Dash v. Union of India and others, AIR 1991 SC 1612 wherein the Hon'ble Apex Court has dealt with the question of the legal nature of select list, how can it be utilised and whether a selected candidate had indefeasible right

of appointment on account of being empanelled in the select list? For ready reference para 7 of the aforesaid decision reproduced as under:

"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 indicate, 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. And if 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, (1974) 1 SCR 1645: (AIR 1973 SC 2216), Miss Neelima Shangla v. State of Haryana, (1986) 4 SCC 268: (AIR 1987 SC 169), or Jitendra Kumar v. State of Punjab, (1985) 1 SCR 899: (AIR 1984 SC 1850)"

10. In Gujrat State Dy. Executive Engineers' Association v. State of Gujrat and others, 1994 Supp (2) SCC 591, the Hon'ble Apex Court has considered the questions 'what is waiting list? can it be treated as a source of recruitment from which a candidate may be drawn as and when necessary and how long can it operate?' The relevant portion of paras 8 and 9, of the decision are being reproduced as under:

"8. Coming to the next issue, the first question is what is a waiting list? can it be treated as a source of recruitment from which candidates may be drawn as and when necessary? and lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High Court. A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join."

9. A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service."

11. In Prem Singh and others v. Haryana State Electricity Board and others, (1996) 4 SCC 319 the questions for consideration before the Hon'ble Apex Court was as to whether the appointment from the select list/waiting list can be limited only to the extent of vacancies advertised or it can be extended for future vacancies also? In this case while taking note of the earlier decisions rendered by it and High Courts the Hon'ble Apex court has dealt with the issue in some detail in paras 15 to 25 of the decision. It would be useful to refer to some paragraphs of the decision as under:

"15. In Subhash Chander Sharma v. State of Haryana, (1984) 1 SLR (P & H) the facts were that as against 60 advertised posts the Public Service Commission had recommended almost double the number and more than 60 candidates were appointed on the basis of that selection. Relying upon the earlier decision of the same High Court in Sachida Nand Sharma v. Subordinate Services Selection Board decided on 1-6-1983 it was contended that all appointments beyond 60 should be invalidated. The High Court distinguished its earlier decision in Sachida Nand Sharma Case and held that if the State adopted a pragmatic approach by taking into consideration the existing vacancies in relation to the process of selection which sometimes takes a couple of years and made appointments in excess of the posts advertised then such an action cannot be regarded as unconstitutional.

16. In Ashok Kumar Yadav v. State of Haryana, AIR 1987 SC 454 what had happened was that Haryana Public Service Commission had invited applications for recruitment to 61 posts in Haryana Civil Service and other allied services. The number of vacancies rose during the time taken up in the written examination and the viva voce test and thus in all 119 posts became available for being filled. The Haryana Public Service Commission, therefore, selected and recommended 119 candidates to the Government. Writ petitions were filed in

the High Court of Punjab and Haryana challenging the validity of the selections on various grounds. The High Court set aside the selection as it was of the view that the selection process was vitiated for more than one reason. On appeal, this Court also found substance in the contention that the Haryana Public Service Commission was not justified in calling for interview candidates representing more than 20 times the number of available vacancies and that the percentage of marks allocated for the viva voce test was unduly excessive. Yet this Court did not think it just and proper to set aside the selections made by the Haryana Public Service Commission as by that time two years had passed and the candidates selected were already appointed to various posts and were working on those posts since about two years.

17. In A.V.Bhogeshwarudu v. A.P. Public Service Commission, J.T. (1989) 4 Sc 130, the process of selection had started in 1983 and was completed in 1987. The vacancies that arose in between were also sought to be accommodated from the recruitment list prepared by the State Public Service Commission. The point which arose for consideration was if out of the names recommended for appointments some candidates did not join, whether the vacancies remaining unfilled can be filled from out of the remaining successful candidates. This Court held that there was no justification in insisting that instead of filling up the vacancies by recommended candidates a fresh selection list should be made. This decision is, therefore, not relevant for the purpose of this appeal. So also, the cases of Neelima Shangla v. State of Haryana (1986) 4 SCC 268 and Shankarsan Dash v. Union of India (supra) cited by the learned counsel for the appellants are of no help as the point involved in those cases was altogether different.

18. In Hoshiar Singh v. State of Haryana, 1993 Supp (4) SCC 377, a requisition was sent to select candidates for appointment on 6 posts of Inspectors of Police by advertisement dated 22-1-1988. Applications were invited for the said 6 posts. Subsequent to the written examination but prior to the physical test and interview a revised request for 18 persons was sent. The Board recommended 19 names out of which 18 persons were given appointments. Those appointments were challenged before the Punjab and Haryana High Court and it was held that appointments beyond 8 posts were illegal. On appeal this Court held that since requisition was for 8 posts, the Board was required to send its recommendation for 8 posts only. This Court further observed: (SCC p. 384, para 10):

"The appointment on the additional posts on the basis of such selection and recommendation would deprive candidates who were not eligible for appointment to the posts on the last date for submission of applications mentioned in the advertisement and who became eligible for appointment thereafter, of the opportunity of being considered for appointment on the additional posts because if the said additional posts are advertised subsequently those who become eligible for appointment would be entitled to apply for the same. The High Court was, therefore, right in holding that the selection of 19 persons by the Board even though the requisition was for 8 posts only, was not legally sustainable."

19. In the case of State of Bihar v. Secretariat Asstt. Successful Examinees' Union 1986, (1994) 1 SCC 126 the Bihar State Subordinate Services Selection Board had issued an advertisement in the year 1985 inviting applications for the posts of Assistants falling vacant up to the year 1985-86. The number of vacancies as then existing was announced on 25-8-1987, the examination was held in November 1987 and the result was published only in July 1990. Immediately thereafter out of successful candidates 309 candidates were given appointments and the rest empanelled and made to wait for release of further vacancies. Since the vacancies available uptil 31.12.1988 were not disclosed or communicated to the Board no further appointment could be made. The empanelled candidates, after making an unsuccessful representation to the State Government approached the Patna High Court which directed them to be appointed in vacancies available on the date of publication of the result as well as the vacancies available which had arisen up to 1991. The State appealed against that decision and this 'Court held that the direction given by the High Court for appointment of empanelled candidates according to the merit list against the vacancies till 1991 was not proper and cannot be sustained. This Court further observed that since no examination was held since 1987 persons who became eligible to compete for appointments were denied the opportunity to take the examination and the direction of the High Court would prejudicially affect them for no fault of theirs. However, keeping in view the fact situation of the case this Court upheld the appointments made on the posts falling vacant up to 1988 and quashed the judgment of the High Court which directed the filling up of of the vacancies of 1989, 1990 and 1991 from out of the list of the candidates who had appeared in the examination held in 1987.

25. From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case."

12. The aforesaid view taken by the Hon'ble Apex Court in Prem Singh and others v. Haryana State Electricity Board and others (supra) and Gujrat State Dy. Executive Engineers' Association v. State of Gujrat and others (supra) has been reiterated again by the Apex Court in Surinder Singh and Ohers v. State of Punjab and others, AIR 1998 SC 18. In paras 14 and 15 of this decision the Apex Court has held as under:

"14. Prem Singh case (1996) 4 SCC 319, was decided on the facts of that case and those facts do not hold good in the present case. In the case of Gujrat State Dy. Executive Engineers' Association, 1994 Supp (2) SCC 591 this Court has explained the scope and and intent of a waiting list and how it is to operate in service jurisprudence. It cannot be used as a perennial source of recruitment filling up the vacancies not advertised. The Court also did not approve the view of the High Court that since vacancies had not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed. Candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative.

15. It is no uncertain words that this Court has held that it would be improper exercise of power to make appointments over and above those advertised. It is only in rare and exceptional circumstances and in emergent situation that this rule can be deviated from. It should be clearly spelled out as to under what policy such a decision has been taken. Exercise of such power has to be tested on the touch stone of reasonableness. Before any advertisement is issued; it would, therefore be incumbent upon the authorities to take into account the existing vacancies and anticipated vacancies. It is not as a matter of course that the authority can fill up more posts than advertised."

13. In State of Bihar and another v. Madan Mohan Singh and others, AIR 1994 SC 765, Hon'ble Supreme Court after taking note of earlier decisions has held that a particular selection is meant for filling of vacancies advertised in that selection from the candidates selected and the select list would be well and good for the purpose of filling only those vacancies for which the selection has been made. The select list would be exhausted if the vacancies have been filled by the selected candidates irrespective of the fact that certain other persons left out and could not get appointment against such vacancies who ranks lower in merit of such selection. For ready reference relevant portion of para 7 of the aforesaid decision is reproduced as under:

"It is therefore crystal clear that the advertisement and the whole selection process that ensued were meant only to fill up 32 vacancies. Learned counsel for the respondents relying on the decisions of this Court in Kailash Chandra Sharma v. State of Haryana, 1989 Suppl (2) SCC 696: (AIR 1990 SC 454) and O.P. Garg v. State of U.P., AIR 1991 SC 1202, contended that when there are temporary vacancies, the direct recruits should have their share of quota in respect of temporary vacancies also. As noted above, the temporary vacancies arose subsequently but even otherwise in the view we are taking namely that the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies, the merit list prepared on the basis of the written test as well as the viva voce will hold good only for the purpose of filling up those 32 vacancies and no further because the said process of selection for those 32 vacancies got exhausted and came to an end. If the same list has to be kept subsisting for the purpose of filling up

other vacancies also that would naturally amount to deprivation of rights of other candidates who would have became eligible subsequent to the said advertisement and selection process."

14. In Madan Lal v. State of J.& K, AIR 1995 SC 1088 the Hon'ble Apex Court has followed the decision rendered earlier in State of Bihar and Another v. Madan Mohan Singh and others (supra) and in paragraph 23 of the decision held as under:

"23.It is now time to refer to rule 41 as pointed out by the learned counsel for the petitioners. The said rule reads as under:-

"Security of the list.-The list and the waiting list of period of one year from the date of its publication the selected candidates shall remain in operation for a in the Government Gazette or till it is exhausted by appointment of the candidates whichever is earlier, provided that nothing in this rule shall apply to the list and the waiting list prepared as a result of the examination held in 1981 which will remain in operation till the list or the waiting fist is exhausted.

A mere look at the rule shows that pursuant to the requisition to be forwarded by Government to the Commission for initiating the recruitment process, if the Commission has prepared merit list and waiting list of selected candidates such list will have a life of one year from the date of publication in Government Gazette or till it is exhausted by the appointment of candidates, whichever is earlier. This means that if requisition is for filling up of 11 vacancies and it does not include any anticipated vacancies, the recruitment to be initiated by the Commission could be for selecting 11 suitable candidates. 'The Commission may by abundant caution prepare a merit list of 20 or even 30 candidates as per their inter se ranking on merits. But such a merit list will have a maximum life of one year from the date of publication or till all the required appointments are made whichever even happened earlier. It means that if requisition for recruitment is for 11 vacancies and the merit list prepared is for 20 candidates, the moment 11 vacancies are filled in from the merit list the same gets exhausted, or if during the span of one year from the date of publication of such list all the 11 vacancies are not filled in, the moment the year is over the list gets exhausted. In either event, thereafter, if further vacancies are to be filled in or remaining vacancies are to be filled in, after one year, a fresh process of recruitment is to be initiated giving a fresh opportunity to all the open market candidates to compete. This is the thrust of rule 41. It is in consonance with the settled legal position as we will presently see. We cannot agree with the learned counsel for respondents that during the period of one year even if all the 11 vacancies are filled in for which requisition is initiated by the State in the present case and if some more vacancies arise during the one year, the present list can still be operated upon because the Commission has sent the list of 20 selected candidates. As discussed above, the candidates standing at serial nos. 12 to 20 in the list can be considered only in case within one year of its publication, all the 11 vacancies do not get filled up for any reason. In such a case only this additional list of selected candidates would serve as a reservoir from which meritorious suitable candidates can be drawn in order of merit to fill up the

remaining requisitioned and advertised vacancies, out of the total 11 vacancies. If that cannot be done for any reason within one year of the publication of the list, even this reservoir will dry up and the entire list will get exhausted. We asked learned counsel for respondents State to point out whether after the letter at page 87, there was any further communication by the State to the Commission to initiate process for recruitment to additional anticipated vacancies. He fairly stated that no further request was sent. That letter at page 87 is the only material for this purpose since that is the basis for the recruitment made by the Commission in the present case. In this connection, we may usefully refer to a decision of this Court in the Case of State of Bihar v. Madan Mohan Singh & Ors. (AIR 1994 SC 765). In that case appointments to the posts of Additional District and Sessions Judges were being questioned. The question was whether appointments could be made to more than 32 posts when the selection process was initiated for filling up 32 vacancies and whether the merit list of larger number of candidates would remain in Operation after 32 vacancies were filled in. Negativing the contention the such merit list for larger number of candidates could remain in operation after 32 advertised vacancies were filled in, K. Jayachandra Reddy, J. made the following pertinent observations:-

"Where the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies, the merit list of 129 candidates prepared in the ratio of 1: 4 on the basis of the written test as well as viva voce will hold good only 'for the purpose of filling up those 32 vacancies and no further because said process of selection for those 32 vacancies got exhausted and came to anend. If the same list has to be kept subsisting for the purpose of filling up other vacancies also that would naturally amount to deprivation of rights of other candidates who would have become eligible subsequent to the said advertisement and selection process."

Reliance placed by the learned counsel for respondents in the case of Asha Kaul (Mrs) and Anr. Vs. State of Jammu and Kashmir and Ors. (1993 (2) SCC 573), is of no avail. In that case the very same Jammu and Kashmir Government had sent a requisition to the Public Service Commission to select 20 candidates for the posts of Munsiffs in accordance with the High Court requirement. Therefore, the Commission advertised for recruitment to the said posts and held written test and oral interview. The Commission having selected 20 candidates in the order of merits and also having prepared a waiting list of candidates, the State of Jammu and Kashmir did not appoint even selected 20 candidates on these advertised posts. The High Court rejected the writ petition praying for a suitable writ of mandamus to the State to fill up the remaining vacancies out of 20 for which recruitment was made. The petitioners approached this court in appeal by way of special leave. This court speaking through Jeevan Reddy, J took the view that though inclusion in the select list does not confer any indefeasible right to appointment, there was an obligation for the Government to fill up all the posts for which requisition and advertisement were given. However on the peculiar facts of the case, the court did not think it fit to interfere. This court in para 10 of the report clearly observed that by merely approving the list of 20 there was no

obligation on the Government to appoint them forthwith. The appointment depends upon the availability of the vacancies. The list remains valid for one year from the date of its approval and date of publication and if within such one year any of the candidates therein is not appointed, the list lapses and a fresh list has to be prepared. Though a number of complaints had been received by the Government about the selection process, if the Government wanted to disapprove or reject the list, it ought to have done so within a reasonable time of the receipt of the select list and for reasons to be recorded. Not having done that and having approved the list partly (13 out of 20 names), they cannot put forward any ground for not approving remaining list. It is difficult to appreciate how this judgment can be of any avail to the respondents. In the case aforesaid before this court there was a clear requisition and recruitment for 20 posts. The State had however chosen to appoint only 13 out of 20. The list had a life of one year till all the 20 posts were fill up. This was in consonance with rule 41. In the present case the facts are different. The requisition is not for 20 vacancies as in Asha Kaul's case but for 11 posts. There is no requisition to fill up any anticipated more vacancies. Once the list is approved even though it may contain names of 20 candidates, the list in the present case will get exhausted once 11 vacancies for which advertisement had been issued and recruitment is made are filled up."

15. The question for entitlement of appointment of wait listed candidate has been considered by the Hon'ble Apex Court again in Sri Kant Tripathi and others v. State of U.P. and others, AIR 2001 SC 3757 in context of recruitment in higher judicial services under U.P. Higher Judicial Services Rules, 1975. While taking note of the earlier decisions rendered by it, the Hon'ble Apex Court in para 32 of the decision held as under:

"The question whether a wait listed candidate like Avinash Kumar Sharma, for the recruitment of 1990, was an issue before the Full Bench of Allahabad High Court. The High Court did not grant the relief to the wait-listed candidate and on the other hand, requested the Chief Justice of the High Court to take necessary steps for formation of a selection committee, so that appropriate number of candidates be interviewed for the 13 posts of direct recruitment to the Higher Judicial Service. The aforesaid request of the Full Bench, tantamount to have a fresh process of selection with the constitution of a selection committee under Rule 16 and necessarily. Therefore, the claim of a wait-listed candidate for being appointed, stood negatived. This decision of the Full Bench has not been assailed in any higher forum and has become final, it would, therefore, be difficult for us to accept Mr. Rao's contention that in view of the vacant position, the wait-listed candidate could be appointed for the recruitment of the year 1990. A wait listed candidate has no vested right to be appointed, except when a selected candidate does not join and the waiting list is still operative, as was held by this Court in the case of Surinder Singh v. State of Punjab (1997) 7 J.T. (SC) 537. In the case of Sanjoy Bhattacharjee v. Union of India, (1997) 4 SCC 283 this Court considered the right of a wait listed candidate and held that inclusion of candidates in merit list in excess of the notified vacancy, is not justified and waiting list candidate has no right to appointment. Reliance has been

placed on the decision of this Court in Virendra S. Hooda v. State of Haryana, (1999) 3 SCC 696 for the proposition that a wait listed candidate could be appointed against the available vacancies. In our considered opinion, the aforesaid decision is of no application to the case in hand. In the said case, there existed two administrative circulars which in fact had been construed for conferring the right. This Court came to the conclusion that the High Court was in error in ignoring those circulars. But in the absence of any such circular or provision in the Recruitment Rule of Higher Judicial Service, the aforesaid decision is of no assistance. Reliance had also been placed on the judgment of this Court in the case of A.P. Agrawal v. Government of NCT, Delhi, (2000) 1 SCC 600, wherein the question of filling up of the vacancy of the member of the appellant Tribunal under Delhi Sales Tax Act was under consideration. This court construed the provision of section 13(4) of the Delhi Sales Tax Act, 1978 as well as the office memorandum dated 14.5.1987, issued by the central government, and on construction of the aforesaid provisions, came to hold that a public duty is cast to fill up the vacancy as early as possible. We are not in a position to appreciate, how this decision will be of any assistance to the wait listed candidates. Reliance had also been placed on the decision of this court in Roshni Devi and Ors. vs. State of Haryana and Ors., 1998 (8) S.C.C. 59, where under this court had observed that some margin over the advertised vacancies is permissible. That decision was given in the peculiar set of facts present there. The practice of selecting and preparing an unusually large list of candidates compared to the vacancy position, has been deprecated by this court in no uncertain terms. But in the fact situation, the court did permit some appointments to be made beyond the advertised vacancies, by exercising power under article 142, as otherwise, it would have caused great injustice to many who had been appointed. We are afraid, this decision is absolutely of no application to the case in hand. several other counsel appeared for several persons in relation to the cases concerning appointment of 1990, but they all supported the arguments advanced by Mr. Rao and, therefore, we need not reiterate the same. We, however, do not find any infirmity with the order of the division bench of the Allahabad High Court dated 24.3.1999, which is the subject matter of challenge in Civil Appeal Nos. 1657 of 2001 and 1656 of 2001. The two writ petitions filed under article 32 of the constitution, viz. Writ Petition Nos. 97 of 2000 and 460 of 1999, challenging the full court resolution dated 11.7.1998, stand disposed of accordingly."

16. In Sri Kant Tripathi's case (supra) wherein in para 34 of the decision the Apex Court has also considered the true import of the expression "vacancies likely to occur in the next two years" and held that the inclusion of vacancies on account of death, compulsory retirement, voluntary retirement, removal, dismissal and elevation of officers as Judge Allahabad High Court could not be comprehended within the meaning of the aforesaid expression. For ready reference the relevant portion of para 34 is reproduced as under:

"34. The aforesaid Division Bench judgment of Allahabad High Court, requires little consideration, in view of the interpretation given to the expression "the vacancies likely to occur in the next two years", in Rule 8(1) of the rules. The high

court in the impugned judgment has come to the conclusion that the vacancies on account of death, compulsory retirement, voluntary retirement, removal, dismissal and appointment of officers as judge of the Allahabad High Court, could also come within the expression "vacancies likely to occur in the next two years". This concept is wholly unsustainable inasmuch as nobody can anticipate as to how many people would die or how many would compulsorily be retired or removed or dismissed or even would be elevated to the High Court. The expression "vacancies likely to occur in the next two years" would obviously mean the vacancies, which in all probability, would occur. In other words, it can only refer to the cases when people would superannuate within the next two years."

17. Thus from the aforesaid enunciation of law by the Hon'ble Apex Court it is now clear that for initiating a process of selection it is necessary for the appointing authority or competent authority to determine the existing vacancies as well as the anticipated vacancies likely to occur within the selection year or within the period provided under the relevant Rules of Recruitment of a particular service. After determination of such vacancies, the advertisement is to be made and the selection process is to be initiated only in respect of those vacancies which were advertised for the purpose of selection. Thereafter by completing the process of selection a select list is to be prepared by including the candidates to the extent of equal number of vacancies notified and available for the process of selection and advertised for the said purpose. At the most some additional vacancies notified by the government to the Commission during the process of selection and/or before it is completed, could be included in the said process but it must be indicated in the advertisement of vacancies that same may be increased in said process of selection by adding the vacancies if available during the course of selection. If Rules of Recruitment provides to include large number of candidates in the select list than the number of vacancies to be filled in for which requisition is made, it shall be open for the selection body to include such large number of candidates in the select list. If no such provision has been made in the Recruitment Rules or Government orders holding the field on subject matter, the select list is to be prepared and confined only to the extent of number of vacancies notified and advertised for such selection. But for the purpose of meeting out emergent situation arising on account of non joining of candidates of the select list the persons placed below in merit of the aforesaid select list though otherwise found fit for selection and appointment, their names may be placed in the waiting list.

18. The candidates of such waiting list may be pushed up for appointment only against those vacancies which may have arisen out of non-joining of the candidate of select list but in all the circumstances the select/waiting list has to be confined in respect of vacancies advertised and/or included in the process of selection as the process of selection is strictly linked with the number of vacancies notified and advertised for such selection. If the appointment is made against those vacancies which were advertised and/or also included in the process of selection, from the select list so prepared, the select list so prepared shall get exhausted. Thus the select list shall

remain operative till the persons included in the select list are appointed to fill up those posts which were included in the process of selection and advertised for such selection or till the life of the select list as provided under the Rules of Recruitment or government order expires, whichever is earlier. Meaning thereby if the select list has been prepared for filling up particular number of vacancies by including a particular number of candidates, say 19 vacancies as in the instant case, if candidates selected were offered appointments and in pursuance thereof they joined the post and filled up all those vacancies even earlier to the life of the select list expired, the select list stood exhausted on filling up those 19 vacancies even if the life of select/waiting list still remains subsisting and certain number of more candidates still remain and left out without appointment. The select list would also be stood exhausted if the life of select/waiting list expired despite certain vacancies advertised and included in the process of selection still remains unfilled for any reason. In other words, if requisition and consequent advertisement is made for filling up certain number of vacancies which were included in such process of selection and select list was prepared by including equal number of candidates or more candidates, the moment all the requisitioined and advertised vacancies are filled up from the merit list or select list same get exhausted, or during the subsistence or life time of the select list all the vacancies are not filled in, the moment life time of select/waiting list is over, the select/waiting list gets exhausted. Thus in either event, both the ways select/waiting list shall stand exhausted as a result of which such merit/select list shall be inoperative even if all the candidates included in the list could not be appointed and certain number of candidates left out for appointment or the posts advertised could not be filled in. Thereafter the candidates included in the select/waiting list cannot claim their appointment against any other vacancies or future vacancies, merely on account of their empanelment in the select/waiting list because of the simple reason that the selection was meant to fill up only particular number of vacancies advertised and included in the process of such selection, but if any selected candidate fails to join the post for any reasons in pursuance of letter of appointment and/or his candidature is cancelled after selection on any grounds like in verification of character and medical fitness and the advertised vacancies remained unfilled on account of non-joining of such candidates only in that eventuality, the candidates who rank lower in the merit list/select list or included in the waiting list can be pushed up to be offered appointment against such vacancies arising out of non-joining of such candidate during the life time of select/waiting list. If the time of waiting list expires and government does not send requisition for sending the names of selected candidates from Commission within life time of waiting list or belated requisition comes from government after expiry of period of select/waiting list, the Commission can decline to recommend the names of selected candidates for appointment from amongst the remaining candidates of select/waiting list.

19. But if all the selected candidates who had been offered appointment against the vacancies included in the process of process of selection join the post to fill up such vacancies though shortly thereafter any or some of the

candidates resign from the post even if during life time or subsistence of select/waiting list, such vacancies stood exhausted on account of such joining of selected candidates and cannot be filled up either from the remaining candidates of select list who ranked lower in order of merit or from the waiting list despite their being included in select/waiting list and life of select/waiting list still subsists. Such vacancies in our considered opinion would be fresh vacancies and to be carried forward for the next selection. It is also because of the another valid reason that the vacancies arising out of resignation of selected candidate in a particular selection after joining the post can neither be said to be existing vacancy for the purpose of the aforesaid selection nor it can be said to be anticipated vacancy likely to occur within stipulated period of time as provided under the Rules of Recruitment as nobody can anticipate resignation of an incumbent like other contingencies of similar nature such as death, compulsory retirement, voluntary retirement, dismissal and removal etc. of any incumbent. Therefore, we are of the considered opinion that the vacancies arising on this ground i.e. on resignation of selected candidate after his joining cannot be filled up from the candidates included in the select list or waiting list even though it has occurred during life time of such select/waiting list or select/waiting list is still operating.

20. At this juncture we would also like to make it clear that only those vacancies could be included in the process of selection which were either existing at the time of initiation of process of selection or could be anticipated to be occurred during selection year as provided under particular rules of recruitment. Since no other vacancies could be anticipated except the vacancies arising out of superannuation, therefore, only such vacancies would be anticipated vacancies and can be filled up from the select list during the life time of select list provided such vacancies were included and advertised for the purpose of such selection. Thus the vacancies occurred on account of death, compulsory retirement, voluntary retirement, dismissal, removal of any incumbent during the life time of waiting list, can not be filled up from such select/waiting list. In our considered opinion, as indicated herein before, similarly the vacancies arising out of resignation of a selected candidate after his joining would be a fresh vacancy and cannot be filled in from the aforesaid select list, rather to be carried forward for the fresh process of selection and to be filled up by affording opportunity to compete all eligible and qualified candidates. This is crux of the matter.

21. Thus the submissions of learned counsel for the petitioner that the petitioner being empanelled at serial no.2 in the waiting list of candidates belonging to general category, on account of resignation of two general category candidates within a period of one year, i.e. during subsistence of waiting list, he was entitled for appointment against any one of such vacancies is wholly misplaced and untenable and without any substance. The decision of the Division Bench of this court rendered in Ved Prakash Tripathi's case (supra), relied upon by the learned counsel for the petitioner in support of his submission is not applicable in this case rather distinguishable on facts. The facts of the aforesaid case as noted in para 3 of the decision is that for the post of Assistant Prosecuting Officer a selection

was held by the Commission which could be completed on 27.2.1998. The Commission had recommended 99 candidates equal to the number of vacancies for which selection was held. It appears that out of aforesaid recommended candidates total 7 candidates did not join the post, but the State Government sent requisition on 27.7.1999 only for three additional names out of the candidates who appeared in Assistant Prosecuting Officers Examination 1996.The Commission admittedly forwarded the names of three additional candidates on 20.10.1999 and no reason had been shown as to why the Government requisitioned only three additional names whereas seven candidates had not joined pursuant to the recommendation made by the Commission. The candidature of four candidates were cancelled on 19.1.2000. The State Government vide letter dated 20.2.2000 requested the Commission to forward four additional names. The Commission declined to make any recommendation in pursuance thereof on the ground that no name could be sent beyond the period of one year from the date of recommendation of the last candidate which was done on 20.1.1999. In the aforesaid case the question in issue was entitlement of appointment of the wait listed candidates against vacancies arising out of non joining of the candidates of particular select list whereas in the instant case the controversy rests on account of resignation of the selected candidates after their joining the post and resigned during the subsistence of waiting list. Therefore, the decision of the aforesaid case can be of no assistance to the case of the petitioner.

22. Another decision upon which learned counsel for the petitioner has placed reliance in support of the case of the petitioner is a decision of Division Bench of this Court rendered in Ravindra Nath Rai and others case (supra) is also distinguishable on facts wherein there was no such waiting list prepared by the Police Headquarters in the recruitment on the post of Sub Inspector of Police. A select list/merit list of eligible and qualified candidates was prepared and the vacancies were increased after selection. From the aforesaid merit list certain more candidates were picked up to fill up those increased posts and they were also sent for training. No life of said merit list was prescribed. In such peculiar facts and circumstances of the case aforesaid decision was rendered by this court. Thus the principles laid down therein has no application to the facts of instant case particularly in view of law enunciated by Hon'ble Apex Court referred herein before which could not be brought to the notice of the Division Bench of this court and also on account of subsequent pronouncements of Hon'ble Apex Court on the question in issue referred herein before, therefore, the same can be of no assistance to the case of the petitioner.

23. Now applying the aforesaid principles on facts of the instant case it is clear that undisputably, advertisement was published in the year 1996 initially for filling up 11 vacancies for the post of Assistant Registrar under the Uttar Pradesh State Universities (Centralised) Service Rules, 1975 which were increased from 11 to 19 during the process of selection. On completion of process of selection a select list containing names of 19 candidates was prepared by the Commission after holding the written

examination and the interview. According to the averments made in paragraphs 4 and 11 of counter affidavit filed on behalf of Commission, the names of all 19 candidates for filling up 19 vacant posts of Assistant Registrar were sent to the State Government vide letter No. 101/2/Misc/E-1/94-95 dated 20 November, 1997. It appears that thereafter letters of appointment were issued by the Government to selected candidates to join the posts in pursuance of the said selection and recommendation made by the Commission. Subsequently thereafter, two candidates namely Sri Kamlesh Kumar Shukla and Sri Anand Kumar belonging to general category, resigned from service on 5.9.1998 and 2.12.1998 respectively that is, within one year of their joining on their posts. The State Government did not ask from Commission for recommending any name from waiting list for appointment on the said vacant posts for quite long time. Ultimately it appears that on various representations made by the petitioner the Government had sent a letter dated 28.7.2001 to the Commission asking to send 3 names from the waiting list for filling up three vacancies out of which one was caused due to non-joining of a scheduled caste candidate and remaining two vacancies were caused due to resignation of two candidates belonging to general category. On receipt of the aforesaid letter of the State Government, Commission sent reply to the State Government that since the period of about four years had elapsed, and one year life time of the waiting list too had expired, the requisition of the government is barred by time consequently, no name could be recommended for appointment on the said vacancies from the waiting list. The communication further states that since two vacancies arose due to resignation of 2 general category candidates who even if resigned within one year after their joining the posts, even then in view of para 3 of government order dated 23.12.1997, such vacancies cannot be filled up from wait listed candidates even if the prescribed period of waiting list still remains to be expired and waiting list survives or operating. Being a general category candidate, the petitioner has claimed his appointment against one vacancy caused due to resignation of general category candidates as aforesaid and aggrieved with the action of the Commission, he filed the instant writ petition.

24. We have gone through the government order dated 31.1.1994 which in para 5 specifies the life of a waiting list for one year from the date of its preparation and last recommendation made to the State Government for appointment from select list and a time schedule has also been given for making appointment and cancellation of candidature of selected candidates who had been offered appointment in pursuance of such selection and could not join the post within time frame or extended joining time. In the government order dated 23.9.1997 which appears to have been issued on the basis of queries made from the other department of the government, a policy decision of the government is incorporated in para 3 thereof which provides that if a selected candidate after joining the post offered in pursuance of the selection, resigns from service, the select list in respect of such candidate stood exhausted and no candidate from the waiting list to substitute him can be recommended for appointment even if the vacancy occurred

during life time of waiting list and waiting list still survives by that time. This policy decision of the government, in our considered opinion, is quite in consonance with the settled legal principle laid down by the Apex Court from time to time and the law enunciated herein before. Since in counter affidavit the aforesaid government orders were shown to have been annexed which in fact were not attached along with it, we desired the counsel appearing for the Commission to supply the government orders which he had supplied to us and are now part of the records.

25. In view of the aforesaid settled legal position and having regard to the facts of the case, the submission made by learned counsel for the petitioner that the petitioner is entitled to be appointed against one of the vacancies caused owing to resignation of two general category candidates within one year during the life time of waiting list, in our considered opinion, is wholly misplaced, without substance and untenable in law and cannot be accepted. The petitioner being a candidate of general category could also not be held entitled for appointment against one vacancy caused on account of non joining of one scheduled caste candidate as the same could be filled only by a wait listed candidate of schedule caste if available and requisition could have been made by the State Government within one year life time of the waiting list and not from any other wait listed candidate of general category or other categories. But there is nothing on record to show that State Government has sent any such requisition within one year from the date of first and last recommendation made by the Commission which in fact was made on 20.11.1997. Contrary to it the requisition of State Government was sent to the Commission on 28.7.2001 much after expiry of life time of the waiting list after lapse of about 4 years. Therefore, in our considered opinion the petitioner is not entitled for appointment against any of such vacancies referred to herein before.

26. Thus in view of foregoining discussion we are of considered opinion that the impugned action of Commission in not recommending the name of petitioner who is wait listed candidate of general category against said vacancies arose on account of resignation of two candidates of general category within one year of their joining during subsistence of waiting list and on account of non joining of one candidate of schedule caste in given facts and circumstances of the case stated herein before is fully justified and according to law and does not call for any interference in exercise of jurisdiction under Article 226 of the Constitution of India.

27. For the aforesaid reasons the writ petition fails and accordingly dismissed.

28. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2005

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 1749 of 1995

Ashagar Ali ...Petitioner
Versus
Administrator, Nagar Maha Palika, Kanpur Nagar and others ...Respondents

Counsel for the Petitioner:
Sri R.S. Mishra
Sri A.K. Tiwari

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

(A) Constitution of India, Art.-226- Promotion-Petitioner initially appointed on the post of Beldar-considering the driving experience-entrested to drive the Zeep-about which Rs.200/- extra payment given on monthly basis apart from usual salary-claimed promotion on the post of driver on the ground in similar circumstances other Beldar given promotion-No statute, Rule, regulation or G.O. providing promotion to class 4th employee on the post of Driver-a post of direct recruitment-held-any illegality on irregular favour of any individual-can not be basis to plea the protection of Art. 14-nor can be enforced by involving power under Art. 226 of the Constitution.

Held: Para 19

Enforcement of such claim would be amount to directing to continue and perpetuate an illegal procedure or illegal order for extending similar benefits to others. Before a claim based on equality is upheld, it must be established by the petitioner, that his claim being just and legal, has been denied to him, while it has been extended to others, in this process there has been a discrimination.

(B) Constitution of India, Art. 226-Regularisation-working for long time on the post of driver-can not be basis to put a claim for Regularisation for a class 4th employee-even on existence of such regular vacancy-held-in absence of any statutory provision-any direction amount to legislation by the Court.

Held: Para 29

Thus in view of settled legal position discussed herein before it is necessary to point out that in absence of necessary foundation in writ petition supported by material and in absence of rule of regularisation neither any direction for regularisation nor any direction to designate the petitioner as driver can be given by this Court only on account of the existence of vacancies on the post of Driver. In my considered opinion, issuance of such direction would be amount to legislation by court contrary existing statutory rules of recruitment referred herein before.

Case law discussed:
1999 (2) ESC-1378
2000 (2) ESC-785
AIR 2001 SC-706
AIR 1995 SC-705
J.T. 2000 (5) SC-389
(J.T. 1996) 1 SC-641
1996 (2) SCC-459
J.T. 1996 (8) SC 387
1997 SCC (1) 35
J.T. 1997 (3) SC-450
1997 (3) SCC-321
AIR 1991 SC-284
AIR 1994 SC-1808
AIR 1989 SC-1899
AIR 199

(Delivered by Hon'ble Sabhajeet Yadav, J.)

By this petition, the petitioner has sought relief of writ of mandamus directing the respondents to promote the

petitioner from the post of Beldar to the post of Driver, in the Nagar Mahapalika, Kanpur Nagar and pay his salary for the post of Driver w.e.f. 14.9.1984.

2. The relief sought in the writ petition rests on the facts that petitioner was appointed as Beldar, Class IV employee in Nagar Mahapalika, Kanpur Nagar on 3.5.1980 in the pay scale of Rs.750/- to 940/- and he was confirmed on the said post in the year 1982. Since he was experienced vehicle driver having valid driving licence he was promoted casually to drive the vehicle i.e. Jeep No. 5592 in the Zone-3 of Nagar Mahapalika, Kanpur Nagar but no promotion order in writing was given to the petitioner by the respondents. On 4.9.1985 an order posting the petitioner permanently in the Project department on the post of driver was passed by the office Director, City Cleaning, Nagar Mahapalika, Kanpur Nagar. Thereafter on 21.9.1989 the Executive Engineer Zone-3 sent a recommendation for promotion of the petitioner from the post of Beldar to the post of driver on the ground that petitioner was working as driver from 4.9.1985 continuously. It is alleged that although in the year 1989, the recommendation was sent to the Mukhya Nagar Adhikari and he has accepted the recommendation of promotion of petitioner on the post of driver on 9.10.1990 but no formal order of promotion was passed nor he was paid his salary for the post of driver despite he is working as driver under the control of respondents from 14.9.1984 but he is being paid salary of Beldar which is less remuneration against the principle of equal pay for equal work. On 3.4.1993 the petitioner sent a representation to the Project Officer, U.D.C., Nagar Mahapalika, Kanpur Nagar with the prayer for his promotion from the post of Beldar to the post of driver. On 15.4.1993 the Project Officer sent a recommendation to the Administrator, Nagar Mahapalika, Kanpur Nagar for promotion of petitioner on the post of driver. On 31.5.1994 the representation of petitioner dated 3.4.1993 was referred to the respondent no.2 by the Administrator but petitioner has not been promoted so far. He again submitted representation on7.6.1994 to the respondent no.1 ventilating his grievances therein.

3. In para 9 of the writ petition it is further stated that one Madho Raj who was appointed as Safai Mazdoor in the year 1992 has been promoted as driver on 2.6.1994 by the respondent no. 1(Annexure-7 of the writ petition). In para 10 of the writ petition it is stated that the petitioner is working as driver since 14.9.1984 continuously under the control of respondents and more than 10 years have passed but he has neither been designated as driver nor salary of driver has been paid to him by the respondents. The petitioner is still working as driver and on 1.3.1994 the petitioner has been deputed to operate Jeep No.U.S.J. 5403 in Third Zone for recovery of revenue. It is further stated in para 11 of the writ petition that according to the service rule the petitioner is entitled for promotion if he deserves. The petitioner is holding a valid licence and he is working as driver by the order of respondents. He is also entitled for designation as driver and entitled for salary of driver in pay scale of Rs.950/- to 1500/- admissible to the post of Driver. The action of respondents in denying the aforesaid benefit of service to the petitioner is arbitrary and illegal and not justified under law.

4. A detail counter affidavit has been filed in the writ petition, wherein the appointment of petitioner as Beldar in pay scale of Rs.165/- to 215/- on 1.9.1980 in a temporary capacity has not been disputed. It is also not disputed that petitioner had driving licence and he was asked to drive the Jeep by Chief Engineer. In reply to para 3 of the writ petition it is stated that the petitioner was transferred to Project Department and was directed to drive the vehicle by Director, City Cleaning. In para 7 of the counter affidavit it has been stated that the petitioner was never promoted as driver in spite of recommendation but he was paid an extra allowances for driving the vehicle. He was regularly paid the allowance of Rs.200/- per month. In para 9 of the counter affidavit although it appears that the facts stated in para 7,8 and 9 of the writ petition were admitted but in para 11 of the counter affidavit in reply to the para 11 of the writ petition it is stated that the substantive post of petitioner was of Beldar and in lieu of his services as a driver he was paid an extra allowances of Rs.200/- per month. The petitioner having accepted the extra allowances for driving the vehicle cannot claim the salary admissible to the post of driver and for regularisation of his services as a driver.

5. It appears that the petitioner has filed a supplementary rejoinder affidavit, whereby certain more new facts have been incorporated basically in para 3,5 and 6 of the affidavit as under:

"3. That petitioner has served the order on 21.3.2003 along with Hon'ble court order dated 7.3.2003 as well as numbers of juniors namely Noor Mohammad, Sabbir, Balram Sri Mishra, Akhilesh Singh, Gulab Singh, Ramakant Tripathi and other have been given cadar of the driver from the post of Beldar as well as getting salary of the post of driver, however the petitioner continuously discharging the duty of the post of driver since 1985 with full satisfaction of the authority. The Photostat copy of receiving dated 21.3.2003 is being filed here with and marked as Annexure no.1.

5. That in reply of contents of paragraph nos. 3 and 4 of the supplementary counter affidavit as stated partly correct and rest is denied. It is further submitted that the post of Beldar and Safai Karmchari are from the categories of class 4 with the same pay scale as well as number of Majadoor and Beldar has been promoted on the post of driver after considering experience of driving who have driving licence.

6. That in reply of contents of paragraph no. 5 of the supplementary counter affidavit as stated needs no comment. It is further submitted that respondents had adopted pick and chose policy in regard of promotion for the post of driver as given promotion Madho Raj, Akhilesh Singh, Dooth Nath, Gulab Singh, RamakantTripathi, NoorMohammad and Rampal Tiwari got promotion on the post of driver from the post of Safai Karmachari and Beldar (Class IV) and all of them are junior to the petitioner, however petitioner's case has not been considered for the promotion of the post of driver as continuously discharging the duty for the post of driver since 1985 and the above stated persons also having no any qualification of High School."

6. It appears that after exchange of aforesaid affidavits, this Court vide order dated 7.3.2003 has directed the

respondents to furnish certain more information in details to the court by filing supplementary counter affidavit in the writ petition alongwith the Rules, Regulations of the Nagar Mahapalika having bearing with the issue as under:

"Heard counsel for the parties.

The petitioner was appointed as a Beldar IVth Class employee in Nagar Maha Palika, Kanpur Nagar on 3.5.1980. The petitioner was experienced vehicle driver having valid driving licence and he was promoted casually to operate the vehicle i.e. Jeep No. 5592 and he was being paid allowance for driving the vehicle. On 21.9.1989 the Executive Engineer sent a recommendation for the promotion of the petitioner from the post of Beldar to the post of Driver and as such the petitioner was performing the work of driver from 21.9.1989 (Annexure-2 to the writ petition). The Project Officer on the application of the petitioner also on 15.4.1993 had sent a recommendation to the Administrator, Nagar Mahapalika, Kanpur Nagar recommending the case of the petitioner to the post of Driver. The copy of the recommendation dated 15.9.1994 is Annexure- 4 to the writ petition. On 31.5.1994 the representation of the petitioner dated 3.4.1993, the Administrator referred the matter for promotion of the petitioner to the Mukhya Nagar Adhikari but the petitioner was not promoted. However, the petitioner again submitted a representation on 7.6.1994 giving assertion that the petitioner after working as a driver from more than 10 years and his juniors who were appointed as a beldar have been promoted as a driver and subsequently it was mentioned that one Madho Raj who was appointed as a Safai Mazdoor in the year 1992 has been promoted as a driver on 2.6.1994.

The averment of the petitioner that a junior Beldar/Safai Mazdoor appointed subsequently in the year 1992 was transferred to the post of Driver by the order dated 2.6.1994 has not been denied in the counter affidavit. Now the respondent has to apprise this court under what circumstances the similarly situated persons had been given chance while the petitioner who is senior to Madha Raj and working for the last twelve years as a driver has been deprived of his appointment to the post of driver. How this discriminatory treatment was adopted and how the services of the petitioner as a driver was ignored.

Now Executive Officer/Mukhya Nagar Adhikari, Kanpur Nagar has to file his personal affidavit and also state that how many posts of driver are available and how many persons are working and the provisions/rules/regulations of the Nagar Mahapalika has also to be apprised to this court in addition to the filing of response by way of affidavit. It is expected that Mukhya Nagar Adhikari, Nagar Mahapalika, Kanpur will give assistance as indicated above.

List this matter on 16th April for further hearing."

7. It appears that in compliance of the aforesaid order dated 7.3.2003 passed by this court two supplementary counter affidavits have been filed on behalf of the respondents one sworn by Sri R.N. Ram working as Nagar Ayukta known as Mukhya Nagar Adhikari, Nagar Mahapalika, Kanpur Nagar and another by Sri Mahatma Prasad working as Project Officer impleaded as respondent no.3 in the writ petition, whereby information sought by the court has been

furnished and stand taken by respondents were also clarified. In para 5 of the supplementary counter affidavit sworn by Sri R.N. Ram it is stated that the post of driver is to be filled up by direct recruitment and the appointment of qualified persons who have driving licence and have worked as a driver for three years and also have knowledge of reading and writing Hindi language can be made after holding selection. A Government Order with regard to the mode of recruitment for appointment of driver is filed as Annexure-1 to the supplementary counter affidavit. In para 6 of the supplementary counter affidavit a clarification has been made with regard to the eligibility and mode of recruitment on the post of driver. It is also made clear that Class IV staff who have passed High School and fulfil the qualification prescribed by the State Government are eligible for promotion in Class -III category posts i.e. Clerk and typist etc., if a person is working as Beldar and fulfils the qualification for any higher post he can be promoted in Class-III post i.e. Clerk, typist etc.. Beldar has no channel of promotion on the post of Driver. However if the driver is eligible and qualified for any higher post, he may apply for selection in open competition, they have no channel of promotion. In para 7 of the aforesaid supplementary counter affidavit it has been further stated that at present there are about 19 vacancies on the posts of driver. It is open for the petitioner to apply for the post and if he fulfils the eligibility conditions for the post of driver, he may apply along with other staff. The petitioner has never been appointed as a driver. His substantive post is of Beldar.

8. In another supplementary counter affidavit sworn by Sri Mahatma Prasad the stand taken on behalf of respondents has been stated in paragraphs 5,7,8 and 9 of supplementary counter affidavit as under:

"5. That in reply to para 3 of the affidavit, it is submitted that Noor Mohd., Sabbir, Balrm, Shri Mishra, Akhilesh Singh, Gulab Singh, Ramakant Tripathi and no person junior to the petitioner in his cadre as Beldar/Safai Mazdoor has been appointed as driver by promotion. The persons mentioned were working as driver and were appointed as driver on temporary basis and have been duly selected as driver by Selection Committee. The petitioner can appear in the selection for the post of driver, if he fulfills the eligibility conditions of the driver and selected by the Selection Committee. There are still 19 vacancies for the post of driver and the petitioner can appear for the selection. It is denied that the petitioner has been working as driver since 1985. Since the petitioner knows driving his services were utilized occasionally and was paid the allowance of driver. The scale of pay of the driver is higher than the Class IV Staff.

7. That the facts stated in para 5 of the affidavit are not correct as alleged and are denied. The post of driver is filled by persons who fulfil the essential eligibility conditions. The post of driver is a directly recruited post and appointment is made of qualified persons who have driving licence and has worked as a driver for 3 years and also has knowledge of reading and writing Hindi Language. The post of Beldar and Safai Mazdoor are from different Class IV category and the promotion to the next higher Class III

post is made from the eligible persons according to the availability of vacancy. That although the post of driver is a class IV post but the scale of pay is higher.
8. That the facts as stated in para 6 of the affidavit are not admitted and are denied. As has already been stated the persons mentioned by the petitioner are not junior to the petitioner. They appeared in the selection for the post of driver and were appointed as driver. The petitioner has not been selected as driver by the Selection Committee. The petitioner knew driving as such occasionally he was asked to drive the vehicle and was paid allowance for the period he performed the duty of driver.
9. That in reply to para 7 of the affidavit, it is submitted that no person junior to the petitioner has been promoted as driver. The post of driver is a directly recruited post and the persons mentioned by the petitioner were not promoted but applied for the selection and were selected by the Selection Committee."

9. On the basis of pleadings of the parties and materials available on record the learned counsel for the petitioner has submitted that in view of clear cut averment made in paragraph 9 of the writ petition that one Sri Madho Raj who was appointed as Safai Mazdoor in the year 1992 has been promoted as driver on 2.6.1994 by respondent no. 1 and in the counter affidavit the aforesaid allegation has neither been denied nor the aforesaid fact has been disputed by the respondents. In para 10 of the writ petition it has been averred that the petitioner is working as driver since 14.9.1984 continuously. Now more than 20 years have passed the petitioner has neither been designated as driver nor the salary of the driver has been paid to him by the respondents. Therefore, he is also entitled to be promoted as driver and to be paid his salary on the aforesaid post even on principle of equal pay for equal work. In support of his submissions learned counsel for the petitioner has placed reliance upon decisions of **Madhav Prasad Dubey Vs. The Executive Engineer, Public Works Department, Allahabad and others, 1999(2) E.S.C. 1378(All.), R.K. Dubey Vs. State of U.P. and others, 2000 (2) E.S.C. 785(All.)** and a decision of Apex Court rendered in **Gujarat Agricultural University Vs. Rathod Labhu Bechar and others, AIR 2001 Supreme Court 706**. The submissions made by learned counsel for the petitioner at the strength of the aforesaid rulings appears to be misconceived and misplaced for the reasons given herein after.

10. Heard Sri A. K. Tiwari, learned counsel for the petitioner and Sri Lal Ji Sinha for the respondents.

11. Having heard learned counsel for the parties and on perusal of records the first question arises for consideration before this court is that in given facts and circumstances of the case as to whether the petitioner while working on the post of Beldar is entitled to be promoted on the post of Driver and further since the work of driver is being taken from him as to whether he is entitled for salary of driver or not? And as to whether on that count he is entitled to be treated and designated as driver or not? In this connection before adverting the arguments advanced by learned counsel for the parties it is necessary to point out that recruitment on any post or service is normally governed by statute i.e. enactment or statutory rules or in absence thereof by Administrative instructions or circulars or office orders

issued from time to time, whatever names it may be called. Thus first of all it is necessary to examine as to whether there exist any statute or Government order/circular regulating the recruitment of Driver. In this regard it is necessary to point out that it is not in dispute that Governor of State of U.P. has issued an order notified in Gazette dated 1.3.1963 in exercise of power conferred under the provisions of Section106 and Section109 of U.P. Nagar Mahapalika Adhiniyam, 1959 under the name and style of **The Uttar Pradesh Nagar Mahapalika Services (Designations, Scales of Pay, qualifications, Conveyance Allowance and Method of Recruitment) Order 1963**. This Government order is of statutory nature, having sanction and backing of the aforesaid provisions of Adhiniyam. Hindi version of relevant extract of it along with schedule has been filed along with supplementary counter affidavit sworn by Sri R.N. Ram. Clause 3 of Government order provides that the servants of Mahapalika shall be grouped into services mentioned in the schedule. Clause-7 provides that qualifications for recruitment to various posts in the Mahapalika shall be such as are given in the schedule. Clause-8 provides that no person shall be appointed to any of the posts created under section 106 unless he fulfils the qualifications and experience mentioned in the schedule against the post provided that exemption may be granted in special cases by the Appointing Authority with certain conditions need not to be referred in detail. In the relevant part of the schedule attached with the aforesaid Govt. Order, against the post of Lory, Truck or Tractor Driver it is provided that, besides having driving lincence there must be three years driving experience and person must read and write in Hindi language. In the column of mode of recruitment it is mentioned as direct recruitment. Thus from the aforesaid provisions of Govt. Order it is clear that the post of driver is liable to be filled up through direct recruitment method from amongst the eligible and qualified persons. The same cannot be filled up by promotion of Beldar. Thus in my considered opinion the assertion made by respondents in this regard in the supplementary counter affidavit finds supports from the provisions of statutory Govt. Order referred herein before and no exception can be drawn in this regard for taking different and contrary view in the matter.

12. Now further question arises for consideration as to whether petitioner while working as Beldar can claim promotion on the post of driver on account of alleged promotion of one Madho Raj on the post of driver on 2.6.1994 who was appointed as Safai Mazdoor/Beldar in the year 1992 subsequent to the appointment of petitioner and was much junior to him on the ground of alleged discrimination? In order to examine this question it is necessary to examine factual back ground of the case first. The petitioner has come forward with the case in writ petition that certain persons named in affidavit, were junior to him appointed on the post of either Beldar or Safai Mazdoor which is Class IV post, but they were promoted on the post of driver. In reply thereto in the supplementary counter affidavits filed on behalf of the respondents a clear cut stand has been taken stating therein that Noor Mohd., Sabbir, Balram, Sri Misra, Akhilesh Singh, Gulab Singh, Ramakant Tripathi and no junior person to the petitioner in his cadre as Beldar/Safai

Mazdoor has been given appointment as driver by promotion. The persons aforementioned were appointed as driver on temporary basis and have been duly selected as driver by selection committee. There are still 19 vacancies against the post of driver and the petitioner can appear for the selection. It is denied that the petitioner has been working as driver since 1985. Since the petitioner knows driving his services were utilized occasionally and was paid the allowances for driver. The scale of pay of driver is higher than class IV staff. It is further stated that the post of driver is filled by persons who fulfil the essential eligibility conditions. It is directly recruited post and appointment is made of qualified persons who have driving licence and have 3 years experience of driver and also have knowledge of reading and writing of Hindi Language. The post of Beldar and Safai Mazdoor are different class IV category post and promotion to the next higher class III post is made from the eligible persons according to availability of vacancy. Although the post of driver is also class IV post but it carries higher pay scale. It is also stated in para 8 of the supplementary counter affidavit that the persons mentioned by the petitioner are not junior to him with further statement of fact that they appeared in selection for the post of driver and they were selected and appointed on that post. The petitioner has not been selected as driver by selection committee. Since the petitioner knew driving as such occasionally he was asked to drive the vehicle and was paid allowances for the period he performed the duty of driver. In para 9 of the said supplementary counter affidavit it is stated that no person junior to the petitioner has been promoted as driver. The post of driver is directly recruited post and persons mentioned by the petitioner were not promoted but applied for selection and were selected by selection committee.

13. Thus in view of these clear and emphatic statement of facts made on behalf of the respondents in the supplementary counter affidavit filed by them in compliance of earlier order passed by this Court on 7.3.2003 referred herein before, clarifying the ambiguity in the statements as earlier made by the parties in their affidavits, in absence of any pleadings and proof of malafide against the respondents authorities, I have no reason to disbelieve aforesaid facts pleaded in the aforesaid supplementary counter affidavit and take different and contrary view in the matter and believe the disputed statement of facts pleaded by the petitioner . It has also never been the case of the petitioner that he has ever been selected and appointed on the post of driver on regular basis in substantive capacity rather it was throughout his case that he was appointed on the post of Beldar but he has been permitted to work as driver since 1984 and continuously working as such on casual basis. He was recommended for promotion on the post of driver by the authorities but no order promoting him was passed. Although he is working on the post of driver but the salary of aforesaid post is not being paid to him. Thus in back drop of these facts and situation the claim of the petitioner for promotion on the post of driver being contrary to the statutory provisions of law referred herein before cannot be accepted.

14. Now viewing the matter from different angles it is necessary to point out that assuming for the sake of arguments if the allegation of the petitioner that

persons juniors to him who were appointed as Beldar and Safai Mazdoors were promoted on the post of driver and one Madho Raj who was appointed as Safai Mazdoor in the year 1992 was promoted on the post of driver on 2.6.1994 was admitted by the respondents as correct, a question arises as to whether that admission of the respondents in original counter affidavit would alone be sufficient ground for grant of relief to the petitioner on account of alleged discrimination? In this connection it is necessary to point out that after clarification sought by this Court vide order dated 7.3.2003, when detail supplementary counter affidavits were filed clarifying the whole situation in that eventuality the admission made in para 9 of the original counter affidavit in reply to the averments made in para 9 of the writ petition has lost its efficacy and can be of no legal consequence in support of the claim of the petitioner but even if such admission still survives and is taken to be into account the question would arises that what would be its effect with regard to the claim of the petitioner ?

15. In this connection it is necessary to point out that from the perusal of Annexure 7 of the writ petition which is order dated 2.6.1994 passed by Up Nagar Adhikari, Karmik, Kanpur Nagar Nigam, in compliance of order of Administrator Nagar Nigam dated 22.2.1994 whereby Sri Madho Raj Safai Mazdoor was transferred against clear vacancy of driver in the workshop department with stipulation that his cadre would be of driver. Except the aforesaid order there is no other material evidence on record to show that how this order of transfer was made posting Safai Mazdoor on the post of driver and as to whether it was made after his due selection on the post of driver and pursuant order dated 22.2.1994 was passed by administrator or it was passed promoting him on the aforesaid post by way of transfer but from the perusal of Annexure 7 of the writ petition there is nothing to indicate that Sri Madhoraj was promoted from the post of Safai Mazdoor to the post of driver as alleged by the petitioner in para 9 of the writ petition. The onus of proof was upon the petitioner to establish his allegation by placing actual order of Administrator dated 22.2.1994 on record, but he has failed to place the aforesaid order of Administrator before the Court. The order dated 2.6.1994 does not recite the word promotion although, the distinction between the expressions transfer, posting, appointment and promotion is well known in service law jurisprudence. Thus the averments made by respondents in two supplementary counter affidavits appears to be correct and persons named by the petitioner have been appointed on the post of driver after due selection by selection committee and since the petitioner did not face selection for the post of driver nor he claims so, as such cannot blame for such alleged discriminatory treatment met to him against aforementioned persons and Sri Madhoraj. Therefore, it can be safely held that the petitioner has failed to substantiate his aforesaid ground of alleged discrimination.

16. However, even assuming the fact in absence of denial, in the counter affidavit that Sri Madhoraj who was admittedly junior to the petitioner and was promoted on the post of driver contrary to the rules as the provisions of the aforesaid Govt.Order which governs the recruitment of driver does not permits such promotion from the post of Beldar or

Safai Mazdoor to the post of driver as correct, nevertheless there can be no hesitation to hold that such alleged promotion of Madhoraj is contrary to the statutory rules referred herein before. Further question arises for consideration as to whether the petitioner can also seek his promotion contrary to the aforesaid statutory rules? In this connection it is necessary to point out that similar question has received consideration of Hon'ble Apex Court at several occasions. It would be useful to refer some decisions in this regard, herein after.

17. In **Chandigarh Administration and another Vs. Jagjit Singh and another, AIR 1995 S.C. 705** in para 8 of the decision Hon'ble Apex Court held as under:

"8. . . . . Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law- indeed, wherever it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law- but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and a similar relief can be given to the petitioner if it is found that the petitioner's case is similar to the other person's case. But then why examine another person's case in his absence rather than examining the case of the petitioner who is present before the court and seeking the relief. It is not more appropriate and convenient to examine the entitlement of the petitioner before the court to the relief asked for in the facts and circumstances of his case than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the Court nor is his case. In our considered opinion, such a course - barring exceptional situations - would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the

writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises)."

18. The similar view has also been taken by Hon'ble Apex Court in **State of Bihar and others Vs. Kameshwar Prasad Singh and another, J.T. 2000 (5) S.C. 389**. In paragraph 30 of the decision Hon'ble Apex Court has considered the several earlier decisions rendered by Supreme Court and has held that any illegality committed by department in favour of any person cannot be made ground and basis to claim parity under Article 14 of the Constitution of India, and no writ, order or direction can be issued by the High Court under Article 226 of the Constitution of India unless the person approaches the court substantiates his claim on independent legal basis. For ready reference Para 30 of the decision is reproduced as under:

"30. The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals other cannot claim the same illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits. In this regard this Court in ***Gursharan Singh & Ors. Vs. N.D.M.C. & others (JT 1996 (1) SCC 647 =1996 (2) SCC 459)*** *held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed:*

"Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination."

Again in ***Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain & others (JT 1996 (8) SC 387 = 1997 (1) SCC 35)*** *this Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding:*

"Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalized. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents."

In ***State of Haryana & others Vs. Ram Kumar Mann (JT 1997 (3) SC 450=1997 (3) SCC 321)*** *this Court observed:*

"The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing mis-appropriate of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Section 14 for reinstatement? The answer is obviously "No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right.""

19. Thus from a close analysis of law laid down by the Hon'ble Apex Court in cases of **Jagjit Singh (supra)** referred herein before it is clear that merely because of the reason that respondent-authority has passed a particular order in case of another person similarly situated can never be the ground for issuing a writ in favour of petitioner on the plea of discrimination. The order in favour of other person might be legal and valid or it might not be that has to be investigated first before it can be directed to be followed in case of petitioner. If the order in favour of other person found contrary to law or not warranted in facts and circumstances of the case it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authorities to repeat the illegality or to pass another unwarranted order. The Hon'ble Apex Court has further cautioned that giving effect to such plea of discrimination would be prejudicial to the interest of law and will do incalculable mischief to public interest. It would be negation of law and rule of law. If in case, the order in favour of other person is found to be a lawful and justified one it can be followed and a similar relief can be given to the petitioner if it is found that petitioner's case is similar to other persons' case. Hon'ble Apex Court went on saying that

but further question would arise why another person's case would be examined, who is not present before the court instead of examining the petitioner's case, who is present before the court. Similarly in **Kameshwar Prasad Singh's case (supra),** the Hon'ble Apex Court held that when any authority is shown to have committed any illegality or any irregularity in favour of any individual or group of individuals other cannot claim the same illegality or irregularity on the ground of denial thereof to them, on plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court, as neither Article 14 of the Constitution conceives such equality within its fold nor Article 226 empowers the High Court to enforce such claim. Enforcement of such claim would be amount to directing to continue and perpetuate an illegal procedure or illegal order for extending similar benefits to others. Before a claim based on equality is upheld, it must be established by the petitioner, that his claim being just and legal, has been denied to him, while it has been extended to others, in this process there has been a discrimination.

20. Now applying the aforesaid principle on the facts of the case, it would be seen that the petitioner did not claim his promotion from the post of Beldar to the post of driver under the rules of recruitment of the post of driver, which is to be filled up through direct recruitment alone and not by promotion but on the ground of alleged discrimination met to him. As a matter of fact there is no channel of promotion from the post of Safai Mazdoor or Beldar to the post of driver. Although both the posts are class IV posts but the post of driver carries slightly higher pay scale and it is selection post bears much responsibility and requires expertise. Thus the petitioner's claim for promotion is contrary to the aforesaid provisions of statutory rules contained in the Government Order of 1963. In case the claim of petitioner for promotion on the post of driver on the ground of alleged discrimination from Madhoraj who was Safai Mazdoor and junior to the petitioner allegedly promoted on 2.6.1994 on the post of driver is accepted, in that eventuality it would be amount issuing a direction for promotion contrary to the aforesaid statutory provisions of the rules by extending same benefit to the petitioner on account of alleged discrimination and that would be amount to directing the respondent to continue and perpetuate an illegal procedure for extending the similar benefit to the petitioner, which would be neither in consonance of principles enshrined under Article 14 of the constitution nor Article 226 empowers this court to enforce such claim of equality before law. Thus in my considered opinion no such direction for promotion of petitioner on the post of driver can be issued by this Court in exercise of writ jurisdiction under Article 226 of the Constitution of India.

21. Before coming to the next question a further question arises to be considered as to whether any direction for relaxing the rules of recruitment can be given by this Court or not? In this connection it is necessary to point out that the rules prescribing the eligibility, qualification and mode of recruitment of a particular post is sole domain of the employer and depending upon the rules of recruitment, which cannot be relaxed even by authorities concerned unless it is expressly provided under the rules itself.

The Hon'ble Apex Court has considered similar controversy in case of **Keshav Chandra Joshi and others Vs. Union of India and others, AIR 1991 S.C. 284.** In para 32 of the decision the Apex Court has held as under :

"32. In those peculiar circumstances this Court though recognized that appointment according to rules is a condition precedent, adopted the rule of deemed relaxation and deemed promotion to the service in accordance with the rules. R.27 of the Rules gives power to the Governor that if he is satisfied that the operation of any rule regarding conditions of service of the members caused under hardship in a particular case; he may consult the Public Service Commission; not withstanding anything contained in the Rules and dispense with or relax the requirement of the conditions of service and extend the necessary benefit as is expedient so as to relieve hardship and to cause just and equitable results. The word "may" consult the Commission has been used in the context of discharge of statutory duty. The Governor is obligated to consult the Public Service Commission. Therefore, the word "may" must be construed as to mean "shall" and it is mandatory on the part of the Governor to consult the Public Service Commission before exempting or relaxing the operation of rule regarding conditions of the service of a member to relieve him from undue hardship and to cause just and equitable results. There is a distinction between "rules of recruitment" and "conditions of service". To become a member of the service in a substantive capacity, appointment by the Governor shall be preceded by selection of a direct recruit by the Public Service Commission; undergoing training in Forestry for two years in the College and passing Diploma are conditions precedent. If the contention of the promotees that rules of recruitment are conditions of service is accepted, it would be open to the Governor to say that "I like the face of "A' and I am satisfied that he is fit to be appointed; I dispense with the rules of recruitment and probation and appoint "A' straightway to the service in a substantive capacity as Assitt. Conservator of Forest. Take another instance. Passing the prescribed tests during probation is a condition of service. Similarly efficiency bar stands as an impediment for the promotee's confirmation. On consideration of the record and on objective satisfaction, in an appropriate case, the Governor may relax those or other similar conditions. So passing the tests prescribed is a condition of service. Therefore, the rule which effects the right to confirmation or similar provision is a condition of service. The rules relating to recruitment to the service either under R. 5(a) or 5(b) or the manner of recruitment to service as per Appendix "A' or "B' are basic rules of recruitment to service. Satisfaction of the Governor that the operation of the rules regarding the conditions of service would cause undue hardship in a particular case or cases and the need to relieve hardship and to cause just and equitable results is a pre-condition. Even otherwise the court cannot substitute its satisfaction to the satisfaction of the Governor in exercise of the power of deemed relaxation. In Narendra Chadha's case the power to relax was wide enough to cover "any rule' and there was no pre-condition of objective satisfaction by the Governor. We hold that R. 5(a) and (b) and Appendices "A' and "B' are basis rules of recruitment and would not be subject to R. 27."

22. Similarly while relying upon the earlier decision in case of **J. & K. Public Service Commission etc. Vs. Dr. Narinder Mohan and others, A.I.R. 1994 S.C. 1808** in para 9 of the decision the Apex Court has held as under:

"9. Moreover the proviso to Article 320 (proviso to S. 133 of J. & K. Constitution), though gives power to the State Government to specify case or class of cases in respect of which consultation with the Public Service Commission may be dispensed with still the recruitment shall be in compliance with either of the Art. 320 (1) and S. 133(1) of the J & K Constitution or by duly constituted body or authority. The rules or instructions should be in compliance with the requirements of Arts. 14 and 16 of the Constitution. The procedure prescribed shall be just, fair and reasonable. Opportunity shall be given to eligible persons by inviting application through the public notification and recruitment should be according to the valid procedure and appointment should be of the qualified persons found fit for appointment to a post or an office under the State. Therefore, it must be held that power of relaxation exercised by the Government is ultra vires the Rules and the High Court is right in holding that Government cannot relax the rules of recruitment to be made by the Public Service Commission. Government have no power to make regular appointment under the Rules without selection by the Public Service Commission under S. 133(1) read with Rule 5 and Schedule III of the Rules."

23. Thus in view of law laid down by the Apex Court, I am of the considered opinion that mode of recruitment on the post of driver is being basic rules of recruitment, can not be relaxed by the authorities concern otherwise it would lead to an anomalous and arbitrary results and would cause serious prejudice to so many others inasmuch as would also be in violation of Art. 14 and 16 of the Constitution. The relaxation of rules of recruitment except the relaxation of educational qualification as provided under the proviso to clause 8 of the aforesaid statutory rules 1963 is not permissible under law, therefore, no direction can be issued by this Court to the respondents-authorities to relax the mode of recruitment on the post of driver and permit the post to be filled by promotion from Safai Mazdoor and Beldar which is not prescribed mode of recruitment under the aforesaid rule. Such direction would be contrary to the statutory rule and would also be amount to legislation by the court creating another mode of recruitment contrary to the rules, therefore, no such direction can be issued by this court under Article 226 of the Constitution of India.

24. Now coming to the next question in given facts and circumstances of the case, as to whether the petitioner is entitled for regularisation on the post of driver or entitled to be designated as driver and payment of salary in the pay scale of driver? In this regard it is necessary to point out that for the sake of convenience the aforesaid question can be split into two parts. The first part of it would be that as to whether the petitioner is entitled for regularisation on the post of driver or to be designated as driver? In this regard only this much allegation has been made in the writ petition that while working on the post of Beldar the work of driver is being taken from him on casual

basis since 1984 till now but inspite of recommendations of promotion made by the immediate officers, the competent authority did not pass formal order for promotion of the petitioner on the post of driver. At this juncture it is necessary to point out that regularisation has been recognized as one of the mode of recruitment in service law jurisprudence as such the same is dependent upon existence rule regarding the regularisation. In absence of such a rule of regularisation it is very difficult for the court to issue any writ, order or direction for regularisation of services of petitioner which would be amount to legislation by the court creating another mode of recruitment contrary to the existing rules of recruitment. In this connection it would be useful to refer some decision of Hon'ble Apex Court having material bearing on the issue herein after.

25. In Asif Hameed and others Vs. State of Jammu and Kashmir and others, A.I.R. 1989 SC 1899, Hon'ble Apex Court while examining the scope of judicial review under Articles 32 and 226 of the Constitution of India Vis-avis doctrine of separation of powers, has very categorically held in paragraphs 17 and 19 of the decision as under:

"17. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution maker have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance, Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self imposed discipline of judicial restraint.

19. When the State action is challenged, the function of the Court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the Court must strike down the action. While doing so the Court must remain within its self imposed limits. The Court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the Court is not an appellate authority. The Constitution does not permit the Court to direct or advise the executive in matters of policy or to

sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

26. Similarly, in **Mullikarjuna Rao and others Vs. State of A.P. and others, AIR 1990 SC 1251**, in para 12 of decision relying upon earlier decisions, the Hon'ble Apex Court has held that the High Court or the Administrative Tribunals cannot issue a mandate to the State Government to legislate under Article 309 of the Constitution of India. The Courts cannot usurp the functions assigned to the executive under the Constitution and cannot even indirectly require the executive to exercise its rule-making power in any manner. The Courts cannot assume to itself a supervisory role over the rule making power of the executive under Article 309 of the Constitution of India.

27. Similar view has also been taken by the Hon'ble Apex Court in **Chandigarh Administration and another Vs. Manpreet Singh and others, AIR 1992 SC 435**. In para 20 of the aforesaid decision also Hon'ble Apex Court has held that the Courts cannot assume role of rule-making authority and cannot also act as appellate authority over rule-making authority. The Courts cannot usurp the functions assigned to the executive authority over the rule-making power. In case of **State of Haryana and others Vs. Piara Singh and others, AIR 1992 SC 2130**, Hon'ble Apex Court has taken a note of earlier cases of **Dharwad District P.W.D. Literate Daily Wage Emploees Association Vs. State of Kerala, AIR 1990 SC 883 and Jacob Vs. Kerala Water Authority and others, AIR 1990 SC 228**. In the earlier case a direction has been issued to regularise the casual and daily rated employees, who have completed ten years service by 31st December, 1989. Guidelines were also issued for regularisation and in the later case while issuing guidelines for regularisation to the employees of certain length of service, other guidelines have also been issued for consideration of their claim for regularisation as well as for relaxation of their age in regular recruitment, but in para 19 of the judgment the Hon'ble Apex Court has held that blanket directions by the High Court for regularisation of all the work-charged, daily wage workers and casual labourers, who are not workmen under the Industrial Disputes Act, on completion of one year, are unsustainable and similar directions to regularise the persons of the above categories, who are workmen, on completion of 4 or 5 years of service, are also unsustainable. But in para 25 of the decision it is further observed that efforts should be made to regularise such daily wage, casual and work-charge employees as far as possible and as early as possible subject to fulfillment of qualifications prescribed for the post and availability of the work.

28. In **J. & K. Public Service Commission etc. Vs. Dr. Narinder Mohan and others, AIR 1994 SC 1808**, in para 11 of the decision Hon'ble Apex Court has held that the directions issued by this Court from time to time for regularisation of adhoc appointments, are not ratio of the decision, rather the aforesaid directions were to be treated under Article 142 of the Constitution of India and ultimately held that the High Court is not right in placing reliance on the judgment as a ratio to give the

direction to the Public Service Commission to consider the cases of the respondents of the aforesaid case. For ready reference the observations made by the Hon'ble Apex Court in paragraph 11 of the decision is reproduced as under:

*"11. This Court in **Dr. A.K. Jain Vs. Union of India, 1988 (1) SCR 335**, gave directions under Article 142 to regularise the services of the adhoc doctors appointed on or before October 1, 1984. It is a direction under Article 142 on the particular facts and circumstances therein. Therefore, the High Court is not right in placing reliance on the judgment as a ratio to give the direction to the P.S.C. to consider the cases of the respondents. Article 142 - power is confided only to this Court. The ratio in **Dr. P.C.C. Rawani Vs. Union of India, (1992) 1 SCC 331**, is also not an authority under Article 141. Therein the orders issued by this Court under Article 32 of the Constitution to regularise the adhoc appointments had become final,. When contempt petition was filed for non-implementation, the Union had come forward with an application expressing its difficulty to give effect to the orders of this Court. In that behalf, while appreciating the difficulties expressed by the Union in implementation, this Court gave further direction to implement the order issued under Article 32 of the Constitution. Therefore, it is more in the nature of an execution and not a ratio under Article 141. In **Union of India Vs. Gian Prakash Singh, JT 1993 (5) SC 681** this Court by a Bench of three Judges considered the effect of the order in A.K. Jain's case and held that the doctors appointed on adhoc basis and taken charge after October 1, 1984 have no automatic right for confirmation and they have to take their chance by appearing before the P.S.C. for recruitment. In H.C. Puttaswamy Vs. Hon'ble Chief Justice of Karnataka **AIR 1991 SC 295 : (1991 Lab IC 235),** this Court while holding that the appointment to the post of clerk etc. in the Subordinate Courts in Karnataka State without consultation of the P.S.C. are not valid appointments, exercising the power under Article 142, directed that their appointments as a regular, on humanitarian grounds, since they have put in more than 10 years service. It is to be noted that the recruitment was only for clerical grade (Class-III post) and it is not a ratio under Article 141. In **State of Haryana Vs. Piara Singh, (AIR 1992 SC 2130),** this Court noted that the normal rule is recruitment through the prescribed agency but due to administrative exigencies, an adhoc or temporary appointment may be made. In such a situation, this Court held that efforts should always be made to replace such adhoc or temporary employees by regularly selected employees, as early as possible. Therefore, this Court did not appear to have intended to lay down as a general rule that in every category of adhoc appointment, if the adhoc appointee continued for long period, the rules of recruitment should be relaxed and the appointment by regularisation be made. Thus considered, we have no hesitation to hold that the direction of the Division Bench is clearly illegal and the learned Single Judge is right in directing the State Government to notify the vacancies to the P.S.C. and the P.S.C. should advertise and make recruitment of the candidates in accordance with the rules."*

29. Thus in view of settled legal position discussed herein before it is

necessary to point out that in absence of necessary foundation in writ petition supported by material and in absence of rule of regularisation neither any direction for regularisation nor any direction to designate the petitioner as driver can be given by this Court only on account of the existence of vacancies on the post of Driver. In my considered opinion, issuance of such direction would be amount to legislation by court contrary existing statutory rules of recruitment referred herein before.

30. Now next question arises for consideration as to whether in given facts and circumstances of the case, the petitioner is entitled for salary in the pay scale of driver? In this connection before I proceed to examine factual aspect of the matter it is necessary to refer some recent decision of the Apex Court wherein the question in issue have received consideration of the Apex Court. In **State of Haryana Vs. Surinder Kumar and others, AIR 1997 S.C. 2129**, in para 5 of the decision observations made by the Hon'ble Apex Court is reproduced as under :

"5. Shri Manoj Swarup, learned counsel for the respondents, contends that the posts held by the respondents are interchangeable and in fact they have been interchanged to enable them to hold the posts. That contention cannot be given acceptance for the reason that since the respondents were appointed on contract basis on daily wages, they cannot have any right to a post as such until they are duly selected and appointed. Merely because they are able to manage to have the posts interchanged, they cannot become entitled to the same pay-scale which the regular clerks are holding by claiming that they are discharging their duties as regular employees. The very object of selection is to test the eligibility and then to make selection in accordance with rules prescribed for recruitment. Obviously the respondents' recruitment was not made in accordance with the rules. This Court has also pointed out in ***State of Haryaya Vs. Jasmer Singh, 1996 (10) JT (SC) 876*** *in that behalf. If any illegal actions have been taken by the officers after recruitment, it would be a grave matter of indiscipline by the officers and the higher authorities are directed to look into the matter and see that such actions are rectified, but that would not be a matter for this Court to give legitimacy to illegal acts done by the officers and to grant relief on the basis of wrong or illegal actions of superior officers. The appropriate authority would look into and take suitable disciplinary action against the erring officers and submit the report of the action taken and the result thereof to the Registry of this Court."*

31. In case of **State of Haryana and another Vs. Haryana Civil Secretariat Personal Staff Association, JT 2002 (5) SC 189** while dealing with doctrine of "equal pay for equal work" in paras 8 and 9 of the decision, Hon'ble Apex Court has held as under:

"8. From the discussions in the impugned judgment it is clear to us that the High Court has ignored certain settled principles of law for determination of the claim on parity of pay scale by a section of Government employees. While making copious reference to the principle of equal pay for equal work and equality in the matter of pay, the High Court overlooked the position that the parity sought by the

petitioner in the case was with employees having only the same designation under the Central Government. Such comparison by a section of employees of State Government with employees of Central Government based merely on designation of the posts was misconceived. The High Court also fell into error in assuming that the averment regarding similarity of duties and responsibilities made in the writ petition was unrebutted. The appellants in their counter affidavit have taken the specific stand that no comparison between the two sections of employees is possible since the qualifications prescribed for the P.A.s in the Central Secretariat are different from the P.A.s in the State Civil Secretariat. Even assuming that there was no specific rebuttal of the averment in the writ petition that could not form the basis for grant of parity of scale of pay as claimed by the respondent. The High Court has not made any comparison of the nature of duties and responsibilities, the qualifications for recruitment to the posts of P.A.s in the State Civil Secretariat with those of P.A.s of the Central Secretariate."

"9. This Court in the case of Secretary, Finance Department and others Vs. West Bengal Registration Service Association and others, dealing with the question of equation of posts and equation of salaries of Government employees, made the following observations:

".....Courts must, however, realize that job evaluation is both a difficult and time consuming task which even expert bodies having the assistance of staff with requisite expertise have found difficult to undertake sometimes on account of want of relevant data and scales for evaluating performances of different groups of employees..... Ordinarily a pay structure is evolved keeping in mind several factors, e.g. (i) method of recruitment, (ii) level at which recruitment is made, (iii) the hierarchy of service in a given cadre, (iv) minimum educational/technical qualifications required, (v) avenues of promotion, (vi) the nature of duties and responsibilities, (vii) the horizontal and vertical relativities with similar jobs, (viii) public dealings, (ix) satisfaction level, (x) employer's capacity to pay, etc.. . . . . .. .There can, therefore, be no doubt that equation of posts and equation of salaries is a complex matter which is best left to an expert body unless there is cogent material on record to come to a firm conclusion that a grave error had crept in while fixing the pay scale for a given post and Court's interference is absolutely necessary to undo the injustice."

32. In the case of **State of Haryana and another Vs. Tilak Raj and others, JT 2003 (5) SC 544**, Hon'ble Apex Court has occasion to consider the doctrine of equal pay for equal work again in context of daily wages helpers of Haryana Roadways. While taking note of earlier decision rendered in case of **Federation of All India Customs and Central Excise Stenographers (Recognised) and others Vs. Union of India and others, AIR 1988 SC 1291; State of U.P. Vs. J.P. Chaurasia, AIR 1989 SC 19; Harbans Lal Vs. State of Himachal Pradesh, JT 1989 (3) SC 296; Ghaziabad Development Authority Vs. Vikram Chaudhary, AIR 1995 SC 2325; State of Haryana and others Vs. Jasmer Singh and others, AIR 1997 SC 1788**, the Apex Court has set aside the judgment and order of High court under challenge and in para 11 of the decision

held that appellant State has to ensure that minimum wage prescribed for such worker may be paid to the respondents. The observation made in para 10 of the judgment is apt to be reproduced as under:

"10. A scale of pay is attached to a definite post and in case of a daily wager, he holds not post. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-Â-vis an alleged discrimination. No material was placed before the High Court as to the nature of duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.

"Equal pay for equal work" is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated into a mathematical formula."

33. Now applying the law laid down by the Hon'ble Apex Court on the facts of the case, it is necessary to point out again, that it is no where case of the petitioner that he has ever been appointed on the post of driver, rather it is alleged that while working on the post of Beldar he was asked to drive the vehicle since 1984, since then he is continuously discharging the duties of driver but salary in the pay scale of driver is not being paid to him. Contrary to it the respondents have taken stand in their counter and supplementary counter affidavits that although the post of Beldar and driver both are class-IV category posts, but the post of driver carries slightly higher pay scale. The petitioner has never been selected and appointed on the post of driver. Since he knew the driving and holding driving lincence, therefore, he was occasionally asked to drive the vehicle for which period extra-allowances of Rs.200/- per month was paid to him and he accepted the same, therefore, he cannot claim same pay scale admissible to the post of driver.

34. Thus in view of law laid down by Hon'ble Apex Court, it is very difficult to hold that the petitioner has pleaded necessary facts and placed the materials on records so as to enable the court to grant the relief of similar pay scale admissible to the post of driver. On the basis of admitted and undisputed facts, I have no hesitation to hold that since the petitioner has never been selected and appointed on the post of driver on regular basis and a particular pay scale is attached to particular post, unless a person holds such post according to law, he cannot claim the pay scale of that post, since the petitioner does not hold the post of driver after his due selection according to the relevant rules of recruitment referred herein before, merely because he was asked to drive the vehicle occasionally on casual basis for which he was paid extra-driving allowance of Rs.200/- per month in addition to his salary on the post of Beldar, and he accepted the same, therefore, he cannot legitimately claim the pay scale attached to the post of driver,

therefore, in absence of other relevant pleadings and proof, in connection of eligibility, qualification, discharge of similar and identical duties and responsibilities merely because some how he managed to work on the post of driver can not entitle him to claim the same pay scale as admissible to the post of driver. The case law upon which the learned counsel for petitioner has placed reliance in support of his case namely **R.K. Dubey Vs. State of U.P. and others, 2000 (2) E.S.C. 785 (Alld.)** is distinguishable on facts hence can be of no assistance to the case of petitioner. Similarly in **Gujrat Agriculture University Vs. Rathod, Labhu Bechar & others A.I.R. 2001 S.C. 705** a total altogether different scheme of regularisation of the daily wages workers and emoluments payable to them were under consideration before Hon'ble Apex Court, therefore, the same is also distinguishable on facts and cannot be any assistance to the case of petitioner. Likewise the case of **Madhav Prasad Dubey 1999(2) E.S.C. 1878 (All.)** relied by learned counsel for petitioner has no application to the facts case of petitioner.

35. In view of aforesaid discussions, I am of the considered opinion that petitioner has hardly made out any case so as to call for any interference of this court under Article 226 of the Constitution of India. In the result writ petition fails and dismissed.

36. However I would like to observe that dismissal of this writ petition will not prevent the competent appointing authority to relax the qualification of the post of driver having regard to the period of services rendered by the petitioner as driver on casual basis while permitting him in the next selection on the post of driver if the selection is to be held in near future against available vacancies.

37. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 33954 of 2005

Bhagwan Deen Verma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri P.N. Saxena
Sri Amit Saxena

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

U.P. Panchayat Raj Rules-1946-r-256-readwith Punchayat Raj Act-1947-Section-95 (1)(g)-ceasor of financial of administrative power of Pradhan-enquiry report-requirement that the lapes on the part of Pradhan-was deliberate and for deriving personal benifit-democratically elected Pradhan can not be removed from the office-at discreation of administrative authorities-order taking the financial power quashed.

Held: Para 12,13,14, & 16

Under the said rule 256 any loss caused to the Gram Panchayat due to negligence or misconduct on the part of the Pradhan could be the basis for surcharge being imposed so as to compensate the loss caused to the Gram Panchayat or its property. The provision contained in rule

256 must necessarily be harmonized with Section 95 (1)(g) Sub-section 3 and read in light of the Division Bench judgment, referred to above.

It may be emphasized that democratically elected Pradhan should not be removed from the office at the dictates of the administrative authorities, nor every negligence or mistake on his part can be made a foundation for exercise of power under Section 95 (1)(g) Sub-section 3. The provision of Section 95 (1)(g) must necessarily be construed strictly and it is only in cases of positive and deliberate action of the Pradhan concerned, to derive personal benefit by misusing his official position that an order for his removal under Section 95 (1)(g) Sub-section 3 could be passed. Loss caused to the Gram Panchayat because of some mistake or negligence of the Pradhan, which is neither deliberate nor interided for any personal benefit, has been taken care of by rule 256 of the Panchayat Raj Rules and in such cases order as contemplated by rule 256 alone is required to be passed.

It is, therefore, necessary for removal of the elected Pradhan under Section 95 (1)(g) that a finding should be recorded that the Pradhan has deliberately misused his official position so as to derive benefit by his act and in absence of a finding so recorded, the order of removal cannot be sustained.

In the totality of the circumstances as borne out from record of the petition, the order dated 16.4.2005, passed by the District Magistrate, Hamirpur cannot be legally sustained and is hereby quashed. However, this order shall not prejudice the recovery of the loss caused to the Gram Panchayat on the basis of the assessment made during the enquiry proceedings in accordance with rule 256 of the Panchayat Raj Rules against the petitioner.

Case law discussed:

1978 ALJ 1367

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

1. Heard P.N. Saxena Senior Advocate, assisted by Sri Amit Saxena Advocate no behalf of the petitioner, Standing Counsel on behalf of respondent nos. 1 to 3 and Sri A.N. Verma Advocate on behalf of respondent no. 4. Parties agree that the writ petition may be finally decided at this stage itself.

2. Petitioner Bhagwan Deen Verma is the elected Pradhan of Gram Panchayat Artara, Block Maudaha, District Hamirpur. The District Magistrate vide order dated 31st March, 2004 ceased the financial and administrative powers of the Pradhan under Section 95 (1)(g) proviso of the Panchayat Raj Act. Feeling aggrieved by the said order, petitioner had filed Writ Petition No. 14474 of 2004. The writ petition son filed was disposed of vide judgment and order dated 1.3.2005 with a direction that the District Magistrate may pass fresh reasoned order after considering the reply of the petitioner.

3. It appears that during this period Project Director, District Rural Development Authority was appointed as final enquiry officer. The said enquiry officer submitted his report no 4.9.2004. The District Magistrate on receipt of the said report, issued a fresh show cause notice dated 16.12.2004 to the petitioner to show cause as to why he may not be removed from the office of Pradhan in view of the charges found proved. The District Magistrate, after considering the explanation furnished by the petitioner, by means of the order dated 16.4.2005 has removed the petitioner from the office of

the Pradhan and has further directed for recovery of sum of Rs.4,290/- against the petitioner. The order dated 16.4.2005 is under challenged in the present writ petition.

4. On behalf of the petitioner it is contended that the order passed by the District Magistrate is legally not sustainable inasmuch as the charges even if found proved against the petitioner are not of such nature so as to justify the removal of the elected Pradhan under Section 95 (1)(g) of the Panchayat Raj Act. The petitioner has also challenged the finding recorded in respect of the individual charge on various fact and grounds.

5. So far as the challenge to the finding recorded in respect of individual charges by the District Magistrate on the basis of the enquiry proceedings against the petitioner is concerned, this Court under Article 226 of the Constitution of India can not re-appreciate the evidence and cannot upset the conclusion arrived a by the District Magistrate on such re-appreciation of evidence. However, it is worthwhile to reproduce the finding recorded in respect of the charges against the petitioner in respect of the charge nos. 1 and 2, which are quoted herein below:

Charge No. 1."इस प्रकार कूप मरम्मत में प्रधान द्वारा दर्शायी गयी कार्य की कुल लागत मु० २१३६६.०० रूपये के कार्य में सहायक अभियन्ता डी०आर०डी०ए० द्वारा किये गये मूल्यांकन मु० १४७८६.०० रूपये को घटाने के उपरान्त रूपये ६५८०.०० का दुरूपयोग पाया गया। स्पष्ट है कि कार्य की गुणवत्ता भी प्रभावित हुयी इस प्रकार आरोप संख्या-१ पूर्णतया सिद्ध पाया गया।

Charge No. 2. "प्रधान द्वारा दिये गये स्पष्टीकरण से उपरोक्तानुसार सहमत नहीं हूँ इस सम्बन्ध में जांच अधिकारी द्वारा कराया गया मूल्यांकन के अनुसार खडंजा की कुल मूल्यांकन१०६१६.०० रूपये पाया गया जबकि कार्य की कुल लागत १२६१६.०० रूपये दर्शायी गयी है। इस प्रकार मु० २०००.०० रूपये का स्पष्ट दुरूपयोग/अपव्यय के दोषी पाये गये।"

6. So far as the charge no. 3 is concerned, the same is general in nature namely in respect of construction work in the Gram Panchayat, the petitioner has acted in violation of the Government Orders and rules and in respect of said charge only a general finding has been recorded that since the petitioner has not submitted reply to the same, he being the Pradhan cannot violate the rules.

7. In view of the finding so recorded, the issue which is up for consideration is as to whether the order of removal of Pradhan can be justified under the provisions of Section 95 (1)(g) of the U.P. Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) Enquiry Rules, 1997 or not.

8. For appreciating the aforesaid issue it would be worthwhile to refer to Section 95 (1)(g). It may be stated that in the facts of the present case the order impugned in the present writ petition can at best be referable to Clause 95 (1)(g) Sub-Section (iii), which reads as follows:

95 (1)(g)- *Remove a Pradhan, Up-Pradhan or Member of a Gram Panchayat or a Joint Committee or Bhumi Prabandhak Samiti, or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he-*

(i) ……

(ii) ……

(iii) has abused his position as such or has persistently failed to perform the duties imposed by this Act or rules made thereunder or his continuance as such is not desirable in public interest, or

9. This Court in the case of *Ishwar Dayal Vs. District Magistrate, Manipuri and others, reported in* ***1978 All. L.J. 1367,*** had an occasion to consider the expression 'abuse of position' as used in the said sub-section and in paragraph 4 it has been held as follows:

"……The expression "abuse of position" contemplates positive and deliberate action on the part of the person concerned to derive benefit by misusing his official position. In the absence of any finding that the petitioner derived any benefit, any irregularity committed by him could not amount to abuse of his position.

10. In view of the aforesaid Division Bench judgment of this court, for establishing that the Pradhan has abused his position as such, it is but necessary to establish that the Pradhan has derived benefit by misusing his official position and in absence thereof any irregularity committed by the Pradhan would not amount to abuse of his official position. The conclusion arrived at by the District Magistrate in the impugned order are necessarily to be adjudged in the light of the aforesaid interpretation placed by the Division Bench of this Court on the language of Sub-section III of Section 19 (1)(g). Examining on the touchstone of the aforesaid legal proposition, the impugned order falls short of the requirements, inasmuch as there is absolutely no allegation that the lapse on the part of the Pradhan was deliberate and for the purposes of deriving benefit, occasioned by misuse of the official position. There is absolutely no allegation of any benefit having been derived by the Pradhan in the facts of the present case.

11. Reference at this stage may also be had to the provisions of Rule 256 of the Panchayat Raj Rules, 1946, which read as follows:

"***256.****(1) In any case where the Chief Audit Officer, Co-operative Societies and Panchayats, considers that there has been a loss, waste or misuse of any money or other property belonging to a Gram Sabha as a direct consequence of the negligence or misconduct of a Pradhan, Up-Pradhan, Member, Officer or s ervant of the Gram Panchayat, he may call upon the Pradhan, Up-Pradhan, Member, Officer or servant, as the case may be, to explain in writing why such Pradhan, Up-Pradhan, Member, Officer, or servant should not be required to pay the amount misused or the amount which represents the loss or waste caused to the Gram Sabha or to its property and such explanation shall be furnished within a period not exceeding two months from the date such requisition is communicated to the person concerned.*

Provided that an explanation from the Pradhan, Up-Pradhan or member of the Gram Panchayat shall be called for through the District Magistrate and from the officer or servant through the District Panchayat Raj Officer:

Provided also that no explanation shall be called for from any member who is recorded in the minutes of the Gram Panchayats or any of its committee as having been absent from the meeting at which the expenditure objected to was sanctioned or who voted against such expenditure.

(2) Without prejudice to the generality of the provisions contained in sub-rule (1) the Chief Audit Officer, Co-operative Societies and Panchayats, may call for the explanation in the following cases:

(a) where expenditure has been incurred in contravention of the provisions of the Act or of the rules or regulations made there-under;
(b) where loss has been caused to the Gram Sabha by acceptance of a higher tender without sufficient reasons in writing;
(c) where any sum due to the Gram Sabha has been remitted in contravention of the provisions of the Act or the rules or regulations made thereunder;
(d) where the loss has been caused to the Gram Sabha by neglect in realizing its dues; or
(e) where loss has been caused to the funds or other property of the Gram Sabha on account of want of reasonable care for the custody of such money or property.

(3) On the written request of the Pradhan, Up-Pradhan, Member, Officer or servant from whom an explanation has been called for, the Gram Panchayat shall give him necessary facilities for inspection of the records connected with the requisition for surcharge. The Chief Audit Officer may, on application from the person surcharged, allow a reasonable extension of time for submission of his explanation if he is satisfied that the person charged has been unable, for reasons beyond his control, to consult the record for the purpose of furnishing his explanation."

12. Under the said rule 256 any loss caused to the Gram Panchayat due to negligence or misconduct on the part of the Pradhan could be the basis for surcharge being imposed so as to compensate the loss caused to the Gram Panchayat or its property. The provision contained in rule 256 must necessarily be harmonized with Section 95 (1)(g) Sub-section 3 and read in light of the Division Bench judgment, referred to above.

13. It may be emphasized that democratically elected Pradhan should not be removed from the office at the dictates of the administrative authorities, nor every negligence or mistake on his part can be made a foundation for exercise of power under Section 95 (1)(g) Sub-section 3. The provision of Section 95 (1)(g) must necessarily be construed strictly and it is only in cases of positive and deliberate action of the Pradhan concerned, to derive personal benefit by misusing his official position that an order for his removal under Section 95 (1)(g) Sub-section 3 could be passed. Loss caused to the Gram Panchayat because of some mistake or negligence of the Pradhan, which is neither deliberate nor interided for any personal benefit, has been taken care of by rule 256 of the Panchayat Raj Rules and in such cases order as contemplated by rule 256 alone is required to be passed.

14. It is, therefore, necessary for removal of the elected Pradhan under Section 95 (1)(g) that a finding should be recorded that the Pradhan has deliberately misused his official position so as to derive benefit by his act and in absence of a finding so recorded, the order of removal cannot be sustained.

15. It is further worthwhile to mention that the statement in the impugned order that the elected Pradhan has misappropriated government money, is factually incorrect inasmuch as there was no such allegation nor any facts in that regard have been noticed in the impugned order.

16. In the totality of the circumstances as borne out from record of the petition, the order dated 16.4.2005, passed by the District Magistrate, Hamirpur cannot be legally sustained and is hereby quashed. However, this order shall not prejudice the recovery of the loss caused to the Gram Panchayat on the basis of the assessment made during the enquiry proceedings in accordance with rule 256 of the Panchayat Raj Rules against the petitioner.

17. In view of the aforesaid writ petition is allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.11.2005

BEFORE
THE HON'BLE MUKTESHWAR PRASAD, J.

Criminal Misc. Application No. 17043 of 2005

Billar ...Applicant
Versus
State of U.P. & another ..Opposite Parties

Counsel for the Applicant:
Sri K.S. Tiwari
Sri Amit Kumar Dixit

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

Code of Criminal Procedure-Section-311
Summoning Order-session judge during course of trial summoned the Investigation officer-by invoking inherent power to reach to the truth-held-none can prevent the court from exercising such power-application u/s 482 on the part of accused-liable to be dismissed.

Held: Para 7

Moreover, second part of Section 311 Cr.P.C. empowers the court to summon or recall or re-examine any person/ witness if his evidence appears to be essential for just decision of the case. Such a power is inherent in a criminal court for the reason that in the criminal court every effort is made to reach to the truth. It appears that learned Sessions Judge felt necessity to recall the Investigating Officer for re-examination. In my opinion, none of the parties can agitate this matter and they cannot prevent the court from exercising its power under Section 311 Cr.P.C. Ultimately, it is the responsibility of the courts to do justice and every efforts should be made by the court to separate this chaff from grain.

Case law discussed:
2000 (40) ACC-311

(Delivered by Hon'ble Mukteshwar Prasad, J.)

1. Heard learned counsel for the applicant, learned A.G.A. and perused the record including orders of the learned Sessions Judge, Banda dated 26.7.2005 and 30.9.2005.

2. It is submitted that learned Sessions Judge vide his order dated 26.7.2005 summoned P.W. 6 Siraj Ahmad, Investigating Officer of the case and Constable, who had made entry in the G.D. on 6.8.2003. This order was passed by the Sessions Judge in exercise of his powers under Section 311 Cr.P.C. which provides that any criminal court may at any stage of any inquiry, trial or other proceedings under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person

if his evidence appears to it to be essential to the just decision of the case.

3. An objection was filed on behalf of the accused that in the order-dated 26.7.2005 the court has not clarified that on what fact the reexamination of the Investigating Officer is necessary.

4. After having heard learned counsel for the State and learned counsel for defence also, learned Judge rejected the application of the accused and as such, a prayer has been made for quashing the order-dated 30.9.2005.

5. The main contention of learned counsel for the applicant is that the court below was required to record reasons in its order for recalling the Investigating Officer for further cross-examination. He has no grievance against the order for summoning the Constable.

6. Reliance has been placed on a Division Bench decision of this Court in **Tahir and others vs. State of U.P. reported in 2000 (40) A.C.C. 311**.

7. I have considered the submissions made by learned counsel for the parties and perused the decision relied upon by learned counsel for the applicant. In my opinion, the aforesaid decision of the Division Bench does not help the applicant. The simple reason is that the impugned order-dated 26.7.2005 was passed by the court suo motu and not on the application of the prosecution or defence. Moreover, second part of Section 311 Cr.P.C. empowers the court to summon or recall or re-examine any person/ witness if his evidence appears to be essential for just decision of the case. Such a power is inherent in a criminal court for the reason that in the criminal court every effort is made to reach to the truth. It appears that learned Sessions Judge felt necessity to recall the Investigating Officer for re-examination. In my opinion, none of the parties can agitate this matter and they cannot prevent the court from exercising its power under Section 311 Cr.P.C. Ultimately, it is the responsibility of the courts to do justice and every efforts should be made by the court to separate this chaff from grain.

8. The criminal courts are also required to ensure that no innocent person is convicted for any offence, which was actually not committed by him. In this view of the matter and in view of the clear provision of Sections 311 Cr.P.C. I am of the opinion that learned Sessions Judge committed no illegality in recalling the Investigating Officer. Consequently, I find that this application lacks of merit and is liable to be dismissed.

9. The application is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2005

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

Civil Misc. Writ Petition No. 75265 of 2005

Chandra Prakash Gupta ...Petitioner
Versus
Nideshak (Kshetriya Gramin Bank), and others ...Respondents

Counsel for the Petitioner:
Sri Umesh Chandra Mishra
Sri Sanjeev Kumar Gupta

Counsel for the Respondents:
Sri K.L. Grover
Sri B.N. Singh

Constitution of India-Art. 226-Legal assistance of trained lawyer-can not be claimed as a matter of right-it depends upon statutory Rules and standing order etc.-petitioner a field officer in Bank-Officer representing the employer-merely an Inspector-can not be said legal 'acumen'-competent authority as well as appellate authority given liberty to take assistance of any bank employee-held-No case made out for exercise of discretionary power.

Held: Para 23, 26 and 28

In view of the above the law can be summarised that, claim to have the legal assistance of a trained lawyer cannot be claimed as a matter of right. Whether the delinquent can ask for it depends upon the Statutory Rules/Standing Orders, applicable in the case. More so, the competent authority has to examine as to whether the delinquent employee would be able to defend himself properly, and for that purpose, it is relevant to examine as what is the gravity of the charges, and what kind of legal issues are involved.

The officer representing the employer is merely an Inspector of the Bank. Thus, he is neither a lawyer nor a legally trained person, nor it has been stated that he is a person of legal acumen, in strict legal sense, nor there is much difference in them in the cadre of hierarchy that petitioner may not be able to represent his case in his presence.

We are of the considered opinion that petitioner's cause is not going to be prejudiced or adversely affected by not giving him the assistance of the lawyer. The Competent authority had given him liberty to take assistance of any Bank employee, and he can still avail it.
Case law discussed:

2001 (9) SCC-540
1979 WLN-737
1986 RIR-757
1993 Supp. (4) SCC-61

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

1. This writ petition has been filed for issuing directions to the respondents to permit the petitioner to engage a legal practitioner to defend him in departmental proceedings.

2. The facts and circumstances giving rise to this case are that petitioner, who was appointed on the post of Field Officer in 1982, has been served with the charge-sheet dated 16.8.2004 contending the allegations that he did not observe the responsibility of his post and committed serious irregularities jeopardising the interest of the Bank and made recommendations for the undeserving loans. It may be pertinent to mention here that prior to the initiation of the disciplinary proceedings by issuing the charge-sheet dated 16.8.2004, an F.I.R. had also been lodged against the petitioner on 20.5.2003, and the Crime Case No. 442 of 2003 is still pending. Petitioner made an application under the provisions of Regulation No. 43 of the Kisan Gramin Bank, Budaun Revised Officer and the Employees' Service Regulations, 2000 (hereinafter called the Regulations), which permits the representation of the delinquent employee by the professional lawyer, if the competent authority so permits. However, his application was rejected vide order dated 30.7.2005 observing that he can take the services of any Bank employee for that purpose. The petitioner being aggrieved against the order dated 30.7.2005 preferred the appeal, which has also been rejected vide order dated

28.11.2005 by the respondent no. 2. Hence this petition.

3. Shri U.C. Mishra, learned counsel appearing for the petitioner has submitted that initiation of the criminal prosecution as well as the disciplinary proceedings is at the behest of one Shri Narendra Nath Dwivedi, the then Branch Manager, against whom an order under Section 156 (3) Cr.P.C. has been passed by the Chief Judicial Magistrate, Budaun, and the said order has been passed by the Court on the basis of the deposition made by the petitioner as PW2. Thus, the whole proceedings are mala fides and rejection of the application of the petitioner for engaging a lawyer is arbitrary, unreasonable, and therefore, the orders passed by the respondent-authority are liable to be quashed.

4. We have considered the submissions made by Shri U.C. Mishra, learned counsel for the petitioner, but we are not convinced that the disciplinary proceeding or the criminal prosecution has been launched against the petitioner at the behest of said Shri Narendra Nath Dwivedi, nor such averments can be taken into consideration as he is not a party before us. More so, the order has been passed by the Court under Section 156 (3) Cr.P.C. on 10th May, 2005. While the F.I.R. has been lodged against the petitioner on 20.5.2003, the charge-sheet in disciplinary proceedings had been issued on 16.8.2004, i.e., much before the passing of the order by the Court. Shri Narendra Nath Dwivedi is merely a Branch Manager, and thus, it is difficult to assume that he is so powerful that he could get the petitioner involved in those proceedings and the competent authority was acting at his behest. As he has not been impleaded as a party, allegations of mala fides cannot be taken into considerations. (Vide State of Bihar & Anr. Vs. P.P. Sharma, I.A.S. & Anr, 1992 Suppl (1) SCC 222; Dr. J.N. Banavalikar Vs. Municipal Corporation of Delhi & Anr., AIR 1996 SC 326; All India State Bank Officers Federation & Ors Vs. Union of India & Ors., JT 1996 (8) SC 550; I.K. Mishra Vs. Union of India & Ors., (1997) 6 SCC 228; Federation of Officers Association Vs. Union of India & Ors, 2003 AIR SCW 1764).

5. The issue involved herein is no more res integra as the same has been considered by the Courts time and again.

6. In N. Kalandri & Ors. Vs. M/s Tata Locomotive & Engineering Ltd., AIR 1960 SC 914; and the Dunlop Rubber Co. (India) Ltd. Vs. Their Workmen, AIR 1965 SC 1392, the Hon'ble Supreme Court held that in domestic enquiry, right of the delinquent employee of being represented by a Lawyer or other employee would depend upon the Certified Standing Orders of the Employer or the Rules applicable in such a case. There is no right to representation as such unless the company, by its Standing Order, recognised such right.

7. In C.L.Subramaniam Vs. The Collector of Customs, Cochin, AIR 1972 SC 2178, the Hon'ble Supreme Court held that right of being represented by a lawyer had to be considered in the light of the Statutory Rules. In that case, the Court dealt with the provisions of Sub-rule (5) of the Central Civil Services (Classification, Control & Appeal) Rules, 1967, which provided as under:-

"The Disciplinary Authority may nominate any person to present the case in

support of the charges because the Authority enquiring into the charges, the Government servant may present his case with the assistance of any Government servant approved by the Disciplinary Authority, he may not engage a legal practitioner for the purpose unless the person nominated by the Disciplinary Authority, as aforesaid, is a legal practitioner or unless the Disciplinary Authority, having regard to the circumstances of the case, so permits." (Emphasis added).

8. In the said case, the representative of the employer though was not a legal practitioner but was a legally trained prosecutor. The Hon'ble Supreme Court came to the conclusion that as the employer's case was handled by the trained prosecutor, the delinquent should have been allowed to be represented by the lawyer for the reason that in such circumstances the cause of the delinquent may seriously be prejudiced and it may amount to denial of reasonable opportunity to defend himself. The Court further held that such an opportunity may be provided when a person is charged with the breach of the rule entailing serious consequences, and is not likely to be in a position to present his case as best as it should be. The accusation against the appellant threatened his very livelihood. Any adverse verdict against him was bound to be disastrous to him as it had proved to be. In such situation, he cannot be expected to act calmly with deliberation. That is why, rule 15 (5) has provided for representation of the Government servant charged with dereliction of duty or with contravention of the rule by another Government servant and in appropriate cases by a legal practitioner.

9. In H.C. Sarin Vs. Union of India & Ors., AIR 1976 SC 1686, while interpreting the provisions of Rule 1730 of the Railways Establishment Code, the Apex Court took aid of the notes attached to the said Rules and held that in absence of the Statutory provision, the delinquent was not entitled for the assistance of a lawyer. While deciding the said case, the Court placed reliance on the judgment in R Vs. Secretary of State for the Home Department Ex-parte Mughal, (1973) 3 All ER 796, where it had been held as under:-

"The rules of natural justice must not be stretched too far. Only too often the people who have done wrong seek to invoke "the rules of natural justice' so as to avoid the consequences."

10. In Sunil Kumar Banerjee Vs. State of West Bengal & ors., AIR 1980 SC 1170, the Supreme Court considered the similar issue and observed as under:-

"The other circumstances were that (Enquiry Officer) did not permit the appellant to engage the lawyer and that he allowed the Presenting Officer to introduce extraneous matters. The rule gives a discretion to the Enquiry Officer to permit or not to permit a delinquent officer to be represented by a lawyer. In the present case, the appellant cross-examined the prosecution witnesses and also examined the defence witnesses. Thereafter when the matter was posted for argument and was adjourned at least once at the instance of the appellant, the appellant came forward with an application seeking permission to engage a lawyer. The Enquiry Officer rejected the application and noticed that it was made at a very belated stage. We think, he was right in doing so; nor is it possible for us

to infer bias from the circumstances that the Enquiry Officer did not allow the appellant to engage the lawyer. We cannot conceive of any prejudice resulting to him by denial of a lawyer."

11. In Board of Trustees of Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni & ors., AIR 1983 SC 109, the Apex Court held that fair play in action requires that in a domestic inquiry, when the delinquent officer is pitted against a legally trained mind and if he seeks permission to appear through a legal practitioner, the refusal to grant this request would amount to denial of a reasonable opportunity to defend himself. The Court was interpreting the provisions of regulation 12 (8) of the Bombay Port Trust Employees Regulations, 1976, which was amended providing the assistance of a lawyer during pendency of the inquiry.

12. In Bhagat Ram Vs. State of Himalchal Pradesh & ors., AIR 1983 SC 454, the Apex Court examined the issue and came to the conclusion That delinquent employee should not be at a comparative disadvantageous position when compared to the Disciplinary Authority represented by the Presenting Officer of a very high rank or much superior from the delinquent. The test to determine whether reasonable opportunity is given or not, is to be determined/considered whether the employee himself was able to understand as what was the charge against him and was able to defend himself.

13. In J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. & ors., AIR 1991 SC 1221, the Apex Court held as under:-

"It would appear that in the inquiry, the Respondent-Corporation was represented by its personnel and Administrative Manager who is stated to be a man of law. The rule itself recognizes that where the charges are so serious as to entail a dismissal from service the inquiry authority may permit the services of a lawyer. This rule vests discretion. In the matter of exercise of this discretion one of the relevant factors is **whether there is likelihood of the combat being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable opportunity for defence by reason of the appellant being pitted against a presenting officer who is trained in law**..... On a consideration of the matter, we are persuaded to the view that the refusal to sanction the service of a lawyer in the inquiry was not a proper exercise of the discretion under the rule resulting in a failure of natural justice; particularly, in view of the fact that the Presenting Officer was a person with legal attainments and experience. It was said that the appellant was no less adept having been in the position of a Senior Executive and could have defended, and did defend, himself competently; but as was observed by the learned Master of Rolls in Pett's case that in defending himself one may tend to become "nervous' or "tongue tied'. Moreover, appellant, it is claimed, has had no legal back-ground. The refusal of the service of a lawyer, in the facts of this case, results in denial of natural justice."

14. In Crescent Dyes and Chemicals Ltd. Vs. Ram Naresh Tripathi, (1993) 2 SCC 115, the Apex Court held as under:-

"A delinquent appearing before the Tribunal may feel that the right to representation is implied in the larger entitlement of a fair hearing based on the rule of justice. He may, therefore, feel that refusal to be represented by an agent of his choice would tantamount to denial of natural justice. Ordinarily, it is considered desirable not to restrict this right of representation by counsel or an agent of one's choice, but it is different thing to say that such right is an element of principles of natural justice and denial thereof would invalidate the inquiry. **Representation through counsel can be restricted by law."**

15. The Court further held that it seems to us that the right to be represented by a counsel or agent of one's own choice, is not an absolute right and can be controlled, restricted or regulated by law, Rules or Regulations. However, if the charge is of a serious and complex nature, the delinquent's request to be represented through a counsel or agent should be conceded.

16. In Bharat Petrolium Corporation Ltd. Vs Maharashtra General Kamgar Union & Ors. AIR 1999 SC 401, the Hon'ble Supreme Court, after considering this issue in detail and after considering a large number of its judgments, held as under:-

"The basic principle is that an employee has no right to representation in the departmental proceedings by another person or a lawyer unless the Service Rules specifically provide for the same. The right to representation is available only to the extent specifically provided for in the Rules."

17. Similar view has been reiterated by the Hon'ble Supreme Court in CIPLA Ltd. & ors. Vs. Ripu Daman Bhanot & Anr., AIR 1999 SC 1635.

Rule 16 (5) of the Rajasthan Civil Services (Classification, Control & Appeal) Rules, 1958 reads as under:-

"The Disciplinary Authority may nominate any person to present the case in support of the charges before the authority inquiring into charges (hereinafter referred to as the Inquiring Authority). The Government servant may present his case with the assistance of any other Government servant (or retired Government Servant) approved by the Disciplinary Authority, but may not engage a legal practitioner for the purpose unless, the person nominated by the Disciplinary Authority is a legal practitioner or unless the Disciplinary. Authority, having regard to the circumstances of the case, so permits."

18. While interpreting the said provisions, in State of Rajasthan Vs. S.K. Dutt Sharma, 1993 Supp (4) SCC 61, the Hon'ble Apex Court held that the delinquent could not claim the assistance of the lawyer as a matter of right. More so, the gravity of the charges should also be taken into consideration in such a case as to whether the delinquent would be able to contest the charges.

19. While interpreting the said rule in case if Judicial Officers, a Division Bench of the Rajasthan High Court in Ravindra Nath Vs. State, 1986 RLR 757, held that the Presenting Officer who is directly recruited to the RHJS from the bar stands on a better footing than a judicial officer who was promoted to the RHJS from the subordinate judiciary, in the matter of competence. In case the

petitioner felt that a directly recruited judicial officer would be in a better position to represent his case he should have requested the disciplinary authority to appoint such an officer as the defence nominee. It cannot be said that the disciplinary authority has committed an error in rejecting the application of the petitioner to engage a legal practitioner and that the said refusal of the disciplinary authority to permit the petitioner to engage a legal practitioner has caused any material prejudice to the petitioner in defending himself.

20. A Division Bench of the Rajasthan High Court in Ugam Raj Bhandari Vs. State, 1979 WLN 737, held that where Presenting Officer was a District Judge and Assisting Officer was a Civil Judge of 12 years standing, held no prejudice was caused in refusing to engage a lawyer.

21. In Indian Overseas Bank Vs. Indian Overseas Bank Officer's Association & Anr., (2001) 9 SCC 540, a similar view has been reiterated by the Hon'ble Supreme Court observing that no such claim can be made as a right, however, it may be examined as not permitting the assistance of the lawyer, the cause of the delinquent is going to be prejudiced and adversely affected as the Charged Officer may not be able to effectively defend himself.

22. Even otherwise, unless in a given situation, the aggrieved party makes out a case of prejudice or injustice, mere infraction of law will not vitiate the order/inquiry/selection.

23. In view of the above the law can be summarised that, claim to have the legal assistance of a trained lawyer cannot be claimed as a matter of right. Whether the delinquent can ask for it depends upon the Statutory Rules/Standing Orders, applicable in the case. More so, the competent authority has to examine as to whether the delinquent employee would be able to defend himself properly, and for that purpose, it is relevant to examine as what is the gravity of the charges, and what kind of legal issues are involved.

24. Another point of paramount consideration for the authority to consider is, as who is the presenting officer on behalf of the employer. If he is a trained lawyer or a law officer, or any person having good legal acumen, it may not be possible for the delinquent to defend himself. More so, if the presenting officer is of a very high rank and the delinquent belongs to the lower category of the service, he may not be able to put his case freely, and it further requires to be considered that if the lawyer's assistance is not provided, as to whether the delinquent employee's cause is going to be prejudiced or adversely affected.

25. The instant case requires to be considered in the light of the aforesaid settled legal propositions.

The provisions of the aforesaid Regulation 43 reads as under:-

"Restriction of engagement of a legal practitioner- for the purpose of Enquiry Officer or employee shall not engage a legal practitioner without prior permission of the competent authority."

26. It empowers the competent authority to permit the assistance of a lawyer in the light of the aforesaid settled legal propositions. The disciplinary

authority as well as the appellate authority has rejected the application of the petitioner for assistance of the lawyer. However, the delinquent employee has been given liberty to seek assistance of any employee of the Bank. The petitioner is working in the Bank as a Field Officer since 1982. The charges framed against him in the disciplinary proceedings are of not very grave nature, as allegations are only not working with sincerity and responsibility, while making recommendation for grant of loans. The officer representing the employer is merely an Inspector of the Bank. Thus, he is neither a lawyer nor a legally trained person, nor it has been stated that he is a person of legal acumen, in strict legal sense, nor there is much difference in them in the cadre of hierarchy that petitioner may not be able to represent his case in his presence.

27. In spite of our repeated queries, Shri Mishra, learned counsel appearing for the petitioner could not point out as to why the petitioner feels to be not competent to defend himself. A parrot like reply came repeatedly that the petitioner does not want to defend himself. That is all. Such a plea, if permitted to be taken, is not enough to meet the requirement of law.

28. We are of the considered opinion that petitioner's cause is not going to be prejudiced or adversely affected by not giving him the assistance of the lawyer. The Competent authority had given him liberty to take assistance of any Bank employee, and he can still avail it.

29. The supplementary affidavit filed today in the Court reveals that the Bank employees, whose names were given by the petitioner to be his defence nominee, have refused to do so only and only on the ground that they would not be able to spare two days in a week, as the inquiry had been fixed for two days in every week, i.e., Friday and Saturday. It is not his case that nobody was ready to defend. There is nothing on record to show that the petitioner ever requested the competent authority to fix the inquiry only for one day in a week.

30. In such a fact-situation, no case is made out for interference in discretionary writ jurisdiction. Petition is devoid of any merit and is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2005

BEFORE
THE HON'BLE S. RAFAT ALAM, J.
THE HON'BLE SUDHIR AGARWAL, J.

Special Appeal No.1423 of 2005

Chandra Shekhar ...Appellant/Applicant
Versus
Sri J.P. Rajpoot & others ...Respondents

Counsel for the Appellant:
Sri Yogesh Kumar Saxena

Counsel for the Respondents:

<u>High Court Rules-Chapter 8 rule 5 Contempt of Courts Act-Section 19-</u> Special Appeal-against the Order dropping contempt proceeding-held-not maintainable-a right of appeal is creative of Statute-in absence of specific provisions appeal can not be pressed-However if the contempt court dealing with contempt case-same direction issued-Special Appeal can be filled only to that extant.

Held: Para 7 & 10

A careful reading of the aforesaid provision clearly indicates that an appeal would lie only against such decision or order of the High Court whereby punishment for contempt is imposed. Any order or decision, mentioned in the Section, is qualified by providing of punishment for contempt in the provision. In a contempt matter when the Court having heard the parties finds that no case for initiation of contempt proceeding is made out, in that event, no right flows to the petitioner on whose application the proceeding was initiated, of further appeal under Section 19 of the Act against the decision of the Hon'ble Single Judge of this Court dropping the proceeding. Section 19 of the Act does not give a right of appeal to the person, who has brought the motion for initiating contempt proceeding against the order/judgment holding that no contempt is made out. Right of appeal is creature of the statute and unless such right is given in the statute, a person feeling aggrieved by such decision or order has no right to appeal. Our view that no appeal would lie under Section 19 of the Act against the order of the Hon'ble Single Judge of the High Court declining to initiate proceeding for contempt, is supported by judgment of Hon'ble Apex Court in the case of Baradakanta Mishra vs. Mr. Justice Gatikrushna Misra, C.J. of the Orissa H.C., AIR 1974 SC 2255.

In the present case also since the Hon'ble Single Judge has refused to entertain contempt petition, the appeal under Chapter VIII Rule 5 of the Rules of the Court, is not maintainable and the contention of the learned counsel for the appellant, therefore, is rejected.

Case law discussed:

1998 (3) UPLBEC 2333
AIR 1974 SC-2255
1997 (3) AWC-1909
1991 Cr. L.J. 3026

(Delivered by Hon'ble S. Rafat Alam, J.)

1. This special appeal is preferred against the judgment and order of the Hon'ble Single Judge dated 28.10.2005 dismissing contempt petition no.3194 of 2004 filed by the appellant.

2. Learned counsel for the appellant submitted that the contempt petition of the appellant has wrongly been rejected by the Hon'ble Single Judge on the ground that the earlier contempt petition having already been dismissed finding that no case for contempt is made out, since no specific direction has been issued by the writ court, second contempt petition without any change in the circumstances, in respect to the same order of the Court, is liable to be rejected.

3. However, the Court prima facie found that the appeal under Chapter VIII Rule 5 of the Rules of the Court itself is not maintainable. Shri Yogesh Kumar Saxena, learned counsel for the appellant placed reliance on a Division Bench judgment of this Court in the case of ***A.P. Verma, Principal Secretary, Medical Health and Family Welfare, U.P. Lucknow and others vs. U.P. Laboratory Technicians Association, Lucknow and others, 1998 (3) UPLBEC 2333*** and submit that the special appeal under Chapter VIII Rule 5 would be maintainable.

4. We have considered the submissions but do not find any force. This court in **A.P. Verma** (supra) held that in respect of orders passed by the Hon'ble Single Judge dismissing the contempt petition, no appeal under Chapter VIII Rule 5 of the Rules of the Court would be maintainable. However,

if the contempt court issues certain further directions to the parties, such directions would amount to orders issued by the Hon'ble Single Judge other than those covered under the Contempt of Courts Act and to that extent, special appeal under Chapter VIII Rule 5 of the Rules of the Court may be maintainable, since that would be regarding the merit of the claim made in the writ petition. The relevant observation contained in para 8 of the aforesaid judgment is reproduced as under: -

"Under the impugned order, learned Single Judge has recorded a clear finding that the directions issued in the writ petition had not been complied with but he did not want to punish the appellants at this stage. He has issued a further direction to the appellants to comply with the order passed in the writ petition in its letter and spirit. In view of what we have held above, this appeal is maintainable under Section 19 of the Act against the finding regarding non-compliance of the order which amounts to a "civil contempt' within the meaning of Section 2(a) of the Act. The appeal will also be maintainable under Chapter VIII, Rule 5 of the Rules of the Court against the directions issued in the impugned order which are regarding the merit of the claim made by the respondents in the writ petition." (para 8)

5. In the present case, the appellant filed contempt petition no.414 of 2005 and the Hon'ble Single Judge, after hearing parties, found that the writ court has not issued any specific direction, which is alleged to have been disobeyed by the respondents and, therefore, no contempt is made out. Accordingly, contempt petition was rejected. Again, contempt petition no.3194 of 2005 was filed alleging non-compliance of the same order of the writ court without any additional facts and circumstances and the Hon'ble Single Judge has rejected contempt petition vide order under appeal. In such circumstances, the order impugned in the appeal does not show that the Hon'ble Single Judge has issued any direction regarding merit of the claim of the appellant in the writ petition and, therefore, the special appeal under Chapter VIII Rule 5 of the Rules of the Court would not be maintainable.

6. The Contempt of Court's Act, 1971 (in short "Act of 1971') is a self-contained code with respect to the procedure to be followed by the Court in the matter of Contempt. Section 19 of the Act provides of filing appeal against any order or decision of the High Court in exercise of its jurisdiction and punish for contempt. Section 19 of the Act reads as under: -

"Appeals - (1) An appeals shall lie as of right from any order to decision of High Court in the exercise of its jurisdiction to punish for contempt-
(a) Where the order or decision is that of a single judge, to a Bench of not less than two Judges of the Court.
(b) Where the order or decision is that of a Bench, to the Supreme Court.
Provided that where the order or decision is that of the Court of the Judicial Commissioner in any Union territory, such appeal shall lie to the Supreme Court.
(2) Pending any appeal. The appellate court may order that-
(a) The execution of the punishment or order appealed against be suspended
(b) If the appellant is in confinement, he be released on bail, and

(c) The appeal be heard notwithstanding that the appellant has not purged his contempt.
(3) Where any person aggrieved by any order against which an appeal may be filed satisfied the High Court that he intends to prefer an appeal, the High Court may also exercise all or any of the powers conferred by sub section (2).
(4) An appeal under sub section (1) shall be filed-
(a) In the case of an appeal to a Bench of the High Court, within thirty days.
(b) In the case of an appeal to the Supreme Court, within sixty days, from the date of the order appealed against."

7. A careful reading of the aforesaid provision clearly indicates that an appeal would lie only against such decision or order of the High Court whereby punishment for contempt is imposed. Any order or decision, mentioned in the Section, is qualified by providing of punishment for contempt in the provision. In a contempt matter when the Court having heard the parties finds that no case for initiation of contempt proceeding is made out, in that event, no right flows to the petitioner on whose application the proceeding was initiated, of further appeal under Section 19 of the Act against the decision of the Hon'ble Single Judge of this Court dropping the proceeding. Section 19 of the Act does not give a right of appeal to the person, who has brought the motion for initiating contempt proceeding against the order/judgment holding that no contempt is made out. Right of appeal is creature of the statute and unless such right is given in the statute, a person feeling aggrieved by such decision or order has no right to appeal. Our view that no appeal would lie under Section 19 of the Act against the order of the Hon'ble Single Judge of the High Court declining to initiate proceeding for contempt, is supported by judgment of Hon'ble Apex Court in the case of ***Baradakanta Mishra vs. Mr. Justice Gatikrushna Misra, C.J. of the Orissa H.C., AIR 1974 SC 2255*** wherein it has been held as under: -

"It is only when the Court decides to take action and initiates a proceeding for contempt that it assumes jurisdiction to punish for contempt. Where the Court rejects a motion or a reference and declines to initiate a proceeding for contempt, it refuses to assume or exercise jurisdiction to punish for contempt and such a decision cannot be regarded as a decision in the exercise of its jurisdiction to punish for contempt. Such a decision would not, therefore, fall within the opening words of Section 19(1) and no appeal would lie against it, as of right under that provision."

8. However, in a matter where the right of appeal has not been conferred by the legislature under the Act of 1971, can a special appeal under Chapter VIII Rule 5 of the Rules of the Court would be maintainable is a moot question to be considered in this appeal. In our view, this question is no more res integra since this issue has already been dealt with by a Division Bench of this Court in ***Sheo Charan vs. Nawal and others, 1997 (3) AWC 1909*** wherein this Court held as under: -

"The Contempt of Courts Act was enacted "to define and limit the powers of certain courts in punishing contempt of courts and to regulate their procedure in relation thereto-"The Supreme Court in Pritam Pal v. High Court of Madhya

Pradesh, Jabalpur, AIR 1992 Supreme Court 904, has held that after the enforcement of the Act, the procedure laid down therein will govern the contempt proceedings before the High Court. The relevant extract of said decision is reproduced below:

"Prior to the Contempt of Courts Act, 1971, it was held that the High Court has inherent power to deal with a contempt of itself summarily and to adopt its own procedure, provided that it gives a fair and reasonable opportunity to the contemnor to defend himself. But the procedure has now been prescribed by Section 15 of the Act in exercise of the powers conferred by Entry 14, List III of the Seventh Schedule of the Constitution. Though, the contempt jurisdiction of the Supreme Court and the High Court can be regulated by legislation by appropriate Legislature under Entry 77 of List I and Entry 14 of List III in exercise of which the Parliament has enacted the Act, 1971, the contempt jurisdiction of the Supreme Court and the High Court is given a constitutional foundation by declaring to be "Courts of Record' under Articles 129 and 215 of the Constitution and, therefore, the inherent power of the Supreme Court and the High Court cannot be taken away by any legislation short of constitutional amendment."

The Act has defined "contempt/, laid down procedure and has placed limitation on the powers of the courts. By Section 19, the Act has created a right of appeal from an order or decision of the court imposing punishment for contempt. There is no provision for appeal under the Act against the decision discharging the notice of contempt and/or dismissing the contempt petition. When statute provides for appeal and also lays down the orders/decisions against which such an appeal can be filed, the Legislature's intention is that appeal against all other orders is barred. As Section 19 has provided for appeal against an order or decision imposing punishment for contempt, the right to file an appeal against all other orders has been taken away by the statute. The result is that the appeal against a decision, rejecting the contempt petition is not maintainable under Rule 5 of Chapter VIII also." (para 11)

9. A similar issue came up for consideration before a Division Bench of Madras High Court in Shantha V. Pai vs. Vasanth Builders, 1991 Cr.L.J. 3026 with respect to the maintainability of the appeal under Clause 15 of the letters patent. The Division Bench held that an order, which is not appealable under Section 19 of the Contempt Act, cannot be appealed under Clause 15 of the letters patent. The Court observed as under: -

".....we hold that a Letters Patent Appeal under clause 15 would not lie against any order passed in exercise of the contempt jurisdiction by the High Court where the trial judge refuses to take cognizance of an application seeking to punish the opposite party for contempt of Court or where it rejects the application after being satisfied that its order had not been flouted and was of the opinion that no vindication of its order was called for by committing the alleged contemnor for contempt of Court." (para 24)

In **A.P. Verma** (supra) also the Division Bench of this Court agreeing with the view taken in the aforesaid case has held that under Chapter VIII Rule 5

such an appeal is not maintainable and in para 6 this Court has observed as under: -

"..... We are in respectful agreement with the view taken in the aforesaid decisions that no appeal is maintainable under Chapter VIII, Rule 5 of this Rules of the Court against any order passed in proceedings under Contempt of Courts Act as it is a self contained Code and it also provides for a remedy of appeal under Section 19 though only against specific type of orders or decisions." (para 6)

10. In the present case also since the Hon'ble Single Judge has refused to entertain contempt petition, the appeal under Chapter VIII Rule 5 of the Rules of the Court, is not maintainable and the contention of the learned counsel for the appellant, therefore, is rejected.

11. In view of the above discussion, the special appeal is dismissed as not maintainable. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2005

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

Civil Misc. Writ Petition No. 47307 of 2005

Chaudhary Chandan Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ch. Chandan Singh
(In Person)

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-readwith Saw Mill Rules 1998-rule 5,6 and 7 alongwith Notification dated 3.6.2002-Grant of Saw Mill licence-Regional Director Samajik Vaniki Van Prabhag-rejected the application for renewal-challenge made on the ground placing reliance upon the decisions of Supreme Court in Jawahar Lal Case reported in J.T. 2002 (1) SC-413-held-subsequent decisions of the Apex Court not brought before the Supreme Court-by which it is mandatory that the application for licence to be placed before the Central Empowered Committee-Regional Director rightly rejected the application-call for no interference by High Court.

Held: Para 18 and 23

It is upon a consideration of the aforesaid provision of the Rules and the orders of the Supreme Court that the Regional Director has rejected the application of the petitioner for grant of licence. It has been noticed that the licence had never been issued in favour of the petitioner prior to 4th March, 1997 but even without the issue of such licence the petitioner had been depositing the licence fee. It has further been noticed that the Central Empowered Committee in its recommendations placed before the Supreme Court had made it clear that the licence cannot be granted merely upon deposit of the licence fee and in such circumstances, the petitioner cannot take the benefit of the decision given by this Court in Nand Lal Vs. State of U.P. & Ors,. 2002 ALJ 1255. The Regional Director has also referred to the directions issued by the Supreme Court that no State Government or the Union of India shall permit the opening of saw-mill without prior permission of the Central Empowered Committee. In such circumstances the Regional Director has concluded that the licence

could not be issued but it has been observed that in case the petitioner desired he could place his application before the Central Empowered Committee.

In the present case the licence of the saw mill of the petitioner had not been renewed prior to 4th March, 1997. The directions of the Supreme Court make it obligatory in such cases, for the applicants to place their application before the Central Empowered Committee. This is precisely what has been observed in the order of the Regional Director.

Case law discussed:
1997 (2) SCC-267
1997 (3) SCC-312
1997 (7) SCC-440
2002 ALJ-1255

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

1. This writ petition has been filed for quashing the order dated 6th April, 2005 which has been passed by the Regional Director, Samajik Vaniki Van Prabhag, Fatehpur (hereinafter referred to as the 'Regional Director') rejecting the application filed by the petitioner for grant of Saw Mill licence. The said order was passed pursuant to the directions issued by this Court on 21st January, 2005 in Writ Petition No. 27395 of 2004.

2. The facts stated in the petition reveal that earlier the Saw Mill belonged to Sri Ram Agarwal who had been granted a licence to run saw mill. The saw mill was sold to one Sri Narendra Kumar Singh on 2nd February, 1989 and thereafter it was sold by Sri Narendra Kumar Singh to the petitioner for a consideration of Rs.25,000/-. The petitioner then submitted an application dated 2nd April, 1989 to the Range Officer for transfer of the licence in his favour and for permission to deposit the renewal licence fee. It appears on the basis of the aforesaid application, the petitioner deposited the licence fee of Rs. 1,000/- in 1990, 1991 and 1992. The licence was, however, not renewed and, therefore, the petitioner filed a writ petition in this Court which was disposed of on 20th October, 2003 with a direction to decide the representation of the petitioner. The application of the petitioner for renewal of the licence was rejected and this was challenged by the petitioner by filing a writ petition being Writ Petition No. 12350 of 2004 which was disposed of on 25th March, 2004 with a direction that the application filed by the petitioner for grant of saw mill licence shall be considered afresh in accordance with law. By the order dated 24th June, 2004 the application was again rejected. Feeling aggrieved, the petitioner filed yet another Writ Petition No. 27395 of 2004. The Court by means of the judgment and order dated 28th January, 2005 set aside the order dated 24th June, 2004 and remanded the matter back to the Regional Director to decide it afresh in accordance with law. Pursuant to the aforesaid directions of this Court, the matter has been considered at length by the Regional Director in the order dated 6th April, 2005 which has been impugned in the present petition.

3. We have heard the petitioner in person and the learned Standing Counsel appearing for the respondents and have perused the materials available on record.

4. The petitioner in person has assailed the order dated 6th April, 2005 contending that once the petitioner was permitted to deposit the licence fee, the respondents could not have refused the grant of the licence and in any view of the

matter, the order of the Supreme Court has not been correctly interpreted by the Regional Director. Learned Standing Counsel on the other hand has supported the impugned order and has submitted that there is no infirmity as it is based upon the orders issued by the Supreme Court from time to time.

5. We have carefully considered the submissions advanced by the parties. Before examining the rival contentions, we consider it proper to refer to the Rules framed by the State Government and to the orders passed by the Supreme Court from time to time with regard to the grant of licence to the saw mills.

6. The State Government has framed the " Uttar Pradesh Establishment and Regulation of Saw-mills Rules, 1978 (hereinafter referred to as the 'Rules'). Rule 2 defines 'Saw-mills' to mean and include any mechanical device whether operating with electric power, fuel power or man-power for the purpose of cutting, sawing or converting, timber and wood into pieces or the like acts. Rule 3 provides that no person shall establish, erect or operate any saw-mill or machinery for converting or cutting timber and wood without obtaining a licence from the Divisional Forest Officer concerned. Under Rule 4 an application has to be submitted by any person desiring to establish, erect or operate any existing saw-mill to the Divisional Forest Officer concerned for obtaining a licence in the form given in the Schedule I appended to the Rules. Rule 5 deals with grant of licence by the Divisional Forest Officer after satisfying himself with regard to the factors enumerated. Rule 7 deals with renewal of licence.

7. The matter regarding protection and conservation of forest was considered by the Supreme Court in T.N. Godavarman Thirumulkpad Vs. Union of India & Ors., (1997) 2 SCC 267 and we reproduce the relevant general directions issued by the Supreme Court contained in paragraph 5 of the judgment.

"1. In view of the meaning of the word "forest" in the Act, it is obvious that prior approval of the Central Government is required for any non-forest activity within the area of any "forest". In accordance with Section 2 of the Act, all on-going activity within any forest in any State throughout the country, without the prior approval of the Central Government, must cease forthwith. It is, therefore, clear that the running of saw mills of any kind including veneer or plywood mills, and mining of any mineral are non-forest purposes and are, therefore, not permissible without prior approval of the Central Government. Accordingly, any such activity is prima facie violation of the provisions of the Forest Conservation Act, 1980. Every State Government must promptly ensure total cessation of all such activities forthwith.

…….

3. The felling of trees in all forests is to remain suspended except in accordance with the working plans of the State Governments, as approved by the Central Government. In the absence of any working plan in any particular State, such as Arunachal Pradesh, where the permit system exists, the felling under the permits can be done only by the Forest Department of the State Government or the State Forest Corporation.

……

6. Each State Government should within two months, file a report regarding:

(i) the number of saw mills, veneer and plywood mills actually operating within the State, with particulars of their real ownership;

(ii) the licensed and actual capacity of these mills for stock and sawing;

(iii) their proximity to the nearest forest;

(iv) their source of timber.

7. Each State Government should constitute within one month, an Expert Committee to assess:

(i) the sustainable capacity of the forests of the State qua saw mills and timber-based industry;

(ii) the number of existing saw mills which can safely be sustained in the State;

(iii) the optimum distance from the forest, qua that State, at which the saw mill should be located."

8. Certain minor variations were made in the aforesaid order and the same are reported in (1997) 3 SCC 312, T.N. Godavarman Thirumulkpad Vs. Union of India & Ors. and are as follows:-

"All unlicensed saw mills, veneer and plywood industries in the State of Maharashtra and the State of Uttar Pradesh are to be closed forthwith and the State Government would not remove or relax the condition for grant of permission/licence for the opening of any such saw mill, veneer and plywood industry and it shall also not grant any fresh permission/licence for this purpose. The Chief Secretary of the State will ensure strict compliance of this direction and file a compliance report within two weeks."

9. Thereafter certain applications were filed in the aforesaid case of T.N. Godavarman Thirumulkpad in which directions were issued. These are reported in (1997) 7 SCC 440 and the relevant direction is reproduced below:-

"After hearing the learned amicus curiae, the learned Attorney General and the other learned counsel, we direct as under:

A. In the State of Uttar Pradesh the following is permitted-

1. Principal Chief Conservator of Forest (PCCF) may, on a case-to-case basis, consider grant of permission to an existing licensed sawmill to relocate itself, provided that the relocated site is not within 10 kms of any existing forest."

10. In the meantime the State Government made various amendments in the Rules in the year 1998. The definition of 'Saw-mill' was amended to mean and include any mechanical device whether operating with electric power, fuel power or man-power for the purpose of cutting, sawing or converting, timber and wood into pieces or the like acts, but would not include such mechanical device whose engine power is up to 3 H.P.

11. The amended Rules, 5, 6 and 7 which deal with grant of licence, period of validity of licence and renewal of licence are as follows:-

"5. Grant of licence.- On receipt of an application under Rule 4 the Divisional Forest Officer shall acknowledge the same and thereafter shall make such enquiries as he may deem fit and after satisfying himself with regard to following factors, grant the licence in the form given in Schedule II appended to these rules:-

(i) that the required quantity of timber through legitimate means would be available at the proposed venue of the saw-mill without causing any damage to the tree-growth in the forests under the control of the Government and the adjacent rural areas;
(ii) that the applicant has acquired or is in a position to acquire necessary area for erecting and running a saw mill in accordance with the conditions specified in the licence;
(iii) that the necessary machinery, power etc, is available or is likely to be available to the applicant;
(iv) that the applicant has obtained a "No Objection Certificate"

In case the Divisional Forest Officer is not satisfied he may reject the application within sixty days of its receipt:

Provided that in case the said application is not disposed of within sixty days from the date of the receipt of the application by the Divisional Forest Officer, the licence shall be deemed to have been granted to the applicant under this rule on the terms and conditions as laid down in Schedule II appended to these rules with effect from the expiry of the said sixty days and in that event the acknowledgement, shall be adequate proof of the licence.

Provided further that the aforesaid proviso shall not apply to saw mills situated within ten kilometre area of any existing forest.

Explanation.- In this rule existing forest shall not include trees situated on either side of the roads and the railway tracks.

"6. Period of validity of licence.- Every licence granted under Rule 5 or renewed under Rule 7 shall remain valid for such period not exceeding three years from the date of issue or renewal as may be specified in the licence:

Provided that, in case of a licence referred to in the proviso to Rule 5 or Rule 7 the period of validity shall be three years."

"7. Renewal of licence.- On an application made to the Divisional Forest Officer concerned for renewal of the licence granted under Rule, 5 he may renew the same indicating thereon the period for which it has been renewed. The renewal application for licence shall be disposed of within sixty days of its receipt:

Provided that in case the application is not disposed of within sixty days, from the date of the receipt of the application by the Divisional Forest Officer, the licence shall be deemed to have been renewed for a period of three years:

Provided further that the aforesaid proviso shall not apply to saw mills situated within ten kilometers of any existing forest.
Explanation:- In this rule existing forest shall not include trees situated on either side of the roads and the railway tracks.

Failure to get the licence renewed before the expiry of date will make the licensee liable to punishment in accordance with Section 77 of the Indian Forest Act, 1927 for operating the saw mills without licence."

12. The aforesaid Rules along with the 1998 amendments came up for consideration before the Supreme Court in the aforesaid case of T.N. Godavarman Thirumulkpad on 30th April, 2002 and the relevant portion of the order is quoted below:-

"Our attention has been drawn to the rules which have been amended by the State of Uttar Pradesh on 6th June, 1998 permitting saw mills having engine power of 3 HP not to have a licence. This amendment was made after this Court's order dated 4th March, 1997 directing closure of all unlicensed saw mill in the State of Uttar Pradesh and Maharasthra. It is quite obvious that with a view to circumvent this Court's order dated 4th March, 1997 the State of Uttar Pradesh has used the device of changing the law. That this was done with view to help the saw mills, is quite evident from the affidavit of Shri Anup Malik Forest Utilization Officer, U.P. Lucknow who in paragraph 4 of the affidavits states that three saw mills, namely M/s. Punjab Saw Mill, M/s. Rana Saw Mill and M/s. Nur Handicraft heaving saw mills of 15 HP, 10 HP and 8 HP respectively within the municipal limits of Saharanpur were sealed pursuant to the orders of this Court dated 4th March, 1997. This affidavit further goes to show that presently these very saw mills are in operation using power less than 3 HP. We refuse to believe that the saw mills which were having 15 HP, 10 HP, and 8 HP, would today be functioning using less than 3 HP. It is only the State of Uttar Pradesh which can be fallible, willingly, or unwillingly, to accept this. We, therefore, set aside the amendment of the U.P. Establishment and Regulation of Saw Mills Rules 1978 which was effected on 26th June, 1998 in so far as it exempts saw mills using mechanical devices with the use of power up to 3 HP from obtaining a licence. As a result of the order passed today each and every saw mill running in the State of Uttar Pradesh would require a licence, whether the saw mill is running with the aid of power or otherwise. The rule which provides for deemed licence in the event of the application for the grant of licence not being dealt with contained in the Saw Mills Rules, being Rule 7, is also held to be contrary to the letter and spirit of the Indian Forest Act, and the order of this Court and is accordingly set aside."

13. On 9th May, 2002 the Supreme Court issued further directions in the aforesaid case of T.N. Godavarman Thirumulkpad and Writ Petition No. 171 of 1996 and the same are as follows:-

"After hearing the learned Amicus Curie, counsel for the parties and taking into consideration the suggestions placed before us by the learned Attorney General, we pass the following order:-

"(1) It is submitted that till the Central Government constitutes a statutory agency as contemplated by Section 3 of the Environment (Protection) Act, 1986 it is necessary and expedient that an authority be constituted at the National level to be called Central Empowered Committee (hereinafter the 'Empowered Committee') for monitoring of implementation of Hon'ble Court's order and to place the non compliance cases before it, including in respect of encroachment removals, implementations of working plans, Compensatory afforestation, plantations and other conservation issues."

14. By a notification dated 3rd June, 2002 the Government constituted the Central Empowered Committee and the powers and functions were defined as follows:-

"The power and functions of the Committee as per the order of the Hon'ble Supreme Court of India are as under:-

……..

"(3) Pending interlocutory application in these two writ petitions as well as the report and affidavit filed by the State in response to the orders made by the Court shall be examined by the Committee, and their recommendations will be placed before Hon'ble Court for orders.

(4) Any individual having any grievance against steps taken by the Government or any other Authority in purported compliance with the order passed by this Hon'ble Court will be at liberty to move the Committee for seeking suitable relief. The Committee may dispose of such applications in conformity with the orders passed by Hon'ble Court. Any application which cannot be appropriately disposed of by the Committee may be referred by it to this Hon'ble Court.

(5) The Committee shall have the power to:-

(a) Call for any documents from any persons of the Government of the Union or the State or any other official.
(b) Summon any person and receive evidence from such person on oath either on affidavit or otherwise.
(c) Seek assistance/presence of any person(s) official(s) required by it in relation to its work."

15. The aforesaid Central Empowered Committee considered the cases of those saw mills where the licence fee had been deposited prior to the restrictions placed by the Supreme Court in its order dated 4th March, 1997 but the licence to operate the saw-mill had not been issued. It submitted its report dated 3rd October, 2002 and the relevant portion of the report is as follows:-

"Further as per the Uttar Pradesh Establishments and Regulations of Saw Mills Rules, provides that on application being made, the Divisional Forest Officer is empowered to grant the licence for any Saw Mill only after satisfying himself that the required quantity of timber is available for the Saw Mill through legal sources besides a No Objection Certificate will have to be obtained by the applicant Saw Mill from the concerned District Magistrate. The documents made available do not establish fulfillment of this vital requirement. Mere deposition money for registration does not mean that a valid licence for running of the Saw Mill has been granted by the Competent Authority.

It is, therefore, concluded that the applicant Saw Mill were not having valid licence for running the Mill on the relevant date i.e. 4.3.1997 and were required to be closed forthwith as per the order dated 4.3.1997."

16. The matter was again considered by the Supreme Court on 29/30th October, 2002 and the following order was passed.

"No State or Union Territory shall permit any unlicensed Saw Mills, veneer, plywood industry to operate and they are directed to close all such unlicensed unit forthwith. No State Government or Union Territory will permit the opening of any

Saw Mills, veneer or plywood industry without prior permission of the Central Empowered Committee. The Chief Secretary of each State will ensure strict compliance of this direction. There shall also be no relaxation of rules with regard of licence without previous concurrence of Central Empowered Committee. It shall be open to apply to this Court for relaxation and or appropriate modification or orders que plantations or grant of licenses."

17. Despite the aforesaid directions contained in the order dated 29/30th October, 2002 certain licences were granted to five saw-mills by the Divisional Forest Officer, Puri Division, Khurda, Orissa on 23rd December, 2002. In these matter the Supreme Court issued suo motu contempt notice. The following order was passed by the Supreme Court on 19th December, 2003 in the said matter:-

"The respondent has tried to overreach this Court by violating the order dated 30th October, 2002 and is clearly guilty of contempt of court. Having regard to the facts abovenoted, we are unable to accept the apology tendered by the respondent. Having bestowed anxious considerations on the aspect of punishment, considering that respondent had joined as DFO only few days before grant of licences and it to being a case of first lapse on his part, on the facts of the case, in our view the ends of justice would be met by reprimanding the respondent and by issue of a warning to him so that he will be careful in future so as not to repeat such an act and also by imposing on him heavy amount which can be utilized for protection of environments. We order accordingly and impose a cost of Rs.50,000/-, which shall be deposited by the respondent in the Registry within four weeks. The suo motu petition is disposed of accordingly."

18. It is upon a consideration of the aforesaid provision of the Rules and the orders of the Supreme Court that the Regional Director has rejected the application of the petitioner for grant of licence. It has been noticed that the licence had never been issued in favour of the petitioner prior to 4th March, 1997 but even without the issue of such licence the petitioner had been depositing the licence fee. It has further been noticed that the Central Empowered Committee in its recommendations placed before the Supreme Court had made it clear that the licence cannot be granted merely upon deposit of the licence fee and in such circumstances, the petitioner cannot take the benefit of the decision given by this Court in Nand Lal Vs. State of U.P. & Ors,. 2002 ALJ 1255. The Regional Director has also referred to the directions issued by the Supreme Court that no State Government or the Union of India shall permit the opening of saw-mill without prior permission of the Central Empowered Committee. In such circumstances the Regional Director has concluded that the licence could not be issued but it has been observed that in case the petitioner desired he could place his application before the Central Empowered Committee.

19. It is this order dated 6th April, 2005 of the Regional Director which has been challenged in this writ petition. The petitioner in person has placed reliance upon the decision of the Supreme Court in the case of Jawahar Lal Sharma & Anr. Vs. Divisional Forest Officer, U.P. &

Anr., JT 2002 (1) SC 413, and upon the decision of this Court in Nand Lal Vs. State of U.P. & Ors., 2002 All. L.J. 1255.

20. In the case of Jawahar Lal Sharma (supra) the Supreme Court in paragraph 6 of the said decision observed as follows:-

"No order or direction made by the Supreme Court of India to the effect that even existing licences shall not be renewed, has been brought to our notice. On the contrary, the learned counsel for the appellants has invited our attention to orders dated 24.01.2000 passed in Civil Misc. Writ Petition No. 991/2000, Gyaneshwar Prasad Singh Vs. Van Sanrakshak, Varanasi Vritya, Varanasi & Ors., order dated 19.02.2000 in Civil Misc. Writ Petition No. 9148 of 2000, Kanwal Deen Chauhan and Ors. Vs. Conservator of Forests and Ors., order dated 31.3.2000 in Civil Misc. Writ Petition No. 15002/2000, Vishwa Bhandar Saw Mills Vs. Divisional Forest Officer & Anr., wherein having noticed the directions made by this Court in T.N. Godavaraman Thirumulkpad Vs. Union of India & Ors., [(1997) 3 SCC 312], the High Court of Allahabad has, in similar circumstances quashed the orders passed by the respondents and directed that on completing all the necessary formalities by the petitioners therein and depositing the licence renewal fee for all the previous years as well as the current years, licences to run the saw mill in favour of the petitioner therein shall be granted of there be no legal impediment. The learned counsel submitted that there is no reason why the same High Court should not have taken a similar view in the cases of these appellants. We find merit in the submission of the learned counsel."

21. It is clear from the observations made above that the subsequent orders/directions of the Supreme Court were not placed before the Court. We have referred to the orders/directions of the Supreme Court which make it mandatory for the licensee to place his application before the Central Empowered Committee for grant of licence.

In the case of Nand lal (supra) the Court observed as follows:-

"The Apex Court was only clarifying that no fresh licence should be granted in violation of the provisions of the Forest Conservation Act, 1980. It did not prohibit that licence to operate saw mills should not be granted on any condition."

22. The decision of this Court in the case of Nand Lal have also not taken note of the subsequent orders/directions of the Supreme Court in the case of T.N. Godavaraman Thirumulkpad (supra).

23. In the present case the licence of the saw mill of the petitioner had not been renewed prior to 4th March, 1997. The directions of the Supreme Court make it obligatory in such cases, for the applicants to place their application before the Central Empowered Committee. This is precisely what has been observed in the order of the Regional Director.

24. Such being the position, there is no infirmity in the order dated 6th April, 2005 passed by the Regional Director rejecting the application filed by the petitioner for grant of saw mill licence.

25. The writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2005

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil misc. Writ Petition No. 42735 of 2000

DCM Shriram Industrial Ltd. ...Petitioner
Versus
Preseding Officer Labour Court-II and another ...Respondent

Counsel for the Petitioner:
Sri Vivek Saran

Counsel for the Respondent:
Sri Ashok Khare
Sri V.S.Chaudhary
Sri Vinod Kumar Singh
S.C.

Constitution of India Art-34 (2) Dismissal order-copy of enquiry report given much after the punishment-second time no-enquiry conducted-Labour Court being the last court of facts-recorded specific finding that due sale of motor cycle management suffered any financial loss-substitution of order of punishment with stoppage of two increments-held-proper.

Held: Para 9

The Labour Court being the last Court of fact after consideration of the evidence on the record has come to the conclusion that the order of dismissal is disproportionate to the offence committed by the workman, as such has substitute the punishment of dismissal by stoppage of two increments. The punishment of dismissal is a major punishment; as such the disciplinary authority while awarding the punishment; as such the disciplinary authority while awarding the punishment of dismissal should have stated the reasons. The basis of punishment should have been incorporated in the order of punishment. As the same has not been done, therefore, in view of the judgment reported in 1997 (77) F.L.R. Page 863, the Labour Court was justified in modifying the punishment of dismissal into stoppage of two increments.

Case law discussed:
1990 (61) SLR-736
2004 (27) SCC-581
1993 (67) FLR-1230
2005 (3) SCC-254
2000 (9) SCC-521
2000 (7) SCC-517
1997 ALJ-88
2005 (L & S) SCC-631
2005 (SCC) L & S 270

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

1. The present writ petition has been filed for quashing the Labour Court award dated 23.2.2000 published on 24.8.2000, Annexure-1 to the writ petition.

2. The facts arising out of the present petition are that the petitioner is a registered company under the Companies Act having its registered office at 18, Barahkhambha Road, kunchanjinga Building, New Delhi and is having a sugar unit known as Daurala Sugar works, district Meerut. Respondent no. 2 was appointed on 2.12.1987 as Cane Development Supervisor. His service conditions were governed by the Standing Orders governing the conditions of employment of workmen in vacuum Pan Sugar Factories of Uttar Pradesh. The said Standing Order were in force under the government Notification dated 3rd October, 1958. Respondent no. 2 was charge-sheeted on 9.5.1990 for fraud,

dishonesty in connection with the factory's business and property of the Company. The charge against respondent was that he claimed motorcycle allowance for the month of December 1989 to March 1990 totalling Rs.640/- when the motorcycle was out of order and the same was not used; as such the workman with intention of cheating illegally claimed the amount as motorcycle allowance. The aforesaid act of the respondent amounts to dishonesty under Paragraph M-1 (c) of the Standing Orders relating to sugar factories. The aforesaid Clause (c) of the Standing Orders is reproduced below: -

"(c) Theft, fraud, or dishonesty in connection with the factory's business or property or property belonging to workmen."

3. The reply was invited and an enquiry was conducted by one Sri K. Tiwari as Inquiry Officer and workman was given full opportunity to defend to himself and to cross examine the witnesses of the Management. The Inquiry Officer submitted his report on 14.1.1991. The Investigation Officer found the workman guilty of the charges leveled against him and has found that the workman with dishonest intention has committed dishonesty in connection with the Company business and property by illegally taking motorcycle allowance when his motorcycle was out of order. The Inquiry Officer has held that this act of the workman amounts to misconduct.

4. The inquiry report was considered by the disciplinary authority in detail and it was found that the charged leveled against the workman are proved and the act of the workman is a grave misconduct, as such he was of opinion that the workman deserve to extreme penalty of dismissal from service as the Management has lost confidence is the workman. The said order was passed by the disciplinary authority on 28.3.1991. Aggrieved by the order of dismissal, the workman raised an industrial dispute before the Conciliation Officer. The conciliation failed and ultimately the Deputy Labour Commissioner, Meerut vide its order dated 29.9.1992 refered the dispute for adjudication before the Labour Court. The case was registered as Case No. 90 of 1992. The reference was "whether the employers were justified in terminating the sevices of the workman w.e.f. 28.3.1991, if not, to what relief is workman entitled to? The workman filed written statement before the Labour Court and the petitioner has also filed the written statement and the rejoinder affidavit and various documents. On behalf of the Management Sri K. Tiwari, Inquiry Officer deposed and proved the inquiry report and other documents. There were various issues framed by the Labour Court. Issue no.1 relates to the fairness of domestic inquiry. The Labour Court has decided bt order dated 7.1.2000 the preliminary issue regarding domestic inquiry to the effect that it was fair and proper and full opportunity of hearing of given to the workman. The Labour Court has held that the charges leveled against the workman has been duly proved. The Labour Court has clearly erred in law when it has been found that the workman was guilty of charges leveled against him, the Labour Court gave an award on 23.2.2000 with a relief to the workman reinstatement with 50% back wages and continuity of service.

5. It has been submitted on behalf of the petitioner that directing the

reinstatement with 50% back wages and continuity of service of wholly illegal and are liable to be set aside when the Labour Court has held that the domestic inquiry was fair and proper in manner and the workman was given opportunity during the domestic inquiry. The award of the Labour Court is liable to be set aside on the ground alone that if the court holds regarding the guilty if charges, the Labour Court has got no jurisdiction to award reinstatement and other reliefs. Regarding finding of non-supply of inquiry report, the petitioner submits that at no point of time the copy of the inquiry report was demanded, therefore, it was not furnished as there is no provision in the Standing Order of the Company to supply the copy of the inquiry report. It has to be given only on the demand of the workman. The further submission of the petitioner that in view of the case of **Union of India and others Vs. Mohd. Ramzan Khan (1990 (61) F.L.R. Page 736)** of the Apex Court, the principal laid down in the said case will be applicable prospectively, therefore, the finding of the Labour Court that when the disciplinary authority owas of the opinion regarding awarding the majer punishment to the workman as the copy of the inquiry report was not given prior to the order of dismissal, therefore, as the workman has not been afforded an opportunity by the disciplinary authority the order of dismissal is bad is a finding which is contrary to the judgment of the Apex Court. The petitioner has placed reliance upon a judgment reported in 2004 (27) S.C.C. Page 581 in the case of **NTC (WBAB & O) Ltd. and another Vs. Anjan K. Saha** and has referred to para 9 of the said judgment. Another judgment relied upon by the counsel by the petitioner is in the case of **Managing Director ECIL Hyderabad Vs. B. Karunakar** (1993 (67) F.L.R. Page 1230 and he has submitted that in the case of non-furnishing of the inquiry report, order of punishment should not mechanically be set aside. Another judgement relied upon by the counsel for the petitioner is 2005 (3) S.C.C. 254, **Divisinol Controller, KSRTC Vs. A.T. Mane** and he has referred to paras 12 and 13 of the said judgment and has submitted that in the case of misappropriation of the fund by the delinquent employee, the punishment which way be awarded is not open for judicial review. If the Corporation or the employer has lost the confidence or faith in such an employee, the punishment of dismissal is correct. Another judgment relied upon by the counsel for the petitioner is **U.P. State Road Transport Corporation Vs. Mohan Lal Gupta and others** (2000 (9) S.C.C.521) and has submitted that in the case of loss of employer's confidence the Court should not substitute its own finding and direct reinstatement. Further rileance has been placed upon the case of **Janata Bazar (South Kanara Central Cooperative Wholesale Stores Ltd.) and others. Vs. Secretary, Sahkari Noukarara sangh and others**. (2000) 7 Supreme Court Cases 517 and has submitted that where the misappropriation of the goods was established in the domestic enquiry and the delinquent employee was dismissed, the Labour Court directing his reinstatement with25% back wages on the ground that his past record was without blemish, the Labour Court cannot substitute its penalty. In such a way the petitioner submits that the award of the Labour Court is liable to be set-aside.

6. On the other hand learned counsel for the respondent has submitted that as the copy of the inquiry report admittedly

has not been furnished to the workman and no second show cause notice, when the disciplinary authority was of the opinion to agree with the inquiry report, has been given, the punishment which has been awarded by the petitioner vitiates in law. Further submission of the respondent is as that from the perusal of the charges leveled against the workman it is clear that no charge was framed against the workman taking into consideration, the post conduct; therefore, while passing the order dismissing the services of the workman, the disciplinary authority cannot take into consideration the previous performance of the workman. It has been submitted on behalf of the respondent that there is no charge against the respondent that he had in any way misappropriated the amount of the motorcycle allowance. It is not the case of Management that the workman had sold the motorcycle and without having the motorcycle, has charge the motorcycle allowance. There is also no charge against the workman respondent that due to non-functioning of the motorcycle from the period mentioned in the charge sheet there was any slackness no the part of the workman and the performance of the workman was not up to the mark. The workman has clearly stated in his reply that the motorcycle was under repairing and in the month of March 1990 when the workman had sold the motorcycle, he immediately informed the said fact and after that no motorcycle allowance was paid to the respondent. The respondent has also submitted that clause M (c) of the Standing Orders is not applicable in the case of the employee concerned because it is not the case of the Management that there is any charge of fraud or dishonesty in connection with the factory's business or property belonging to the workman. There was a condition that the allowance will be payable only when the workman concerned will be in possession of the motorcycle in his own name. It has also not been proved or there was any charge against the workman that due to non-working of the said motorcycle for one or two months, there was any affect in the efficiency of the working of the workman concerned.

7. The Labour Court considering all the submissions made on behalf of the parties has come to the conclusion that in spite of the fact that the domestic inquiry was held properly but as the copy of the inquiry report was given to the workman after the order or dismissal and no second show cause notices was given, therefore, the Labour Court has interfered and given an award in favour of the workman. It is well settle in law that if there was no charge in the charge sheet regarding previous conduct of an employee, the same connot be considered for initiating any action in spite of the fact that the charges leveled against the delinquent employee is proved. It has further been submitted on behalf of the respondents that the contention of the petitioner cannot be accepted that there is no provision in the Standing Orders for giving a second show cause notice while awarding the major punishment. It has been submitted that the Apex Court has clearly held that in spite of the fact that there is no rule regarding the second show cause notice, keeping in view the principal of nature justice, the show cause notice should have been given The principal of Ramzan 's case have been made applicable to all establishments. Reliance has been placed by the respondent upon a judgment of Madras High Court1997 LLJ Page 88, the Management of **Eswara & Sibs**

Engineers (Pvt.) Ltd. Vs. III Addl. Labour Court, Madras and others and has submitted that the said judgment is based on the Apex Court judgment that punishment vitiated as no notice was given to the workman before taking into account othe past record of service.

8. It has further been submitted on behalf of the workman-respondent that the Labour Court was justified in the facts and circumstances of the present case by modifying the order dismissal in stopping the two increments. Regarding awarding the back wages it has been submitted that though the workman has clearly proved that he was not financially employed anywhere, though it has been denied by the employer. The workman has established this fact that as he was not employed anywhere during the period of pendency of the dispute, but the Labour Court has awarded only 50% of the back wages, the finding the recorded by the Labour Court is a finding of fact and need no interference by this Court.

9. I have heard the learned counsel for the parties and have perused the record. It is not the case of the establishment that the workman concerned after selling out the motorcycle has charged the motorcycle allowance. It was in his possession but it appear that during this period it was not in a very proper condition and was being repaired, as such it cannot be said the workman has misappropriated or charged certain amount from the employer without having any vehicle. It is also not the case of the establishment that due to non-functioning of the said motorcycle there was any deficiency in the work of the workman. There is no charge against the delinquent workman that due to non-operating with the motorcycle, the factory had borne some financial loss. In the month of March 1990 when the motorcycle was sold by the workman, he immediately informed the said fact to the establishment and no payment has been made after march 1990, in my opinion, it cannot be said to be a grave misconduct. If it would have been the case by the establishment that the delinquent workman without having any motorcycle or the same has been sold without informing this fact to the establishment, was realizing the motorcycle allowance, than it can be said to be a misconduct on the part of the workman. Regarding taking the previous conduct of the workman, it is now well settled that unless and until for past conduct, there is a charge or person concerned is given an opportunity, the past conduct of a person cannot be for the purpose of initiating an action which is not know to the person concerned can be taken. Admittedly the copy of the inquiry report has been given to the workman after the order of dismissal. In para 10 of the writ petition the petitioner has admitted this fact that the copy of the inquiry report was supplied to the workman after the orders dated 22.4.1991 and 4.5.1991. The Labour Court being the last Court of fact after consideration of the evidence on the record has come to the conclusion that the order of dismissal is disproportionate to the offence committed by the workman, as such has substitute the punishment of dismissal by stoppage of two increments. The punishment of dismissal is a major punishment; as such the disciplinary authority while awarding the punishment; as such the disciplinary authority while awarding the punishment of dismissal should have stated the reasons. The basis of punishment should have been

incorporated in the order of punishment. As the same has not been done, therefore, in view of the judgment reported in 1997 (77) F.L.R. Page 863, the Labour Court was justified in modifying the punishment of dismissal into stoppage of two increments.

10. Regarding the contention raised by the petitioner that the 50% back wages which has been given to the petitioner is not permissible in view of the Apex Court judgment in the case of **Hindustan Motors Ltd. Vs. Tapan Kumar Bhattachara** 2002 Vol. (6) S.C.C. Page 41 and has submitted that the Apex Court has clearly held that unless and until it is proved by adducting the evidence that the employee concerned remained unemployed in interregnum between the dismissal and reinstatement. I have considered the submission made on behalf of the petitioner regarding awarding 50% back wages. The workman has submitted an application that he was not financially employed anywhere during the aforesaid period and has proved it, though there was denial by the employer and the Labour Court has clearly considered the Apex Court judgment and on that basis has only awarded 50% back wages, therefore, it cannot be said that the judgment and order passed by the Labour Court suffers from illegality in awarding back wages up 50%. In Apex Court judgment reported in 2005 S.C.C. (L & S) 631, **Allahabad Jal Sansthan Vs. Daya Shanker Rai and others** the Apex Court has observe that "A law in absolute terms cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or dinied. The Labour Court and/or Industrial Tribunal, before which the industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration. Inter alia, a pleading to the effect that he been sitting idle or had not obtained any other employment in the interregnum, must be raised by the workman seeking back wages."

11. In the Apex Court judgment 2005 SCC (L & R) 270 ***Kendriya Vidyalaya Sansthan and others Vs. S.C. Sharma****, the Apex Court has held that for determination of question of back wages, burden of proof is on the employee. He has to show that he was not gainfully employed and if the same has been proved, the employee is entitled for the back wages.*

12. In view of the aforesaid finding recorded by the Labour Court, in my opinion, it needs no interference under the discretionary jurisdiction of this Court under Article 226 of the Constitution of India. The award given by the Labour Court is just and proper; therefore the writ petition is devoid of merit and is hereby dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2005

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

Criminal Misc. Application No. 5372 of 2000

Deena Nath Arora & others ...Applicants
Versus
State of U.P. and another
...Opposite Parties

Counsel for the Applicants:
Sri R.L. Shukla
Sri J.C. Bhardwaj
Sri S.S. Pal

Counsel for the Opposite Parties:
Sri A.K. Srivastava
A.G.A.

Code of Criminal Procedure-S-482-Summoning Order-for offence under Section 323 I.P.C.-complaint case Summoning Order passed after 8 years-absolutely no explanation for delay-complaint on the basis of certain apprehensions-nothing happened between 15 years-impugned complaint amounts to abuse of the process of court-hence-Quashed.

Held: Para 6

A bare reading of the complaint in the present case makes it clear that only certain apprehensions against the applicants have been voiced by the complainant for the reason that his son and daughter-in-law had left his house and started living separately. After lapse of 15 years nothing has happened in between and it is apparent that continuation of the criminal proceedings on the basis of impugned complaint will only amount to an abuse of the process of the court and therefore, I therefore quash the complaint which is registered as Complaint Case No. 1007 of 1990-V.K. Taneja Vs. Deena Nath Arora and others, pending in the court of Chief Judicial Magistrate, Bareilly. This application is accordingly allowed.

Case law discussed:
AIR 1973 SC-494 (SC)
1997 JIC-212 (SC)
AIR 1994 SC-1229
2004 (50) ACC-924

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri Rajiv Lochan Shukla and Sri J.C. Bharadwaj Advocates for the applicants and learned A.G.A. for the State. Sri Anil Kumar Singh has put in appearance on behalf of the complainant and has filed counter affidavit. Rejoinder affidavit has also been filed on behalf of the applicants. List is revised.

2. This application under Section 482 Cr.P.C. invoking inherent jurisdiction has been filed on behalf of the applicants with prayer to quash the complaint case No. 1007 of 1990-V.K. Taneja Vs. Deena Nath Arora and others, pending in the court of Chief Judicial Magistrate, Bareilly and also to quash the order dated 9.10.1998, Annexure-4 to the affidavit. The facts giving rise to the dispute is that the applicant no. 9 Sanjeev Kumar Taneja is the son of opposite party no. 2, complainant and applicant no. 10 Smt. Asha Taneja alias Ruchita Taneja is wife of applicant no. 9 (daughter-in-law of the complainant). The other applicants are close relatives of Smt. Asha Taneja. The complaint is annexed as Annexure-1 to the affidavit filed in support of this application which was filed on 31.3.1990 under Sections 147, 148, 149, 406, 420, 452, 504, 506, 323 I.P.C. and the same was numbered as Criminal Case No. 1007 of 1990. After lapse of 8 years, statements of Govind Raman Taneja was recorded under Section 202 Cr.P.C. which is annexed as Annexure-2 to the affidavit. Smt. Subodh Kumari Taneja, wife of the complainant was also examined under Section 202 Cr.P.C. on the same day i.e. 21.8.98. The learned Magistrate summoned the applicants vide order dated 9.10.1998 under Sections 147, 148, 149, 504, 506, 452, 323 I.P.C. It is brought to my notice that while summoning the applicants the learned Magistrate did not summon the applicants under Section 406 and 420 I.P.C. The applicants filed a

protest petition challenging the summoning order which was rejected vide order dated 9.2.1999 by the learned Sessions Judge, Bareilly stating therein that in view of the various decisions of the Apex Court as well as this Court summoning order is an interlocutory order and is not maintainable. In the circumstances, the learned Sessions Judge rejected the application as not maintainable without giving any opinion on merits. This order is also under challenge. The applicants have filed a copy of an application given by the complainant prior to institution of the complaint case on 26.3.1990 wherein it has been stated that the family members of the daughter-in-law, applicant no. 10, in absence of the complainant somehow managed to instigate his son (applicant no. 9) to leave his parent's house and finally the son and daughter-in-law left the house of the complainant. The complainant alleged in the said application that he apprehends that the family members of the applicant no. 10 may lodge false report or implicate them in some frivolous case. The allegation made in that application to the extent that they are likely to be blackmailed by the complainant and his family members. This application has been annexed as Annexure-6 to the affidavit and has not been denied by the contesting opposite parties in their counter affidavit. The applicants have prayed for quashing the complaint on the ground that; (1) it is frivolous in nature, (2) the complaint was registered in the year 1990 whereas the summoning order has been passed after lapse of 8 years and (3) the application dated 26.3.1990 moved before the Additional District Judge (Administration) was prior to the lodging of the complaint expressing his apprehension, only because his son applicant no. 10 had left his father's house with his wife and the complaint is only an abuse of the process of the court.

3. Before I proceed to decide whether the instant criminal complaint can be quashed or not, it is necessary to decide the question as to whether the order dated 9.2.1999 passed by the learned Sessions Judge in Criminal Revision No. 57 of 1999 calls for any interference. I have gone through the entire judgment and do not find any illegality. The learned Sessions Judge declined to give any opinion on merit but rejected the revision as not maintainable. The Apex Court has also ruled in the case of **Adalat Prasad Vs. Roop Lal Jindal and others, 2004 (50), A.C.C., 924** that the learned Magistrate could not review its earlier order as the Criminal Procedure Code do not contemplate such a situation. In the instant case the revisional court declined to interfere for the reason that the order summoning the accused is an interlocutory order and not maintainable placing reliance on a number of decisions. In the circumstances, I do not find any illegality in the order dated 9.2.1999 passed by the learned Sessions Judge, Bareilly.

4. Now the prayer for quashing of the complaint on the ground that it is only as a means of harassment and specially in view of the fact that on 26.3.1990 a somewhat similar application was filed before the Additional District Judge and subsequently the criminal complaint was filed. Besides, almost forty cases are going on between the parties, it is to be examined whether the summoning of the applicants under Sections 147, 148, 149, 452, 504, 506, 323 I.P.C. warrants

quashing of the proceedings. It is apparent that the date of occurrence as mentioned in the criminal complaint is 28.2.1990. Almost 15 years have gone by and there has been no outcome of the so called threat extended to the complainant and his family members by the applicants. In fact after filing of the complaint, the matter was left in cold storage continuously for the period of 8 years and thereafter summoning order has been filed after lapse of very long time. It is apparent that the complaint was instituted only because the son and daughter-in-law separated from the complainant and left the house. It is only a pressurizing tactics to get back the son and daughter-in-law. It is also noteworthy that though the applicants have been summoned under Section 323 I.P.C. but there appears to be no allegation of causing physical assault and in absence of any injury report, there is apparently nothing in the complaint to show that they were injured or their injuries were ever examined. The matter is pending since the year 1990. Almost 15 years have gone by and continuation of the criminal proceedings on the basis of criminal complaint sought to be quashed is nothing but an abuse of the process of the court. The Apex Court has categorically ruled that the criminal cases should be concluded expeditiously and delay of more than 10-12 years has been held to be fatal to the trial. In the case of **Santosh De Vs. Archana Guha and others, A.I.R. 1994 S.C., 1229**, the Supreme Court quashed the proceedings where the delay was 14 years and there was no explanation why delay was caused by the prosecution and it was held that it infringes the right of the accused to speedy trial. In the instant case the complaint was lodged in the year 1990 and the witnesses were examined under Section 200 and 202 Cr.P.C. after lapse of 8 years i.e. in the year 1998 and thereafter the summoning order was passed. A bare reading of the entire paper book, it is evident that the criminal proceedings were initiated only as a pressurizing tactics. There is no explanation whatsoever in the summoning order regarding delay and lapse of 8 years between the period when the complaint was lodged and the witnesses were examined under Sections 200 and 202 Cr.P.C. The Apex Court in the case of Santosh De (Supra) declined to interfere in the order of the High Court where the proceeding was quashed on account of delay of 8 years. For ready reference paragraph 12 of the said judgment is quoted below:-

"We are not satisfied that there are any valid grounds for interference with the order of the High Court. The most glaring circumstance in the case is the delay in commencing the trial. The case was committed to sessions court on July 15, 1974 and the charges came to be framed by the sessions court only on April 13, 1983 i.e., after a lapse of about eight years. The appellant is not in a position to explain the reasons for this delay. In the order under appeal, the High Court has stated that this delay is entirely on account of the default of the prosecution. This is not a case of what is called 'systemic delays'—as explained in A.R. Antulay, (AIR 1992 SC 1701). In our opinion, this unexplained delay of eight years in commencing the trial by itself infringes the right of the accused to speedy trial. In absence of any material to the contrary, we accept the finding of the High Court that this delay of eight years is entirely and exclusively on account of the default of the prosecution. Once that

is so there is no occasion for interference in this appeal. It is accordingly dismissed.

5. Similar view has been voiced by the Apex Court in the case of **State of U.P. Vs. Kapil Deo Shukla, A.I.R. 1973 S.C. 494 and A.A. Mulla and others Vs. State of Maharashtra and another, 1997 J.I.C. 212 (S.C.).** In the said cases reliance was placed on a number of decisions of the Apex Court. A perusal of the entire paper book shows that the identical allegations were levelled against the applicants four days prior to the lodging of the instant complaint. The application before the Additional District Magistrate dated 26.3.1990, Annexure-6 to the affidavit, it is only narration which has been given out in the instant complaint which is Annexure-1 to the affidavit. It is thus evident that repeated allegations at the instance of the complainant is nothing short of an abuse of the process of the court, specially when the complainant has only narrated his apprehensions on the basis of the so called threat said to have been extended by the applicants, such a long period has gone by and nothing has come out, therefore, mere threat to cause the injury to his person and property is sheer imagination of the complainant. It is not a case where serious criminal offences are alleged in the complaint and the applicants have been kept on waiting for the outcome of the complainant, specially the summoning order has been passed after lapse of 8 years which can not be overlooked by this Court. It is not a case where inherent powers have been invoked immediately after lodging of the complaint but they have been summoned after a considerable long span of eight years.

6. A bare reading of the complaint in the present case makes it clear that only certain apprehensions against the applicants have been voiced by the complainant for the reason that his son and daughter-in-law had left his house and started living separately. After lapse of 15 years nothing has happened in between and it is apparent that continuation of the criminal proceedings on the basis of impugned complaint will only amount to an abuse of the process of the court and therefore, I therefore quash the complaint which is registered as Complaint Case No. 1007 of 1990-V.K. Taneja Vs. Deena Nath Arora and others, pending in the court of Chief Judicial Magistrate, Bareilly. This application is accordingly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2005

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 23237 of 2004

Dilip Kumar Singh ...Petitioner
Versus
Bharat Sanchar Nigam Ltd. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Chaubey
Sri R.K.S. Chauhan

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

Constitution of India, Art. 226-Right to promotion-petitioner qualified departmental examination for Junior Accounts Officer-send for training-during

mid-term of-called back-in view of the facts C.B.I. case is pending against petitioner-during investigation house of petitioner was searched but nothing incriminating found-No charge sheet issued-held-entitled to complete the training by forthwith and be promoted on the post in question-subject to final out come of criminal investigation by C.B.I.

Held: Para 13 and 14

It is evident that in so far as other suspended employees in the matter are concerned the C.B.I. has issued charge sheet to them, but no charge sheet has been issued to the petitioner by the C.B.I. His house was searched out and nothing incriminating has been found. From the letter dated 28.7.2004 it is apparent that the C.B.I. is of the view that the question of promotion of the petitioner is an internal matter of the Department. From the record it is also evident that the petitioner had been sent for training and was called back in the midst of training. It is further evident that other candidates along with the petitioner who had passed the examination have been sent for training. The career of the petitioner is being jeopardized only because he is not being sent for training due to the alleged investigation in which neither incriminating articles have been found till date nor any charge sheet has been issued to the petitioner.

For the reasons stated above, the writ petition is disposed of with the direction to the respondents to send the petitioner for training forthwith. However, the enquiry pending against the petitioner may go on. The petitioner may be promoted to the post of Junior Accounts Officer which shall be subject to the finalization of the crimination investigation by the C.B.I.

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

1. Heard learned counsel for the petitioner and Sri B.N.Singh for respondents 1 to 3. Sri G.S.Hajela for the respondent no. 4 is not present.

2. By means of this writ petition, the petitioner has sought for a writ of mandamus directing the respondents to send him for training for the post of Junior Accounts Officer along with other successful candidates and permit him to join on the promotional post of Junior Accounts Officer.

3. Brief facts of the case are that after completion of requisite training, the petitioner is working as a Senior Telephone Operating Assistant (P) G.M.T.D., Allahabad. The examination for the promotional post of Junior Accounts Officer Part I was held by the Department in October 2002 in which the petitioner was declared successful. The petitioner also passed the examination of Junior Accounts Officer Part II in the year 2003 and the candidates who had appeared along with him were sent for training but the petitioner was discriminated and was not sent for training till date. In these circumstances, the petitioner has filed this writ petition. After qualifying in the examinations of Junior Accounts Officer Part I and II, the petitioner made a representation/application to the respondents dated 18.9.2003 to relieve him for training for the post of Junior Accounts Officer, but the application remained unactioned. Thereafter the petitioner made successive representations dated 23.10.2003, 1.12.2003, 5.4.2004 and 10.6.2004, which also met with the same fate.

4. It appears from record that the petitioner was suspended vide order dated 17.5.2001 on the charges of embezzlement which were brought to the notice of the Department and were under investigation of the C.B.I. The order of suspension was subsequently revoked on 21.8.2001. It also appears that during the pendency of investigation, a search warrant was issued and a search of the premises of the petitioner was made in which nothing incriminating was found. The report dated 6.6.2002 regarding the search is appended as Annexure 9 to the writ petition.

5. In response to the query of the Assistant General Manager of the Department as to whether any vigilance enquiry was pending against the petitioner, he was informed vide letter dated 11.9.2003 contained in Annexure 10 to the writ petition that no vigilance enquiry is pending against the petitioner. The contents of the said letter dated 11.9.2003 are as under:-

"Preshak,
Up. Man. Abhi. M.B.F.E.

Sewa Men,
Sahayak Mahaprabandhak (Prashasan)
Ka Neej 9.52 Sanchar Alld.

Patrank San. Es.Dee.Dee./Em.Dee. Ef.Dee. 100 A Allahabad Dinank 11.9.03

Visay:- Sri Dileep Kumar Singh C.T.O.A. (P) ke satarkta ka anushasnatmak mamle ke sambandh me.

Mahaprabandhak Door Sanchar Allahabad ke patrank E.9/J.A.O./Training/G.M.T.D./27 Dinank 11.9.03 ke anupalan men soochit kiya jata hai ki Sri Dileep Kumar Singh C.T.O.A. (P) ke viruddha satarkta sambandhi koi mamla vicharadhin ya lambit nahin hai.

Sd/- illegible
(Seal)
Up Mandal Abhiyanta M.B.F.E 10 O.
Doorbhas Kendra Civil Lines, Allahabad 211001"

Note: (The original letter is in Devnagri script which is given hereinabove in Roman script due to technical reason).

6. A short counter-affidavit and two supplementary counter-affidavits have been filed on behalf of Tele-Communication Department, Bharat Sanchar Nigam Ltd. The learned counsel for the respondents has placed reliance on paragraphs 6 and 7 of the short counter-affidavit wherein it has been averred that the Divisional Engineer (A & P), Office of Telecom District Manager, Shahjahanpur vide his letter dated 20.3.2003 informed that investigation by the C.B.I. is going on against the petitioner for making fake figures in the computer which facilitated huge public money to be embezzled by certain officials of the Telecom District Manager, Shahjahanpur. It is also stated therein that as the investigation against the petitioner is pending he could not be relieved for training of Junior Accounts Officer Part II. It is further averred that the matter was referred to the Circle Officer, Lucknow but no orders have been issued by the Chief General Manager U.P., East Circle, Lucknow to relieve the petitioner for training in view of the investigation by the C.B.I.

7. In the supplementary counter-affidavit filed on behalf of respondent

nos. 1 to 3 filed along with application no. 236733 of 2004, it has been averred that the petitioner was sent for training of Junior Accounts Officer due to oversight but he failed in the second attempt also and was returned back and that the criminal investigation by the C.B.I. is still under investigation and the petitioner has not been given clean chit by the C.B.I. till date, as such he cannot be sent for training as is evident from copy of the letter dated 28.7.2004 which has been appended as Annexure C.A. 1. A perusal of the letter dated 28.7.2004 shows that the C.B.I. is of the view that the promotion of the petitioner during the pendency of the investigation by C.B.I. is an internal matter of the Department and the Department has been advised to take action within the provisions of the relevant departmental rules and vigilance manual in the matter in this regard.

8. In the second supplementary counter-affidavit filed along with application no 26659 of 2004 the same facts are reiterated as in the short counter-affidavit.

9. The learned counsel for the respondents submits that the contention of the learned counsel for the petitioner that C.B.I. has submitted its report in respect of investigation is not correct. Unless and until report is submitted by the C.B.I. and is accepted by the Magistrate and the petitioner is exonerated of the charge, he cannot be sent for training and as such the prayer of the petitioner for an interim order to send him for training during the pendency of the writ petition is liable to be rejected.

10. In rebuttal, the petitioner replied the averments in supplementary rejoinder-affidavit. In paragraph 6 it has been averred that the charge sheet has been issued against the delinquent employees of T.D.M. Office, Shahjahanpur by the **C.B.I. but no charges have been framed against the petitioner**, as such there is no justification for denying promotion to him even after qualifying the departmental examination of Junior Accounts Officer Parts I and II.

11. In the counter-affidavit filed on behalf of respondent no. 4, Superintendent of Police, Central Bureau of Investigation, Lucknow only paragraphs 10 and 12 of the writ petition have been replied to in paragraph 4 of the counter-affidavit as under:-

"4. That the contents of the para 10 and 12 denied. It is submitted that against the petitioner Dilip Kumar Sigh a case has been registered by the CBI at its Branch at Lucknow and case registered at RC No. 2(A) 2002 under Sections 120B/409 IPC and 13(2) R/W Section 13(1) (d) Prevention of Corruption Act 1988. This case was registered on 17.1.2002 and accused D.K.Singh is named accused in that FIR. Even a house search was conducted at the house of the petitioner Dilip Kumar Singh on 6.6.2002 in the presence of independent witnesses. At present in the above noted case investigation is still going on."

12. In reply to rest of the paragraphs, i.e., 1 to 8 and 11 to 18 it is stated that they need no reply or no comments.

13. It is evident that in so far as other suspended employees in the matter are concerned the C.B.I. has issued charge sheet to them, **but no charge sheet has been issued to the petitioner by the C.B.I.** His house was searched out and

nothing incriminating has been found. From the letter dated 28.7.2004 it is apparent that the **C.B.I. is of the view that the question of promotion of the petitioner is an internal matter of the Department.** From the record it is also evident that **the petitioner had been sent for training** and was called back in the midst of training. It is further evident that other candidates along with the petitioner who had passed the examination have been sent for training. The career of the petitioner is being jeopardized only because he is not being sent for training due to the alleged investigation in which neither incriminating articles have been found till date nor any charge sheet has been issued to the petitioner.

14. For the reasons stated above, the writ petition is disposed of with the direction to the respondents to send the petitioner for training forthwith. However, the enquiry pending against the petitioner may go on. The petitioner may be promoted to the post of Junior Accounts Officer which shall be subject to the finalization of the crimination investigation by the C.B.I.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2005

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

Civil Misc. Writ Petition No. 25034 of 1988

Diptee Singh ...Petitioner
Versus
IInd Additional District Judge, Mainpuri and others ...Respondents

Counsel for the Petitioner:
Sri Swaraj Prakash

Counsel for the Respondents:
Sri Ravi Kant
Sri R.P. Dubey
Sri S.R. Pandey
S.C.

U.P. Urban Building (Regulation of Rent and Eviction) Act 1972-S-21(I) bonafied need-Release application-residential accommodation on the ground of personal need-during pendency of the proceeding-Land lord got constructed another house in the same city and shifted there-held-subsequent event have to be taken into consideration.

Held: Para 10 and 11

However there does not appear to be any divergence of opinion on the question of consideration of subsequent event of acquisition of property by the landlord. In the following authorities of the Supreme Court, it has been held that if after passing of the release order by the courts below and during pendency of the appeal/ revision or writ petition landlord acquires another accommodation which completely satisfies his need then this fact / subsequent event will have to be taken into consideration and release order will have to be set-aside on this ground

Accordingly I hold that acquisition of the house by the landlord during pendency of the writ petition and shifting of his residence to the acquired house completely eclipsed his need. This fact is so important that it can not be ignored and it will have to be taken into consideration. Amendment application is therefore allowed. Due to acquisition of another house need of the landlord stands completely satisfied and the need, which he had has vanished.

Case law discussed:
AIR 2003 SC-2713
AIR 2004 SC-3484
2004 (2) ARC 764
AIR 1997 SC-2399
AIR 2001 SC 803

AIR 1975 SC-1409
AIR 1991 SC-1760
AIR 1981 SC-1711
2004 (2) ARC 64
AIR 1997 SC-2510

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

1. This is tenant's writ petition arising out of eviction/ release proceedings initiated by landlord respondent No. 2 and 3 Sri Dhruv Kumar and Smt. Satyawati against him on the ground of bonafide need under section 21 of U.P Act No. 13 of 1972. Release application was registered as Misc. Case No. 50 of 1986. Prescribed authority, Shikohabad through judgment and order dated 16.2.1987 rejected the release application. Against the said judgment and order, landlord respondent No. 2 and 3 filed Misc. Appeal No. 69 of 1987. II Additional District Judge, Mainpuri through judgment and order dated 26.11.1988 allowed the appeal, set-aside the judgment and order of the prescribed authority and allowed the release application of the landlord hence this writ petition by the tenant.

2. Property in dispute is a house rent of which is only Rs.30/- per month. Prescribed authority found the need of the landlord not to be bonafide on the ground that in Village Asvai landlord had available with him a residential house. Landlord had offered that he was ready to let out a part of the said house to the tenant in case he vacated the house in dispute which was situate in the town of Sirsaganj, Tehsil Shikohabad, district Mainpuri. Prescribed authority held that as the need of the landlord was not bonafide hence there was no occasion for the landlord to offer the alternative accommodation to the tenant.

3. The appellate court found that landlord Dhruv Kumar was employed in Allahabad Bank and was posted at Shikohabad which was at a short distance from Sirsaganj where the house in dispute is situate and that he was handicapped in the sense that there was a shortening in one of his legs and that it was quite difficult for him to go from village Asvai to Sirsaganj either on cycle or on scooter and then go to Shikohabad. Appellate court also found that mother of Dhruv Kumar i.e respondent No. 3 was an old lady suffering from several ailments and in connection with her treatment she had to visit regularly town Sirsaganj. In view of these findings appellate court concluded that the need of the landlord was quite bonafide. In respect of comparative hardship appellate court found that tenant also had his own house in the village Gurau, which was at a short distance from Sirsaganj hence he would not suffer much hardship in case of eviction. Appellate court also held that the village of the tenant where his house was situated was on the Sirsaganj, Etawah road. In any case tenant did not show that what efforts he made to search alternative accommodation after filing of the release application. This by itself was sufficient to tilt the balance of comparative hardship against the tenant as held by the Supreme Court in ***B.C.Bhutada Vs. G.R.Mundada AIR 2003 SC 2713***.

4. The prescribed authority had adopted double standard for judging the case of both the parties. House of landlord situate in adjoining village was found suitable for him while house of tenant also situate in another adjoining village was found in sufficient and improper for him. The prescribed authority even suggested the alternative means of

transport to the landlord in order to reach his place of work from his village and go back. If a landlord residing in a village wants to shift to town then his need can not be said to be not bonafide. A town or city contains much more facilities than a village.

5. Accordingly I do not find least error in the judgment and order passed by the appellate court holding the need of the landlord to be bonafide and also deciding the question of comparative hardship in his favour.

6. However the matter does not end here. An amendment application dated 9.7.2004 was filed by the tenant petitioner seeking amendment in the writ petition. Through the amendment application, it has been sought to be brought on record that about three years before the filing of the amendment application i.e. around 2001 landlord has built his own house in Nagar Palika Shikohabad and his entire family has shifted in the said house. In the counter affidavit filed to the said amendment application, the said fact has been admitted. In Para 9 of the counter affidavit, it has been stated that landlords respondent Nos. 2 and 3 are ready to give compensation of Rs. 50000/- to the tenant petitioner in case he vacates the house in dispute. In Para 10 of the counter affidavit, it has been stated that the house in dispute can now be let out for Rs. 1500/- to 2000/- per month rent. Rejoinder affidavit was also filed by the tenant petitioner and contents of Para 9 and 10 of the counter affidavit were replied in Para 10 of the rejoinder affidavit. In the said Para it has been stated that landlord was pressurizing tenant petitioner to accept Rs. 4 lakhs for vacating the house in dispute. It was also stated in the said paragraph that house in dispute could fetch only Rs. 500/- per month rent. During arguments the court enquired from the learned counsel for the landlord as to whether landlord was ready to pay more compensation to the tenant for mitigating the hardship, which the tenant would face in case of eviction. Learned counsel for the landlord stated that landlord was ready to offer even Rs. 1 lakh for the said purpose. Learned counsel for the tenant after consulting his client sated that the tenant was ready to vacate the house on payment of Rs.180000/- which amount would include Rs. 1 lakh as compensation and Rs. 80000/-, which the tenant has spent in litigation. To this counter proposal learned counsel for landlord did not agree.

7. The question is as to whether the subsequent event of acquisition of a house by the landlord can be taken into consideration or not. On the question of taking into consideration the subsequent events in release matters on the ground of bonafide need there appears to be some divergence of opinion among different authorities of the Supreme Court.

8. In ***Shakuntala Bai Vs. Narain Das, AIR 2004 SC 3484*** decided on 5.5.2004, it was held that subsequent event of death of landlord is not to be taken into consideration. However in another authority decided on 13.10.2004 reported in ***K.N.Agarwal Vs. Dhanraji Devi, 2004 (2) ARC 764*** a contrary view was taken and it was held by the Supreme Court that death of the landlord during pendency of the writ petition for whose need the shop in dispute was released by the courts below made the release order passed by the courts below ineffective and inexecutable as due to the death of the

landlord the need vanished and in case his heirs were interested in doing business they could file a fresh release application. Unfortunately in the later authority of **K.N. Agarwal** the earlier authority of ***Shakuntala Bai*** was not considered. In ***Kamleshwar Prasad Vs. B.Agarwal AIR 1997 SC 2399*** also it was held that death of the landlord does not make any difference. The said case arose out of U.P Rent Control Act and was considered in **Shakuntala Bai's** case.

9. It has also been held by the Supreme Court that if release is sought for business purposes then some job during the period when matter remains pending in the court does not disentitle the landlord from getting the benefit of the release order. In this regard reference may be made to ***Gaya Prasad Vs. Pradeep Srivastava, AIR 2001 SC 803.***

10. However there does not appear to be any divergence of opinion on the question of consideration of subsequent event of acquisition of property by the landlord. In the following authorities of the Supreme Court, it has been held that if after passing of the release order by the courts below and during pendency of the appeal/ revision or writ petition landlord acquires another accommodation which completely satisfies his need then this fact / subsequent event will have to be taken into consideration and release order will have to be set-aside on this ground:-

1. P. Venkateswarlu Vs. Motor and General Traders, AIR 1975 SC 1409
2. Gulab Bai Vs. N.N.Vohra, AIR 1991 SC 1760
3. Hasmat Rai Vs. Raghunath Prasad AIR 1981 SC 1711

11. Accordingly I hold that acquisition of the house by the landlord during pendency of the writ petition and shifting of his residence to the acquired house completely eclipsed his need. This fact is so important that it can not be ignored and it will have to be taken into consideration. Amendment application is therefore allowed. Due to acquisition of another house need of the landlord stands completely satisfied and the need, which he had has vanished.

12. Accordingly due to acquisition of a house during pendency of the writ petition, this writ petition is allowed. Judgment and order passed by the appellate court is set-aside. Judgment and order passed by the prescribed authority is restored (even though on different grounds).

13. I have held in ***Khursheeda Versus A.D.J, 2004 (2) ARC 64*** that while granting relief to the tenant against eviction in respect of building covered by Rent Control Act, writ court is empowered to enhance the rent to a reasonable extent. Under somewhat similar circumstances the Supreme Court in the authority reported in ***A.K Bhatt Vs. R.M Shah AIR 1997 SC 2510*** enhanced the rent from Rs. 101/- per month to Rs. 3500/- per month with effect from the date of the judgment of the Supreme Court. For the period during which appeal remained pending before the Supreme Court rent was enhanced to Rs. 2000/- per month for some of the period and Rs. 2500/- per month for rest of the period. In the said authority release application of the landlord had been allowed by the courts below. The Supreme Court held that the landlord who had sought release of the building when he was about 54

years of age had become 87 years of age when the matter was decided by the Supreme Court hence he was not in a position to do any business. This fact of old age of the landlord was taken into consideration as relevant subsequent event by the Supreme Court.

14. In the instant case landlord has asserted that house in dispute which contains two rooms, varandah and other amenities can be let out for Rs. 1500/- to Rs.2000/- per month. Tenant has asserted that it can not be let out for more than Rs.500/- per month. Taking an average of these two figures, reasonable rent appears to be Rs.800/- per month.

15. Accordingly, it is directed that with effect from 1.1.1989 till 31.12.1995, tenant petitioner shall pay the rent at the rate of Rs.400/- per month. With effect from 1.1.1996 till 31.12.2005, he shall pay rent at the rate of Rs.600/- per month. With effect from 1.1.2006 onward, rent shall be paid at the rate of Rs.800/- per month. Entire arrears of rent at the above rates due till 31.12.2005 after adjusting the rent already paid on the old rate shall be cleared in 18 (eighteen) equal monthly installments starting from 1.1.2006. If by June 2007, entire arrears of rent as aforesaid are not cleared then this writ petition shall be treated to have been dismissed and tenant petitioner shall be evicted in proceedings under section 23 of the Act after June 2007. This order is being passed in the light of the judgment of the aforesaid authority of Supreme Court of ***A.K. Bhatt***. In the said authority also, it was directed in the last but one sentence that if tenant committed default he should be liable to ejectment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 1107 of 2002

Ex. Constable 539 CP Kanhaiya Lal.
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Sarvajeet Singh
Sri S.N. Pandey
Sri S.B. Singh

Counsel for the Respondents:
S.C.

U.P.Police Officers of the Subordinate Rank (Punishment & Appeal) Rules 1991-Rule 8 (26)- Punishment by dispensing with disciplinary-enquiry-on the ground enquiry, impossibility–No reason recorded why enquiring not possible-repeated punishment for unauthorised absence from duty-in 20 years of service life-absent for 576 days-enquiring can be easily made-so the decision of dispersing with enquiry-held-arbitrary.
Held: Para 9

In the present case, I find that the petitioner absented himself on several occasions for which he was penalised. The disciplinary authority found that in 20 years he was absent for 576 days and that he was also involved in a criminal case, and on this basis, the disciplinary authority had passed the order removing the petitioner from the service. The impugned order indicates that the authority had not given any reason for dispensing with the inquiry. Consequently, the impugned order is the violation of the provisions of Rule 8(2)(b) of the Rules of 1991. Further, the

charges so levelled against the petitioner are such which can be easily enquired through a departmental inquiry and it is not a case where an oral inquiry cannot be held. Consequently, in my opinion, the decision of the disciplinary authority in taking recourse to the provisions of Section 2(8)(b) of the 1991 Rules was wholly arbitrary.

Case law discussed:

AIR 1985 SC-1416
AIR 1986 SC-1416
AIR 1991 SC-1043
AIR 1991 SC-385
1981 ALR 317
1999 (3) ALR 812
2002 (47) ALJ 570
2005 ALJ 819

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

1. The petitioner was working as a Constable. He was removed from the service by an order dated 9.7.2001 under Sub Rule (2) of Rule 8 of the U.P. Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991. The petitioner preferred an appeal which was also rejected by an order dated 9.11.2001. Consequently, the present writ petition has been filed. The learned counsel for the petitioner submitted that under sub-clause (b) of clause (2) of Rule 8, the services of the petitioner could be dispensed with provided the disciplinary authority was satisfied that it was not reasonably practicable to hold an inquiry and that the satisfaction of the authority was recorded in writing. The learned counsel for the petitioner submitted that the disciplinary authority had not recorded any reasons in the impugned order while dispensing with the inquiry and, since no reasons had been recorded, the impugned order could not be sustained and was liable to be quashed.

2. Admittedly, the services of the petitioner had been terminated under Rule 8(2)(b) of The Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991. Rule 8(2)(b) reads as under:-

"8. (2)(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 inquiry."

3. The language of the aforesaid rule is similar to the second proviso to Article 311(2) of the Constitution of India. **In Union of India vs. Tulsiram Patel,** A.I.R. 1985 SC 1416, the Supreme Court held (para 130)-

"The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that" it is not reasonably practicable to hold the inquiry contemplated by clause (2) of Article 311....

"....Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability, which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.

".....The reasonable practicability of holing an inquiry is a matter of assessment to be made by the disciplinary authority."

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

4. In Tulsiram Patel's case (AIR 1986 SC 1416) (supra) the Supreme Court further held- (paras 133 and 134)

"The second condition necessary of the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reasons for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a Constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional.

It is obvious that the recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty."

The Supreme Court further went on to say that-

"If the Court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (b) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated."

5. In **Chief Security Officer v. Singasan Rabi Das**, AIR 1991 SC 1043, the Supreme Court held that there was a total absence of sufficient material or good ground for dispensing with the inquiry and accordingly held that the order of termination dispensing with the inquiry was illegal.

In **Jaswant Singh vs. State of Punjab**, (1991) 1 SCC 362: (AIR 1991 SC 385), the Supreme Court held (para 5)-

"It was incumbent on the respondents to disclose to the Court the material in existence at the date of the 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 inquiry".

The Supreme Court further held-

"The decision to dispense with the departmental inquiry 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 **Maksudan Pathak and others vs. Security Officer, Eastern Railway and others**, 1981 A.L.R. 317, a Full Bench of this Court held:

"We are, therefore, of the opinion that the words 'reasonably practicable' would apply in the case where the authority cannot, in a reasonable manner, put into practice the clauses in relation to an enquiry, namely, because of certain facts and circumstances peculiar to each case, the authority cannot, in a reasonable manner, hold an enquiry. There may be a case where the charged person may have absconded, or a case where in spite of the best efforts, the disciplinary authority may not have been above to serve the notice of the enquiry on the person charged or it may be a case where it is not possible for the person against whom the charge had been made to come and join, at the enquiry or there may be similar other valid reasons depending on the facts and circumstances of each case."

7. Similar view has been held by this Court in **Tej Bahadur Singh vs. The Senior Superintendent of Police, Moradabad and others**, 1999(3) ALR 812 and in **Achal singh vs. State of U.P. and others**, (2002) 47 ALJ 510.

8. In **Dharam Pal Singh vs. State of U.P. and others**, 2005 ALJ 819, the impugned order of termination passed under Rule 8(2)(b) of the Rules of 1991 was set aside by this Court as it did not contain the reasons for dispensing with the inquiry.

9. In the present case, I find that the petitioner absented himself on several occasions for which he was penalised. The disciplinary authority found that in 20 years he was absent for 576 days and that he was also involved in a criminal case, and on this basis, the disciplinary authority had passed the order removing the petitioner from the service. The impugned order indicates that the authority had not given any reason for dispensing with the inquiry. Consequently, the impugned order is the violation of the provisions of Rule 8(2)(b) of the Rules of 1991. Further, the charges so levelled against the petitioner are such which can be easily enquired through a departmental inquiry and it is not a case where an oral inquiry cannot be held. Consequently, in my opinion, the decision of the disciplinary authority in taking recourse to the provisions of Section 2(8)(b) of the 1991 Rules was wholly arbitrary.

10. In the result, the writ petition succeeds and is allowed. The impugned orders dated 9.7.2001 and 9.11.2001, passed by the respondents are quashed. It is open to the disciplinary authority to initiate a departmental inquiry against the petitioner, if they are so advised and provide an opportunity of hearing to the petitioner as contemplated under The Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2005

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

Criminal Misc. Application No. 8049 of 1997

Ganga Ram Singh ...Applicant
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Applicant:
Sri Dev Raj

Counsel for the Respondents:
Sri Muktar Alam

Code of Criminal Procedure-S. 482-readwith Negotiable Instrument Act-Section 138-cheque dishonored due to paucity of funds-after recording statements-under Section 200 and 202 Cr.P.C.-accused were summoned-but subsequent discharge on grand of pre-mature-revision also get the same fate-held-both the courts below committed great error-They should have waited and allowed the complainant to establish his case-cognigence should have taken after expiry of the stipulated period-impugned order quashed-consequential directions issued.

Held: Para 4

Looking to the entire facts and circumstances of the case and hearing the counsel for respective parties, I feel that in view of the decisions of the Apex Court, the trial court should have waited and allowed the complainant to establish its case or cognizance should have been taken after expiry of the stipulated period, instead of dismissing the complaint out right as premature. The court should have taken cognizance only after necessary period had lapsed in accordance with law and cognizance should be taken subsequently. Since the complaint has been dismissed summarily, the applicant has no other alternative but to approach this Court for redressal of its grievance.

Case law discussed:
J.T. 2000 (10) SC-141
J.T. 1999 (10) SC-381
J.T. 2004 (7) SC-243

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri Devraj Advocate for the applicant and Sri Mukhtar Alam Advocate for the opposite party nos. 3 and 4 and learned A.G.A. for the State.

2. This application has been filed challenging the order dated 27.3.1995 passed by the Judicial Magistrate Nagina, District Bijnor confirmed in Revision No. 156 of 1995 vide order dated 16.8.1997 by the Additional session Judge, Bijnor. The facts giving rise to the dispute is that the applicant's firm M/s Singh Brothers, Dhampur, District Bijnor is a registered firm and deals in the business of Khandsari sugar. The applicant Ganga Ram (complainant) is managing partner of the firm. The contesting opposite parties are engaged in manufacturing the crystal less (Boora) and used to purchase sugar from the complainant on credit. It is stated that after the accounts were settled, outstanding amount of Rs.53,000/ was due against the opposite parties. An account payee cheque dated 25.9.1991 was issued for a sum of Rs.54,000/ drawn in Canara Bank Dhampur Branch, District Bijnor in the name of Singh Brothers. The cheque was dishonoured for paucity of funds. This information was received by the applicant on 24.3.1992. A written notice was sent to the opposite party nos. 2 to 4 on 6.4.1992. A copy of the notice has been annexed as Annexure-1 to the affidavit. It is alleged in the notice that the opposite party no. 2 refused to accept the notice while the notice issued to opposite party nos. 3 and 4 was returned, therefore, a second notice dated 4.5.1992 was served on opposite party no. 4 on 6.5.1992, while the notice to opposite party no. 3 was returned with an endorsement that the name has not been written correctly. Finally a complaint under Section 138 of the Negotiable Instruments Act was filed in the court of Judicial Magistrate, Bijnor on 20.5.1992. A copy of the same is annexed as Annexure-2 to the affidavit. The statements under 200 and 202 Cr.P.C. was recorded and opposite party nos. 2 to

4 were summoned, whose evidence was also recorded. The complainant has filed original cheque dated 15.9.1991 along with an endorsement of the Bank on the cheque and reason for its dishonour. The accused were discharged by the learned Magistrate vide order dated 27.3.1995. This order was challenged in revision which was dismissed and both the orders have been challenged in this application on a number of grounds.

3. Counsel for the applicant has argued that the learned Magistrate discharged the opposite party nos. 2 to 4 on the ground that the criminal complaint was premature. Reliance has been placed on a decision of the Apex Court in the case of **Narsingh Das Tapadia Vs. Goverdhan Das Partani and another, J.T. 2000 (10) S.C. 141**. Learned counsel has argued on the basis of the aforesaid decision that no period is prescribed before which the complaint can not be filed and if filed, not disclosing the cause of action in terms of Clause (c) of the proviso to Section 138 Negotiable Instruments Act, the Court may not take cognizance till the time the cause of action arises to the complainant. Emphasis has been laid on the principle enunciated in the aforesaid decision; "Taking cognizance of an offence" by the court has to be distinguished from the filing of the complaint by the complainant. If the complaint is found to be prematured, it can await maturity, be returned to the complainant for filing later. Mere presentation of a complaint under Section 138 Negotiable Instruments Act at an earlier date would not necessarily render the complaint liable to be dismissed. The other case relied upon by the counsel for the applicant is **M/s Samrat Shipping Co. Pvt. Ltd. Vs. Dolly George, J.T. 1999 (10) S.C., 381**. Learned counsel has submitted that the dismissal of the complaint at the threshold is too hasty an action and the Apex Court has set aside the orders of the trial court as well as High Court holding that prima facie the court should have accepted the complaint. Only after evidence was recorded and the complainant was afforded an opportunity to prove the allegations of the complaint, the court could dismiss the complaint. In the present case the argument on behalf of the complainant is that the courts below rejected the complaint summarily as it was presented before the expiry of the stipulated period and thereafter he has no other alternative but to approach this court by invoking inherent jurisdiction guaranteed under Section 482 Cr.P.C. Reliance has been placed on a recent decision of the Apex Court in the case of **Adalat Prasad Vs. Roop Lal Jindal and others, J.T. 2004 (7) S.C., 243** where the Apex Court has completely barred the courts from reviewing an earlier order and in the circumstances, the applicant is not in position to institute the second complaint as the first one has been rejected on the ground that it is premature. A second complaint would amount to reviewing its earlier order and as such it has been prayed that the impugned orders be set aside and the learned trial court be directed to decide the case on merits instead of dismissing the complaint being premature.

4. Looking to the entire facts and circumstances of the case and hearing the counsel for respective parties, I feel that in view of the decisions of the Apex Court, the trial court should have waited and allowed the complainant to establish its case or cognizance should have been

taken after expiry of the stipulated period, instead of dismissing the complaint out right as premature. The court should have taken cognizance only after necessary period had lapsed in accordance with law and cognizance should be taken subsequently. Since the complaint has been dismissed summarily, the applicant has no other alternative but to approach this Court for redressal of its grievance.

5. For the reasons discussed above, the application is allowed and the impugned orders dated 27.3.1995 and 16.8.1997 are set aside. The trial court is directed to proceed afresh and decide the question afresh on merits.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2005

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

Criminal Misc. Application No.8063 of 1997

Smt. Geeta Tiwari ...Applicant
Versus
Kashinath and another...Opposite Parties

Counsel for the Applicant:
Sri V.C. Tiwary
Sri Ashwini Kumar Awasthi
Sri Manish Tiwary

Counsel for the Opposite Parties:
Sri D.S. Tiwari
Sri Bajrangee Mishra
A.G.A.

Code of Criminal Procedure-Section 482-applicant filed complaint-alleging the offence committed by the Opposite Party No. 2 –who in its official capacity replied the query made by the applicant about non payment of the salary of her husband-and also for not making visit to her company for last four months-Court below held the letter written under official capacity in bonafide manner hence no offence made out, according the complaint rejected at the same time passed an order of acquittal-held impugned orders suffers no illegality or any miscarriage of justice-call for no interference.

Held: Para 6

After going though the entire record and the perusal of the ingredients of Section 499 I.P.C. the facts of the case would not constitute the offence of 'defamation', I am of a considered opinion that the alleged letter was firstly written in good faith and only and opinion was disclosed to the applicant, that too in compliance of the direction of the District Magistrate. Assuming that the imputation was made against the applicant husband, it was in good faith for the protection of the interest of the wife (applicant) who herself had asked for information about her husband as his whereabouts was not known since last four months. The letter was only by way of a caution intended for the good of the person.

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri Manish Tiwary, learned counsel for the applicant Sri D.S. Tiwary Advocate, assisted by the Sri Bajrangee Mishra Advocates for the opposite party no. 1 and learned A.G.A.
Counter and rejoinder affidavits have been filed which are on record.

2. The applicant has challenged the order dated 4.10.1997 passed by the Sessions Judge, Azamgarh in Criminal Revision No. 152 of 1997 confirming the order dated 15.4.1997 in case no. 490 of 1995, whereby the Chief Judicial Magistrate, Azamgarh rejected the

complaint filed by the applicant and passed an order of acquittal under Section 500 I.P.C.

3. The facts giving rise to the dispute is that the husband of the applicant was posted as Sayayak Krishi Nirishak at Block Tarwa and the contesting opposite party was working as Vikas Khand Adhikari, Tarwa. A letter was written by the applicant to the District Magistrate, Azamgarh inquiring the reason for non payment of salary of her husband and also making a complaint that her husband has not come home since last four months, though he has written three letters requesting his wife (applicant) to arrange for some finance so that he can give it to the concerned officer for releasing his salary. The applicant Smt. Geeta Tiwari had written in that letter, twice, that she had to sell her jewelry and now she is not left with no money to look after herself and her minor children. She had very clearly enquired as to why the salary of her husband is not being paid and also expressed her doubt whether her husband is telling truth so that she may able to make suitable steps. The District Magistrate, Azamgarh had marked the letter to the opposite party no. 1 for making inquiry vide order dated 5.7.1994. The said letter has been annexed along with counter affidavit as Annexure-CA-3. An order was passed by the District Magistrate, Azamgarh on 5.7.1994 on the letter itself. In reply to the said letter, the contesting opposite party informed that the certain charges are levelled against the applicant's husband and it is for this reason the salary is not being paid. Regarding the question as to why her husband is not coming home since last four months, he has clearly informed that a respectable lady visits her husband and this information has been given by a number of persons. It is presumed that the visiting lady is none else but wife of Gyan Prakash Tiwari i.e. applicant herself. However, since she herself has expressed doubt about the conduct of her husband, it is better she should making inquiries in the matter so that she may not be faced with any grave and untowards situation. Copies of the letters were also sent to the District Magistrate. Assistant Agriculture Inspector Tarwa and District of Agriculture, Lucknow. This letter sent in reply, was complained to be defamatory in nature and consequently a complaint under Section 500 I.P.C. was instituted against the opposite party no. 1 by the applicant. This was challenged in this Court on the ground that the letter was written in his official capacity as such a prior sanction under Section 197 Cr. P.C. was necessary before any prosecution could commence against the accused opposite party no. 1. An application was filed under Section 482 Cr.P.C. before this Court which was numbered as Criminal Misc. Application No. 461 of 1997-Kashi Nath Vs. The State of U.P. and others. This Court had disposed of the application vide order dated 3.2.1997 directing the applicant before the Magistrate concerned regarding the question of sanction under Section 197 Cr.P.C. which shall be disposed of expeditiously by a speaking order and till the disposal of the application, the arrest of the accused under Section 500 I.P.C. in case crime No. 490 of 1995 was stayed. A copy of this order has been annexed along with counter affidavit as Annexure CA-5. In pursuance to the aforesaid direction, the Chief Judicial Magistrate passed an order dated 15.4.1997 to the effect that the prosecution could not continue for

want of necessary sanction and also that the letter written by the accused will not amount to defamation within the meaning of Section 500 I.P.C. and the applicant was acquitted vide order dated 15.4.1997. this order was challenging by filing Criminal Revision No. 152 of 1997-Geeta Tiwari Vs. State which was also dismissed on 4.10.1997 by the learned Sessions Judge, Azamgarh. This order is impugned in the present application. A preliminary objection has been raised by the learned counsel for the opposite party no. 1. He has submitted that since the sentence provided for an offence under Section 500 I.P.C. is simple imprisonment for a term which may extend for a period of two years or fine or with both. The case is a summon case. Definition of summon case is provided in Section 2(w) Cr.P.C. which is as under:-

"Summon case means a case relating to an offence and not being warrant."

4. It is, therefore, argued that it was a summon case and the order dated 15.4.1997 clearly show that the applicant is acquitted. In the circumstances, an appeal against the said order was maintainable but a revision could not be entertained. Sri Tiwari has emphasized that since the applicant failed to prefer an appeal against the order of acquittal, his revision could not be entertained under Section 401(4) Cr.P.C. Second argument advanced by Sri Tiwari is that the complaint was dismissed and the accused wee acquitted not only for want of sanction but also after recording his finding that the letter written by the accused to the complaint (applicant) was only with an intention to give her information, which she had asked for from the District Magistrate and in no way, it can constitute a case under Section 500 I.P.C. Sri Manish Tiwary has emphatically argued that the learned Magistrate proceeded to decide the application in pursuance to the direction of this Court in Criminal Misc. Application No. 461 of 1997. The order was very specific directing the Magistrate to decide the question grant of sanction by a speaking order. In the circumstances, no order on merit could be passed and it will be treated that the order dated 15.4.1997 was only in respect of the question of sanction and it can not be said that it is an order of acquittal. It is, therefore, emphasized that the order dated 15.4.1997 was a revisable order and the learned Session Judge committed an illegality while dismissing the criminal revision no. 152 of 1997. While dismissing the revision, a finding was recorded that the letter dated 11/12.7.1994 was sent by the accused Khand Vikas Adhikari in reply to the letter of the complainant herself, as such it was she, who has invited the information, rather than the Khand Vikas Adhikari had tired to malign the reputation either of the complainant or her family. The revisional court had concluded that the letter was written in discharge of official duty, certainly permission to file complaint was required under Section 197 Cr.P.C. It is also noteworthy that the inquiry was made by the complainant on account of the reason that the District Magistrate had passed an order directing the accused/opposite party to look into the matter and given an appropriate reply, which was done by the Khand Vikas Adhikari. It is thus clear that the letter sent in reply was in compliance to the direction of the District Magistrate and therefore in discharge of his duty. The Khand Vikas Adhikari was duty bound to give a reply and necessary information on

account of the order of the District Magistrate. In the circumstances, if the courts below were of the view that the act done by the accused was in discharge of his official duty, there is no illegality. Besides the allegation of the complaint do not constitute an offence of defamation within the meaning of Section 499 I.P.C. which defines Defamation as:-

"499. Defamation-Whoever, by words either spoken or intended to be read, or by sings by visible representations, makes or publishes any imputation concerning any person intending to harm, the reputation of such person is said except in the cases hereinafter excepted, to defame that person."

5. There are ten exception given in the Indian Panel Code to Section 499 I.P.C. If the facts alleged are covered within any of the exceptions of Section 499 I.P.C., no offence of Defamation is made out. The facts of the present case squarely comes within the fold of 3 categories of exception.

Third Exception- **Conduct of any person touching any public question-**It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Ninth Exception-**Imputation made in good faith by person for protection of his or other's interests-**It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Tenth Exception-**Caution intended for good of person to whom conveyed or for public good-**It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person interested, or for the public good.

6. After going though the entire record and the perusal of the ingredients of Section 499 I.P.C. the facts of the case would not constitute the offence of 'defamation', I am of a considered opinion that the alleged letter was firstly written in good faith and only and opinion was disclosed to the applicant, that too in compliance of the direction of the District Magistrate. Assuming that the imputation was made against the applicant husband, it was in good faith for the protection of the interest of the wife (applicant) who herself had asked for information about her husband as his whereabouts was not known since last four months. The letter was only by way of a caution intended for the good of the person.

7. In the circumstances, I do not consider that the impugned orders suffer from any illegality and it can not be said that it amounts to an abuse of the process of the court or any miscarriage of justice, which calls for interference in exercise of inherent powers. The objections of Sri Tiwari to the effect that an appeal was maintainable against the order of acquittal also appears to be well founded. The applicant had institute the complaint on 6.1.1995 and is continuing to pursue the complaint, which stands already dismissed in the year 1997. In fact it is the contesting opposite party who has been subjected to undue harassment despite the

fact he was acquitted on 15.4.1997. The Apex Court has continuously held that the High Courts should be slow in reversing the order of acquittal by the trial judge suffers manifestly from gross illegality otherwise it should not be interfered with. The Magistrate while passing the order dated 15.4.1997 has clearly given a finding that the alleged letter do not constitute an offence of defamation and he prima facie did not consider it a fit case for summoning the accused to face the tail. In the circumstances, the argument of the counsel for the complaint/applicant do not inspire any confidence. It is a case where the view taken by the courts below can not be said to the perverse or at any rate which was not reasonably possible. In the circumstances, I do not find that the revisional order challenged in this application suffers from any illegality.

The application is accordingly, rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2005

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 12979 of 1999

Gopal Ji Trivedi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare

Counsel for the Respondents:
S.C.

U.P. Intermediate Education Act-1921 Chapter III Regulation 103- Compossionate appointment-on the post of Trained graduate teacher-in minority institution-not permissible. However such dependant of deceased teacher working in minority institution can be appointed-on non teaching post-necessary direction issued.

Held: Para 23, 24 and 25

It is further to be noted that although with regard to appointment on the teaching post of the dependent of the deceased employee in a non-minority institution there is a specific provision as contained in Section 16 third proviso and regulation 103 but there is no express provision permitting the appointment of dependent of deceased employee on a teaching post in a minority institution. This is obvious because legislature is concious that permitting appointment on teaching post on compassionate ground is violative of rights of minority guaranteed under Article 30 of the Constitution of India.

As held above, the dependent of deceased employee of the minority institution is not entitled for appointment on teaching post, hence his claim for appointment on teaching post in non-minority institution can also not be considered. The alternative submission raised by the counsel for the petitioner can also not be accepted.

The Governing Body of the registered Society designated as St. Andrew's College Association, Gorakhpur and another Versus State of U.P. and others (supra) the dependent of deceased employee of a minority institution is entitled for consideration for appointment on a non teaching post. The claim of the petitioner for appointment against the non teaching post requires consideration by the respondents. Consequently, the respondent no. 4 is directed to consider the claim of the petitioner for compassionate appointment against non teaching post as dependent of deceased employee expeditiously preferably within a period

of three months from the date of production of a certified copy of this order.

Case law discussed:

2000 (1) AWC-857
2002 (3) AWC-2221
1998 (1) SCC-206
2002 (8) SCC-481
AIR 1987 SC-311

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

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

2. By this writ petition the petitioner has prayed for a writ, order or direction commanding the respondents to forthwith grant compassionate appointment to the petitioner as an Assistant Teacher in L.T. Grade in any recognised and aided higher secondary school of district Kanpur Nagar.

Brief facts necessary for deciding the controversy raised in the writ petition are;_____

3. Petitioner's father Raj Kumar Tripathi was permanent Assistant Teacher in Christ Church Inter College, Kanpur which is a recognised and aided minority institution. Sri Raj Kumar Tripathi died on 16th May, 1994 while still in service. Petitioner being son of the deceased Raj Kumar Tripathi, made an application on 26.7.1994 praying for appointment on compassionate ground in clerical cadre. The qualification of the petitioner as disclosed in the application was intermediate, he being student of B.Sc. Part II at the time of making the application. Petitioner claims to have made several applications to the respondents for giving appointment on compassionate ground. Petitioner passed B.Sc. In 1995 and B. Ed. In 1996. An application was made in the year 1997 by the petitioner claiming appointment on the post of Assistant Teacher. The District Inspector of Schools wrote a letter dated 12.8.1997 to the State Government expressing difficulty in appointing the petitioner as Assistant Teacher in view of the fact that Christ Church Inter College is a minority institution and the Regulations as amended vide Government order dated 2.2.1995 were not applicable on the minority institution. The District Inspector of Schools in the said letter also referred to a letter dated 14.10.1994 of the District Inspector of Schools recommending appointment of the petitioner on Class IV post in Christ Church Inter College against a supernumerary post. Petitioner's case in the writ petition is that no communication was ever received by the petitioner from the respondent with regard to claim of the petitioner of compassionate appointment.

4. A counter affidavit has been filed on behalf of the respondents stating that the petitioner was given appointment on Class IV post on 14.10.1994 but he has not joined the post. A judgment of the learned Single Judge dated 23.4.1998 passed in writ petition No. 41564 of 1997 Sanjeev Kumar Dubey Versus District Inspector of Schools and others has also been referred by which judgment the provisions of giving compassionate appointment on the post of Assistant Teacher was held to be ultra vires. A Government order dated 8.1.1999 issued in pursuance of the above mentioned judgment has also been referred and

relied. Rejoinder affidavit has been filed by the petitioner stating that the petitioner was at no point of time offered any kind of appointment on compassionate ground. It is denied that the petitioner was given appointment on Class IV post. The judgment of the learned Single Judge in Sanjeev Kumar Dubey Versus District Inspector of Schools and others has been set aside by the Division Bench in Special Appeal No. 426 of 1998 **Sanjeev Kumar Dubey Versus District Inspector of Schools and others** reported in 2000 (1) A.W.C. 857. A copy of judgment has been annexed as Annexure-R.A.I The Division Bench held that the provision of third proviso to Section 16 (1) of U.P. Act 5 of 1982 is intra vires and the notification dated 2.2.1995 substituting regulations 105 and 106 were also held not to be ultra vires to Article 14 of the Constitution of India,

5. Learned counsel for the petitioner in support of the writ petition submitted that the petitioner is fully entitled to be considered for appointment as Assistant Teacher as dependent of the deceased employee in accordance with the regulation framed under the U.P. Intermediate Education Act, 1921. The judgment of the learned Single Judge in **Sanjeev Kumar Dubey Versus District Inspector of Schools and others** holding that the third proviso to Section 16 of Act 5 of 1982 has been set aside by the Division Bench in **Sanjeev Kumar Dubey Versus District Inspector of Schools and others** (supra). The appointment on the post of Assistant Teacher on compassionate ground is fully permissible. It is further contended that the proviso to regulation 103 which exempted the minority institution from the applicability of regulations 101 to regulation 107 has been deleted vide amendment dated 9.8.2001. The judgment of the learned Single Judge reported in 2002 (3) A.W.C. 2221 **Committee of Management, M.A.H. Inter College and another Versus District Inspector of Schools and others** holding the regulation providing for compassionate appointment in minority institution is in violation of Article 30 of the Constitution of India, has been over ruled by the Division Bench judgement reported in 2003 (4) A.L.R. 381 **The Governing Body of the registered Society designated as St. Andrew's College Association, Gorakhpur and another Versus State of Uttar Pradesh and others**. Learned counsel for the petitioner further contended that even with regard to minority institution provisions can be made governing the conditions of service of teacher, for the general welfare of the institution and teachers and providing for social welfare measures; hence the regulations framed under Chapter III of the Intermediate Education Act, 1921 providing for compassionate appointment do not contravene the provisions of Article 30 of the Constitution of India. Reliance has been placed on judgement of the apex Court (1987) 4 Supreme Court Cases 691 **Christian Medical College Hospital Employees' Union and another Versus Christian Medical College Vellore Association and others**; (1988) 1 Supreme court Cases 206 **All Bihar Christian Schools Association and another Versus State of Bihar and others; (2002) 8 Supreme Court Cases 481 T.M.A. Pai Foundation and others Versus State of Karnataka and others** and A.I.R. 1987 Supreme Court 311 **Frank Anthony Public School Employees' Association Versus Union of India and others**. Alternatively it is

contended that even if permitting of compassionate appointment against a teaching post in a minority institution contravene Article 30 of the Constitution, there exist no justification for excluding the dependent of deceased employee of a minority institution from being considered for compassionate appointment against a teaching post in a non-minority institution.

6. Learned standing counsel refuting the submission of the petitioner's counsel submitted that the appointment on the post of Assistant Teacher in a minority institution is not permissible in view of the right guaranteed to minority institution under Article 30 of the Constitution of India. It is further contended that even in Division Bench judgment relied by the counsel for the petitioner in the **The Governing Body of the registered Society designated as St. Andrew's College Association, Gorakhpur and another Versus State of Uttar Pradesh and others** (supra) the Division Bench made observations that the compassionate appointment cannot be made on the post of Head Master or teacher in a minority institution which may amount to infringing the right of minority under Article 30 of the Constitution.

7. I have considered the submissions of counsel for the parties and perused the record.

8. Before coming to the respective submissions raised by the counsel for the parties it is necessary to glance the statutory provisions governing the appointment in recognised and aided minority institutions.

9. Uttar Pradesh Intermediate Education Act, 1921 contains the provisions for appointment on teaching and non-teaching post. The provisions regulating the appointment in minority institutions are different as compared to provisions regulating the recruitment on the post of teachers. The Selection Committee with regard to non-minority institutions is to be constituted in accordance with Section 16F whereas with regard to minority institutions Section 16FF provides the manner and procedure of selection of teachers in minority institutions. The management has been given much more freedom in selection of teachers as compared to non-minority institutions. Although the selection of the teachers requires prior approval but emphasis in the provision is that no such prior approval be withheld except on the ground that the candidate does not possess the minimum qualification prescribed and is otherwise eligible. The Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 has been enacted providing for constitution of Selection Board for selecting teachers in the recognised institutions. A complete change has been affected by the aforesaid 1982 Act with regard to procedure and manner of selection of teachers in recognised institutions. However, an exemption has been given to the minority institutions from the applicability of U.P. Act 5 of 1982. Section 30 of the Act is quoted below :-

"30. Exemption to minority Institutions, *_____ Nothing in this Act shall apply to an institution established and administered by a minority referred to in Clause (1) of Article 30 of the Constitution of India."*

10. The exemption to the minority institutions has been given to safeguard the rights of minority as guaranteed under Article 30 of the Constitution of India. The appointment on compassionate ground was governed by a Government order dated 21.9.1981 in aided institutions. By notification dated 30.7.1992 regulations 101 to 107 were added in Chapter III of the U.P. Intermediate Education Act providing for giving compassionate appointment to the dependent of deceased teacher or non teaching staff while dying in service. Initially, the regulations contemplated appointment on compassionate ground only on non teaching post. By subsequent amendment dated 2.2.1995 regulation 103 was substituted providing for appointment on the post of teacher or on non teaching post. The proviso was, however, added to regulation 103 to following effect:-

"Provided that anything contained in this regulation would not apply to any recognised aided institution established and administered by any minority class."

11. It is relevant to note that the provisions of U.P. Secondary Education (Services Selection Board) Act, 1982 were also amended by the U.P. Act No. XV of 1995 with effect from 28.12.1994 by adding the following as third proviso:-

"Provided also that the dependent of a teacher or other employee of an institution dying in harness should possess qualification prescribed under the U.P. Intermediate Education Act, 1921, may be appointed as teacher in trained graduate grade in accordance with the regulation made in sub-section (4) of Section 9 of the said Act."

12. As noted above, Section 16 or the amended proviso is applicable only to non-minority institutions and the amendment under the U.P. Act 5 of 1982 permitting appointment on teaching post was with regard to non-minority institutions and regulations amended vide notification dated 2.2.1995 containing proviso to regulation 103 exempting minority institutions from applicability of regulations was in consonance with the rights of minority. The above proviso to regulation 103 has been subsequently deleted vide notification dated 9.8.2001 again amending the regulation 103.

13. The question to be answered in this case is as to whether the appointment on compassionate ground can be given on a teaching post in a minority institution. There is no dispute on entitlement of appointment on a teaching post in non-minority institution by express provisions of Section 16 (3rd proviso) and regulation 103 of Chapter III of the U.P. Intermediate Education Act, 1921. The Division Bench judgement of this Court in the case of **Sanjeev Kumar Dubey Versus District Inspector of Schools, Etawah and others** (supra) which was a case of non-minority institution, has no bearing while considering the entitlement of compassionate appointment on a teaching post in minority institution.

14. The issue of compassionate appointment in minority institutions was considered by a learned Single Judge in the case of **Committee of Management, M.A.H. Inter College and another Versus District Inspector of Schools and others** (supra). The notification dated 9.08.2001 which has effect of deleting the proviso to regulation 103 has been quashed by the learned Single Judge. The

learned Single Judge took the view that no compassionate appointment is permissible in a minority institution either on the post of teacher or non-teaching post and any such appointment shall infringe the rights of minority under Article 30 of the Constitution. A Division Bench had occasion to consider the above judgment of the learned Single Judge in the case of **The Governing Body of the registered Society designated as St. Andrew's College Association, Gorakhpur and another Versus State of Uttar Pradesh and others** (supra). The Division Bench was considering similar government order providing for compassionate appointment in minority institutions in a Degree College. The Division Bench took the view that the regulation providing for appointment of the deceased employee even in a minority institution is regulatory in nature and permissible and does not offend Article 30 of the Constitution. The order impugned in the writ petition was an order giving appointment of one of the respondents as routine grade clerk in the College on compassionate ground due to death of his father who was lecturer in the College. The Division bench in concluding the part of the judgment made following observations:-

"We see no reason why humanitarian regulations, such as the kind, which has been impugned in this petition, cannot be made for minority institutions. We cannot see how such humanitarian measures of the kind with which we are dealing in this petition can be said to infringe the right under Article 30 of a minority institution.

It may have been a different matter if the compassionate appointment was sought to be made on the post of Head Master or teacher, and there it possibly could have been said that this infringes the right of the minority institution under Article 30 of the Constitution. since teaching work is certainly related to the standard of education imparted. That is not the case here. Here we are concerned with an appointment on a Class III post in a minority institution on compassionate ground. We see no violation of Article 30 of the Constitution in such a case or in case of a class IV post."

15. While considering the learned Single Judge's judgment in **Committee of Management, M.A.H. Inter College and another Versus District Inspector of Schools and others** (supra) following observation was made by the Division Bench:-

"Learned counsel for the petitioner has invited our attention to the decision of a learned Single Judge of this Court in ***Committee of Management, MAH Inter College Versus DIOS, Ghazipur*** *2002 (2) AWC 2221, in which a contrary view has been taken by the learned Single Judge. The learned Single Judge was of the view that since an appointment on compassionate grounds is not made on merit since there is no competition with the candidates from the open market hence it cannot be said that a direction for making such appointments in minority institutions will be conducive to efficiency and standards of education in the said institution. We respectfully disagree with the reasoning given by the learned Single Judge. As held by the Supreme Court in* ***TMA Pai's*** *(supra) a regulation for the welfare of teacher does not infringe the right of a minority institution under Article 30 of the Constitution. We do not see how appointment on a class III or*

class IV post will affect. The standard of education in a minority institution. After all, a class III post is not a teacher's post."

16. The apex Court had examined various aspects of the rights of minority guaranteed under Article 30 of the Constitution. In (2002) 8 Supreme Court Cases 481 **T.M.A. Pai Foundation and others Versus State of Karnataka and others**. Following observations were made by the apex Court in paragraphs 136, 137 and 139:-

"136. *Decisions of this Court have held that the right to administer does not include the right to maladminister. It has also been held that the right to administer is not absolute, but must be subject to reasonable regulations for the benefit of the institutions as the vehicle of education, consistent with national interest. General laws of the land applicable to all persons have been held to be applicable to the minority institutions also___ for example, laws relating to taxation, sanitation, social welfare, economic regulation, public order and morality.*

137. *It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain other laws of th land pertaining to health, morality and standards of education apply. The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of law, and we reiterate the same. By the same analogy, there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1).*

139. *Like any other private unaided institutions, similar unaided educational institutions administered by linguistic or religious minorities are assured maximum autonomy in relation thereto; e.g. method of recruitment of teachers, charging of fees and admission of students. They will have to comply with the conditions of recognition, which cannot be such as to whittle down the right under Article 30."*

17. The apex Court in the same judgement had further observed with regard to those minority institutions which are receiving grant in aid from the State. The apex Court observed in paragraph 141 of the judgement that for granting aid there cannot be abject surrender of right of management. The receipt of aid cannot be reason for altering the nature or character of recipient of the education institution. Choosing teachers who will carry on the educational institution toward excellence has been held to be right of management of minority institutions.

18. Now the judgment relied by the counsel for the petitioner are next to be considered. The apex Court judgement in **Christian Medical College Hospital Employees' Union and another Versus Christian Medical College Vellore Association and others** (supra) was a case in which the apex Court held that the provisions of Sections 9-A, 10, 11-A, 12 and 33A of the Industrial Disputes Act, 1947 are also applicable on the minority institutions. The apex Court held that the

provisions of the Industrial Disputes Act is enacted as a social security measure in order to ensure the welfare of the teachers. The Act provide for a machinery for collective bargaining. The Act being a general law for settlement of the industrial dispute, cannot be construed to be the law which directly interfere with the rights of minority educational institutions. The apex Court in the said judgment held that the aforesaid provisions of Industrial Disputes Act do not interfere with any right of the minority guaranteed under Article 30. The said judgment is of no help to the petitioner in the present case.

19. **All Bihar Christian Schools Association and another Versus State of Bihar and others** (supra) was a case in which the apex Court had examined various provisions of Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, 1981. The apex Court laid down in the said case that statutory measures regulating standard and excellence of minority educational institutions do not offend Article 30 of the Constitution of India. While considering Section 18 (3) Clause (b) which require Managing Committee of the minority institution to appoint teachers possessing requisite qualification with the concurrence of the School Service Board. Following observation was made by the apex Court in paragraph 13:-

*"**13**. Section 18(3) provides that recognised minority secondary schools shall be managed and controlled in accordance with the provisions contained in clauses (a) to (k). Clause (a) requires a minority secondary school to have a managing committee registered under the Societies Registration Act, 1862 and to frame written bye-laws regulating constitution and functions of the managing committee. The bye-laws regarding the constitution of the managing committee are required to be framed by the minority institution itself. The State or any other authority has no power or authority to impose any terms or conditions for the constitution of the managing committee. If a society running a minority institution frames written bye-laws providing for the constitution of managing committee entrusted with the function of running and administering its school it would ensure efficient administration. This clause is in the interest of the minority institution itself, as no outsider is imposed as a member of the managing committee, there is no interference with the minorities' right to administer its school. Clause (b) provides for two things, firstly it requires the managing committee or of a minority school to appoint teachers possessing requisite qualifications as prescribed by the State Government for appointment of teachers of other nationalised schools, secondly, the managing committee is required to make appointment of a teacher with the concurrence of the School Service Board constituted l; under Section 10 of the Act. Proviso to clause (b) lays down that the School Service Board while considering the question of granting approval to the appointment of a teacher, shall ascertain if the appointment is in accordance with the rules laying down qualifications, and manner of making appointment framed by the State Government. The proviso makes it clear that the School Service Board has no further power to interfere with the right of managing committee of a minority school in the appointment of a teacher. Under clause (b) the managing committee is*

required to make appointment of a teacher with the concurrence of the School Service Board. The expression 'concurrence' means approval. Such approval need not be prior approval, as the clause does not provide for any prior approval. Object and purpose underlying clause (b) is to ensure that the teachers appointed in a minority school should possess requisite qualifications and they are appointed in accordance with the procedure prescribed and the appointments are made for the sanctioned strength. The selection and appointment of teachers is left to the management of the minority school; there is no interference with the managerial rights of the institution. In granting approval the School Service Board has limited power. The appointment of qualified teachers in a minority school is a sine qua non for achieving educational standard and better administration of the institution. Clause (b) is regulatory in nature to ensure educational excellence in the minority school. Clause (C) requires a minority school to frame rules regulating conditions of service of its teachers; such rules should be consistent with principles of natural justice and the prevailing law. The clause further requires the minority institution to submit a copy of such rules to the State Government. This clause in substance lays down that the management of a recognised minority school shall frame rules, regulating conditions of service of teachers and such rules shall conform to principles of natural justice and prevailing law. These provisions are directed to avoid uncertainty and arbitrary exercise of power. If rules are framed by the management those rules would bring uniformity in administration and there would be security of employment to teachers. In a civilised society the observance of principles of natural justice is an accepted rule; these principles contain basic rules of fair play and justice n and it is too late in the day to contend that while administering a minority school the management should have right to act in contravention of the principles of natural justice. Clause (c) is regulatory in nature which requires the managing committee to frame rules of employment consistent with principles of natural justice and the prevailing law. No outside agency is required to frame rules of employment of teachers instead the management itself is empowered to frame rules. There is therefore no element of interference with the management's right to administer a minority school."

20. The judgement of the apex Court in **Frank Anthony Public School Employees' Association Versus Union of India and others** (supra) was a case in which the apex Court considered various provisions of Delhi Education Act qua their applicability to minority institutions; following observations were made in paragraph 13 :-

*"**13**. Thus, there, now, appears to be a general and broad consensus about the content and dimension of the Fundamental Right guaranteed by Article 30(1) of the Constitution. The right guaranteed to religious and linguistic minorities by Art. 30 (1) is two fold, to establish and to administer educational institutions of their choice. The key to the Article lies in the words" of their own choice". These words indicate that the extent of the right is to be determined, not with reference to any concept of State necessity and general societal interest but with reference to the educational institutions themselves, that is, with*

reference to the goal of making the institutions "effective vehicles of education for the minority community or other persons who resort to them". It follows that regulatory measures which are designed towards the achievement of the goal of making the minority educational institutions effective instruments for imparting education cannot be considered to impinge upon the right guaranteed by Article 30(1) of the Constitution. The question in each case is whether the particular measure is, in the ultimate analysis, designed to achieve such goal, without of course nullifying any part of the right of management in substantial measure."

21. From the various judgements of the apex Court as noted above, it is now well settled that the regulatory measure can be validly made regard to minority institutions also provided those regulatory measure are designed towards the achievement of the goal of making the minority educational institutions effective instruments for imparting education. The object of every minority institution is to achieve excellence thus the regulatory measure which advance the aforesaid objective does not impinge upon any of the rights of the minority. However, any regulation which does not promote the aforesaid object and fetters the right of management to choose its teachers and staff cannot be held to be valid regulation. Selection and appointment of a teacher of minority educational institutions by any one other then the management of the minority institution certainly fetters the right of management as guaranteed under Article 30. The appointment of dependent of deceased employee as a teacher cannot be said to be towards achieving the excellence in educational standard. Selecting the dependent of deceased employee even though he may possess minimum qualification is not selection by management out of best candidates out of large number of applicants who normally apply against any post in aided institutions.

22. The judgement of the Division Bench in the **The Governing Body of the registered Society designated as St. Andrew's College Association, Gorakhpur and another Versus State of U.P. and others** (supra) has also not approved the appointment on the post of a teacher in a minority institution rather the observations of the Division Bench as quoted above are to the effect that the appointment of dependent of deceased employee on teaching post shall be violative of rights of minority as guaranteed under Article 30 of the Constitution.

23. It is further to be noted that although with regard to appointment on the teaching post of the dependent of the deceased employee in a non-minority institution there is a specific provision as contained in Section 16 third proviso and regulation 103 but there is no express provision permitting the appointment of dependent of deceased employee on a teaching post in a minority institution. This is obvious because legislature is concious that permitting appointment on teaching post on compassionate ground is violative of rights of minority guaranteed under Article 30 of the Constitution of India.

24. Now remains the alternative submission raised by the counsel for the petitioner that even if the dependent of deceased employee of minority institution

is not entitled for appointment on a teaching post in a minority institution, he may very well can be considered for appointment on teaching post in other non-minority institution. Right of a dependent of deceased employee flow from service conditions to which the deceased was governed. The dependent of deceased employee of a minority institution is entitled for the benefit which flow from service conditions of the employee from whom he is claiming right. As held above, the dependent of deceased employee of the minority institution is not entitled for appointment on teaching post, hence his claim for appointment on teaching post in non-minority institution can also not be considered. The alternative submission raised by the counsel for the petitioner can also not be accepted.

25. In view of forgoing discussions the petitioner has not made out any case for issuing writ of mandamus for appointment on teaching post. In the counter affidavit the respondent has referred to a class IV appointment offered to the petitioner on 14.10.1994. Reference of said appointment is made in the letter dated 12.8.1997 of the District Inspector of Schools to the State Government filed as Annexure-16 to the writ petition. From perusal of the said letter it appears that a letter dated 14.10.1994 was written by the District Inspector of Schools proposing appointment of the petitioner on Class IV post against the supernumerary post and the Principal was directed to permit the joining of the petitioner. The petitioner has categorically denied receiving of such information or letter. The copy of the said letter dated 14.10.1994 has also not been brought on record nor there is any material brought by the respondent to show that the petitioner was ever communicated any such appointment. The petitioner has categorically denied receiving of any appointment or information. In this view of matter the claim of the respondent that the petitioner was offered Class IV appointment on 14.10.1994, cannot be accepted. In view of the Division Bench judgement in the case of **The Governing Body of the registered Society designated as St. Andrew's College Association, Gorakhpur and another Versus State of U.P. and others** (supra) the dependent of deceased employee of a minority institution is entitled for consideration for appointment on a non teaching post. The claim of the petitioner for appointment against the non teaching post requires consideration by the respondents. Consequently, the respondent no. 4 is directed to consider the claim of the petitioner for compassionate appointment against non teaching post as dependent of deceased employee expeditiously preferably within a period of three months from the date of production of a certified copy of this order.

The writ petition is disposed of accordingly. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2005

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Misc. Writ Petition No. 1633 of 2005

India Casting & Krishi Udyog ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Rai
Sri S.N. Singh

Counsel for the Respondents:
Sri K.M. Tripathi
Sri Pankaj Mithal
Sri S.K. Mishra
S.C.
Sri W.H. Khan

U.P.Z.A. & L.R. Rules-Rule-285-I-objection against the sale of movable property-can not be filed-but the question-about the Plant and Machinery-the subject matter of auction sale is movable or immovable property-required to be decided by the commission.

Held: Para 8

In view of the aforesaid Division Bench decisions, which are of binding effect and of higher authority than the Single Judge decision in Bharat Singh's case and also because attention of the court was not drawn to Section 282 of the U.P.Z.A. & L.R. Act in Bharat Singh's case the decision in that case is per incuriam. In view of what has been stated above I am of the view that no objection against the sale of movable property can be filed within the scope of Rule 285-I of the U.P. Z.A. & L.R. Rules. The question as to whether the property in dispute is movable property has to be decided by the Commissioner.

Case law discussed:
1997 J.T. (10)-82
2005 (98) 203
1991 R.D. 250

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

1. There were certain electricity dues against respondent no.5 M/s S.K. Glass works. The dues were recovered as arrears of land revenue. Certain plant and machinery of S.K. Glass were brought to sale in an auction held on 29.5.2004. The petitioner India Casting & Krishi Udyog was the purchaser. The auction sale was confirmed on 23.6.2004. It appears that objections under Rule 285-I of the U.P. Z.A. & L. R. Rules were filed by the respondent M/s. S.K. Glass Works on 13.8.2004. The objections were allowed by the Commissioner, Varanasi Division by his impugned order dated 16.10.2004. The auction sale was set aside and it was directed that fresh auction sale be held. The Commissioner held that there was material irregularity in the publication and sale. He found that 30 days clear notice between the dates of the proclamation of sale and the sale itself was not given. This constitutes breach of Rule 285-A of the U.P.Z.A. & L.R. Rules. It was also found that the sale proclamation was published in an evening newspaper "Kashi Varta", which has scant circulation and that the valuation of the property was made by the P.W.D., which is not authorized to value plant and machinery. It was also found that the sale price was reduced on account of arbitrary fixation of the price of a portion of the machinery released from the sale. Further the properties were mortgaged with the Canara Bank and no notice had been given to it.

2. I have heard Sri S.N. Singh on behalf of the petitioner and Sri Pankaj Mittal on behalf of respondent no.5 and the learned Standing Counsel on behalf of respondents 1 to 4.

3. It appears that before the Commissioner an objection was raised by the petitioner auction purchaser that the objections under Rule 285-I of the U.P.Z. A. & L.R. Rules were not maintainable as the properties were moveable properties. The Commissioner has referred to this objection in his order but no finding has

been given in this regard. The other submission raised by the petitioner's counsel is that the order passed by the Commissioner is an ex parte order and no opportunity was given to the petitioner. Learned counsel for the petitioner placed before me the release certificate dated 24.6.2004 issued by the Tehsildar in which reference is made to the property sold, which are described as moveable property. In the letter of the Tehsildar dated 1.7.2004 reference is made to an earlier letter dated 29.6.2004 directing that the moveable property be not removed. Reliance is also placed upon the admission made by the respondent no.5 in paragraph 4 of the counter affidavit in which it is stated that movable property, plant and machinery were attached on 29.12.2003. In paragraph 30 of the counter affidavit the property has been described as plant and machinery. On this basis it is submitted by Sri S.N. Singh that there was ample material on the record to indicate that the properties, which were the subject matter of sale were moveable property. On the other hand it is submitted by Sri Pankaj Mittal, learned counsel for the respondent that the plant and machinery were embedded in the earth and was therefore immovable property. He relied upon the averments made in paragraph 4 of the application filed on 11.4.2005 a portion of which is quoted below;

"The plant and machinery was installed on a concrete platform and was fixing to the earth by means of steel nuts and bolts, which were embedded to the earth about 8'-10' deep."

4. The reply to this paragraph has been given in the rejoinder affidavit in paragraph 5 that it is moveable property, which was sold. The question as to whether the plant and machinery can be treated as immovable property was considered by the Apex Court in 1997 J.T. Vol. 10 page 82 Star Paper Mills Ltd. Vs. The Collector of Central Excise. It was held; "Apart from this finding of fact made by the Tribunal, the point advanced on behalf of the appellant, that whatever is embedded in earth must be treated as immovable property is basically not sound. For example, a factory owner or a householder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property. Some of the components of water pump may even be assembled on site. That too will not make any difference to the principle. The test is whether the papermaking machine can be sold in the market. The Tribunal has found as a fact that it can be sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the company just because a plant and machinery are fixed in the earth for better functioning, it does not automatically become an immovable property."

5. The issue as to whether the properties were movable or immovable is a mixed issue of law and fact and in a writ petition it is not appropriate to decide it in the first instance as facts are involved. The Commissioner who is vested with the jurisdiction of deciding an objection under Rule 285-I is competent to go into this question to determine whether the objections are maintainable.

6. It was however submitted by Sri Pankaj Mittal that even if the properties

are treated as movable properties Rule 285-I is still applicable. He relied upon the decision of this Court in 2005 (98) R.D.203 (Bharat Singh Vs. State of U.P. and others). In that case it was held that objections under Rule 285-I can be filed even in respect of movable property. This decision would ordinarily bind me. However, it appears that certain decisions of higher authority of Division Benches of this Court as well as certain provisions of the Statute were not brought to the notice of the Court in Bharat Singh's case. Before referring to the Division Bench decisions on the point I will refer to the statutory provisions governing the point. Section 282 of the U.P.Z.A. & L.R. Act provides that the procedure for the sale and attachment of moveable property shall be the same as that in execution of a decree under the Civil Procedure Code. The U.P.Z.A. & L.R. Rules also contain certain provisions relating to attachment and sale of movable properties. These rules find place under the heading of attachment and sale of movable property and begin from Rule 254 and continue upto Rule 271. To the extent to which direct provision has been made under the U.P.Z.A.& L.R. Rules the rules would prevail. However, recourse to the civil procedure code in respect of matters on which the U.P.Z.A. & L.R. Rules are silent has to be made. This follows not only from the provisions of Section 282 of the U.P.Z.A. & L.R. Act but also in view of the provisions of Section 341 of the U.P. Z.A. & L.R. Act, which makes applicable to the proceedings under the U. P. Z. A. & L.R. Act the provisions of the civil procedure code. There is a clear bifurcation under the C.P.C. between the procedure for the sale of movable property and for the redressal of grievance in respect of them on the one hand and for the sale of immovable property on the other hand. Although under the civil procedure code objections to the attachment of moveable property can be filed under Order 21 Rule 58 Civil Procedure Code but there is no provision under which the sale of movable property can be challenged on the ground of material irregularity in the publication or sale. This would be clear from Order 21 Rule 78-A of the Civil Procedure Code, which in terms provides that no sale shall be set aside on the ground of irregularity in the publication but the remedy of the person aggrieved is to obtain compensation. Under Order 21 Rule 77 the sale of movables becomes absolute on payment of the purchase money. Sale of immovable property can however be set aside under the provisions in Order 21 Rule 90 C.P.C. on ground of material irregularity or fraud in the publication or conducting of the sale. A sale of immovable property can also beset aside under Order21 Rule 89 C.P.C. on payment of the purchase price and certain additional amount. In case no objections are filed, the sale shall be confirmed in accordance with the provision of Order 21 Rule 92 Civil Procedure Code. The scheme of the U.P. Z.A. & L.R. Act and the Rules framed thereunder appears to be similar in this regard. This is what appears from the provisions contained in Rules 285-H and 285-I. Rule 285-H provides that any person aggrieved by the sale whose holding or other immovable property has been sold can apply for setting aside the sale on payment to the purchaser the sums mentioned therein. It is clear from this provision that it applies only to immovable property. Rule 285-I, which follows this rule provides that the remedy of a person whose property has been sold is to apply before the

Commissioner for setting aside the sale on account of material irregularity or mistake in publishing or conducting it. The proviso to Rule 285-H takes away the right of the person who applies under Rule 285-I to get the sale set aside under Rule 285-H. The consequence of not filing objections under Rule 285-I or of their dismissal have been given in the Rules 285-J which is that the sale shall be confirmed if the Collector is satisfied that the purchase of land would not be in contravention of Section 154. Rule 285-J thus refers to land, which is immovable property. Rule 285-M also refers to the sale of immoveable property and provides for putting the purchaser in possession. It will thus be seen that the consequences contemplated for not filing objections or of confirmation of sale are in respect of immovable property. The consequence of filing objections under Rule 285-I is the deprivation of right to apply under Rule 285-H which relates to immovable property. If the consequences of not filing objections under Rule 285-I fall upon immovable property it can be inferred that the objections contemplated under Rule 2985-I relate to immovable property.

7. The provisions of Section of 282 of the U.P. Z.A. & L.R. Act were considered by a Division Bench of this Court in 1991 R.D. 250 Shiv Narain Tiwari Vs. District Magistrate, Fatehpur. This was a case relating to sale of a bus as arrears of land revenue under the provisions of the U.P. Z.A. & L.R. Act. The court referred to Section 282 and applied the provisions of Order 21 Rules 77 and 78 of the C.P.C. and held that the sale becomes absolute on payment of the purchase price and the remedy of the person whose property is sold is to obtain compensation. The Division Bench relied upon an earlier Division bench in Seth Hira Lal Vs. State of U.P. that a sale of movable property becomes complete on payment by the purchaser of the price and issuance of receipt and no order or confirmation of sale is necessary. This Division Bench was not considered in the case of Bharat Singh Vs. State of U.P. and others decided by the learned Single Judge of the Lucknow Bench of this Court. A learned Single Judge of this Court while considering the provisions of Section 282 of the U.P.Z.A., & L.R.Act has held that the auction sale of movable property does not require any confirmation and that the sale becomes absolute on payment of purchase money. Sri S.N. Singh also placed reliance upon a decision in 1967 (37) A.W.R. Lakshmi Narayan Vs. Sub Divisional Officer, Gyanpur, Varanasi and another on the point that an objection under Rule 285-I of the Rules has to be disposed of judicially on evidence and by an order recording findings on the relevant points.

8. In view of the aforesaid Division Bench decisions, which are of binding effect and of higher authority than the Single Judge decision in Bharat Singh's case and also because attention of the court was not drawn to Section 282 of the U.P.Z.A. & L.R. Act in Bharat Singh's case the decision in that case is per incuriam. In view of what has been stated above I am of the view that no objection against the sale of movable property can be filed within the scope of Rule 285-I of the U.P. Z.A. & L.R. Rules. The question as to whether the property in dispute is movable property has to be decided by the Commissioner. If the Commissioner holds that the property in question was

immovable property it will be open to him to decide the objections on merits. If he comes to the conclusion that it is movable property the objection would have to be dismissed as being not maintainable. It is not necessary for me to advert to the other submission made by Sri S.N. Singh that the order passed by the Commissioner was an ex parte one and without opportunity as the order is being set aside on another point.

9. In view of the discussions made above the writ petition is allowed and the order dated 16.10.2004 passed by the Commissioner, Varanasi Division, Varanasi is quashed. The Commissioner is directed to decide the matter afresh and if possible within a period of six months from the date of presentation of a certified copy of this order before him. Counsel for the parties agree that they will appear before the Commissioner on 26.9.2005 and in case for any reason that is not a working day then on the next working day.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2005

BEFORE
THE HON'BLE V.C. MISRA, J.

Civil Misc. Writ Petition No.14671 of 1984

Kali Charan and others ...Petitioners
Versus
Additional Collector, Aligarh and others ...Respondents

Counsel for the Petitioners:
Sri A.K. Sand
Sri P.M. Gupta
Sri M.C. Joshi

Counsel for the Respondents:
Sri V.K. Singh
Sri Anuj Kumar
S.C.

U.P.Z.A. & L.R. Act 1955-Section 122-B-Petitioner was granted lease of Bachat land being uneven and uncultivated by the L.M.C. under Section 195-earliear case under Section 209 dismissed on 317.75 with findings the possession of petitioner is not illegal-became final between the parties-another village Pradhan initiated proceeding u/s 122-B decided in favour of petitioner by order dt. 21.1.84-on the basis of report of Lekhpal to the effect the name of petitioner recorded in colum-4-hence possession illegal-the Tehsildar by order dt. 30.6.84 passed the order of dispossession with direction to Pay damage of Rs.24,675/-held-without jurisdiction, manifestly erroneous, wrong, bad and illegal-Quashed the finding recorded earlier will operate as resjudicata.

Held: Para 8

The assumption of power to initiate proceedings by the Tehsildar again under Section 122-B of the Act in which the impugned orders dated 19.9.1984 and 30.6.1984 were passed by the respondents no.1 and 2 respectively are wholly without jurisdiction and manifestly erroneous, wrong, bad and illegal and liable to be quashed. In view of the same, the imposition of damages to the extent of Rs.24,675/- imposed arbitrarily by the respondent no.2 without any basis is also unjust and the petitioners are not liable to pay the same.

(Delivered by Hon'ble V.C. Misra, J.)

Heard learned counsel for the parties at length and perused the record.

1. This writ petition has been filed challenging the Judgments and Orders

dated 19.9.1984 and 30.6.1984 passed by respondents no.1 and 2 respectively by which the petitioners were declared to be in illegal possession and were to be dispossessed from the land in question and also to pay a sum of Rs.24,675/- to the Gaon Sabha as damages.

2. The facts of the case in brief are that during consolidation proceedings in district Aligarh Tehsil Hathras the Gaon Sabha of village Lutsan as per the earlier decision of Land Management Committee (in short LMC) after due publication by beat of drum decided to allot plot no.741/1 vested in it and left as bachat land being uneven and uncultivated. No one came forward to take this plot except the petitioners. The said plot was allotted in their name and they invested money as alleged by the petitioners to the tune of Rs.10,000/- and laboured hard to make it even and cultivable. The LMC while allotting the plot imposed a condition that after the expiry of 10 years of period of cultivation the petitioners shall start paying Rs.100/- per year to the Gaon Sabha. A Patta was granted on 10.4.1962 by the LMC exercising its power under Section 195 of the U.P. Zamindari Abolition and Land Reforms Act (in short the Act).

3. In the year 1972, a new Pradhan was elected and he filed a Suit No.514 Gram Sabha Vs. Kali Charan and others before the Magistrate 1st class under Section 209 of the Act, which was dismissed on 31.7.1975 on merits holding the possession and occupation of the petitioners as not illegal in nature but with the consent of the Gaon Sabha. The Gaon Sabha being aggrieved by the said order dated 31.7.1975 filed a First Appeal No.165 of 1974-75 in the Court of Additional Commissioner, Agra which too was dismissed on merits vide order dated 19.2.1976 upholding that the land in question belonged to the petitioners who were in possession on the basis of the resolution dated 10.4.1962 of LMC and that their possession was not of a trespasser as contemplated by Section 209 of the Act. The Gaon Sabha did not prefer any appeal against the said order dated 19.2.1976 of the Additional Commissioner before the Board of Revenue and the Judgments and findings of both the aforesaid Courts became final. The petitioners on legal advice filed an application for fixation of the land revenue before the Sub Divisional Officer, Hathras which fixed the land revenue at the rate of Rs.56.90 paise per annum. In the mean time, another Pradhan was elected and he filed an application before the Sub Divisional Officer to initiate proceedings under Section 122-B of the Act against the petitioners on the ground that they were in illegal possession of the land in question and the Gaon Sabha was suffering a loss. The said proceedings also culminated in favour of the petitioners and vide order dated 21.7.1984 the notice under Section 122-B of the Act was discharged, holding thereby the possession of the petitioners as not unauthorized.

4. During the pendency of the proceedings, said proceedings under Section 122-B of the Act the Lekhpal of the village on 21.3.1984 submitted a report to the Tehsildar under Section 122-B of the Act to the effect that the names of the petitioners was shown in column no.4 of the revenue records and they were in illegal possession of the land in question. The Tehsildar issued a notice to the petitioners. The petitioners contested

the said notice claiming themselves to be in authorized possession which had already been finally held by the revenue Court in the aforesaid regular Suit No.514 and that the present proceedings under Section 122-B of the Act were wrong bad and mala fide in nature. The Tehsildar without giving an opportunity of hearing to the petitioners passed an order dated 30.6.1984 against the petitioners to the effect that they be dispossessed from the land in question and pay damages to the tune of Rs.24,675/- to the Gaon Sabha.

5. Being aggrieved by the said order of the Tehsildar, the petitioners filed a revision before the Additional Collector who too disposed off the same on 19.9.1984 upholding the order of the Tehsildar. Being aggrieved by the order dated 30.6.1984 passed by the Tehsildar and the order dated 19.9.1984 passed by the Additional Collector, the petitioners preferred the present writ petition on the ground that the respondents no.1 and 2 had no jurisdiction to initiate proceedings under Section 122-B of the Act which are summary in nature and could be initiated against those persons only when their possession on the land in question was of a recent origin and without any right or title. That the question of deciding the bona fide right and title was beyond the scope of Section 122-B of the Act. In the present case a clear case of right and title became involved as in the previous proceedings of Suit No.514 before the Court of law, it was held that the petitioners were not in illegal possession and the findings would act as res-judicata thereby debarring the respondents from dispossessing the petitioners from the land in question by a subsequent summary proceedings under Section 122-B of the Act.

6. After having heard the learned counsel for the parties at length and perusal of the record, I find that the petitioners had been validly granted a Patta by the said LMC on 10.4.1962 exercising its powers under Section 195 of the Act, which does not come under the mischief of Section 209 of the Act. The relevant portion of Section 195 of the Act which as it stood on the date of the grant of Patta, reads as under:-

195. The Gaon Sabha shall have the right to admit any person as sirdar to any land (other than land falling in any of the classes mentioned in Section 132) where-

(a) the land is vacant land,

(b) the land is vested in the Gaon Sabha under Section 117 or

(c) the land has come into the possession of Gaon Sabha under Section 194 or under any other provision of this Act.

The relevant portion of Section 209 of the Act is quoted below:-

A person taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force, and –

(b) where the land does not form part of the holding of a bhumidar, sirdar or asami without consent of the Gaon Sabha, shall be liable to ejectment on the suit of the Gaon Sabha, or the Collector and shall also be liable to pay damages.

In the said suit No.514 issue no.3 was framed as, "whether the defendants are in possession without the consent of the Gaon Sabha and against the provisions of law?" This issue was decided in negative on the basis of evidence placed on record by the parties with a finding

that the Pradhan did not produce the proceedings book of the relevant year inspite of it being in his possession. As the suit was dismissed holding that the defendants-petitioners were not liable to ejectment, and findings being confirmed in Appeal No.165 of 1974, which were not challenged subsequently before the higher Court it became final and binding between the parties. Even in the subsequent proceedings initiated under Section 122-B of the Act by the Pradhan before the Sub Divisional Officer the notice was discharged and the proceedings were dropped by him as it could not be initiated against the petitioners.

7. The proceedings initiated subsequently before the Tehsildar again under Section 122-B of the Act in which the impugned order dated 30.6.1984 was passed by the Tehsildar against the petitioners was in the teeth of the aforesaid Judgments passed in the Suit No.514 and confirmed in Appeal No.165 of 1974 and the question of the validity of the possession of the petitioners could not be re-agitated and looked into and decided by the revenue authorities as the principle of res judicata applied. The revisional Court also erred in upholding the order of Tehsildar The whole process of reasoning given by the revisional Court also stands vitiated in law. More so, the provisions of Section 122-B of the Act are not applicable in the present case as at the time when the Patta was granted by the LMC on 10.4.1962 in favour of the petitioners. Section 122-B of the Act had not seen the light of the day. It came into effect only from 3.6.1981 by U.P. Act No.20 of 1972. The relevant portion of Section 122-B of the Act is quoted below:-

122-B. Powers of the Land Management Committee and the Collector.-

(1) Where any property vested under the provisions of this Act in a Gaon Sabha or a local authority is damaged or misappropriated or where any Gaon Sasbha or local authority entitled to take or retain possession of any land under the provisions of this Act and such land is occupied otherwise than in accordance with the provisions of this Act, the Land Management Committee or Local Authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated or any person is in occupation of any land, referred to in that sub-section, in contravention of the provisions of this Act, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation as mentioned in such notice be not recovered from him or, as the case may be, why he should not be evicted from such land.

(3).....

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2) he shall discharge the notice.

(4-A) Any person aggrieved by the order of the Assistant Collector under sub-section (3) or sub-section (4) may, within thirty days from the date of such order prefer, a revision before the Collector on the grounds mentioned in clause (a) to (e) of Section 333.

(4-E) No such suit as is referred to in sub-section (4-D) shall lie against an order of the Assistant Collector if a revision is preferred to the Collector under sub-section (4-A).

It is also found that the subsequent proceedings in which the impugned orders were passed had been initiated by the Pradhan himself individually and not by the LMC as no such resolution was duly passed by the LMC as is required by it to inform the Assistant Collector concerned in the manner prescribed, which is only by way of passing a resolution, the fact that no resolution was passed by LMC is apparent from the statement of the Lekhpal contained in the Judgment of the Assistant Collector dated 31.7.1975 annexure-4 to the application/affidavit of the petitioners dated 10.10.2002, which reads as follows:-

"प्रतिवादीगण के विरूध यह मुकदमा दायर करने के लिये कोई प्रस्ताव पेश नही हुआ ।"

8. The assumption of power to initiate proceedings by the Tehsildar again under Section 122-B of the Act in which the impugned orders dated 19.9.1984 and 30.6.1984 were passed by the respondents no.1 and 2 respectively are wholly without jurisdiction and manifestly erroneous, wrong, bad and illegal and liable to be quashed. In view of the same, the imposition of damages to the extent of Rs.24,675/- imposed arbitrarily by the respondent no.2 without any basis is also unjust and the petitioners are not liable to pay the same.

In view of the aforesaid facts, circumstances, and observations made hereinabove, the impugned orders dated 19.9.1984 and 30.6.1984 passed by respondents no.1 and 2 respectively are hereby quashed. The writ petition is allowed with costs throughout.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.7.2005

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

Civil Misc. Writ Petition No. 48682 of 2005

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

Counsel for the Petitioner:
Sri S.R. Singh

Counsel for the Respondents:
Chief Standing Counsel
Sri V.K. Singh (S.C.)
(Gaon Sabha)

U.P. Zamindari Abolition and land Reform Act- Section 122-B (4-F)- Settlement of Gaon Sabha Land- petitioner alleging himself to be scheduled cost candidate- on basis of compromise the village pradhan-given the land in question for construction of 'Barat Ghar'- No material produced regarding plea of agricultural labour-the man possessing financial status to construct a 'Barat Ghar' cannot be agricultural labour- compromise between the petitioner and the Gaon Panchayat- unsustainable-Court expressed its great concern- D.M.

concerned to initiate appropriate proceeding against the concerned revenue officials.

Held-Para 14, 15,16

The property in question vests in Gaon Panchayat and is not a private property of Gram Pradhan. Gram Pradhan is only custodian of such property. Any property vested in Gaon Sabha is the property of entire village community. The order dated 2.2.2005 by which petitioner was permitted to make construction of Barat Ghar on the basis of compromise between the petitioner and Gram Pradhan on the property of Gaon Panchayat is wholly unsustainable in law. This Court is also of the opinion that if a person is having capacity to construct Barat Ghar, he cannot be considered to be a landless agricultural labourer under the U.P.Z.A. & L.R. Act and is a person of sufficient means.

For admission of a person as a Bhamidhar under Section 122-B(4-F) of the Act, the first condition to be satisfied is that person must be an agricultural labourer. In order to prove that he is an agricultural labourer, applicant claiming benefit under Section 122-B(4-B) of the Act is required to prove that his main source of livelihood is agricultural labour. For this purpose he shall also that have to prove the facts giving details such as where and in whose field he is working as an agricultural labour as well as his total income received from working as an agricultural labour and other relevant facts. Second important factum required to be proved is that the main source of livelihood of a person claiming benefit under Section 122-B(4-F) of the U.P.Z.A. & L.R. Act is agriculture labour.

In the present case neither there is any evidence on record to show that petitioner was ever engaged or working as an agricultural labour or his main source of livelihood was income from agricultural labour. The report of the Revenue Inspector dated 5.7.2003 does not mention petitioner as an agricultural labourer on the relevant date could not be settled in his favour under Section 122-B(4-F) of the U.P.Z.A. & L.R. Act.

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

1. This writ petition is directed against the judgment and order date 28.9.2004 of Assistant Collector, Bharthana, District Etawah rejecting petitioner's application refusing to provide benefit of Section 122-B(4-F) of the U.P.Z.A. & L.R. Act (hereinafter referred to as the Act) in allotment of land involved in Suit. A revision preferred by petitioner against the said order was also rejected by the judgment dated 14.3.2005.

2. Heard learned counsel for the petitioner, learned Standing Counsel as well as learned counsel for Gaon Sabha.

3. Learned counsel for the petitioner urged that the order passed by the authorities below are vitiated in law. As petitioner was an landless agricultural lobourer belonging to the Scheduled Caste in actual possession of the land in dispute on 1st May, 2002, he will acquir rights under Section 122-B(4-F) of the Act. He further urged that the findings of the authorities below to the contrary are unsustainable in law and the impugned orders were not passed in accordance with law.

4. In reply to the same, learned Standing Counsel urged that the orders passed by the authorities below were passed in accordance with law. Petitioner cannot get any right under Section 122-B(4-F) of the Act.

5. In rejoinder learned counsel for the petitioner referred judgment dated 2.2.2005 of the Sub Divisional Officer, Bharthana, District Etawah passed on the basis of some compromise entered into between Gram Pradhan and petitioner and urged that under the compromise land in dispute, total area .37acre, was settled in favour of petitioner for construction of Barat Ghar. He also urged that at least petitioner may be given benefit of Section 122-B(4-F) of the Act for that part of the land, out of total area of land .74 acre. Considered the arguments of learned counsel for the petitioner and learned Standing Counsel.

6. Benefit of Section 122-B(4-F) of the Act is available to a person who is landless agriculture labourer belonging to the category mentioned therein. Section 122-B(4-F) of the Act being reproduced below for ready reference:-

Section 122-B(4-F) of the U.P.Z.A. & L.R. Act

"122-B(4-F) Notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to a Scheduled Caste or Schedule Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mention in Section 132) having occupied it from before [May 1, 2002], and the land so occupied together with land, if any, held by him from before the said date as Bhumidhar, sirdar or asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the collector against such labourer, and it shall be deemed that he has admitted as bhumidhar with non-transferable rights of that land under Section 195.

Explanation-the expression 'agricultural labourer' shall have the meaning assigned to it in section 198"

Explanation (1) & (2) to Section 198 of the U.P.Z.A. & L.R. Act defines landless agricultural labourer, same are being quoted below:-

"Explanation (1) 'landless' refers to a person who or whose spouse or minor children held no land as bhumidhar or asami and also held no land as such within two years immediately preceding the date of allotment; and

Explanation (2) 'agricultural labourer' means a person whose main source of livelihood is agricultural labour."

7. From perusal of the record and finding recorded by the authorities below , it is clear that the land in Plot Nos. 2035/1, area .12 acre, 2037/2, area .12 acre, 2037, area .14 acre, 2039/3, area .34 acre and 2039/4, area .02 acre total .74 acre were recorded as Bhumidhari land in the name of petitioner's father Sone Lal. It is also borne out that during consolidation proceeding by the order dated 12.12.2002 passed by the Deputy Director, Consolidation, Etawah petitioner's father allotted other land in lieu of aforesaid plots and aforesaid plots were reserved as Bachat land and vested in the Gaon Panchayat. The land in dispute was not Bachat land and vested in Gaon Panchayat on relevant date and petitioner could not be in possession of the land in dispute against the law on the revelant date i.e. 1st May, 2002.

8. In view of the above, petitioner cannot claim any benefit of Section 122-B(4-F) of the Act of the Bachat land on 1st May, 2002, as the land in dispute was not in possession of petitioner on the relevant date.

9. It is clear from the record that in order to grab the property of Gaon Sabha, some collusive proceedings appears to have been initiated by the petitioner in collusion with the revenue authorities on the basis of the manipulated report of Revenue Inspector.

10. The authorities below rightly considered the entire material and rightly rejected petitioner's claim in land in dispute on the ground that benefit of Section 122-B(4-F) of the Act could not be granted to the petitioner. The Revisional authorities rightly affirmed said order.

11. The another aspect of the matter is that petitioner tried to grab the land of Gaon Panchayat in collusion with the Gram Pradhan and some concerned revenue authorities. The property of Gaon Panchayat is the property of the entire village community and the Gram Pradhan and concerned Land Management Committee are only custodian of such property and are authorized to manage the same in accordance with the relevant law and procedure prescribed.

12. Aims and object of the U.P.Z.A. & L.R. Act clearly shows intention of the legislature while enacting U.P.Z.A. & L.R. Act in the matter of properties vasted in Gaon Sabha. Relevant portion of Aims and Object of U.P.Z.A. & L.R. Act is being quoted below:-

"All lands of common utility, such as abadi sites, pathways, waste-lands, forests, fisheries, public well, tanks and water channels, will be vested in the village community or the Gaon Samaj consisting the all the residents of the village as well as the pahikasht cultivators. The Gaon Panchayat acting on behalf of the village community has been interested with wide powers of land management. This measure which makes the village a small republic and a co-operative community is intended to facilitate economic and social development and to encourage the growth of social responsibility and community spirit."

13. From perusal of the order dated 2.2.2002, passed by the Sub Divisional Officer, Bharthana it transpires that on the basis of some compromise entered into between the Gram Pradhan and the petitioner, this order was passed permitting petitioner to construct Barat Ghar on plots aforementioned. There is nothing on record to Barat Ghar on plots aforementioned. There is nothing on record to show that compromise was entered into between the petitioner and the Gram Pradhan with prior permission of the contempt authority by any resolution of the Land Management Committee.

14. The property in question vests in Gaon Panchayat and is not a private property of Gram Pradhan. Gram Pradhan is only custodian of such property. Any property vested in Gaon Sabha is the property of entire village community. The order dated 2.2.2005 by which petitioner was permitted to make construction of Barat Ghar on the basis of compromise between the petitioner and Gram Pradhan

on the property of Gaon Panchayat is wholly unsustainable in law. This Court is also of the opinion that if a person is having capacity to construct Barat Ghar, he cannot be considered to be a landless agricultural labourer under the U.P.Z.A. & L.R. Act and is a person of sufficient means.

15. For admission of a person as a Bhamidhar under Section 122-B(4-F) of the Act, the first condition to be satisfied is that person must be an agricultural labourer. In order to prove that he is an agricultural labourer, applicant claiming benefit under Section 122-B(4-B) of the Act is required to prove that his main source of livelihood is agricultural labour. For this purpose he shall also that have to prove the facts giving details such as where and in whose field he is working as an agricultural labour as well as his total income received from working as an agricultural labour and other relevant facts. Second important factum required to be proved is that the main source of livelihood of a person claiming benefit under Section 122-B(4-F) of the U.P.Z.A. & L.R. Act is agriculture labour.

16. In the present case neither there is any evidence on record to show that petitioner was ever engaged or working as an agricultural labour or his main source of livelihood was income from agricultural labour. The report of the Revenue Inspector dated 5.7.2003 does not mention petitioner as an agricultural labourer on the relevant date could not be settled in his favour under Section 122-B(4-F) of the U.P.Z.A. & L.R. Act.

17. In view of the above facts where petitioner tried to usurp the property of Gaon Panchayat, this court is of the view that appropriate proceeding be initiated against the petitioner, Gram Pradhan and the collusion order were passed in favour of petitioner. Consequently, the District Magistrate, Etawah shall initiated appropriate proceedings against the concerned revenue official/inspector alongwith Gram Pradhan and the petitioner immediately.

With above directions, writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Writ Petition No. 50378 of 2005

Mahesh Chandra Gautam ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam
Sri Satya Prakash
Sri Amit Srivastava

Counsel for the Respondents:
Sri Suresh Singh
S.C.

Constitution of India, Art. 226-Service law-Right of deputanist-petitioner, send on deputation-from Police department to the Trade Tax Department-for period of 3 years-the Commissioner Trade Tax by impugned Order-repatriated back to Police Department-challenged on ground that before expiry of period of deputation-the Commission Trade Tax has no authority-held-in absence of Rules or Regulations in this regard the borrowing department has every jurisdiction it can not be saddled with surplus staff.

Held: Para 9 & 10

There is another aspect of the matter. The borrowing department cannot be saddled with surplus staff and if their services are not required, it is always open to the borrowing department to sent the employee back to the parent department. In my view, the borrowing department was competent to pass the orders repatriating the petitioners back to their parent department.

In view of the aforesaid and in the absence of any Rules or Regulations, I am of the opinion that the Trade Tax Department was competent to repatriate the petitioners back to the parent department. The borrowing department had complete and full jurisdiction to pass the order repatriating the petitioners to their parent department.

Case law discussed:

1981 LIC-1057 distinguished
199 (3) AWC 2414
1981 LABIC 1057
2005 (5) SCC-362
2002 (4) AWC-3067 (L.B.)

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

1. Heard Sri Vijay Gautam, Sri Satya Prakash and Sri Amit Srivastava, the learned counsels for the petitioners and Sri Suresh Singh, the learned standing counsel appearing for the respondents.

2. The petitioners have challenged the order dated 8.7.2005 issued by the Joint Commissioner, Trade Tax, whereby the petitioners have been repatriated back to their parent department, i.e., the Police Department. It transpires that on the request of the Trade Tax Department, the petitioners were sent on deputation to the Trade Tax Department for a period of three years. It is alleged that the period of three years has not yet expired and, by the impugned order, the period of deputation has been cut short and the petitioners have been repatriated back to their parent department. The ground of attack is, that the Joint Commissioner, Trade Tax has no power to issue the order of repatriation, inasmuch as, only the parent department could recall the petitioners. The Joint Commissioner, Trade Tax has the power and authority to transfer the petitioners in the Trade Tax Department itself, but could not transfer or repatriate the petitioners back to the parent department and that the parent department could alone issue the order of repatriation. Further, the period of deputation had not come to an end, therefore, without canceling the original order, the present order of repatriation could not have been issued. The learned counsel further submitted that the petitioners' lien is still with the Police Department and, therefore, the order of repatriation could only be passed by the Police Department and not by the Trade Tax Department. In support of their contention, the learned counsels for the petitioners have relied upon a Full Bench decision of the Punjab and Haryana High Court, in the case of **Dr. Bhagat Singh vs. The Vice Chancellor, Punjab University, Chandigarh and others, 1981 L.I.C.1057**, wherein it was held that a Government Officer who was appointed as a Vice Chancellor of a University for a period of three years and sent on deputation could not be recalled before the expiry of his term.

3. The learned counsels for the petitioners further submitted that the Trade Tax Department should have written to the parent department to

repatriate the petitioners rather than issue the order of repatriation themselves. Since the Trade Tax Department had no jurisdiction to issue the impugned order, the impugned order was liable to be quashed.

4. On the other hand, the learned standing counsel submitted that since the petitioners themselves admitted that they had no lien on any post in the Trade Tax Department and that the lien is still with their parent department, in that event they cannot be aggrieved by the order of repatriation.

5. The learned Standing Counsel further submitted that it is open to the Trade Tax Department or to Police Department to cut short the period and repatriate the petitioners. The Standing Counsel further submitted that it is open to both the department to pass the order of repatriation. In the present case, the petitioners were found to be surplus and were not required in the Trade Tax department. On the basis of the letter of the Additional Commissioner, the Trade Tax Commissioner, Lucknow issued an order on 7.7.2005 repatriating the petitioners to the Police Department. Based on the order of the Commissioner, the impugned order was issued by the Joint Commissioner. The Standing Counsel further stated that on the basis of the aforesaid orders, the Additional Director General of Police, Uttar Pradesh, Lucknow has accepted the repatriation of the petitioners back to the Police Department and had issued necessary directions to the authorities to post the petitioners at different places. The submission of the learned standing counsel is, that even assuming that the Trade Tax Department had no authority to issue the said order, nonetheless, the order has been accepted by the Police Department and therefore it does not lie in the mouth of the petitioner to contend that they are liable to continue to serve the Trade Tax Department till the period of deputation.

6. It my view, the contentions raised by the learned counsels for the petitioners cannot be accepted. It is perogative of the employer to call back its employees sent on deputation. The employee, who has been sent on deputation and in the present case, namely, petitioners have no right or lien on the deputation post. Even if period has been cut short, the petitioners have no right or claim on that post and they cannot stand before this Court and submit that they are entitled to continue on that post till the original period of deputation. In **Hari Om Tripathi vs. Nideshak, Rajya Nagar Vikas Adhikaram and another, 1999 (3) A.W.C. 2414,** this Court held that the employee, who was sent on deputation could be reverted back to the parent department prior to the expiry of the stipulated period, since the employee cannot claim any right on the deputation post.

7. The learned Single Judge further distinguished the case of **Dr. Bhagat Singh vs. The Vice Chancellor, Punjab University, Chandigarh and others, 1981 LABIC 1057** and held that the facts and circumstances in the case of Dr. Bhagat Singh were totally different and could not be equated with the facts of the petitioner. I am in complete agreement with the aforesaid decision of this Court and for the aforesaid reason, the decision cited by the learned counsel for the petitioner, i.e., namely, the case of Bhagat Singh is clearly distinguishable and is not

applicable to the facts and circumstances of the present case.

8. In **Kunal Nanda vs. Union of India and another, 2000 (5) SCC 362**, the Supreme Court held that a deputationist can always and at any time be repatriated to his parent department either at the instance of the borrowing Department or on the instance of the lending department. The Supreme Court further held that incumbent who had which has been posted had no vested right to continue on deputation or get absorbed in borrowing department. The Supreme Court held-

"On the legal submissions also made there are no merits whatsoever. It is well settled that unless the claim of the deputationist for a permanent absorption in the department where he works on deputation is based upon any statutory rule, regulation or order having the force of law, a deputationist cannot assert and succeed in any such claim for absorption. The basic principle underlying deputation itself is that the person concerned can always and at any time be repatriated to his parent department to serve in his substantive position therein at the instance of either of the departments and there is no vested right in such a person to continue for long on deputation or get absorbed in the department to which he had gone on deputation."

Similar view was taken by a Division Bench of this Court in **Dr. O.P. Singh vs. State of U.P. and others, 2002 (4) AWC 3067 (LB).**

9. There is another aspect of the matter. The borrowing department cannot be saddled with surplus staff and if their services are not required, it is always open to the borrowing department to sent the employee back to the parent department. In my view, the borrowing department was competent to pass the orders repatriating the petitioners back to their parent department.

10. In view of the aforesaid and in the absence of any Rules or Regulations, I am of the opinion that the Trade Tax Department was competent to repatriate the petitioners back to the parent department. The borrowing department had complete and full jurisdiction to pass the order repatriating the petitioners to their parent department.

11. Consequently, I do not find error in the impugned order. The writ petitions fail and are dismissed. In the circumstances of the case, there shall be no order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2005

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

Special Appeal No. 884 of 2005

Mohd. Arif ...Petitioner/Appellant
Versus
M/s Mirza Glass Works and others ...Respondents

Counsel for the Petitioner:
Sri Y.S. Saxena
Sri D.K. Kulshreshtha

Counsel for the Respondents:
Sri V. Sahai
C.S.C.

High Court Rules-Chapter VIII Rule-5High Court Rules-Chapter VIII Rule-5 readwith Payment of Wages Act 1936-S-15 and 18-Special Appeal-against the judgment passed by Single Judge-petition arises out against Order passed by the Prescribed Authority under Section 15 of the Payment of wages Act 1936-(withing the meaning of tribunal)-entrested with the Power of Civil Court-held-appeal barred-not maintainable.

Held: Para 5 & 6

From a conjoint reading of Section 15 (1) with Section 18 of the Payment of Wages Act, 1936, it is clear that the authority empowered to decide claims arising out of deduction from wages is entrusted all the powers of Civil Court under the Code of Civil Procedure for the purposes of taking evidence and for attendance and compelling the protection of documents. Thus the said authority has trapping of Court and is a tribunal. Any order, thus, passed by authority under Section 15 of the Payment of Wages Act, 1936 is an order passed by tribunal. The special appeal being barred against an order of one Judge exercising jurisdiction under Article 226/227 of the Constitution arising out of a writ petition from an order of tribunal, the preliminary objection raised by counsel for the respondents has substance.

The appeal is barred under Chapter VIII Rule 5 of the Rules of the Court and is dismissed as not maintainable.

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

1. A preliminary objection has been raised by counsel for the respondents that this special appeal is not maintainable in view of the fact that writ petition was filed against an order passed by Prescribed Authority against the appellant under the Payment of Wages Act, 1936.

2. Chapter VIII Rule 5 of the Rules of the Court provides that special appeal shall not lie from a judgment of learned single Judge passed in exercise of jurisdiction conferred by Article 226/227 of the Constitution in respect of any judgment, or order or award of a tribunal, Court or statutory arbitrator. Chapter VIII Rule 5 of the Rules of the Court is extracted below:-

[**5 Special appeal.**- *An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its of Superintendence or in the exercise of criminal jurisdiction [or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award (a) of a tribunal Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any Officer or authority, made or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge.]"*

3. The question for consideration is as to whether the Prescribed Authority under the Payment of Wages Act, 1936 is a tribunal. Section 15 (1) of the Payment of Wages Act, 1936 provides that the State government may, by notification in the Official Gazette, appoint the Presiding

Officer of any Labour Court or Industrial Tribunal, or under any corresponding law relating to the investigation and settlement of industrial disputes or any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a Civil Court to be authority to hear and decide all claims. Section 15 (1) of the Payment of Wages Act, 1936 is extracted below:-

"15 Claims arising out of deductions from wages or delay in payment of wages and penalty for mallclous or vexatious claims.- *(1) The State Government may, by notification in the Official Gazette, appoint [a presiding officer of any Labour Court or Industrial Tribunal, constituted under the Industrial Disputes Act, 1947 (14 of 1947), or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the State or] any Commissioner for Workmen's Compensation or other office with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of wages, [of persons employed or paid in that area, including all matters, incidental to such claims:*

……"

4. Section 18 provides for powers of authorities appointed under Section 15 which is extracted below:-

"**18.** ***Powers of authorities appointed under Section 15-*** *Every authority appointed under sub-section (1) of section 15 shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents, and every such authority shall be deemed to be a Civil Court for all the purposes of section 195 and of [Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974.]"*

5. From a conjoint reading of Section 15 (1) with Section 18 of the Payment of Wages Act, 1936, it is clear that the authority empowered to decide claims arising out of deduction from wages is entrusted all the powers of Civil Court under the Code of Civil Procedure for the purposes of taking evidence and for attendance and compelling the protection of documents. Thus the said authority has trapping of Court and is a tribunal. Any order, thus, passed by authority under Section 15 of the Payment of Wages Act, 1936 is an order passed by tribunal. The special appeal being barred against an order of one Judge exercising jurisdiction under Article 226/227 of the Constitution arising out of a writ petition from an order of tribunal, the preliminary objection raised by counsel for the respondents has substance.

6. The appeal is barred under Chapter VIII Rule 5 of the Rules of the Court and is dismissed as not maintainable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2005

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No.47817 of 2005

Mohammad Ehteshamul Hasan
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Jai Prakash Rai

Counsel for the Respondents:
Sri K.C. Sinha
Sri D.S. Shukla
Sri V.K. Singh
S.C.

Constitution of India, Art 226-Sevice Law- Right to appointment-vacancies of Tuberculosis Health Visitors-advertised on 2.3.05 prescribing the essential qualification-Intermediate with science-after interview- by subsequent advertisement the requisite qualification prescribed Intermediate with Biology-challenged on the ground once the petitioner participated in the interview as per earlier advertisement-it cannot be denied by the change of requisite qualification–held-the subsequent advertisement issued as per guidelines of State Govt.- in absence of essential qualification petitioner has no right to challenge the subsequent advertisement.

Held: Para 6

Considering the aforesaid facts and circumstances and keeping in view that the subsequent advertisement has been issued on the basis on the guidelines issued by the State Government and also considering that the petitioner does not posses the essential qualification for appointment on the post of T.B.H.V. even according to the guidelines of the Central Government as have been relied by the petitioner and also keeping in view the law laid down by the Supreme court in the aforesaid two cases relied upon by the learned counsel for the respondents, the prayer made in this writ petition is not liable to be granted.

Case law discussed:
J.T. 1991 (2) SC-380
1994 (6) SCC-151

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

1. Heard learned counsel for the petitioner as well as learned Standing Counsel appearing for the State-respondents no. 1,2 and 3, Sri V.K. Singh, learned counsel appearing for respondent no. 4 and Sri D.S. Shukla, learned Additional Standing Counsel for the Union of India appearing for respondent no. 5.

2. The facts in brief are that in response to an advertisement issued on 2.3.2005 by respondent no. 4, District Tuberculosis Officer as Member Secretary of the District Tuberculosis Control Society, Allahabad inviting applications for filling up the post of Tuberculosis Health Visitor (T.B.H.V.) the petitioner had applied. The qualification as mentioned in the said advertisement was that the candidate should have passed Intermediate with Science. It is not the case of the petitioner that in response to the said application filed by the petitioner he had been call for interview or any other action has been taken with regard to his selection. However, a fresh advertisement was issued on 14.6.2005 again inviting applications for the post of T.B.H.V. in the subsequent advertisement the essential qualification for appointment on the post of T.B.H.V. was Intermediate with

Biology. In this advertisement it was also provided that those candidates who have already applied in response to the earlier advertisement need not apply afresh and their earlier applications shall be considered. According to the petitioner ha has passed Intermediate with Science but not with Biology as a subject. The petitioner contends that since he was eligible on the basis of the qualification mentioned in the first advertisement dated 2.3.2005, his application ought to have been considered in response to the subsequent advertisement also and he should have been called for interview.

3. The submission of the learned counsel for the petitioner is that as per the guidelines issued by the Government of India for making appointments on certain posts (filed as Annexure-S.A.3 to the supplementary affidavit) the essential qualification for the post of T.B.H.V. was only Intermediate with Science and experience of working as MPW/LHV/ANM. He thus contends that since the guidelines do not specify that the candidates should have biology as a subject in Intermediate, such condition as mentioned in the subsequent advertisement is illegal. This writ petition has thus been filed with the subsequent advertisement dated 14.6.2005 may be quashed and the petitioner may be considered for appointment to the post of T.B.H.V.

4. Learned Standing Counsel appearing for the State-respondents has, on instruction received from his client, produced before me the circular dated 2.8.2002 issued by the State Government to all the District tuberculosis Control Society wherein it has been provided that the essential qualification for the post of T.B.H.V. is Intermediate Science with biology as a subject. It is not disputed b the petitioner that the society is controlled by the State Government and funds are provided by it and that the members of the society are all functionaries of the State Government. Thus, the subsequent advertisement issued in consonance with the direction given by the State Government cannot be said to be illegal. Even as per the own case of the petitioner the essential qualification for appointment for the post of T.B.H.V. as per the guidelines issued by the Central Government was that a candidate should be Intermediate with Science and experience of working as MPW/LHV/ANM. It is not the case of the petitioner that he possesses such qualification. According to him he is only intermediate with Science. It is nowhere stated that he has experience as prescribed in the guidelines of the Central Government.

5. Sri V.K. Singh, learned counsel appearing for the contesting respondent no. 4 has further submitted that even after selection for appointment of a particular post the candidate does not acquire any indefeasible right to be appointment. Reliance in this regard has been placed on two decisions of the Apex Court namely, **Shankarasan Dash Vs. Union of India JT 1991 (2) S.C. 380 and State of M.P. and others Vs. Raghuveer Singh Yadav and others** (1994) 6 S.C.C. 151. As such, it has been contended that in such view of the matter, the petitioner who had merely filed his application for being given appointment does not acquire any right to be appointment or be considered for appointment.

6. Considering the aforesaid facts and circumstances and keeping in view that the subsequent advertisement has been issued on the basis on the guidelines issued by the State Government and also considering that the petitioner does not posses the essential qualification for appointment on the post of T.B.H.V. even according to the guidelines of the Central Government as have been relied by the petitioner and also keeping in view the law laid down by the Supreme court in the aforesaid two cases relied upon by the learned counsel for the respondents, the prayer made in this writ petition is not liable to be granted.

7. The writ petition lacks merit and is, accordingly, dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 7789 of 2004

Naresh Chandra Sharma ...Petitioner
Versus
State of U.P. & another ..Opposite parties

Counsel for the Petitioner:
Sri M.D. Singh "Shekhar"

Counsel for the Opposite Parties:
Sri Pushoendra Singh
S.C.

U.P. Fundamental Rules- Rule-56 (c) Compulsory Retirement-mere acceptance of the report of screening committee-by endorsement of word "Anumodit" cannot be termed as application of mind-the District Magistrate not exercised its jurisdiction strict in accordance with the Rule 56(6)-order compulsory retirement of petitioner liable to quashed.
Held: Para-11 and 15

From the records of the proceedings as aforesaid this Court is satisfied that there has been non application of mind by the District Magistrate with regards to the character roll entries of the petitioner as well as to the fact as to whether the nature of entries in the character roll was such so as to come to the conclusion that the petitioner was a fit person to be compulsorily retired. The District Magistrate has only approved the proposal of the Screening Committee to the effect that the petitioner may be compulsorily retired. The recommendation of the Screening Committee is only an opinion. It is the satisfaction of the appointing authority which should determine as to whether powers under Section 56 (c) of the fundamental rules are to be exercised. Such a satisfaction must be arrived at after due application of mind to the service record of concerned government servant. The Appointing authority has to decide that the employee has become a dead wood and it is in public interest to retire him compulsorily. Mere acceptance of the report of Screening Committee in the facts of the case by endorsement of the word 'Anumodit' by the appointing authority (District Magistrate) cannot beheld to a decision to compulsorily retire the petitioner after due application of mind as required under Fundamental Rules 56 (c).

With reference to aforesaid legal principles enunciated, this Court is satisfied, that the facts of the present case the order of compulsorily retirement passed by the District Magistrate dated 12.1.2004 is legally not justified as he as not exercised his jurisdiction in accordance with the Rule 56(c) and, therefore, is hereby quashed.
Case law discussed:
2005 (5) ESC-2431

1993 HVD (Ahd) Vol.II-131

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

1. Heard Sri M.D. Singh 'Shekhar' on behalf of the petitioner Standing Counsel on behalf of respondents.

2. This writ petition is directed against an order dated 12.1.2004 passed by the District Magistrate, Ghaziabad (the appointing authority of the petitioner) in exercise of powers under fundamental rules 56 (c) as contained in final in book Vol. 2 part 2 to 4 as amended upto date, compulsorily retiring the petitioner from service w.e.f. the date of the order.

3. On behalf of the petitioner it has been stated that except for adverse entries awarded for the year 2000-01 and of the year 2002-03 against which Appeals filed by the petitioner wee pending consideration all other annual entries of the petitioner wee 'Utkarsh' or 'Ati Uttam'. It is therefore submitted that the petitioner cannot be termed as a dead wood to be chopped of before he attains the age of superannuation nor can it be said that it is in public interest to retire the petitioner. It is stated that the adverse entries of the year 2000-01 and 2002-03 cannot be taken into consideration. In the alternative it is submitted that the Screening Committee constituted for the screening of the petitioner was not inconformity with statutory rules as it did not include the appointing authority. Lastly it is pointed out that the District Magistrate has not applied his mind to the recommendation of the Screening Committee and has not recorded his satisfaction as required under fundamental rules 56(c) for compulsory retiring the petitioner.

4. On behalf of the respondents a counter affidavit has been filed and it has been stated that the petitioner was awarded adverse entry in the year 1998-99 and 1999-00 his integrity was withheld in the year 2000-01 besides these there are adverse entries were recorded for the years 2000,2001 and 2003. It has been stated that the Appeal filed by the petitioner against the adverse entries have been rejected by the competent authority. The character roll of the petitioner was such that a conclusion was arrived at by the disciplinary authority for compulsorily retiring the petitioner. The decision cannot be said to be arbitrary nor any interference is called for under Article 226 of the Constitution of India inasmuch as an order of compulsory retirement is not a punishment, it implies no stigma nor suggestion of misbehaviors, reference AIR 1992 S.C. Page 1020(Baikunth Nath Das Vs. Chief Medical Officer).

5. One of the basic issues to be decided in the petition is as to whether the Screening Committee was constituted in accordance with the provisions applicable and further as to whether the recommendations of the Screening Committee were considered by the District Magistrate after due application of mind to the service record of the petitioner before taking a decision to compulsorily retire the petitioner.

6. On records of the present writ petition is a Government Notification No. 5/1/1975-Karmik-1 dated 26th August, 1975, providing for the constitution of Screening Committee. Relevant Clause 2 of the same which is applicable in the case of petitioner reads as follows:

"(2) Aise Karmchariyon Jinke Niyukti Pradhikari Rajyapal Se Bhin Hain, Ki

Screening Jin Adhikariyon Se Niyukti Pradhikari Rajyapal Se Bhinn Adhikari Hain, Unki Screening Nimn Prakash Gathit Screening Committee Dwara Ki Jayengi:-

(1) NiyuktiPradhikari……Adhyaksh.

(2) Niyukti Pradhikari Dwara Manonit Do Varishtha Adhikari…..Sadasya.

Uprokt Committeeyon Ki Sanstuti Ka Karyanvan Niyukti Pradhikariyon Ke Stur Par Hi Hoga.

Ukt Dono Screening Committeeyon Ka Koi Vidhik Status Nahin Hoga, Na Ve Kewal Sambandhit Niyukti Pradhikariyon Ke Samadhan Mein Sahayta Ke Liye Hongi, Va Unki Karyavahiyan Bhi Unaupcharik Hongi, Va Unke Gathan Mein Kisi Anaupcharikta Ke Hote Hue Bhi Niyukti pradhikari Swa Vivek Se Upyukt Nirnnay Le Sakenga."

7. Along with counter affidavit filed on behalf of the respondents the rport of the Screening Committee has been enclosed as Annexure CA-8. From the report so enclosed it is apparent that it comprised of three members only:

(1) J.B. Singh, Deputy Collector, Ghazibad.

(2) S.B. Tewari, Diputy Collector, Garh Mukteshwar.

(3) Rakesh Chandra, Additional District Magistrate(Admn.), Ghaziabad.

8. It is thus apparent that Screening Committee did not include the District Magistrate as one of its members. The report of the said Screening Committee is so far as it pertain to the etitioner Shri Naresh Chandra Sharma reads as follows:

"Shri Naresh Chandra Sharma (Sa.Ra.Ka.) Ki Do Varshik Pravishtiyan Pratikool Tatha Do Pratikool Pravishthiyan Vibhagiya Ke Antargat Nirgat Ki Gayin Hain.

Asharam (Sa.Ra.Ka.) Va Shri Naresh Chandra Sharma (Sa.Ra.Ka.) Ko Anivarya Sewanivrit Kiye Jane Ki Sanstuti Ki Jati Hai.

On the said report dated 27.12.2005 there is an endorsement which reads as fallows:

"Kya Shri Sharma Va Shri Asharam Ke Pratikool Pravishtiyon Ke Viruddh Pratyavedan Lambit To Nahin Hai.

Sd/-27.12.2005"

9. On the next page of the report is another note addressed to the Additional District Magistrate (Admn.) submitted by the Bhulekh Adhikari dated 3.1.2004 which reads as follows:

"Apar Zila Adhikari(Pra.)

Committee Ki Karyavahi Tippri Sankhya 3 Per Apne Aadesh Ka Avlokan Karne Ka Kasht Karen.

Shri Naresh Chandra Sharma, (Sa.Ra.Ka.) Ka Varsh 2000 Mein Zila Adhikari Mahodaya Dwara Di Gai Pratikool Pravishthi Tatha Satyanishta Sandigdh Ghoshit Kiye Jane Ke Viruddh Ek Pratyavedan Ayukt,-Meerut Mandal, Meerut Ke Yahan Lambit Hai, Iske Atirikt Varsh 2002-2003 Ki Varshik Pratikool Pravishthi Ke Virudh Shri Naresh Chanda Sharma Dwara Dinank 26.12.2003. Ko Ek Pratyavedan Aapko Prastut Kiya Hai, Jo Abhi Lambit Hai."

On 9th January, 2004 the note put by the A.D.M. to the District Magistrate reads as follows:

"Avlokit Samiti Ki Aakhya Dinank 27.12.2003 Se Sahmat Zila Adhikari

Mahodaya Ke Anumodanarth Agrasarit.

9.1.2004"

10. Lastly the District Magistrate on the same page has recorded as follows:

'Anumodit'

and has signed the same in the month of February, 2004.

11. From the records of the proceedings as aforesaid this Court is satisfied that there has been non application of mind by the District Magistrate with regards to the character roll entries of the petitioner as well as to the fact as to whether the nature of entries in the character roll was such so as to come to the conclusion that the petitioner was a fit person to be compulsorily retired. The District Magistrate has only approved the proposal of the Screening Committee to the effect that the petitioner may be compulsorily retired. The recommendation of the Screening Committee is only an opinion. It is the satisfaction of the appointing authority which should determine as to whether powers under Section 56 (c) of the fundamental rules are to be exercised. Such a satisfaction must be arrived at after due application of mind to the service record of concerned government servant. The Appointing authority has to decide that the employee has become a dead wood and it is in public interest to retire him compulsorily. Mere acceptance of the report of Screening Committee in the facts of the case by endorsement of the word 'Anumodit' by the appointing authority (District Magistrate) cannot beheld to a decision to compulsorily retire the petitioner after due application of mind as required under Fundamental Rules 56 (c). The aforesaid conclusion is further supported by the reason that the Screening Committee did not refer to (i) all the entries recorded into the character roll of the petitioner in the previous years(specifically of recent part). (ii) the relevant period for which such adverse entries have been recorded, (iii) the nature of adverse entries, (iv) the effect of other entries which were good/outstanding available on the service records of the petitioner.

12. Division Bench of this Court in the case of Sri Narain Saxena Vs. Principal Secretary, reported in 2005 Vol. 4 Education and Service Cases page 2431, after referring to various judgments of the Hon'ble Supreme Court in paragraph 20 of the judgment has held as follows:

"Paragraph 20 In view of the above there is no bar for the Competent Authority to appoint a Screening Committee and consider its recommendations by application of his mind. This view stands fortified by the judgment relied upon by Shri K. Ajit in Kamta Singh Vs. State of U.P. and another, 1993 HVD (Alld.)Vol. 2, Page 131, wherein it had been held that the Appointing Authority has to apply his mind independently on the recommendation made by the Screening Committee, failing which the order impugned would stand vitiated."

13. In paragraph **23** and **24** it has been further held as follows:

23. "Undoubtedly, one particular misconduct or adverse entry unless it is of doubtful integrity or involving moral turpitude cannot be the basis of passing the order of compulsorily retirement. The entries service record is to be examined for this purpose. Inefficiently

of an employee may weigh with the authority concerned in coming to the conclusion whether or not the employee should be compulsorily retired and in that case the scope of judicial review is very limited. If on the perusal of the service book of the employee and file of the Department, The Court comes to the conclusion that the order has been passed by the competent authority in strict adherence to the statutory required, the order cannot be held to be invalid. (Vide State of Rajisthan and another Vs. Sripal Jain A.I.R. 1963 S.C. 1323).

24. "It is so for the competent authority to examine as to whether the Government employee should be retained in service or not, and to be retained in service is not a fundamental right of the employee. However, a permanent employee has a right to hold the post till he reaches the age of superannuation subjects to his remaining fit and efficient and other statutory provisions dealing with the subject. In such circumstances other than the question of the efficiency also. Therefore, it is in the exclusive domain of the Competent Authority to take a decision after assessing the over all services record. (Kailash Chandra Vs. Union of India, AIR 1961 S.C. 1346; L. Butail Vs. Union of India and others (1970) 2 SCC 876; Gurdial Singh Fiji Vs. State of Punjab and others AIR 1979 S.C. 1622).

14. Reference may also be made to the Division Bench judgment of this Court in the case of Kamta Singh Vs. State of U.P. 1993 HVD (Alld.) Vol. II Page 131, Paragraph 6 whereof reads as follows:

"F.R. 56 (c) empowers the appointing authority, the State Government in this case, to require the petitioner to retire after attaining the age of fifty years "if it appears to the said authority to be in the public interest." This provision supposes that the State Government has formed the opinion that it is in the public interest to retire the petitioner compulsorily. If the decision of the State Government is based merely on the opinion of an extraneous body like the Screening Committee, it cannot be said that the State Government has exercised its jurisdiction as accordance with the said rule. It is not shown that the Screening Committee is a committee of the Government which has been constituted under the Rules of Business made under Article 166 of the Constitution. The I.G. Prisons who is not part of the organization known as Government, was also a member of the Screening Committee. The Screening Committee cannot be regarded as an instrumentality of the Government. The role of Screening Committee is to assist the State Government and after a careful examination of the relevant materials to report whether there is a prima facie case to require the Government servant concerned to retire compulsorily in public interest. The function to do so is that of the Government to do so is that of the Government and the order is passed on the subjective satisfaction of the Government. Subjective satisfaction cannot be a matter of delegation and the satisfaction of the Screening Committee cannot be the satisfaction of the Government. This is not to say that the law requires a second examination of the materials by the Government, as

apprehended by the learned Standing Counsel. But, circumstances must exist which would indicate that the Government (or the appointment authority) has itself applied its mind to all the relevant material and was satisfied that the concerned government servant has become a dead wood and public interest would suffer more by allowing him to continue to perform the duties and functions of his office till superannuation in the normal course and that it is in public interest to order compulsorily retirement and that in taking such action it has not merely acted on the basis of the report of the Screening Committee. We have come to the conclusion after giving out most thoughtful consideration to the facts and circumstances of the present case that the impugned order of compulsorily retirement has not been passed by the State Government after applying its mind to all the relevant material on record. The impugned order is, therefore, clearly arbitrary, the requisite opinion having not been formed in the requisite manner as required by law, and it is liable to be quashed."

15. With reference to aforesaid legal principles enunciated, this Court is satisfied, that the facts of the present case the order of compulsorily retirement passed by the District Magistrate dated 12.1.2004 is legally not justified as he as not exercised his jurisdiction in accordance with the Rule 56 (c) and, therefore, is hereby quashed.

16. Petitioner shall be reinstated in services with all consequently benefits. It will be open to the appointment authority to take a fresh decision under Fundamental Rule 56 (c) qua the petitioner in accordance with law and the observations made hereinabove. Writ petition is allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2005

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Writ Petition No. 6435 of 2004

Radhey Shyam Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Ray

Counsel for the Respondents:
A.G.A.

Constitution of India Art. 226-Writ Petition-maintainability-controversy of conversion of private vehicle into maxi cab-involve if the vehicle not converted-transport authority has no jurisdiction to imposed the tax-penalty of Rs.1,79,809/- Quashed-Subject to Payment of Rs.10,000/- penalty as provided in section 192 of M.V. Act.

Held: Para 13 & 15

So far as the question of maintainability of this petition is concerned, in the present case the controversy in respect of the assessment of the taxes is not involved but the controversy of conversion of a private vehicle into a maxi cab is involved. If the vehicle is not legally converted into a maxi cab, the taxes imposed by the Transport authority are not permissible in the eyes of law. Therefore, in this case it is not required to approach the Transport

Commissioner in respect of the assessment of tax, therefore, this petition is maintainable.

But the vehicle of the petitioner was intercepted by the transport authority which was violating the provision of section 66 of the Act because by that time 12 passengers were carrying by that vehicle, therefore, the petitioner is liable to pay the penalty as provided by section 207 of the Act. In the present case it has come in evidence that prior the present seizure of the vehicle, it was intercepted on 27.3.1998 also and penalty of Rs.3500/- was paid by the petitioner and the vehicle was released by the A.R.T.O. Ballia in his favour on 3.4.1998 with a warning. Therefore, the petitioner is liable to pay the penalty i.e. Rs.10,000/- as provided under section 192 A of Motor Vehicles Act, 1988.

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

1. Heard Sri Anil Kumar Ray, learned counsel for the petitioner and the learned A.G.A.

2. This writ petition is filed on behalf of Radhey Shyam Yadav with a prayer that respondents be directed to release the Vehicle No.U.P. 60-A0919 (Jeep) in favour of the petitioner.

3. The brief facts of this case are that the petitioner is the owner of a commander Jeep No. U.P. 60-A 0919 and he has paid one time road tax on 13.10.1996. It is registered as a private vehicle. The aforesaid vehicle has been intercepted by the Assistant Regional Officer, Ballia, respondent no.2 on 24.7.2003 and the same was kept at the Police Station Phephna district Ballia. The petitioner has produced the registration certificate but the same has not bee released by respondents 2 and 3. Thereafter the petitioner filed an application before the Chief Judicial Magistrate, Ballia with a prayer to release the vehicle in his favour but respondent no.2 submitted a challan report in respect of the vehicle concerned on 26.2.2004 and respondent no. 2 submitted a report dated 15.03.2004 mentioning therein that the petitioner had moved an application to convert the registration of the vehicle concerned from private vehicle to public vehicle, it reply was given by the petitioner by way of filing a criminal revision no. 139 of 2004 in the court of learned Sessions Judge, Ballia but the same was dismissed by the 4th Additional Sessions Judge, Ballia on 29.5.2004.

4. It is contended by the learned counsel for the petitioner that it is an admitted fact that the vehicle concerned is registered vehicle in the name of the petitioner and the petitioner has applied for converting the same as a public vehicle but the same has not been converted and respondent no. 2 has illegally intercepted the vehicle of the petitioner and demanded tax and additional tax which is not leviable on the petitioner's vehicle.

5. It is further contended that the vehicle in question was never used as a public vehicle. It is used as a private vehicle and respondent no.2 has submitted challan report after six months of the seizure of the petitioner's vehicle, which is a concocted document and the conduct of respondent no. 2 was fully malafide. In case there was any violation of the provisions of the Motor Vehicles Act, the petitioner was liable for fine only.

6. It is further contended that there is a prescribed procedure for converting a

private vehicle into a public vehicle, but till now no procedure has been followed and without following any procedure the vehicle concerned has been converted into a maxi cab, which is illegal and it is manipulation in the record of the vehicle concerned kept in the office of the A.R.T.O. Therefore, no reliance can be placed on any report of suck conversion.

7. It is further contended by the learned counsel of the petitioner that according to section 192-A of the Motor Vehicles Act if a private vehicle is used for commercial purposes and it is used in contravention of the provisions of sub-section 1 of section 66 or in contravention of any condition of permit relating to the route on which or the purpose for which the vehicle may be used, shall be punishable for the first offence with a fine which may extend to five thousand rupees but shall not be less than two thousand rupees and for any subsequent offence with imprisonment which may extend to one year but shall not be less than 3 months or with fine which may extend to ten thousand rupees but shall not be less than five thousand rupees or with both.

8. It is further contended that in the present case the controversy in respect of tax is not involved but the controversy of conversion of the vehicle into a maxi cab is involved because after the deposition of all the usual charges for conversion, the vehicle in question was never taken by the transport authority for fitness purposes and without examining the vehicle and issuing of the fitness certificate no vehicle can be converted into a maxi cab. Only deposition of the usual charges for conversion purpose is not sufficient but it is a mere formality to convert the vehicle into a maxi cab. In the present case the vehicle of the petitioner has been seized and thereafter some entries were made in the record of the vehicle, which are manipulated entries.

9. It is opposed by the learned A.G.A. by submitting that the vehicle in question was registered in the name of the petitioner as a private vehicle which was intercepted by respondent no.2 on 24.7.2003 because it was used for transportation of the passengers without paying the requisite taxes and it was plied without paying the taxes. In this regard tax and Additional tax upto 31.7.2004, totaling a sum of Rs.1,79,809/- was due on the petitioner the same has not been paid by him, so the vehicle was seized and the petitioner without approaching the transport authority and in order to avoid the payment of taxes directly approached the court concerned. This vehicle was also intercepted by the Enforcement Officer Ballia on 27.3.1998 and thereafter the petitioner himself paid the penalty and applied for conversion and the same was converted into a maxi cab after obtaining the requisite fees etc. but it was plied by the petitioner without paying the dues/taxes, therefore, the vehicle in question was rightly seized by the Transport Officer because at that time it was transporting the passengers. Firstly the vehicle in question was intercepted on 27.3.1998 at that time it was carrying 12 passengers. Thereafter, the petitioner himself filed an application on 2.4.1998 before the A.R.T.O. with an explanation that at the time of seizure of vehicle he was coming after cremation of a dead body from Mahavir Ghat. On that application a detailed report was prepared. A penalty of Rs.3,500/- was assessed and the same was paid by the petitioner then the vehicle was released by the A.R.T.O.

Ballia on 3.4.1998 in favour of the petitioner with a warning that he will not use the said vehicle as maxi cab and if it is again intercepted in such condition full tax of maxi cab will be realized from him. Thereafter, he approached the A.R.T.O. concerned on 3.6.1998 for converting the vehicle into a maxi cab. On 4.6.1998 he deposited the required tax including conversion fee of Rs.2,500/- and difference of tax from private to a commercial viz. Rs.130/- in view of that the vehicle was converted as maxi cab on 4.6.1998 by the A.R.T.O. Ballia. Therefore, the petitioner is liable to pay the tax with effect from 4.6.1998.

10. It is further submitted that after the order of conversion of the vehicle in question, the petitioner never approached the department by filing an application and form No. S.R. 12 for fitness and never applied for permit etc. and started using the vehicle in question which is not permissible in law because all the formalities were not completed, which were required for conversion.

11. It is further submitted by the learned A.G.A. that the present writ petition is not maintainable because the petitioner has an alternative remedy by way of approaching the transport authority under the provisions of section 207 (2) of the Motor Vehicles Act.

12. It is further contended that against the taxes under the U.P. Motor Vehicle Taxation Act, 1997 a statutory appeal is also provided under section 18 of the aforesaid Act and the petitioner can approach the authority concerned i.e. the Transport Commissioner, U.P. Lucknow to which the petitioner has not yet approached as such the present petition is premature and is liable to be dismissed.

13. From the perusal of the record, it appears that in the present case the petitioner has deposited the required fees of conversion including the difference of tax as demanded by the department concerned but deposition of the required charges is not sufficient to convert a private vehicle into a maxi cab because before passing the order of conversion fitness of the vehicle is essentially required by the provisions of law but in the present case all the necessary formalities for converting the private vehicle into a maxi cab have not been done by the transport authority. The provision for conversion is specifically given in the Motor Vehicles Act but the same has not been followed in such a condition the assessed taxes and dues on the petitioner is not proper because the vehicle in question was not in fact converted into a maxi cab. In respect of conversion the initiation was made by the petitioner and for the same required charges were deposited by him but other formalities were not done by the transport authorities even the fitness certificate was not given by the transport authority and it is admitted case that after deposit of the charges of conversion the petitioner never approached the transport authority. It also shows that the vehicle in question was never examined for fitness purpose. If any entry has been made in the papers of the vehicle maintained at the office of the A.R.T.O., the same is not reliable and by these entries it cannot be said that the vehicle was, in fact, converted into a maxi cab. Therefore, the assessment of the taxes made by the transport authority is illegal for which the petitioner is not liable to pay the same. So far as the

question of maintainability of this petition is concerned, in the present case the controversy in respect of the assessment of the taxes is not involved but the controversy of conversion of a private vehicle into a maxi cab is involved. If the vehicle is not legally converted into a maxi cab, the taxes imposed by the Transport authority are not permissible in the eyes of law. Therefore, in this case it is not required to approach the Transport Commissioner in respect of the assessment of tax, therefore, this petition is maintainable.

14. In view of the above discussion the impugned order dated 23.3.2004 passed by the learned Additional C.J.M. – I Ballia and the judgment and order dated 29.5.2004 passed by the IVth Additional Sessions Judge, Ballia in Criminal Revision No. 139 of 2004 are not perfect orders as they have not been passed after considering the main controversy of conversion of the vehicle into a maxi cab. Therefore, the impugned orders are hereby set aside and assessment of taxes as Rs.1,79,809/- shall not be realized from the petitioner.

15. But the vehicle of the petitioner was intercepted by the transport authority which was violating the provision of section 66 of the Act because by that time 12 passengers were carrying by that vehicle, therefore, the petitioner is liable to pay the penalty as provided by section 207 of the Act. In the present case it has come in evidence that prior the present seizure of the vehicle, it was intercepted on 27.3.1998 also and penalty of Rs.3500/- was paid by the petitioner and the vehicle was released by the A.R.T.O. Ballia in his favour on 3.4.1998 with a warning. Therefore, the petitioner is liable to pay the penalty i.e. Rs.10,000/- as provided under section 192 A of Motor Vehicles Act, 1988.

16. Thereafter, it is directed that the petitioner shall deposit a sum of Rs.10,000/- as penalty at the office of A.R.T.O. Ballia, in case above penalty is deposited, the vehicle in question i.e. commander jeep bearing registration no. U.P. 60-A/0919 shall be released in favour of the petitioner forthwith.

Accordingly this petition is allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2005

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

Criminal Misc. Application No. 1808 of 2000

Rajdhar ...Applicants
Versus
State of U.P. and others...Opp. Parties

Counsel for the Applicants:
Sri A.K. Srivastava

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

Code of Criminal Procedure-Section-319-Evidence rendered during trail of case-can not be treated as evidence collected during enquiring or trail-after recording statements of two witness-three accused named in FIR acquitted-but by the same order learned session judge summond the other-named accused including the applicant-held-summoning order absolutely proper but the acquittal can be recorded after the prosecution's evidence is completed-hearing of prosecution and the defence completed-accordingly the order of

acquittal set-a-side direction issued to summon those accused persons also-complete the trail within period of six months.

Held: Para 4

It is thus evident that after the prosecution evidence is completed and the examination of the accused and hearing of the prosecution and the defence, only an order of acquittal can be recorded whereas in the present case after the evidence of two witnesses namely P.W. 1 Chandrawati and P.W. 2 Santosh Kumar, named accused were summoned. Simultaneously, an order of acquittal has been passed by the Sessions Judge, which is absolutely illegal and cannot be left to stand. "The evidence envisaged in Section 319 Cr.P.C. is the evidence rendered during trial of the case and the material placed before the committal court cannot be treated as evidence collected during inquiry or trial". In the circumstances, if the Sessions Judge was of the opinion on the basis of the evidence recorded during the trial that the named accused should also be tried, he was absolutely within his right to summon the named accused including the present applicant but he could not have recorded a finding of acquittal in respect of those three accused, who were facing the trial.

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. List is revised. No one is present for the applicant. Learned A.G.A. appears for the State.

2. The applicant Rajdhar has filed this application invoking inherent powers for quashing the order dated 15.4.1999 passed by the Sessions Judge Chitrakoot in Session Trial No. 33 of 1993 under Section 302 I.P.C. The First Information Report was registered on 24.5.1991 at 7.40 a.m. against the five accused namely Rajdhar s/o Vijyanand, Premika s/o Vijyanand, Vishnu Dayal s/o Raghuman, Hemraj s/o Mahesh and Dhanpat s/o Raghuman. According to the narration of the F.I.R., the husband of the complainant Malkhan @ Bulbul was done to death in the middle of intervening night 23-24.5.1991. After completion of investigation, charge sheet was submitted against three accused Lavelesh s/o Khuraki, Dafola @ Raja Bhai and Mohan s/o Mahesh Chaubey, all of them were not named in the F.I.R. The Session Trial commenced against the said three accused under Sections 302, 120 I.P.C. Smt. Chandrawati wife of the deceased was examined as P.W. 1, Santosh Kumar son of the deceased was examined as P.W. 2. The learned Sessions Judge, Chitrakoot summoned the present applicant Rajdhar along with other two accused under Section 319 Cr.P.C. While summoning the accused, the learned Sessions Judge recorded a finding that the prosecution witnesses had made clear allegations against the named accused in the First Information Report and also stated that the Investigating Officer did not investigate the matter under the influence of the accused and submitted the charge sheet against different persons, who are not named in the First Information Report. Two named accused Vishnu Dayal and Hemraj had already died before the trial could be completed as such three accused including the present applicant were summoned. Specific allegations were leveled against the investigating officer by the two witnesses and affidavits were also given by them, which is Exhibits Ka-2 and Ka-5. Eyewitnesses have clearly exonerated the three persons namely Lavlesh, Dafola @ Raja Bhai and Mohan against who the police submitted charge sheet. On the basis of said

statement, the named accused were summoned to face the trial by means of the impugned order. Argument advanced on behalf of the applicant is that Section 319 Cr.P.C. contemplates summoning and trial of such other persons, who have not been facing the trial and the court feels from the evidence recorded during the trial or inquiry that those person should be tried together with the other accused for the offence, it can proceed against such persons. Provision of Section 319 Cr.P.C. gives ample power to the court to take cognizance and add "any person" not being accused before it and try him along with accused persons sent up for the trial. It has emphatically been stated that since the three accused, who were facing the trial have been acquitted by means of common order dated 15.4.1999, nothing remains to be tried and, therefore, the trial has come to an end and the impugned order stands vitiated in law. Since no trial is pending, the learned Session Judge could not exercise powers under Section 319 Cr.P.C. Counter affidavit has been filed by the Sub Inspector Bajrangi Singh to which rejoinder affidavit has also been filed. No counter affidavit has been filed by the opposite party no. 3. The order sheet dated 9.8.2000 shows that notices have been received back after due service but no counter affidavit has been filed on behalf of the complainant. In the present case, the learned Sessions Judge has passed a composite order under Section 319 Cr.P.C. as well as by the same order he has recorded a finding of acquittal in respect of accused Lavlesh, Dafola @ Raja Bhai and Mohan. After hearing counsel for the applicant and learned A.G.A. for the State, it is necessary to examine Section 319 Cr.P.C., which is reproduced below:

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

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although no under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

3. Section 319 (4) (a) prescribes that the proceedings in respect of such persons, who have been summoned during course of the trial on the basis of evidence shall be commenced afresh, and the witnesses be re-heard. Sub clause (b) of clause 4 of Section 319 Cr.P.C. entitles the court to proceed against the newly added accused as they were accused at the time when the court took cognizance of the offence. In the instant case, the

present accused Rajdhar along with four other accused were named in the First Information Report and specific allegations were leveled against them. The learned Sessions Judge has very categorically discussed the statement of the two witnesses P.W. 1 and P.W. 2 on the basis of which, he had arrived at the conclusion that the named accused should also be tried. I do not think that there is any illegality in that part of the judgment. However, the Sessions Judge has completely erred in law in acquitting the three accused, who were sent up for trial by means of common judgment and order on the basis of evidence of P.W. 1 and P.W. 2 alone. Perusal of the charge sheet shows that there are as many as 34 witnesses mentioned, which the prosecution proposed to examine. In the circumstances, before the prosecution has completed its evidence and arguments are advanced after an opportunity for defence is afforded, the trial is still in progress and it cannot be said to be completed. Learned Sessions Judge erred in law in recording the finding of acquittal even before the trial was completed and that part of the judgment is against the procedure provided in Chapter XVIII of the Criminal Procedure Code. This chapter provides "trial before the court of sessions which begins from the opening case of prosecution". Section 232 Cr.P.C. defines acquittal:-

If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.

4. It is thus evident that after the prosecution evidence is completed and the examination of the accused and hearing of the prosecution and the defence, only an order of acquittal can be recorded whereas in the present case after the evidence of two witnesses namely P.W. 1 Chandrawati and P.W. 2 Santosh Kumar, named accused were summoned. Simultaneously, an order of acquittal has been passed by the Sessions Judge, which is absolutely illegal and cannot be left to stand. "The evidence envisaged in Section 319 Cr.P.C. is the evidence rendered during trial of the case and the material placed before the committal court cannot be treated as evidence collected during inquiry or trial". In the circumstances, if the Sessions Judge was of the opinion on the basis of the evidence recorded during the trial that the named accused should also be tried, he was absolutely within his right to summon the named accused including the present applicant but he could not have recorded a finding of acquittal in respect of those three accused, who were facing the trial. Looking to the facts and circumstances of the case, the application is finally disposed of and the case is remanded to the learned District and Sessions Judge, Chitrakoot to issue notices to the three accused, who were facing trial and have been acquitted and thereafter commence the trial afresh in respect of the present applicant along with other two accused who have been summoned under Section 319 Cr.P.C. Learned Sessions Judge is directed to afford an appropriate opportunity to the prosecution to produce as many witnesses as it thinks proper after affording an opportunity to the defence and after completion of the arguments, the court shall pass final judgment. The order dated 15.4.1999 passed in Session Trial No. 33

of 1993 is set aside to the extent of acquittal of the three accused by means of the common order. I am conscious of the fact that the three accused namely Lavlesh, Dafola and Mohan have not been arrayed as a party as such I direct the learned Sessions Judge to issue notice to the three accused to face the trial but they may not be taken into custody as they were already on bail at the time when the relevant order was passed on 15.4.1999. Since the sureties were discharged, they will only be required to furnish fresh bonds.

5. Learned Sessions Judge, Chitrakoot is further directed to complete the trial expeditiously preferably within a period of six months from the date a certified copy of this order is received. Registry is directed to send a certified copy of this order to the District Judge Chitrakoot for compliance of this order so that Session Trial No. 33 of 1993 be completed within the stipulated period.

6. With the aforesaid observations, this application is finally disposed of and the case is remanded for afresh trial in accordance with the directions given hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2005

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 45102 of 2003

Rajendra Kumar Karanwal ...Petitioner
Versus
Smt. Kamlesh Garg and others ...Respondents

Counsel for the Petitioner:
Sri Some Narayan Mishra
Km. Rama Goel

Counsel for the Respondents:
Sri Manoj Kumar Sharma
Sri Namit Sharma

U.P. Urban Buildings (Regulation of letting Rent and Eviction) Act 1972-Section 30 (1)-Scope of Revision-Order permitting the petitioner-tenant to deposit the rent in court-in case of refusal to accept the rent by the land lord-District Judge by impugned judgment-exercised its power of revision and set-aside the order passed by the Civil Judge (J.D.)-held-in view of decision of Anwar Ali's case-Revisional Court acted beyond jurisdiction-No appeal or Revision maintainable against the order passed by Munsif under Section 30 (1) of the Act.

Held: Para 4

In view of the provisions of Section 30 (1) and in view of the decision of Anwar Ali (supra), in my opinion, the revisional court has acted beyond jurisdiction in entertaining the revision under Section 115 of the C.P.C.

Case law discussed:
2002 (2) ARC-562 relied on.
1964 ALJ-256

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

1. The petitioner-tenant has challenged the order dated 24.3.2003 passed by the Special/Additional District Judge, Saharanpur in Civil Revision No. 11 of 1997 (Annexure 6 to the writ petition).

2. Smt. Pamod Kumari and two minor children filed an application under Section 30 (1) of the Act in the court of Civil Judge (Junior Division), Saharanpur

for depositing rent of the premises under their tenancy. The said application was registered as Misc. Case No. 14 of 1989. The respondent-landlord filed an objection to the aforesaid application filed by dated 22.11.1996 held that there is relationship of the landlord and tenant between the parties and directed the tenant to handover the amount of rent to the landlord and directed the landlord to give the receipt of the same and further observed that if the landlords refuse to accept the rent, the tenant will deposit the same in the court. The respondent-landlord aggrieved by the aforesaid order preferred a revision being Civil Revision No. 11 of 1997 in the court of District Judge under Section 115 of the Code of Civil Procedure who vide its order dated 24.3.2003 allowed the revision and set aside the order of the Civil Judge and rejected the application filed by the tenant under Section 30 (1). Thus, this writ petition.

3. Learned counsel for the petitioner has contended that under the provisions of U.P. Act No. 13 of 1972 no revision or appeal lies before any authority or court against the order passed by the Civil Court under Section 30 (1) U.P. Act No. 13 of 1972. Thus, the revision was not maintainable and the order of the revisional court entertaining the revision under Section 115 of the Code of Civil Procedure is wholly without jurisdiction. Learned counsel for the petition relied upon the decision of this Court reported in **2002 (2) ARC 562; Anwar Ali Versus Additional District Judge, Moradabad and others** wherein this Court has held that no appeal or revision lay against the order passed by the Munsif under Section 30 (1) of decision this writ petition deserves to be allowed and the order of the revisional court deserves to be quashed.

4. Learned counsel for the respondent has relied upon the full Bench decision of this court reported in **1964 All. L.J. 256; Chatur Mohan and others Versus Ram Behari Dixit.** The Full Bench decision relied upon by learned counsel for the respondent is under the provisions of the old Act and there is no pari material provision under old Act like section 30 (1). In view of the provisions of Section 30 (1) and in view of the decision of Anwar Ali (supra), in my opinion, the revisional court has acted beyond jurisdiction in entertaining the revision under Section 115 of the C.P.C.

5. In view of what has been stated above, this writ petition is allowed. The order of the revisional court dated 24.3.2003 is quashed. The parties shall bear their respective costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2005

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

Criminal Misc. Application No. 9693 of 2005

Rajiv Agrawal ...Applicants
Versus
State of U.P. ...Respondents

Counsel for the Applicants:
Sri Vinod Prasad

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Section-451-Release of Vehicle-applicant submitted with No objection certificate affidavits of other heirs-District Magistrate also forwarded the report for release of vehicle-rejection held-Magistrate committed gross error-No good reason assigned for rejection of release application, impugned order Quashed with direction to the Magistrate to release the Bus within period of one week.
Held: Para 3 & 4

The Magistrate committed a gross error in rejecting the application, even though all the documents were produced before him including fact was brought to the notice that the permit stands transferred in the name of the present applicant.

After taking the entire matter into consideration, I come to the conclusion that the order of the Magistrate dated 1.7.2005 can not be left to stand. No good reason has been assigned for refusing the prayer for release of the bus. Accordingly, the order dated 1.7.2005 is quashed. The Chief Judicial Magistrate, Jhansi is directed to release the bus within a period of one week from the date, a certified copy of this order is produced before him after taking adequate guarantee/ security of the bus from the applicant Rajiv Agarwal.
Case law discussed:
2003 (46) ACC-223
2004 (48) ACC-605
2003 (47) ACC-1086

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri Vinod Prakash Advocate for the applicant and learned A.G.A. for the State. On the agreement between the parties, this application is finally heard.

2. This is an application challenging the order dated 1.7.2005 passed by the Chief Judicial Magistrate, Jhansi in a Misc. Application No. Nil of 2005 in a case, State Vs. Mangal Singh, under Sections 279, 337, 338, 304A, 427 I.P.C. read with Section 179 of the Motor Vehicle Act, Police Station Nababad, District Jhansi, arising out of case Crime No. 1224 of 2005. The learned Magistrate has refused to release the vehicle No. DLP 5240 in favour of the applicant. The vehicle was registered in the name of Smt. Kapoori Devi, wife of Gauri Shanker Agarwal. A carriage permit No. PHTP 55/68 was issued in respect of the vehicle which is a bus of 1992 model. Smt. Kapoori Devi was grandmother of the applicant. Smt. Kapoori Devi died and all the family members had agreed amongst themselves that the vehicle be transferred in the name of the applicant. Affidavits were filed in favour of the applicant by the family members which was in form of a no objection/consent for transfer of permit. The affidavits have been annexed as Annexure-2 to the affidavit. However, the vehicle met an accident on 19.6.2005 in respect of which a first information report was registered at case Crime No. 1224 of 2005. The applicant applied for release of the vehicle vide application dated 21.6.2005 which is annexed as Annexure-3 to the affidavit. A report was called for in respect of the vehicle under the orders of the District Magistrate/ Collector, Jhansi regarding actual and legal heir of Smt. Kapoori Devi. Tehsildar inquired into the matter and submitted a report. Annexure-4 is a letter issued by the District Magistrate, Jhansi to the Secretary U.P.S.R.T.C. apprising him that the Tehsildar has submitted a report on 3.6.2005 that the permit PHTP 55/86 STA State/96 and vehicle No. DLIP No. 5240 Model 1992 is to be transferred in the name of the present applicant. The vehicle was also being run under his supervision.

The report of the Tehsildar was appended to the letter of the District Magistrate. All these documents were brought on record before the Chief Judicial Magistrate, Jhansi and he was also apprised of the fact that on the basis of no objection issued by other heirs of late Smt. Kapoori Devi, permit of the vehicle stood transferred in the name of the applicant. The tax receipts of the vehicle were also submitted in the name of the applicant but the learned Magistrate rejected the application vide order dated 1.7.2005 for the reason that there are six children of late Smt. Kapoori Devi and the registration is not in the name of the applicant, he can not be said to be the sole owner of the vehicle. Accordingly he refused to release it in his favour, hence this application.

3. I have gone through the record as well as the impugned order. The Apex Court, in the case of **Sunder Bhai Ambalal Desai Vs. State of Gujrat, 2003 (46) A.C.C. 223** has clearly held that the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes:- (i) Owner of the article would not suffer because of its remaining unused,(ii) Court or the police would not be required to keep the article in safe custody, (iii) If the proper panchnama before handing over article is prepared, that can be used in evidence instead of its production before the court during the trial, if necessary, (iv) This jurisdiction of the court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles. The Apex Court has clearly held that appropriate orders should be passed immediately because keeping it at police station for a long period would only result in decay of the article. The court should ensure that the article will be produced if and when required by taking bond, guarantee or security. Similar view has been followed in a number of decisions of this Court as well. Mohd. **Shamim Khan Vs. State of U.P., 2004, A.C.C. (48), 605. In the case of Tulsi Rajak Vs. State of Jharkhand, 2004, Criminal Law Journal, 2450**, it was held that truck lying in the police station for more than one year resulted in heavy loss of the petitioner and in the circumstances, the High Court permitted to release of the vehicle. In **Gurnam Singh and another Vs. State of Uttaranchal, 2003 (47) A.C.C., 1086,** it was held that what so ever the situation be, there is no use to keep the seized vehicle at the police station or court campus for a long period, the Magistrate should pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicle, if required at any point of time. In the instant case, the counsel for the applicant has brought to my notice that two wheels of the standing bus has been removed by someone and in the event, the vehicle is not released, each and every part will go one by one but for the metallic frame of the bus. The admitted position in the present case is that all the heirs of the actual owners in whose name the vehicle was registered, have filed their affidavits/ no objection certificate. The District Magistrate has also got the matter enquired through the Tehsildar and informed the UPSRTC as such it is evident that the learned Magistrate should have released the bus after taking appropriate precaution in form of bonds or security. The Magistrate committed a gross error in rejecting the application, even though all the documents were produced before him including fact was brought to the notice

that the permit stands transferred in the name of the present applicant.

4. After taking the entire matter into consideration, I come to the conclusion that the order of the Magistrate dated 1.7.2005 can not be left to stand. No good reason has been assigned for refusing the prayer for release of the bus. Accordingly, the order dated 1.7.2005 is quashed. The Chief Judicial Magistrate, Jhansi is directed to release the bus within a period of one week from the date; a certified copy of this order is produced before him after taking adequate guarantee/ security of the bus from the applicant Rajiv Agarwal.

5. For the reasons discussed above, this application is finally allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2005

BEFORE
THE HON'BLE S.RAFAT ALAM, J.
THE HON'BLE VIKRAM NATH, J.

Special Appeal No. 615 Of 2005

Ram Kesh Yadav and another
...Appellants/Petitioners
Versus
The District Manager, Food Corporation of India and another ...Respondents

Counsel for the Appellants:
Sri R.C. Gupta

Counsel for the Respondents:
Sri A.K. Gupta

Constitution of India Art 226- Compassionate appointment-Food Corporation of India- by eivender Dt. 2.2.77 as modified on 3.7.96- provides voluntary retirement of those workers within the age limit of 55 years-and to give appointment on compassionate ground to one of the dependent of such worker-by impugned order the request for voluntary retirement accepted but compassionate appointment turned down- held -on technical ground such claim can not be rejected.

Held: Para 4

We are of the view that once the respondents have accepted the request for retirement of the employee under the aforesaid scheme on medical grounds then they are obliged to consider the claim of giving appointment to the dependent of such employee/worker and his request cannot be turned down on some technical ground. That apart the controversy being covered by the judgment of the Division Bench of this Court, this special appeal also deserves to be allowed.

Case law discussed:
Special Appeal No. 579 of 05 Decided on 11.5.05-relied on.

(Delivered by Hon'ble S. Rafat Alam, J.)

1. This appeal arises from the order of the learned Single Judge dated 29.03.2005 dismissing the writ petition of the appellant.

2. We have heard Sri R.C. Gupta, learned counsel for the appellants and Sri A.K. Gupta, learned counsel for the respondents.

3. The short facts giving rise to this appeal is that the father of the appellant no. 1 who is also the appellant no. 2 was working as handling labour in the office of Food Storage Depot at Azamgarh under the Food Corporation of India. The Food Corporation of India issued a circular dated 02.02.1977. It was modified by circular dated 03.07.1996. The said

circular provide that the worker who seek voluntary retirement on medical grounds and apply within the age limit of 55 years may avail the benefit of appoint of a dependant on compassionate ground. The appellant no: 2 who was admittedly working as handling labour in view of his bad health applied for giving premature retirement and also providing appointment to his son appellant no. 1 as per aforesaid circular. The respondents though accepted the request of retirement and accordingly retired the appellant no. 2 on attaining the age of 55 years but declined to provide appointment to appellant no. 1 on the ground that the application has been moved beyond the specified period and was delayed by 2 months 20 days. Learned counsel for the appellant vehemently contended that once the request of the employee in terms of the circular dated 03.07.1996 is accepted and the order of retirement was passed it was incumbent on the respondents to provide appointment simultaneously to the son of such retired employee. He further placed reliance on the Division Bench Judgment of this Court in a similar case being **Special Appeal No. 579 of 2005 Nizammuddin & another vs. The District Manager, Food Corporation of India, Kanpur Nagar & another**, decided on 11.05.2005 wherein the direction was issued to give appointment to the appellant therein within the 7 days from the date of service of copy of the order on the respondents or in any event within three weeks from the date of the order.

4. Learned counsel for the respondent fairly admitted that the facts of controversy involved in both the appeal are identical. It was however contended that the application was moved after two months 20 days and, therefore, the request was not accepted. The circular dated 03.07.1997 which is annexed as Annexure 1 to the affidavit filed in support of the appeal inter alia provides that the benefit of the compassionate ground appointment shall be extended to the dependant of the departmental workers who seek voluntary retirement on the medical ground on their own request subject to the conditions contained in the procedure of circular of clauses (i) to (ix). It is not dispute before us that the appellant no. 2 is in the employment of the respondents and admittedly his request under the aforesaid circular was giving voluntary retirement on medical grounds accepted. It is also not dispute that his son appellant no. 1 has claimed appointment under the same circular. We are of the view that once the respondents have accepted the request for retirement of the employee under the aforesaid scheme on medical grounds then they are obliged to consider the claim of giving appointment to the dependent of such employee/worker and his request cannot be turned down on some technical ground. That apart the controversy being covered by the judgment of the Division Bench of this Court, this special appeal also deserves to be allowed.

5. The special appeal is allowed. The order of the learned Single Judge is accordingly set aside and the writ petition is also allowed. We accordingly direct the respondents to provide employment to the appellant no. 1 within a week from the date of production of certified copy of this order, provided the appellant no. 1 fulfills all the formalities as required under the circulars.

6. There shall be no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2005

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 11822 of 2005

Ravi Kant Sharma ...Applicant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Rajeev Sisodia

Counsel for the Opposite Party:
Sri Dinesh Kumar
A.G.A.

Code of Criminal Procedure Section-439-Bail Application-offence-under Section 498-A/323/506 I.P.C.-demand of Rs.50,000/- and for Motor cycle Pulser and some ornaments-prosecution story fully corroborated by medical evidence-7 injuries on neck, cruelty committed by the applicant-tried commit the murder of injured by hanging-duly supported by presence of injuries-considering the gravity of offence applicant deserves no sympathy-held-not entitled to be released on bail.
Held: Para 6

In view of the facts and circumstances of the case, the submissions made by the counsel for the applicant, learned counsel for the complainant and the learned A.G.A., and after considering the medical examination report of the injured, it appears that athe prosecution story is fully corroborated by the medical evidence because the injured, the wife of the applicant was badly beaten consequently, she received 7 injuries, the applicant being the husband is under legal/social obligation to maintain her wife in cool and calm atmosphere but in the present case it is not happened, and the cruelty has been committed by the applicant and others, even they tried to commit the murder of the injured by way of hanging which is supported by the presence of the injuries on the neck, the gravity of the offence is too much, therefore, the applicant does not deserve for any sympathy and is not entitled to be released on bail.

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

1. Heard Sri Rajiv Sisodia learned counsel for the applicant, Sri Dinesh Kumar, counsel for the complainant and the learned A.G.A.

2. The applicant has applied for bail in Case Crime No.245-C of 2005, P.S. Kotwali Dehat District Bijnor.

3. From the perusal of the record, it reveals that the applicant is the husband of the injured Smt. Pallavi, whose marriage was solemnized with her on 25.11.2003. The injured was subjected to cruelty by the applicant and other co-accused persons with a view of fulfil the demand of Pulser Motor cycle and Rs.50,000/-and there was a demand of some ornament of gold for the Jethani of the injured. The injured conveyed all these things to her father. The first informant and other persons tried to persuade the in-laws of the injured by they were not satisfied. The injured was subjected to cruelty continuously. The injured had written some letters to her father mentioning therein that she was subjected to cruelty to fulfil the demand of dowry. Thereafter on 8.4.2005, when the applicant and other persons told that the demand of dowry will not be fulfilled,

so the injured was detained in a room, where she was beaten by the Danda, Kicks and fists by the applicant and other co-accused persons at about 12.30 P.M. Thereafter, the injured was caught hold by the co-accused Shambhu Dayal, Luxmi Kant and Krishna Kant to commit the murder and the applicant and co-accused Renu tied her neck and hanged to-but at the persuasion of the injured, she was not murdered. The applicant and other co-accused came to the house of the first informant by bringing her in injured condition, after seeing her condition, all shocked. Again the aforesaid demand of dowry was made with the threatening that in case the demand of dowry is not fulfilled, the injured will be killed. Then the first informant made hue and cry. He was also beaten by kicks and fists by the applicants and others. Some independent witnesses namely Daya Swaroop, Sanjai Kumar and Virendra Singh came at the place of occurrence, then the applicant and other co-accused persons ran away from there. The injured was taken to the hospital and medical aid was provided to her but F.I.R. was not lodged by the Police. Thereafter, the F.I.R. was lodged in pursuance of the order passed by the learned A.C.J.M., Nagina, District Bijnor under Sec. 156 (3) Cr.P.C. The medical examination report shows that the injured has received 7 injuries, in which injury Nos. 1 & 2 were on the neck.

4. It is contended by the learned counsel for the applicant that the F.I.R. is delayed and there is no demand of dowry. The alleged occurrence had taken place in sudden quarrel because the injured was a misbehaved woman.

5. It is opposed by the learned A.G.A. and the learned counsel for the complainant by submitting that the injured is a poor woman and she was subjected to cruelty with a view to fulfil the demand of dowry and she was subjected to cruelty with a view to fulfil the demand of dowry and she was badly beaten by the applicant and other co-accused persons. The prosecution story is fully corroborated by the medical examination report. The F.I.R. is delayed because the police has registered the F.I.R. in pursuance of the order passed under Section 156 (3) Cr.P.C., so there is no delay on the part of the first informant.

6. In view of the facts and circumstances of the case, the submissions made by the counsel for the applicant, learned counsel for the complainant and the learned A.G.A., and after considering the medical examination report of the injured, it appears that athe prosecution story is fully corroborated by the medical evidence because the injured, the wife of the applicant was badly beaten consequently, she received 7 injuries, the applicant being the husband is under legal/social obligation to maintain her wife in cool and calm atmosphere but in the present case it is not happened, and the cruelty has been committed by the applicant and others, even they tried to commit the murder of the injured by way of hanging which is supported by the presence of the injuries on the neck, the gravity of the offence is too much, therefore, the applicant does not deserve for any sympathy and is not entitled to be released on bail.

7. Accordingly this bail application is rejected at this stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2005

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition no. 8397 of 2005

Ram Vriksha ...Petitioner
Versus
The Assistant Director of Consolidation and another ...Respondents

Counsel for the Petitioner:
Sri R.S. Misra

Counsel for the Respondents:
Sri Swaraj Prakash
S.C.

(A) Hindu Minority and Guardianship Act 1956-Section 11 read with U.P. Consolidation of Holding Act 1962-Section 9-A Sale Deed executed by grand mother-minor's father and mother already died-at the age of 24 years. Notification under section 4 of C.W. Act made in the year 1972-minor, attain majority in the year 1968-6years period of limitation would expire in 1974- of adverse possession not available.

Held:Para 16 and 17

On the basis of evidence brought on record in the form of voter list of 1973 and Parivar register the Settlement Officer Consolidation held that the petitioner attained majority either in 1968 or in 1972. The said finding of the Settlement Officer Consolidation is based on the voter list wherein the age of the petitioner is recorded as 24 years and the parivar register wherein this date of birth is 25.2.1954. Thus in any case even if the starting point of limitation is taken to be 1968 when the petitioner attained majority, six years period would expire in 1974. Admittedly the village was notified for consolidation operation on 20.5.1972. After commencement of the consolidation operation no suit under Section 209 of U.P.Z.A.& L.R. Act can be filed, the jurisdiction being barred and hence non-filing of suit would confirm no rights on the person who was in possession an the date the consolidation proceedings started if the limitation for a suit under Section 209 of U.P.Z.A. & L.R. Act has not till them run out. In other words if before the expiry of the prescribed period of limitation consolidation intervenes then the limitation prescribe by section 209 stands arrested. The view taken by me finds support from a division bench judgment of our court in the case of Smt. K. Devi Vs. Joint Director of Consolidation U.P. & Ors. 1973 ALJ 395.

In view of the above legal position the period of six years from the time petitioner attained majority having not expired before the commencement of the Consolidation proceedings, the respondent no.4 would not acquire any title or right by adverse possession. The remand order made by Deputy Director of Consolidation cannot be said to be justified in any manner in the aforesaid facts and circumstances.
Case law discussed:
2001(45) ALR 820

(B) Constitution of India Art-226-writ petition against remand order-generally the Court I refused to interfere-but where the interference become necessary-Court not to refused can technical ground-finding of facts recorded by the S.O.C. without setting a side the same-where the sale transaction made by defects guardian found void-remand order on illegal presumption of viodable document by the D.D.C.-cannot be held justified –such order deserves to be interfered.

Held: Para 18

If the court normally does not interfere with the remand order, it does not mean

that there is any lack of power or the writ petitioned is not maintainable. The court can interfere if it find the circumstances to be extraordinary or the interference necessary in the interest of justice. In the present case on the material available on the record the Settlement Officer Consolidation recorded a finding of fact regarding the age of the petitioner, Deputy Director of Consolidation without even referring to the said documents or setting aside the finding of fact recorded by Settlement Officer has remanded the case back and that too on the illegal presumption that the sale deed was a viodable document.

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

1. This petition under Article 226 of the Constitution of India is directed against the judgment and order dated 26.8.1980 passed by Deputy Director of Consolidation by which the case has been remanded back to the Settlement Officer Consolidation.

2. The dispute arises out of proceeding under Section 9A (2) of the U.P. Consolidation of Holdings Act (for short the Act) and relates to plot no.102/65 and khata no.175. The undisputed facts are that one Raj Bali, father of the petitioner was recorded as sirdar of the land in dispute. He died in 1956 when the petitioner was minor, aged about 2 years. Vide order dated 11.4.1956 passed by Naib Tehsildar, the name of the petitioner was mutated in revenue record in place of his deceased father. Shortly, after the death of the petitioner's father his mother also died. The petitioner was under care and supervision of his grand mother. On account of his disability, being a minor, the petitioner was not able to cultivate the land himself as such it was let out to one Sawaroo, the father of respondent no. 4 on "BATAI" (crop sharing basis). Later on the grand-mother of the petitioner executed a sale deed of the disputed plot in favour of Sawaroo on 11.5.1959, on behalf of the petitioner as his guardian. The name of Sawaroo also came to be mutated in the revenue record.

3. On attaining majority when the petitioner came to know about the entries in the revenue records he field objection under section 9 A (2) of the Act for expunging the name of Sawaroo on the ground that sale deed executed by his grand mother during his minority was void as she was not the natural guardian. The objection was contested by respondent no.4 on the ground that since no suit was filed for cancellation of the sale deed by the petitioner within limitation, after attaining majority his rights in the land in dispute were extinguished and in the alternate it was pleaded that he has perfected rights by being in possession for about 20 years.

4. The Consolidation Officer vide order dated 24.4.1978 dismissed the objection filed by the petitioner. Appeal filed against the said order was allowed by the Settlement Officer Consolidation vide Order dated 9.3.1997. Aggrieved the respondent no. 4 filed a revision which was allowed by the Deputy Director of Consolidation and the case was remanded back to the Settlement Officer Consolidation.

5. The Consolidation Officer held that petitioner did not file suit for cancellation of sale deed within three years of attaining the majority and the objection has also been field by him after more than one year of publication of notification under Section 4 of the Act

and the consolidation court have no power to cancel the sale deed hence the objection is liable to be dismissed. In appeal the Settlement Officer Consolidation held that since the sale deed was not executed by natural guardian of minor hence it is hit by Section 11 of Hindu Minority and Guardianship Act and is void. He also recorded a fining that consolidation intervened before the respondent no. 4 could perfect his right by adverse possession as such he is not entitled to any right in the property in dispute.

6. The Deputy Director of Consolidation was however of the view since the sale deed was executed without obtaining permission of District Judge as such it was only a voidable document. He further held that it is not clear when the petitioner attained majority and without ascertaining the age of the petitioner the question whether the petitioner took steps within limitation after attaining majority cannot be decided. Thus he directed the case back to Settlement Officer Consolidation to re-determine the age of the petiti9oner and accordingly ascertain whether objection was field by him within prescribe period of limitation after attaining majority.

7. It has been urged by the leaned counsel for the petitioner that sale deed executed by grand mother of the petitioner who was not natural guardian was void and hit by Section 11 of the Hindu Minority and Guardianship Act. The Deputy Director of Consolidation has wrongly and illegally held it to be a voidable document. It has further been urged that there was no justification to remand the case back for recording a finding about the age of the petitioner as there was enough material available on the record on the basis of which Consolidation Officer and Settlement Officer both recorded a finding of fact about the date of birth and age of the petitioner. The Deputy Director of Consolidation without considering the said evidence remanded the matter back for no rhyme and reason.

8. In reply the learned counsel for the respondents while justifying the remand order contended that writ petition is not maintainable against the remand order.

9. I have considered the arguments advanced by the learned counsel for the parties and perused the record.

10. The twin questions which arise for adjudication are (i) the competence of the grand mother of the petitioner to execute the sale deed as his guardian (ii) whether the respondent no.4 would perfect rights by adverse possession.

11. In so far as first question is concerned Section 11 of the Hindu Minor and Guardianship Act 1956 is a complete answer. The said Section provides that De Facto Guardian has no right or authority to dispose of or deal with the property of the minor. Section 11 of the Act reads as follows:

"***De Facto Guardian not to deal with minor's property*- After commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the de-facto guardian of the minor"**

12. A plain reading of Section goes to show that after commencement of the Act no person is entitled to transfer, alienate or deal with the property of the minor on the ground of his or her being the De Facto Guardian.

13. The Hon'ble Apex Court in the case of **Madhegowda (D) by L.Rs. Vs. Ankegowda (D) by L.Rs. and others 2001 (45) ALR 820** SC has ruled that transfer of a minor's property in violation of Section 11 of the Act is void ab initio void. It has been observed as follows;

"From the statutory provisions noted above, it is clear that with the avowed object of saving the minor's estate being miss appropriated or squandered by any person, by a relation or a family friend claiming to be a well wisher of the minor, Section 11 was enacted to prohibit any such person from alienating the property of the minor. Even a natural guardian required to seek permission of the court before alienating any part of the estate of the minor and the court is not to grant such permission to the natural guardian except in case of necessity or for an evident advantage to the minor. So far as de facto guardian or de facto manager is concerned the statute has in no uncertain term prohibited any transfer of any pert of minor's estate by such a person. In view of the clear statutory mandate, there is little scope for doubt that any transfer in violation of the prohibition incorporated in Section 11 of the Act is ab initio void".

14. From the aforesaid settled legal position, it is clear that the sale deed executed by the grand mother of the petitioner was a void document and the Deputy Director of Consolidation wrongly held it to viodable.

15. In view of the fact that since the sale deed was a void document, the judgment of the Deputy Director of Consolidation remanding the case back to the Settlement Officer Consolidation to find out the age of the petitioner to ascertain whether proceedings were initiated by him within limitation after attaining majority also cannot be sustained for the simple reason that void document does not require any cancellation and can be ignored by the consolidation authorities. The Limitation provided under general law for cancellation of a document would not stand in the way of the consolidation authorities in case the document in question is a void document.

16. In so far as the second question is concerned admittedly the respondent no. 4 came in possession in 1959, on the basis of sale deed executed during the minority of the petitioner. The limitation of six years as prescribed at the relevant time, for perfecting rights by adverse possession would start running after the petitioner had attained majority. On the basis of evidence brought on record in the form of voter list of 1973 and Parivar register the Settlement Officer Consolidation held that the petitioner attained majority either in 1968 or in 1972. The said finding of the Settlement Officer Consolidation is based on the voter list wherein the age of the petitioner is recorded as 24 years and the parivar register wherein this date of birth is 25.2.1954. Thus in any case even if the starting point of limitation is taken to be 1968 when the petitioner attained majority, six years period would expire in 1974. Admittedly the village was notified for consolidation operation on 20.5.1972. After commencement of the consolidation

operation no suit under Section 209 of U.P.Z.A.& L.R. Act can be filed, the jurisdiction being barred and hence non-filing of suit would confirm no rights on the person who was in possession an the date the consolidation proceedings started if the limitation for a suit under Section 209 of U.P.Z.A. & L.R. Act has not till them run out. In other words if before the expiry of the prescribed period of limitation consolidation intervenes then the limitation prescribe by section 209 stands arrested. The view taken by me finds support from a division bench judgment of our court in the case of **Smt. K. Devi Vs. Joint Director of Consolidation U.P. & Ors. 1973 ALJ 395.**

17. In view of the above legal position the period of six years from the time petitioner attained majority having not expired before the commencement of the Consolidation proceedings, the respondent no.4 would not acquire any title or right by adverse possession. The remand order made by Deputy Director of Consolidation cannot be said to be justified in any manner in the aforesaid facts and circumstances.

18. The objection raised by learned counsel for the respondents that writ petition challenging remand order is not maintainable, is also not liable to be accepted. It cannot be said that as a rule writ petition against remand order is not maintainable. Generally, the court refuses to interfere or issue a writ of certiorari against a remand order for there is no final adjudication. If the court normally does not interfere with the remand order, it does not mean that there is any lack of power or the writ petitioned is not maintainable. The court can interfere if it find the circumstances to be extraordinary or the interference necessary in the interest of justice. In the present case on the material available on the record the Settlement Officer Consolidation recorded a finding of fact regarding the age of the petitioner, Deputy Director of Consolidation without even referring to the said documents or setting aside the finding of fact recorded by Settlement Officer has remanded the case back and that too on the illegal presumption that the sale deed was a viodable document. Thus the remand order in no way can be said to be justified. The approach of the Deputy Director of Consolidation is totally contrary to the law and the order deserves to be interfered and quashed by this court.

19. In the result writ petition succeeds and is allowed. The impugned order of Deputy Director of Consolidation dated 26.8.1980 stands quashed and that of Settlement Officer Consolidation dated 9.3.1979 stands affirmed. However, in the facts and circumstances of the case, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 46588 of 2005

Sanjeev Sharma & another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ravi Kant
Sri M.R. Khan
Sri Manish Goyal
Sir Anil Bhushan
Sri Gautam Chaudhary

Counsel for the Respondents:
Addl. Advocate General
S.C.

United Provinces Legal Remembrance and Law Officer Establishment Rules-1942-Rule-5 (2)-Regularisation-working on daily wages basis-long period of 6 years-can not be basis for regularization-initial appointment contrary to the procedure provided in Rule-by adopting pick and choose policy-held-illegal.

Held: Para 16

The illegalities in that regard are writ large on the records. In such circumstances, this Court has no hesitation to hold that the initial appointment of the petitioners itself was de-hors any procedure known to law and therefore cannot be a subject matter of further continuance under the discretionary and equitable powers of this Court under Article 226 of the Constitution of India. This Court would rather follow the dictum of the Hon'ble Supreme Court in the case of Gujrat Agriculture University vs. Rathore Labhu Bechar and others; 2001(3) SCC 574 and therefore refuse the relief of regularization to the petitioners based only on the plea of long service rendered by them as a Class-IV employee since 1999.

Case law discussed:
1997 (1) SCC-251
2001 SCC-664,
2001 (2) SCC-41
2001 (9) SCC-204
2001 (4) SCC-139
1986 (3) SCC-156
2003 (1) SCC-95
2004 (7) SCC-112
2001 (3) SCC-574
2005 (1) SCC-639

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

1. Heard Sri Ravi Kant Senior Advocate, assisted by Sri Manish Goel Advocate, Sri Anil Bhushan Advocate, Sri M.R. Khan Advocate, on behalf of the petitioners in Civil Misc. Writ Petition No. 46588 of 2005, Civil Misc. Writ Petition No. 58494 of 2005 and Civil Misc. Writ Petition No. 60861 of 2005. Additional Advocate General on behalf of the respondents in all the writ petitions.

2. These three writ petitions have been filed by 21 petitioners. All of them claim to have been appointed as Class-IV Employees on daily wage basis (on a fixed salary of Rs.1050/- per month) in the Establishment of Advocate General U.P., Allahabad and in the Establishment of Government Advocate at Allahabad between 1998 to 1999. The petitioners allege that they have been continuously working as daily wage employees since their initial appointment without any break. The services rendered by the petitioners are highly satisfactory and absolutely nothing adverse has been noticed against the work and performance of the petitioners as Class-IV employees.

3. It is contended that in past the respondents have been filling up the Class-IV vacancies, as and when they became available, by regularization of daily wage employees, who had been appointed earlier. In support thereof reliance has been placed upon the letters dated 9th June, 2004 and 19th June, 2004 (Copies whereof has enclosed as Annexure-4 to the Writ Petition No. 58494 of 2005). In this background on 7th June, 1999 Advocate General U.P. had forwarded a request to the State Government for sanction/creation of new posts in order to cope with the additional work. In response to the aforesaid proposal, a letter dated 13th December, 2000 was forwarded by the State

Government. Thereafter further correspondence was entered into and meeting between the State Officials and the Advocate General took place on various dates.

4. On the strength of these documents brought on record along with the writ petition, petitioners submit that between the Advocate General U.P. and the State Government a decision was taken that there was requirements of 106 additional Class-IV posts and it was also specifically noticed that against the aforesaid 106 additional posts, 57 daily wage employees were already working. Under the proposal it was recommended that after the aforesaid 57 daily wage Class-IV employees (persons like the petitioners) are regularized, 49 posts will be available for new appointments.

5. Ultimately on 17th May, 2005, the State Government sanctioned amongst other 104 posts of Class-IV employee in the pay scale of Rs. 2550-3200. Out of which, 58 posts were earmarked for the Lucknow Establishment, while 46 posts were earmarked for Allahabad Establishment. The letter dated 17th May, 2005 specifically provided that posts shall be deemed to be created from the date appointments on the newly created posts are actually made.

6. On the creation of the aforesaid additional posts of Class-IV employee in the Establishment, the office of the Advocate General U.P. at Allahabad issued an advertisement dated 22nd June, 2005 inviting applications from all eligible candidates, including daily wage employees for appointment against the aforesaid 46 vacancies. The advertisement provided that the selection shall be made on the basis of interview, which was scheduled for 30th June, 2005. Subsequent thereto another advertisement was published by the office of the Advocate General U.P. Allahabad dated 17th August, 2005 where it was mentioned that written examination shall take place on 3rd September, 2005 and all the applicants may appear in the said written examination. At this stage the present writ petitions were filed by the daily wage employees with the prayer that the advertisement dated 17th August, 2005 and 22nd June, 2005 be quashed and respondents may be directed to absorb the petitioners (regularize the petitioners) against the posts which have been now created under the Government Order dated 17th May, 2005. The relief prayed for in the present writ petitions were sought to be justified on the basis of the following contentions:

(a) Petitioners, who have worked for more than 6 years regularly as Class-IV employees, are entitled for such absorption/regularization on the post now created by the State Government in view of the law laid down by the Hon'ble Supreme Court of India in the following cases:

(i) State of Hariyana vs. Pyara Singh; 1992(4) SCC 118
(ii) Gujrat Agricultural University vs. Rathore Labhu Bechar and others; 2001(3) SCC 574.
(iii) Andhra Pradesh Electricity Board an others vs. J. Venkateshwara Rao and others; 2003(1) SCC 116

(b) On the principle of promissory stopples the respondents are debarred from making direct recruitment on the post in question without considering the regularization of the petitioners at the first instance inasmuch as a specific assurance

was held out to the petitioners by the State Authorities qua their regularization on posts becoming available, as was borne out from the correspondence, which was entered into between the Advocate General U.P. Allahabad and the State Government as well as from the past conduct of the respondents. In support thereto the counsel for the petitioners have placed reliance upon the judgments of the Hon'ble Supreme Court reported in **1997(7) SCC 251, 2001 SCC 664, 2001(2) SCC 41, 2001(9) SCC 204 and 2001(4) SCC 139**.

(c) Lastly it is submitted that so far as the Establishment at Lucknow is concerned, no written examination has taken place and appointments have been offered to daily wage employees as well as to the candidates from the open market only on the basis of the interview. Therefore, the respondents cannot adopt two different modes of selection, one for the establishment at Allahabad and other for the establishment at Lucknow. In support thereto the counsel for the petitioners have placed reliance upon the judgments of the Hon'ble Supreme Court reported in **1986 (3) SCC 156, 2003(1) SCC 95**.

7. On behalf of the State respondents, Additional Advocate General submits that the initial entry of the petitioners in service itself was patently illegal and void. Admittedly, no sanctioned posts were available on the date the petitioners had been appointed nor any budgetary allocation in that regard had been made. It is further submitted that appointments on the post in question is regulated by The United Provinces Legal Remembrancer's and Law Officers Establishments Rules, 1952.

8. All the petitioners have been offered appointment without following any procedure known to law for such selection/appointments. They had only been picked and chosen by the incumbents holding the office earlier for the purposes of catering to the exigencies of work in the establishment. Such appointments which are offered de horse the rules, cannot be form the basis for regularization inasmuch as the Hon'ble Supreme Court of India in the case of A. Uma Rani vs. Registrar, Cooperative Societies and others; **2004(7) SCC 112** has specifically held that appointments made in contravention of the statutory provisions would be illegal and cannot be regularized by the State. The said judgment has been specifically approved in the latest judgment of the Hon'ble Supreme Court in the case of Mahendra L. Jain and Others vs. Indore Development Authority and Others; **2005(1) SCC 639**. With regards to plea of promissory estopples, it is submitted that no assurance was ever held out by the State respondents to the petitioners qua their regularization at any point of time nor any such promise is borne out from the records. It is further submitted that the petitioners have failed to establish as to in what manner they had altered their position because of the daily wage appointments offered to them so as to set up a plea of promissory estoppel.

9. Lastly it is pointed out that so far as the establishment at Lucknow is concerned, as against 58 newly created/available vacancies only 236 applications were received in response to the advertisement published on 30th June, 2005 and therefore the selections have been held after holding interview only on 28th, 29th and 30th June, 2005. In

pursuance of the recommendation of the Selection Committee, constituted for the purposes, appointments have been offered to the candidates selected on merit and the said selected candidates have also joined. It has been clarified that a large number of Class-IV employees, who have participated in the selection at Lucknow have also been offered fresh appointments on the newly created posts, on the basis of merit secured by them in the process of selection.

10. So far as the Establishment at Allahabad is concerned, it is pointed out that against the 46 newly created posts available at the Allahabad establishment 1431 applications were received and after scrutiny as many as 1143 applications were found valid. Since it was not practically possible to hold selection on the basis of the interview only from such large number of the applicants, it was decided to hold a written examination for the purposes of short-listing of the candidates to be called for interview. Learned Additional Advocate General submits that the process adopted for short-listing of the applicants to be considered for final selection through interview, is a fair and just procedure known to law and therefore cannot be said to be arbitrary and unjustified in any manner. Since the fact situation with regards to number of applicants for the posts at Lucknow establishment vis-Ã -vis the number of applicants in respect of the vacancies at the Allahabad establishment was materially different and two large the decision to hold the written examination for short-listing, cannot be said to be discriminatory in any manner.

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

12. The first and foremost issue for consideration before this Court is as to whether the petitioners have a right of being regularized against the vacancies, which have now been created and have become available in the establishment at Allahabad, only on the strength of their long service (nearly six years) as daily wage Class-IV employees. It is no doubt true that Hon'ble Supreme Court of India in the judgment reported in **2001 (3) SCC 574** has held in paragraph 17 and 21 as follows:

"17. *From the aforesaid, it emerges that the learned Single Judge had concurred with the finding of the Tribunal that the contesting workmen have been working in the appellant University regularly for a long number of years. The existence of permanent nature of work was inferred on this account and also due to the vastness of the appellant's establishment. The regularization is claimed only in respect of Class IV employees. The main objection which was raised earlier and is raised before us, is that a person could only be regularized on any vacant post and if there be one he should be qualified for the same as per qualifications, if any, prescribed. In fact, the Tribunal has held that on the date of the award, most of the workmen had completed 10 years of their service. It is also well settled, if work is taken by the employer continuously from the daily wage workers for a long number of years without considering their regularization for its financial gain as against employees' legitimate claim, has been held by this Court repeatedly as an unfair*

labour practice. In fact, taking work from a daily-wage worker or an ad hoc appointee is always viewed to be only for a short period or as a stopgap arrangement, but we find that a new culture is growing to continue with it for a long time, either for financial gain or for controlling its workers more effectively with a sword of Damocles hanging over their heads or to continue with favoured ones in the cases of ad hoc employees with stalling competent and legitimate claimants. Thus we have no hesitation to denounce this practice. If the work is of such a nature, which has to be taken continuously and in any case when this pattern becomes apparent, whey they continue to work for year after year, the only option to the employer is to regularise them. Financial viability, no doubt, is one of the considerations but then such enterprise or institution should not spread its arms longer than its means. The consequent corollary is, where work taken is not for a short period or limited for a season or where work is not for a part-time nature and if pattern shows that work is to be taken continuously year after year, there is no justification to keep such persons hanging as daily-rate workers. In such a situation a legal obligation is cast on an employer; if there be vacant post, to fill it up with such workers in accordance with rules, if any, and where necessary by relaxing the qualifications, where long experience could be equitable with such qualifications. If no posts exist then duty is cast to assess the quantum of such work and create such equivalent posts for their absorption."

***21.** State of Haryana v. Piara Singh. This was a case of ad hoc/temporary government employees. This Court held, those eligible and qualified and continuing in service satisfactorily for a long period have a right to be considered for regularization. Long continuing service gives rise to a presumption about the need for a regular post. In such cases the Government should consider feasibility of regularization having regard the particular circumstances, with a positive approach and empathy for the person concerned."*

13. To the similar effect are the other judgments, which have been relied upon by the counsel for the petitioners.

14. The legal position has, however, gone a sea change subsequent to the aforesaid judgments of the Hon'ble Supreme Court and the Hon'ble Supreme Court of India in its latest judgment in the case of A. Uma Rani vs. Registrar Cooperative Societies and Others; **2004 (7) SCC 112** in paragraph 39, 40 and 70 has held as follows:

***"39.** Regularization, in our considered opinion, is not and cannot be the mode of recruitment by any "State" within the meaning of Article 12 of the Constitution of India or any body or authority governed by a statutory Act or the Rules framed thereunder. It is also now well settled that an appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification wold be wholly illegal. Such illegality cannot be cured by taking recourse to regularization."*

"40. *It is equally well settled that those who come by back door should go through that door*."

"70. *Yet again, recently in Ramakrishna Kamat v. State of Karnataka this Court rejected a similar plea for regularization of services stating: (SCC pp.377-78, para 7)*

"We repeatedly asked the learned counsel for the appellants on what basis or foundation in law the appellants made their claim for regularization and under what rules their recruitment was made so as to govern their service conditions. They were not in a position to answer except saying that the appellants have been working for quite some time in various schools started pursuant to resolutions passed by Zila Parishads in view of the government orders and that their cases need to be considered sympathetically. It is clear from the order of the learned Single Judge and looking to the very directions given, a very sympathetic view was taken. We do not find it either just or proper to show any further sympathy in the given facts and circumstances of the case. While being sympathetic to the persons who come before the court the courts cannot at the same time be unsympathetic to the large number of eligible persons waiting for a long time in a long queue seeking employment."

15. The aforesaid judgment has been specifically approved in the case of Mahendra L. Jain;(supra) **2005(1) SCC 639**. The counsel for the petitioners has not been able to demonstrate before the Court that any procedure known to law was ever followed for the purposes of offering appointments to the petitioners on daily wage basis. From the records, which were produced before this Court by the Additional Advocate General, it is established that all the petitioners had been appointed only by adopting the policy of pick and choose at the sole discretion of incumbent holding the office at the relevant time. At the time of appointments of the petitioners statutory rules have not been followed. Under the statutory rules, known as "The United Provinces Legal Remembrancer's and Law Officers Establishments Rules, 1942", appointments to the inferior establishment shall be made by direct recruitment or by promotion of persons already in the service in any government office, in such manner as the appointing authority may deem fit. Relevant rule 5(2) is being quoted herein below:

"5.(2) Appointments to the inferior establishment shall be made by direct recruitment or by promotion of persons already in the service of the Crown in any government office, in such manner as the appointing authority may deem fit."

16. Neither any appointment letters have been brought on record nor the manner in which the appointments were made had been disclosed. In paragraph 2 of the writ petition only the dates, from which the petitioners have been working in the employment of respondent no. 2 establishment, have been disclosed. Non-compliance of the statutory provisions regulating the appointments, violates Article 14 and 16 of the Constitution of India as well as reservation policy enforced for such appointments within the State of U.P. which have been given go by in the method of appointments of the petitioners. The illegalities in that regard are writ large on the records. In such circumstances, this Court has no hesitation to hold that the initial appointment of the petitioners itself was de-hors any procedure known to law and

therefore cannot be a subject matter of further continuance under the discretionary and equitable powers of this Court under Article 226 of the Constitution of India. This Court would rather follow the dictum of the Hon'ble Supreme Court in the case of Gujrat Agriculture University vs. Rathore Labhu Bechar and others; **2001(3) SCC 574** and therefore refuse the relief of regularization to the petitioners based only on the plea of long service rendered by them as a Class-IV employee since 1999.

17. So far as the plea of promissory estoppels is concerned, counsel for the petitioners could not demonstrate from the records any promise said to have been held out to the petitioners qua their regularization. All the documents relied upon by the counsel for the petitioners in their writ petitions are mere agendas or proposals, which are submitted from time to time. There is no document on record, which could establish that aforesaid proposal/agendas fructified into a positive decision of the competent authority to regularize the services of daily wage employees like the petitioners.

18. It is needless to point out that on the insistence of the counsel for the petitioners, this Court had also summoned the original records pertaining to various correspondences, which had been entered into between the office of the Advocate General and the State Government qua the creation of posts in question. From the records it is established that at no point of time any assurance was held out to the petitioners by any of the respondents for regularization/absorption on creation of necessary number of posts. The petitioners have failed to establish any promise having been held out to them on the basis of the records. The petitioners could not substantiated their case by any documents available on record.

19. Even otherwise, counsel for the petitioners has not been able to point out as to how the petitioners have altered their position to their detriment because of the alleged promise, said to have been held by the respondents, as alleged by the petitioners. It is needless to point out that for attracting the principles of promissory estoppels, it is necessary for the petitioners to not only establish that a promise so held out but also to establish that the petitioners have altered their position to their detriment because of the promise so held out. Neither in the writ petition nor otherwise there is any plea of the petitioners having altered their position to their detriment because of the promise alleged to have been held out by the respondents. Thus, on both the grounds the plea of promissory estoppels, as set up by the petitioners, is not supported by any material and therefore rejected. The legal principle reiterated in the judgments relied upon by the counsel for the petitioners in respect of promissory estoppels are not in dispute and therefore are not being referred.

20. So far as the plea of adopting different procedures for appointment in establishment at Lucknow vis-Ã-vis the appointments in the establishment at Allahabad is concerned, the Court is of the firm opinion that the said plea has only been stated to be rejected. From the facts, which have been disclosed on behalf of the respondents namely the number of valid applications received in respect of 46 posts at Allahabad i.e. 1143 the decision taken to short-list the applicants on the basis of written

examination before holding the interview cannot be said to be arbitrary in any manner. This Court is satisfied that the procedure so adopted is fair and based on different set of circumstances which come into existence because of the large number of applications received at Allahabad. The decision taken by the State respondents to hold a written examination before holding interview for the purposes of short-listing cannot be said to be arbitrary and discriminatory in any manner.

In view of the aforesaid, none of the grounds raised on behalf of the petitioners are tenable in the eyes of law. Writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 49225 of 2005

Shiv Devi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri M.P. Srivastava

Counsel for the Respondents:
Sri Ashok Srivastava
S.C.

U.P. Punchayat Raj Act 1947 Section 95 (1)(g)-readwith-U.P. Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) Enquiry Rules 1997-Rule-8-Financial and administrative power of Pradhan-ceased by the District Magistrate-No enquiry as per provisions of Rules conducted for long spell of time of 3 years-held-the authorities failed to act in conformity with Statutory provision-operation of impugned Order Quashed-as the Pradhan are elected by democratic process interference must be in strict conformity with statutory provision.

Held: Para 5 and 8

The period may not mandatory but still the authority's are required to act under law with all promptness in the proceedings initiated against the Pradhan under Section 95 (1)(g) proviso of the U.P. Panchayat Raj Act without any uncalled for delay. It is to be kept in mind that the Pradhans of Gram Panchayat are elected by a democratic process, interference in powers of the elected representatives of the people by the administrative authorities must be in strict conformity with the statutory provision.

In such circumstances, this Court is prima facie of the opinion that the respondent-authorities have failed to act in conformity with the statutory provisions, by not getting a final enquiry conducted against the Pradhan (petitioner), by a nominated officer within reasonable time. Therefore, they not be permitted to continue with the ceasation of financial and administrative powers of the Pradhan.

Case law discussed:
1999 (2) UPLBEC-718

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

1. Heard Sri M.P. Srivastava, learned counsel for the petitioner, Sri Ashok Srivastava, learned counsel for the respondent no. 3 and learned Standing counsel on behalf of respondent nos. 1 and 2.

Respondents are granted three weeks time to file counter affidavit. Rejoinder

affidavit may be filed within a week thereafter.

List on 31st August, 2005.

2. The financial and administrative of the elected Pradhan, namely, Shiv Devi (petitioner) were ceased under order of the District Magistrate, Sonbhadra dated 20th November, 2002. Feeling aggrieved by the aforesaid order of the District Magistrate the petitioner filed Civil Misc. Writ Petition No.5444 of 2002. In the said writ petition the Court did not grant any interim order to the petitioner, the writ petition is still pending. Subsequently the District Panchayat Raj Adhikari, Sonbhadra passed orders dated 31st March, 2003 and dated 5th April, 2003, whereby the Pradhan as well as two other persons namely, District Panchayat Raj Adhikari and Secretary, were required to deposit a sum of Rs.29708/- said to be loss caused to the Gram Panchayat. Thereafter the District Magistrate passed an order dated 23rd December, 2003 restoring the financial and administrative powers of Pradhan. Feeling aggrieved by the said order of the District Magistrate Ramvyas Vishawakarma (respondent no.3) filed Civil Misc. Writ Petition No. 162 of 2004 (Ramavyas Vishwakarma Vs. District Magistrate, Sonbhadra and others). In the said writ petition initially an interim order was granted by this Court on 7th January, 2004. However, the said writ petition was disposed of finally on 5th March, 2004 by this Court and order dated 7th January, 2004 was quashed with a direction to the District Magistrate, Sonbhadra to take final decision qua in the proceedings initiated against the Pradhan strictly in accordance with law. The District Magistrate instead of getting final enquiry conducted against the Pradhan in accordance with the U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 (hereinafter referred to as the Rules of 1997, has proceeded to pass an order dated 2nd August,2004 whereby the financial and administrative powers of the Pradhan were restored with a direction upon the Pradhan to deposit a sum of Rs.19854/-. The order of the District Magistrate dated 2nd August, 2004 restoring the financial and administrative powers of the Pradhan was again challenged before this Court by Sri Ramvyas Vishwakarma (respondent no.-3) by means of writ petition no.31601 of 2004. The writ petition filed by the respondent no.3 was allowed, the order dated 2nd August, 2004 was quashed vide judgment and order dated 2nd March, 2005, in view of the provisions of Section 95 (1)(g) proviso of the U.P. Panchayat Raj Act, 1947 as also in view of the judgment reported in **1999 (1) UPLBEC 718**. The Court in the said judgment recorded a categorically finding that since the final enquiry has not been conducted against the Pradhan and he has not been exonerated of the charges leveled against her, therefore, there is no question of administrative and financial powers of the Pradhan being restored.

3. The District Magistrate has now passed an order dated 21st June,2005 in alleged compliance of the judgment and order of this Court dated 2nd March, 2005 whereby the earlier order dated 2nd August, 2005 has been revoked and the financial and administrative powers of the Pradhan have again been ceased by restoration of the order dated 30th November, 2000. The order now passed by the District Magistrate dated 2nd June, 2005 has been challenged by the

petitioner by means of the present writ petition amongst others on the ground that under the provisions of Rules of 1997 specific times frame for holding preliminary enquiry as well as for holding final enquiry has been provided. The authorities cannot keep the enquiry pending for years and thereby interfere with the rights of the elected Pradhan on the basis of preliminary enquiry alone.

4. In order to appreciate the contention so raised reference may be had to Rule 8 of the Rules of 1997, which regulates the time fixed for holding final enquiry and reads as follows:

"**8. Submitting the report to the Government-**[Enquiry Officer shall conclude the enquiry within six months from the date of receipt of complaint and forw ard to State Government the records of the enquiry which shall include-

(a) the report prepared by him under Rule-7;
(b) the written statement of defence, if any, of the person against whom the enquiry has been held;
(c) the oral and documentary evidence produced during the course of the enquiry;
(d) written briefs, if any, filed during the course of the enquiry; and
(e) the orders, if any, made by the State Government and the Enquiry Officer in regard to the enquiry."

5. The period may not mandatory but still the authority's are required to act under law with all promptness in the proceedings initiated against the Pradhan under Section 95 (1)(g) proviso of the U.P. Panchayat Raj Act without any uncalled for delay. It is to be kept in mind that the Pradhans of Gram Panchayat are elected by a democratic process, interference in powers of the elected representatives of the people by the administrative authorities must be in strict conformity with the statutory provision.

6. This Court, while entertaining the present writ petition on 15th July, 2005 required the learned Standing Counsel to seek instructions from the District Magistrate, Sonbhadra as to whether any final enquiry in terms of Rule 8 (a) of the Rules of 1997, in respect of the proceedings initiated against the petitioner, Shiv Devi, Pradhan of village Jhanmsheela, District Sonbhadra, has been submitted till date or not. The learned Standing Counsel has made a statement before this Court today on the basis of the instructions so received from the office of the District Magistrate, Sonbhadra that final enquiry was conducted by the Commissioner of Division against the petitioner and the Commissioner, in its report has held that the charges as have been leveled against the petitioner are found to be corrected.

7. From the instructions so received by the learned Standing Counsel, it is apparently clear that final enquiry as contemplated under the provisions of Rules of 1997 by a nominated District Level Officer has not been conducted against the Pradhan till date nor any final enquiry report referable to the statutory rules have been obtained by the District Magistrate, Sonbhadra. It is further apparent that the Commissioner of Division was not nominated by the District Magistrate as the district level officer, to conduct the final enquiry against the Pradhan under the provisions of Rule of 1997. A period of three years have been elapsed, since the

administrative and financial powers of the Pradhan under Section 95 (1)(g) proviso of the Act of 1947 were ceased. Fresh elections of the Gram Pradhan are to be held in near future.

8. In such circumstances, this Court is prima facie of the opinion that the respondent-authorities have failed to act in conformity with the statutory provisions, by not getting a final enquiry conducted against the Pradhan (petitioner), by a nominated officer within reasonable time. Therefore, they not be permitted to continue with the ceasation of financial and administrative powers of the Pradhan.

9. The petitioner has made out a prima facie case for grant of interim order.

10. Till the next date of listing the operation of the order dated 2nd June, 2005 passed by the District Magistrate, Sonbhadra shall remain stayed and respondents shall not interfere with the administrative and financial powers of the Pradhan (petitioner).

11. A copy of this order shall be supplied to the learned counsel for the petitioner on payment of usual charges by 27th July, 2005.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2005

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

Civil Misc. Writ Petition No.55898 of 2004

Shiv Kumar Akela, Advocate and others ...Petitioners

Versus

The Registrar, Societies Firms and Chits, Under the Societies Registration Act, 1860, Allahabad and others ...Respondents

Counsel for the Petitioners:
Smt. Sadhna Upadhya
Sri S.S.Rathore (in person)

Counsel for the Respondents:
Sri S.M.A.Kazmi, CSC
Sri Ranvijay Singh, SC
Sri S.Prakash,
Sri T.P.Singh,
Sri Sidharth Singh
Sri Amit Sthalekar,
Sri V.B. Upadhaya

Constitution of India, Art. 226- maintainability-writ petition-against High Court Bar Association Allahabad-being registered under Societies Registration Act-member of the society are the Advocates-an officer of Court-an indispensable constituent of 'justice delivery system'-enjoys privileged position-references/ condolences-which are Court proceeding at the request of Bar Association-bar to ensure proper and smooth functioning of Courts hence a public functionary-Writ Petition held-maintainable.

Held: Para 10,19,23 & 27

Court has provided accommodation to the High Court Bar Association and Advocate Association. Court provides

various other facilities- with no charges. Court holds 'References' on the request of High Court Bar Association- which are Court proceedings. All this ultimately concerns the welfare of the 'Public' and 'BAR is nothing but a 'Public' 'functionary'. It also shows that concept of 'Bar' Association itself has emerged from the solemn object to ensure proper and smooth functioning of the Courts so that 'justice' may be dispensed with to the public at large, which is possible only when 'BAR' maintains a minimum desired standard both from the point of view of professional ethics and professional proficiency.

Second objection regarding maintainability of the Writ Petition on this ground that High Court Bar Association being registered under Societies Registration Act is not amenable to writ jurisdiction under Article 226, Constitution of India, it will suffice to mention that at this stage writ petition does lie and is maintainable against respondent nos.1, 5, 6, 7, 8 & 9. Curiously, none of the respondents except respondent no.2, 3, & 4 have raised objection regarding maintainability of the writ Petition.

In view of the view (both majority and minority) Writ Petition against a registered Society consisting of Advocates (members of the High Court Bar) is maintainable.

Advocate is an officer of the Court. He is an indispensable constituent of the 'justice delivery system'. He enjoys special status by virtue of his being enrolled as Advocate. He enjoys privileged position in Court (as well as in public). In High Court he is provided place to sit in Court premises. High Court has given large accommodation in the High Court Building to High Court Bar Association for chambers, canteen etc. High Court holds references/ condolences on the request made by the High Court Bar Association, and these proceedings are Court proceedings.

Case law discussed:
AIR 2005 SC-2473
1992 (4) SCC-305
1994 Supp. SCC(2) 115
2005 (4) SCC-649
1995 (5) SCC-716
AIR 1996 SC-98
1995 (1) SCC-732
1995 AIR SCW-473
1995 (3) SCC-619
1995 AIR SCW 2203
1995 Crl.L.J. 2910
AIR 2003 SCC 739

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

ORDER

1. Respondent nos. 3 & 4, impleaded as President and Secretary of High Court Bar Association, for short 'HCBA'. Respondent no.2 at the outset of the hearing of the case raised, 'Preliminary Objection' regarding maintainability of the present Writ Petition under Article 226, Constitution of India, on two counts, namely;-

(i) present Writ Petition can not be entrtained as 'Public Interest Litigation' (PIL), and ,
(ii) 'High Court Bar Association, Allahabad' (HCBA), is a 'Society' registered under Societies Registration Act, (whose 'Bye-laws'/Rules have no statutory force), and hence not amenable to High Court jurisdiction under Article 226, Constitution of India.

2. It is conspicuous to note that none of the other Respondents (viz. The Registrar, Societies Firms and Chits-under Societies Registration Act, 1860, Allahabad/Respondent No.1, Uttar Pradesh Bar Council /Respondent No.5, Bar Council of India through its

Chairman, New Delhi/ Respondent no. 6, Advocate General, State of Uttar Pradesh, Lucknow/Respondent no.7, High Court of Judicature at Allahabad through its Registrar General/Respondent no. 8 and The Advocate Association, 4th floor, New Building (High Court Allahabad)/Respondent 9) have joined the Respondent Nos. 2, 3, & 4 on the above 'Preliminary Objection' regarding maintainability of the Writ Petition, rather directly or indirectly they support the petitioners and seek court intervention to ensure proper functioning of High Court Bar Association.

3. To appreciate 'Preliminary Objection', we may refer to the reliefs claimed in the Writ Petition which read-

"(i) issue, a writ order or direction in the nature of mandamus for constituting a committee of Former Presidents HCBA presently practising in the High Court for weeding out non-practising advocates and to prepare final list of genuine voters who are regular practitioners in this Hon'ble Court and to hold elections of the General Body of the HCBA for the term 2004-2005 immediately thereafter.

(ii) issue, a writ, order or direction in the nature of mandamus ceasing the financial powers of the respondent number 3 & 4 other than disbursement of salary to HCBA staff until holding of the HCBA General Body elections 2004-2005.

(iii) issue, a writ order or direction in the nature of ad-interim mandamus ceasing the financial powers of the respondent number 3 & 4other than disbursement of salary to HCBA staff until holding of the HCBA General Body Elections 2004-2005, and/or during the pendency of the present writ petition before this Hon'ble Court, besides constituting a committee of Former Presidents HCBA presently practising in the High Court for weeding out non-practising advocates and to prepare final list of genuine voters who are regular practitioners in this Hon'ble Court and to hold elections of the General Body of the HCBA for the term 2004-2005 immediately thereafter, so as to secure the ends of justice, or else the petitioner as well as the 'institution' shall suffer irreparable harm and injury.

(iv) issue, any such other or further orders as this Hon'ble Court deems fit and proper in the present facts and circumstances of the case so as to secure the ends of justice."

4. We shall now examine the status of the petitioners in the wake of the reliefs (quoted above) claimed in the Writ-Petition.

5. Undisputedly, Petitioners before the Court are Advocates who belong to legal profession. They are-members of the High Court Bar Association (HCBA), practising regularly as Advocate in High Court, Allahabad. They are ordinary members with right to vote to elect Governing Council of High Court Bar Association under relevant Bye-laws/Rules of the High Court Bar Association. Smt. Sadhana Upadhyay, Petitioner No.3, is an 'ex-office bearer' of High Court Bar Association.

6. Issues raised by the petitioners in the present Writ Petition concerns, in general, functioning of the 'justice delivery system' and, in particular, functioning of the 'High Court' (which is an essential component of the said system

and vital organ of administration of justice in the State). Quality of dispensation of justice is directly dependant upon professional standards of ethics and discipline amongst the members of legal profession. One cannot expect the system to function smoothly and deliver desired fruits unless all its wings (Bar is one of it) is healthy and maintains dignity of the noble profession.

7. Bye-law/Rule No.3 & 17 containing objects and composition of 'Governing Body' of High Court Bar Association read-

"Objects

3. The objects of the Association are:
(a) to promote the development of legal science and studies and to watch legislation for the purpose of assisting in the progress of sound legislation;
(b) to safeguard and promote the interest of the legal profession and its members in general and of the members of the Association in particular.
(c) to promote a high professional tone, standard and conduct amongst the members of the legal profession and to check unprofessional practices;
(d) to maintain a library of legal literature and of other subjects likely to be useful to the members of the Association;
(e) to provide a meeting place for the members of the Association particularly for study and discussion of law;
(f) to bring to the notice of the Bar Council, the High Court, the Supreme Court or the Central or State Governments matters affecting the legal profession in general of the members of the Association in particular;
(g) to prepare and implement schemes for giving assistance to members of their families in distress circumstances;
(h) to establish and maintain a printing press for the printing and publication of the Cause list and the promotion of other objects of the association, and
(i) to do all such acts or take such steps as might be necessary for the well being of the Association, or for the fulfilment of these objects.

Governing Council

17*. The affairs of the Association shall be managed and its entire business including the investment of the funds shall lbe conducted by and under the control of Governing Council consisting of:*

(i) office bearers elected under Rule 16;
(ii) 12 other members to be elected from amongst the members of the Association in the Annual General Meeting of the Association;
(iii) The Advocate General, U.P., Ex-officio.
(iv) The Ex-Presidents of the Association are Ex-officio."

8. Inclusion of Advocate-General, U.P. (Ex. Officio) shows that it is not ordinary registered society and its existence is with an object to ensure proper functioning of Courts and to provide legal expertise to public at large so that justice is dispensed in real sense. It is prima facie, a function having all the flavours of public utility service and basically a public function.

9. High Court Bar Association is also affiliated and recognised by U.P. Bar Council, Allahabad. It is, thus under supervision and control of 'Bar Council

of U.P.' a 'statutory body' under Advocates Act. This is clear from 'Certificate of Affiliation' brought on record by U.P. Bar Council.

10. Very object of providing 'Bar Association' at all level of the Courts/with affiliation/recognition extended by State Bar Council, regulating members of legal profession under Advocates' Act, 1961 and Rules framed thereunder, initiation of various statutory Welfare Schemes under control of U.P. Bar Council and State of U.P., to arrange for 'library' for the use by its members to save and promote intend of legal profession and its members, to promote high professional tone, standard and conduct amongst members of legal profession, to promote and develop legal science, to watch legislation for the purpose of assisting in the progress of sound legislation and to print 'Cause List', leave one in no doubt that it has to perform a very onerous duty to ensure healthy functioning of the 'Apparatus' meant for 'justice delivery-system', namely the Courts. Court has provided accommodation to the High Court Bar Association and Advocate Association. Court provides various other facilities-with no charges. Court holds 'References' on the request of High Court Bar Association-which are Court proceedings. All this ultimately concerns the welfare of the 'Public' and 'BAR is nothing but a 'Public' 'functionary'. It also shows that concept of 'Bar' Association itself has emerged from the solemn object to ensure proper and smooth functioning of the Courts so that 'justice' may be dispensed with to the public at large, which is possible only when 'BAR' maintains a minimum desired standard both from the point of view of professional ethics and professional proficiency. 'BAR' in England in its formative period considered of 'Clergy' which was supposed to do public service. Our 'Gown' owes its origin to the 'Gown' of a clergymen.

11. Apex Court in the case of ***Rajendra Sail Verus Madhya Pradesh High Court Bar Association and others, AIR 2005 Supreme Court 2473*** (Para 32) has noted-

*"**32.** .....The confidence of people in the institutive of judiciary is necessary to be preserved at any cost. That is its main asset. Loss of confidence in institution of judiciary would be end of Rule of law. Therefore, any act which has such tendency deserves to be firmly curbed. For rule of law and orderly society, a free responsible press and independent judiciary are both indispensable. Both have to be, therefore, protected."*

12. In that back ground, concern shown by the petitioners cannot be said to be without foundation or that of a stranger of Bye-passers.

13. It may be noted that Bar Council of U.P. has joined the petitioners on the issues raised in the Writ-Petition and disapproves present functioning of the Bar Association, particularly enrolment of non practising Advocates and those who are not regularly practising in the High Court (i.e. those who are enrolled solely for the purpose of elections to create pseudo majority of a particular candidate).

14. Advocate General, U.P. has also joined the issue raised in the Writ Petition when he made a statement that Court should intervene in order to remedy the

malady/malaise to save the judicial institution.

15. Petitioners, thus, have vital interest in the result of the Writ Petition and undisputely got locus standi to approach the Court by maintaining 'Public Interest Litigation'. Their endeavour shows their genuine and bonafide concern in the functioning of Courts. Endeavour of the petitioners, is to protect the genuine legal practitioner in the High Court and ensure disciple in the High Court premises. By no stretch it can be said that petitioners have raised frivolous issues for personal gain only.

16. Petitioners, in absence of any material to the contrary on record, successfully proved their bonafide in prosecuting the writ petition.

17. We are satisfied that petitioners have approached this Court with clean hands and clear hearts for the relief which does not concern only High Court Bar Association or its members alone but also concerns the management and functioning of the Court and 'justice delivery system' in the State of U.P.

18. In support of our conclusion, reference may be made to the cases-***The Janta Dal Versus H.S. Chowdhary 1992 (4) SCC 305 and Kazi Lhendup Dorji Versus Central Bureau of Investigation 1994 Supp (2) SCC 115***.

19. Second objection regarding maintainability of the Writ Petition on this ground that High Court Bar Association being registered under Societies Registration Act is not amenable to writ jurisdiction under Article 226, Constitution of India, it will suffice to mention that at this stage writ petition does lie and is maintainable against respondent nos.1, 5, 6, 7, 8 & 9. Curiously, none of the respondents except respondent no.2, 3, & 4 have raised objection regarding maintainability of the writ Petition.

20. Moreover, the Writ Petition is maintainable against respondent no.2 in view of the judgement dated February 2, 2005 in the case of ***M/S Zee Telefilms Ltd. & Another Versus Union Of India and others, 2005 (4) SCC 649***.

21. Vide para 31 of the aforesaid reported majority judgement (Hon. N. Santosh Hegde, J, Hon. B.P. Singh, J and Hon. H.K. Sema, J.) it is held-

"Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or right of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for violation of aright of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32.

This Court in the case of Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. Vs. V.R. Rudani & Ors. (1982 2 SCC 691) has held:

"Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writ can be issued to " any person or authority". The term " authority" used in the context, must receive a liberal meaning unlike the term in Article 12 which is relevant only for the purpose of enforcement of fundamental rights under Article 32, Article 226 confers powers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words " any person or authority " used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party, no matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."
Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore, merely because a non-governmental body exercises some public duty that by itself would not suffice to make such body a State for the purpose of Article 12. In the instant case the activities of the Board do not come under the guidelines laid down by this Court in Pradeep Kumar Biswas case (supra) hence there is force in the contention of Mr. Venugopal that this petition under Article 32 of the Constitution is not maintainable."

22. In the minority judgement, Hon'ble Judges of the Apex Court (Hon. S.N. Variava, J. and Hon S. B. Sinha, J.) have noted-.

*"**Para 171**.....What is, therefore, relevant and material is the nature of the function.*

***Para 172**. In our view, the complex problem has to be resolved keeping in view the following further tests:*

*(i) When **the body acts as a public authority and has a public duty to perform'***
(ii) When it is bound to protect human rights.
*(iii) **When it regulates a profession** or vocation of a citizen which is otherwise a fundamental right under a statute or its or its own rule.*
(iv) When it regulates the right of a citizen contained in Article 19(1)(a) of the Constitution of India available to the general public and viewers of the game of cricket in particular.
*(v) **When it exercises a de facto or a de jure monopoly'***
(vi) When the State out-sources its legislative power in its favour;
*(vii) **When it has a positive obligation of public nature.***

These tests as such had not been considered independently in any other decision of this Court.

.....

Para 173. *The traditional tests of a body controlled financially and administratively by the Government as laid down in Pradeep Kumar Biswas (supra) would have application only when a body is created by the State itself for different purposes but incorporated under the Indian Companies Act or Societies Registration Act.....*

An Authority necessarily need not be a creature of the statute.....

Applying the tests laid down hereinbefore to the facts of the present case, the Board, in our considered opinion, fits the said description. It discharges a public function. It has its duties towards the public. The public at large will look forward to the Board for selection of the best team to represent the country. It must manage its housekeeping in such a manner so as to fulfil the hopes and aspirations of millions. It has, thus, a duty to act fairly. It cannot act arbitrarily, whimsically or capriciously. Public interest is, thus, involved in the activities of the Board. It is, thus, a State actor. We, therefore, are of the opinion that law requires to be expanded in this field and it must be held that the Board answers the description of " Other Authorities" as contained in Article 12 of the Constitution of India and satisfied the requisite legal tests, as noticed hereinbefore. It would therefore, be a 'State'."

23. In view of the view (both majority and minority) Writ Petition against a registered Society consisting of Advocates (members of the High Court Bar) is maintainable.

Section 34 (1) of the Advocates Act reads-

" 34(1) The High Court may make rules laying down the conditions subject to which an advocate shall be permitted to practise in the High court and the courts subordinate thereto."

The above provision also supports our view taken above.

24. **In (1995) 5 SCC 716: AIR 1996 SC 98, U.P. Sales Tax Service Association Versus Taxation Bar Association, Agra and others Apex Court has held-**

" .....

11. It is fundamental that if rule of law is to have any meaning and content, the authority of the Court or a statutory authority of the Court and the confidence of the public in them should not be allowed to be shaken, diluted or undermined. The Courts of justice and all tribunals exercising judicial functions from the highest to the lowest are by their constitution entrusted with functions directly connected with the administration of justice. It is that expectation and confidence of all those, who have or are likely to have business in that Court or tribunal, which should be maintained so that the court/tribunal perform all their functions on a higher level of rectitude without fear or favour affection or ill-will. .....The protection to the judges/judicial officer/authority is not personal but accorded to protect the institution of the judiciary from undermining the public confidence in the efficacy of judicial process. The protection, therefore, is for fearless curial process.....".

25. In **Indian Council of Legal Aid and Advice Versus Bar Council of India reported in (1995) 1 SCC 732:**

(AIR 1995 SC 691): (1995 AIR SCW 473, **Supreme Court observed-**

" ..... the duty of a lawyer is to assist the Court in the administration of justice, the practice of law has a public utility flavour and, therefore, he must strictly and scrupulously abide by the Code of Conduct. ....."

Again in Sanjeev Datta reported in (1995) 3 SCC 619 : (1995 AIR SCW 2203); 1995 Cri LJ 2910**, **Supreme Court observed-

"20..... The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. .....If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible."

26. The Apex Court while dealing with the case of ***Ex- Capt. Harish Uppal versus Union of India and another, AIR 2003 Supreme Court 739*** while referred to the above decision, in para 31,32,33, 34 and 36 observed-

***"31**. It must also be remembered that an Advocate is an officer of the Court and enjoys special status in society. Advocates have obligations and duties to ensure smooth functioning of the Court. .....The principles is that those who have duties to discharge in a Court of justice are protected by the law and are shielded by the law to discharge those duties, the advocates in return have duty to protect the Courts. .....*

***32.** It was expected that having known the well-settled law and having been that repeated strikes and boycotts have shaken the confidence of the public in the legal profession and affected administration of justice, there would be self regulation. The above mentioned interim order was passed in the hope that with self restraint and self regulation the lawyers would retrieve their profession from lost social respect. The hope has not fructified. Unfortunately strikes and boycott calls are becoming a frequent spectacle.....The judicial system is being held to ransom. Administration of law and justice is threatened. The rule of law is undermined.*

***33.** It is held that submission made on behalf of Bar Councils of U.P. merely need to be stated to be rejected. .....Bar Council of India is enjoined with the duty of laying down standards of professional conduct and etiquette for advocates. This would mean that the Bar Council of India ensures that Advocates do not behave in unprofessional and unbecoming manner. Section 48 A gives a right to Bar Council of India to give directions to State Bar Councils. The Bar Associations may be separate bodies but all Advocates who are members of such Association are under4 disciplinary jurisdiction of the Bar Councils and thus the Bar Councils can always control their conduct. .....*

***34.** In the case of Abhay Prakash Sahay Lalan V. High Court of Judicature at Patna reported in AIR 1998 Patna 75, it*

has been held that Section 34(1) of the Advocates Act empowers High Courts to frame rules laying down conditions subject to which an Advocate shall be permitted to practice in the High Court and Courts subordinate thereto. It has been held that the power under Section 34 of the Advocates Act is similar to the power under Article 145 of the Constitution of India. It is held that other Sections of the Advocates Act cannot be read in a manner which would render Section 34 ineffective."

36. *It must be noted that Courts are not powerless or helpless. Section 38 of the Advocates Act provides that even in disciplinary matters the final Appellate Authority is the Supreme Court. Thus even if the Bar Councils do not rise to the occasion and perform their duties by taking disciplinary action on a complaint from a client against an advocate for non-appearance by reason of a call for strike or boycott, on an Appeal the Supreme Court can and will,. apart from this, as set out in Romans Services' case, every Court now should and must mulct. Advocates who hold Vakalats but still refrain from attending Courts in pursuance of a strike call with costs,. Such costs would be in addition to the damages which the Advocate may have to pay for the loss suffered by his client by reason of his non-appearance.*

27. Advocate is an officer of the Court. He is an indispensable constituent of the 'justice delivery system'. He enjoys special status by virtue of his being enrolled as Advocate. He enjoys privileged position in Court (as well as in public). In High Court he is provided place to sit in Court premises. High Court has given large accommodation in the High Court Building to High Court Bar Association for chambers, canteen etc. High Court holds references/ condolences on the request made by the High Court Bar Association, and these proceedings are Court proceedings.

28. There is no dispute or doubt that Writ Petition lies against Respondent No.1/Registrar, Societies Registration who is responsible for proper functioning of a 'Society' (registered under Societies Registration Act) including High Court Bar Association. Similarly, Writ Petition lie against Respondent nos. 5,6,7, 8 & 9.

29. The question, as to what extent this court can issue 'Writ' against Respondent Nos. 2, 3 & 4, shall be seen while hearing and deciding the case finally on merit.

30. Objections, regarding maintainability of the Writ Petition are not tenable at this stage.

31. These objections shall, however, be dealt finally in detail while deciding the Writ Petition on merit.

Prima facie Writ Petition is maintainable.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.11.2005

BEFORE
THE HON'BLE SHIV SHANKER, J.

Criminal Revision No. 4394 of 2005

Mrs. Salma Aijaz ...Applicant/Revisionist
Versus
The State of U.P. and others
...Opposite Parties

Counsel for the Revisionist:
Sri J.A. Khan
Sri Afzal Durrani

Counsel for the Respondents:
Sri A.K. Kushwaha
A.G.A.

Code of Criminal Procedure-Section 183, 451-Release of Vehicle-truck during-course of journey from Indore to Varanasi-looted within the jurisdiction of Police Station Karvi-Application for release of Vehicle-Rejected by the Magistrate Chitrakoot on the ground of want of jurisdiction-held-illegal-direction issued for release of vehicle after taking adequate security.

Held: Para 8

The truck in question was taken from Indore to Varanasi and it was looted and the same was found within the jurisdiction of P.S. Karvi, District Chitrakoot (U.P.) and, therefore, the court below has jurisdiction to decide the release application on merits of the case according to the provisions of Section 183 Cr.P.C.. Therefore, the court below has committed the illegality in passing the impugned order.

Case law discussed:
2003 (46) ACC-223
2004 ACC (48) 605
2003 ACC (47) 1086
2005 (3) JIC-42 Alld.

(Delivered by Hon'ble Shiv Shanker, J.)

1. This criminal revision has been directed against the order dated 24.9.2005 passed in release application no. nil of 2005, State Vs. Unknown, under Section 41 Cr.P.C./411 I.P.C., P.S. Karvi, District Chitrakoot whereby the release application of the applicant revisionist was rejected on the ground of beyond jurisdiction.

2. The brief facts, arising out of the case are that on 18.7.2005 the truck bearing no. U.P. 70/AT 2262 was booked by Delhi Assam Roadways Indore and plastic granule was loaded on the truck of the applicant for the transportation to the destination of District Varanasi. In the way of transportation of goods the second driver Sri Kamlesh Kumar Shukla had badly injured the driver Harish Chandra with an intention to commit loot fled away with loaded truck in question on 19.7.2005. He was admitted in the hospital by visible persons. In this regard a first information was lodged at police station Bareili, District Raisen (M.P.). On 25.7.2005, the applicant got a telephonic message from unknown person that his truck was lying in the area of the police station Karvi, District Chitrakoot (U.P.) and as such the applicant revisionist rushed to site and found that the truck was found unloaded and on an enquiry, it was informed that the second driver Kamlesh Kumar Shukla fled away with the goods of truck towards Rajapur. The applicant informed this fact to the concerned police Station Karvi, District Chitrakoot and the truck was brought to the police station Karvi with the help of police and by the joint efforts of the police personnel, the goods were also recovered under the limits of police station Rajapur and was also taken by the police in its custody and a report was lodged in this regard at P.S. Karvi, District Chitrakoot on 29.7.2005 which was registered as Case Crime No. Nil of 2005 under Sections 392/412 I.P.C..

3. The truck in question was purchased by applicant and the same was registered with the registering authority in his name after taking financial assistance

from I.C.I.C.I. Bank Ltd. and the same was hypothecated with the aforesaid bank.

4. Thereafter, the release application under Section 451 Cr.P.C. was moved before the Magistrate Chitrakoot on 3.8.2005 which was rejected on the ground that Court of Chitrakoot has no jurisdiction to decide the release application regarding the release of truck in question by his order dated 24.9.2005. Feeling aggrieved, the applicant revisionist has preferred this criminal revision in this Court.

I have heard learned counsel for the both the sides and perused the records.

5. It is contended on behalf of the revisionist that the learned court below has wrongly rejected the release application on the ground of lack of jurisdiction and that the court below has jurisdiction to decide the release application as the truck was found within the jurisdiction of P.S. Karvi where it was taken into custody by the police. It is further contended that if the truck in question is not released then the truck will be became decay and great hardship is to be caused to the applicant revisionist and that the applicant will be unable to pay the installments of the concerned bank. The truck is lying in the police custody from July, 2005, on the other hand, it is urged that the learned Magistrate has committed no illegality in rejecting the release application.

6. I have considered the arguments of learned counsel for both the parties.

7. It has been provided under Section 183 Cr.P.C. that when an offence is committed whilst the person by or against whom, or the thing in respect of which the offence is committed is in the course of performing a journey or voyage, the offence may be inquired into or tried by a Court through or into whose local jurisdiction that person or thing passed in the course of that journey or voyage.

8. The truck in question was taken from Indore to Varanasi and it was looted and the same was found within the jurisdiction of P.S. Karvi, District Chitrakoot (U.P.) and, therefore, the court below has jurisdiction to decide the release application on merits of the case according to the provisions of Section 183 Cr.P.C.. Therefore, the court below has committed the illegality in passing the impugned order.

9. It has been laid down by Hon. Supreme Court in Sunderbhai Ambalal Desai Vs. State of Gujrat reported in 2003 (46) ACC 223 that the powers under Section 451 Cr.P.C. should be exercised expeditiously. It would serve various purpose namely-

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation;
2. Court or the police would not be required to keep the article in safe custody;
3. If the proper panchnama before handing over possession of article is prepared, that can be used in evidence instead of its production before the court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and
4. This jurisdiction of the court to record evidence should be exercised promptly so that there may not be

further chance of tampering with the articles.

10. The Apex Court has clearly held that appropriate orders would be passed immediately because keeping it at police station for a long period would only result in decay of the article. The Court should ensure that the article will be produced if and when required by taking bond, guarantee or security. Similar view has been followed in a number of decisions of this Court as well in Mohd. Shamim Khan Vs. State of U.P., 2004 ACC (48), 605.

11. It was held in the case of Tulsi Rajak Vs. State of Jharkhand, 2004 Criminal Law Journal 2450, that truck lying in the police station for more than one year resulted in heavy loss of the petitioner and in the circumstances, the High Court permitted to release of the vehicle. It was held in Gurnam Singh and another vs. State of Uttaranchal, 2003 (47) A.C.C. 1086, that what so ever the situation be, there is no use to keep the seized vehicle at the police station or Court campus for a long period and the Magistrate should pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicle, if required at any point of time. The above principles have been followed by this Court in Rajeev Agarwal vs. State of U.P., 2005 (3) JIC 42 (All).

12. After taking into consideration the aforesaid pronouncement, I am of the opinion that the truck in question is liable to be released in favour of the applicant-revisionist who is the registered owner of the vehicle in question.

13. In view of the discussions made above, I come to the conclusion that this revision is liable to be allowed and the impugned order deserves to be quashed.

14. The revision is allowed and the impugned order is quashed. It is directed to the court below to release the vehicle in question after taking adequate security with an undertaking that as and when the vehicle in question is required, the same will be produced in District Court or in any other Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2005

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

Civil Misc. Writ Petition No.49394 of 2004

Smt. Srikanti Nishad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Singh

Counsel for the Respondents:
Sri S.N. Singh
Sri Vishnu Pratap
S.C.

Constitution of India, Art. 226-Grant of mining lease-Petitioner discovered new area of mining-applied for grant of lease-Application remained pending for 8 years-decided only after interference of High Court-the G.O. dated 26-5-95 relied by petitioner-modified by subsequent G.O. dated 16-10-04-those who discovered new mines-during this period -not inpleaded-No mala-fide allegation against the authority-court declined to interfere.

Held: Para 12

Thus, the District Magistrate, Deoria was required to consider the provisions of Government Order applicable on the date the decision was to be taken. From the records, we find that by Government Order dated 27th August, 2002, the Government had taken a decision not to grant mining lease in future on the basis of the earlier Government Order dated 25th May, 1995 and even in the subsequent Government Order dated 16th October, 2004, there is no provision for grant of mining lease in favour of a person who has discovered the mining lease. The District Magistrate, Deoria has passed a detailed order rejecting the representation of the petitioner on this ground. We see no infirmity in the said order.

Case law discussed:

1997 (7) SCC-314
AIR 1981 SC-711
1999 (1) SCC-475
2004 (1) SCC-663
1992 (3) SCC-455
1995 (5) SCC-125
1998 ACJ-590

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

1. This writ petition has been filed for quashing the order dated 8th November, 2004 passed by the District Magistrate, Deoria rejecting the representation filed by the petitioner for grant of mining lease and for a direction upon the respondents to grant the mining lease to the petitioner on the basis of the Government Order dated 25th May, 1995.

2. The facts and circumstances giving rise to this case are that the petitioner discovered a mining area measuring 7.50 acres in Mahal Nadi of Chhoti Gandak situate in Majhauliraj, Tahsil Salempur, District Deoria and on the basis of the Government Order dated 25th May, 1995, submitted an application on 4th June, 1996 for grant of mining lease in her favour. However, instead of granting mining lease to the petitioner, the District Magistrate, Deoria passed an order granting the mining lease in favour of one Shri Mundrika Prasad Nishad for a period of three years. This order was challenged by the petitioner in Writ Petition No. 3566 of 1989, which was dismissed as infructuous vide judgment and order dated 01.04.2004 but liberty was given to the petitioner to make a representation as permissible under law for grant of mining rights. The petitioner then submitted an application dated 15th May, 2004 before the District Magistrate, Deoria for grant of mining lease on the basis of Government Order dated 25th May, 1995. This application was rejected by the District Magistrate vide order dated 19th August, 2004. The petitioner then filed Writ Petition No.40990 of 2004 for quashing the order dated 9th August, 2004. The petition was dismissed by this Court vide order dated 6th October, 2004 since the petitioner did not press the petition as he had already approached the concerned authority. The Court, however, observed that the representation filed by the petitioner would be decided within three weeks from the date of receipt of the order. The representation filed by the petitioner was rejected by the District Magistrate, Deoria vide order dated 8th November, 2004. Hence the present petition.

3. Mr. A.K. Singh, learned counsel for the petitioner submitted that the petitioner is entitled to grant of mining lease in her favour on the basis of the Government Order dated 25th May, 1995 as she had discovered the mining area in question and, therefore, the District

Magistrate was not justified in rejecting her representation. He further submitted that the application for grant of mining lease had been filed on 4.6.1996, though it had been considered and rejected on 1st April, 2004 after expiry of an unreasonable power of 8 years. The petitioner is entitled to get her application disposed of as per the law existing on the submission of her application.

4. Learned Standing Counsel, on the other hand, submitted that in view of the subsequent Government Order dated 27th August, 2002, the mining lease could not have been granted in favour of the petitioner merely on account of the fact that she had discovered the mining area and even the subsequent Government Order dated 16th October, 2004 does not provide for grant of any such mining lease. He further submitted that there was no error in the order dated 8th November, 2004 passed by the District Magistrate, Deoria rejecting the representation of the petitioner on the ground that the earlier Government Order dated 25th May, 1995 did not survive after the issuance of Government Orders dated 27th August, 2002 and 16th October, 2004.

We have carefully considered the rival submissions advanced on behalf of the learned counsel for the parties and have perused the record.

5. The sole contention raised by the learned counsel for the petitioner is that she is entitled to grant of mining lease on the basis of the Government Order dated 25th May, 1995 as she has discovered the mining area. The application for grant of such mining lease was considered by the District Magistrate, Deoria on 8th November, 2004. The Hon'ble Supreme Court in Union of India & Ors. Vs. Indian Charge Chrome & Anr., (1997) 7 SCC 314 has clearly held that the law which is to be applied in a case is the law prevailing on the date of decision making.

6. In State of Tamil Nadu Vs. M/s. Hind Stone & Ors., AIR 1981 SC 711, while dealing with a similar issue the Hon'ble Supreme Court held that mere pendency of an application does not create any legal right in favour of the applicant and the application is to be decided as per the law applicable on the date of decision. The Court held as under:-

"While it is true that such application should be dealt with within a reasonable time, it cannot on that account be said that right to have an application disposed of in a reasonable time, clothes an applicant for a lease with a right to have the application disposed of on the basis of rules in force at the time of making of the application. No one has a vested right to the grant or renewal of a lease and none can claim a vested right to have an application for the grant or renewal of a lease dealt with in a particular way, by applying particular provisions. In the absence of any vested rights in any one, an application for a lease has necessarily to be dealt with according to rules in force on the date of the disposal of the application despite the fact that there is a long delay since the making of application."

7. The said judgment has been approved and a similar view has been reiterated by the Hon'ble Supreme Court in V. Karnal Durai Vs. District Collector, Tuticorin & Anr., (1999) 1 SCC 475, wherein it has been held that if during the pendency of an application for grant of a

mining lease the rules are amended, the application is to be decided as per the amended rules.

8. Similar view has been reiterated in Howrah Municipal Corporation & Ors. Vs. Ganges Rope Company Ltd. & Ors., (2004) 1 SCC 663, wherein reliance had been placed on the judgment of its earlier judgment in Usman Ganij. Khatri of Bombay Vs. Cantonment Board & Ors., (1992) 3 SCC 455 and State of West Bengal Vs. Terra Firma Investment & Trading Pvt. Ltd, (1995) 1 SCC 125, wherein the Apex Court had held that application is to be decided on the basis of the law existing on the date of decision and not on the basis of the law prevailing on the date of submission of the application.

9. In view of the above, we are of the considered opinion that even if the application of the petitioner has been filed on 4.6.1996 and was disposed of after a lapse of 8 years, and that is too by the direction of this Court, mere pendency of her application for 8 years could not create any vested right in her favour to get the application decided as per the law existing on the date of submission of her application.

10. Learned counsel for the petitioner has placed a very heavy reliance upon the Division Bench judgment of this case in Jagmohan Dutt Sharma & Ors. Vs. State of U.P. & Ors., 1998 All. C.J. 590, wherein this Court has taken a view that a person if discovers a new area, he shall be entitled for grant of mining lease in his favour by virtue of the provisions of Government Order dated 25.5.1995.

11. In view of the fact that the said Government Order was not in existence on the date of consideration of her application, petitioner cannot derive any benefit of the said judgment. The law laid down by the said judgment that is Jagmohan Dutt Sharma (Supra) has lost its rigor on 27th August, 2002, the date on which the State Government issued another order not issuing a direction not to grant any lease in pursuance of the Government Order dated 25th May, 1995.

12. Thus, the District Magistrate, Deoria was required to consider the provisions of Government Order applicable on the date the decision was to be taken. From the records, we find that by Government Order dated 27th August, 2002, the Government had taken a decision not to grant mining lease in future on the basis of the earlier Government Order dated 25th May, 1995 and even in the subsequent Government Order dated 16th October, 2004, there is no provision for grant of mining lease in favour of a person who has discovered the mining lease. The District Magistrate, Deoria has passed a detailed order rejecting the representation of the petitioner on this ground. We see no infirmity in the said order.

13. Petitioner herself has mentioned in paragraph 14 of her petition that instead of granting the lease in the said area, the mining lease of the same land had been granted in favour of Shri Mundrika Prasad Nishad vide order dated 18.9.1996. We fail to understand under what circumstances petitioner could claim any relief if in respect of the same land mining lease had been granted in favour of the said person, that is too without impleading him as a respondent. The

respondent no. 4 Mining Officer has been impleaded by him, but no allegations of mala fides have been alleged against him. We could not understand the purpose of impleading the respondent no. 4 by him as a party is required to be impleaded by name also in case there are allegations of mala fide against him.

In view of the above, we do not find any ground to interfere with. Petition lacks merit and is accordingly dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2005

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

Civil Misc. Writ Petition No. 48778 of 2005

Smt. Sukhraji Devi ...Petitioner
Versus
Babu Ram Kanaujia and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Singh

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226- Practice of Procedure-Order of status quo-passed by S.D.M. to maintain the peace-aggrieved party can file separate suit or to take the recourse of filing application under Order 39 rule 1 C.P.C.-but can not be interfered under writ jurisdiction-various reasons disclosed.

Held: Para 14

In view of the above, we reach inescapable conclusion that in a matter where the issue of title is involved, the party has to get the grievance redressed through the Civil Court. Petitioner ought to have resorted to the same, and it is still open to him, even today, to do so.

Case law discussed:
AIR 1962 SC-527
1972 ALJ-379
AIR 1989 Ker-81
AIR 1995 Ker-74
AIR 1989 Ker-164
AIR 1975 Kar-137
AIR 1955 SC-566
AIR 1971 SC-1244
AIR 1996 SC-339
2002 (8) SCC-87
AIR 1982 SC-1081
1995 Suppl (2) SCC-290
AIR 1968 SC-1165

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

1. This writ petition has been filed for quashing the order dated 05.06.2005 (Annex.18) passed by the Sub Divisional Magistrate, Gyanpur, Sant Ravidas Nagar; holding an enquiry and till then to maintain status quo regarding possession, over the property in dispute.

2. The facts and circumstances giving rise to this case are that the petitioner on the one hand and the respondents no. 4 and 5 on the other, have a dispute in respect of a particular piece of land. The petitioner claims that she had been granted a Patta in respect of the said land under the scheme of Family Planning and she is in possession thereof. Respondents no. 4 and 5 claim ownership over the said land and filed a Civil Suit No. 525 of 2004 for permanent injunction against the present petitioner. However, their application for interim relief under Order XXXIX Rule 1 of the Code of Civil Procedure (hereinafter called the "C.P.C.') is still pending and no order has yet been passed. The respondents no. 4 and 5 approached the Sub Divisional

Magistrate, Gyanpur and the Sub Divisional Magistrate has passed the order dated 05.06.2005 that the parties shall maintain status quo. Hence, the present petition.

3. Learned counsel for the petitioner has submitted that the order passed by the Sub Divisional Magistrate is without jurisdiction and nullity. No order could be passed by him as no interim order has yet been passed in favour of the said plaintiff-respondents. Thus, the petition deserves to be allowed and the order dated 05.06.2005 is liable to be quashed.

4. Learned Standing Counsel has submitted that the Civil Suit is still pending wherein the present petitioner is the defendant and in case the respondents no. 4 and 5 herein could not succeed in getting an interim injunction, there is no bar in law for the present petitioner to file an application for interim relief before the said Court. Even otherwise, if she apprehends any threat to her property, she may maintain an independent suit. More so, the order passed by the Sub Divisional Magistrate is in order to maintain the law and order situation, as is evident from the language of the order itself and once the Civil Court passes an order, the order passed by the Sub Divisional Magistrate will stand superceded. Thus, the petition should not be entertained.

We have considered the rival submissions made by learned counsel for the parties and perused the record.

5. The petitioner herself claims to be in possession of the land. The order impugned also provides for maintaining the status quo. We fail to understand how the order impugned is adversely affecting the petitioner and what grievance she can have. More so, if petitioner feels any kind of apprehension, there is no bar in law for her to file a separate and independent suit against the said respondents or to apply for interim relief in the said suit and once she succeeds in getting the interim relief from the Civil Court, either by moving an application in the same suit or by filing an independent suit, the order passed by the Sub Divisional Magistrate will stand superceded. In the peculiar facts and circumstances of the case, the Civil Court can grant an interim relief even if the case does not fall within the ambit of Order XXXIX Rules 1 and 2, C.P.C.

6. The Hon'ble Supreme Court in Manohar Lal Chopra Vs. Raj Bahadur Rai Raja Seth Hira Lal, AIR 1962 SC 527 held that the Civil Court has a power to grant interim injunction in exercise of its inherent jurisdiction even if the case does not fall within the ambit of provisions of Order 39 CPC while delivering the judgment the Hon'ble Apex Court considered the scope of application of the provisions of Section 94 CPC and observed as under:-

"It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression 'if it is so prescribed' in Sec. 94 is only this that when the rules in Order 39, Civil P.C. prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances

of the case bring it within the prescribed rule. If the provisions of Sec. 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. It is in the incident of the exercise of the power of the Court to issue temporary injunction that the provisions of Sec. 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power."

7. The said judgment has been followed by this Court in Dileep Kumar Vs. Ram Saran, 1972 All LJ 379 as well as the Patna High Court in Bhagelu Mian Vs. Mahboob Chik, AIR 1978 Pat 318.

In exercise of the power under Order 39, Rule 1, C.P.C., injunction can also be passed against the plaintiff, as the last two clauses of the Rule refer to orders of injunction against defendants, whereas the clause (a) does not confine to application filed by the plaintiffs. The words "by any party to the suit" in the said clause are sufficient enough to indicate that the Legislature intended such orders to be passed even on applications filed by the defendants. The purpose for granting temporary injunction is to maintain status quo. (Vide Vincent Vs. Aisumma, AIR 1989 Ker 81; Sathyabhama Amma Vs. Vijaya Amma, AIR 1995 Ker 74; and Shiv Ram Singh Vs. Mangara, AIR 1989 All 164).

8. In Dr. Ashish Ranjan Das Vs. Rajendra Nath Mullick, AIR 1982 Cal 529 a similar view has been reiterated. However, it was clarified that the defendant can pray for interim relief only if the cause of action of the defendant is the same as that of the plaintiff, otherwise not.

9. In Suganda Bai Vs. Sulu Bai & Ors., AIR 1975 Kar 137, the Division Bench of the Karnataka High Court had taken the same view observing that for granting the relief to the defendant the cause of action of the defendant as well as the plaintiff must be the same.

10. We are not impressed by the submissions made by learned counsel for the petitioner that the order passed by the Sub Divisional Magistrate is without jurisdiction, as the order impugned itself made it clear that the order was being passed in order to maintain the piece. Thus, it is evident that it has been passed in exercise of powers under Section 145 of the Code of Criminal Procedure and it has nothing to do with the determination, title, right or interest of the parties in the land in dispute. Even otherwise, the findings recorded by the Criminal Court in this respect are not final for determining the right, interest or title, nor binding on the Civil Court. On the other hand, the findings recorded by the Civil Courts in such matters are binding on Criminal Courts. (Vide Anil Behari Ghosh Vs. Smt. Latika Bala Dassi & Ors., AIR 1955 SC 566; and M/s. Karamchand Ganga Persad & Anr. Vs. Union of India & Ors., AIR 1971 SC 1244). It is settled law that decisions of Civil Courts are binding on Criminal Courts but converse is not true.

11. In V.M. Shah Vs. State of Maharastra & Anr., AIR 1996 SC 339, the Apex Court held that findings of the Criminal Court, particularly in summary proceedings, cannot be taken note of in Civil Court for recording the findings on an issue. The Apex Court in K.G. Premshankar Vs. Inspector of Police, (2002) 8 SCC 87, reconsidered the

aforesaid cases and held that the rule does not apply universally and finding recorded by the Civil Court would not supersede the finding recorded by the Criminal Court. The issue involved therein had been as to whether dismissal of the suit for damages filed by the complainant against the accused, would bring the criminal proceedings to end. The reply had been in negative observing that criminal proceedings would not be dropped. Thus, it depends as to what extent the previous judgments are binding in subsequent proceedings under Sections 40, 41, 42 and 43 of the Evidence Act.

12. Issue of title cannot be determined in summary proceedings even under the Statutes like the Public Premises Act, Urban Development Act, Municipalities Act, and for determination of such an issue, recourse has to be taken to the Civil Court. (Vide Govt. of Andhra Pradesh Vs. Thummala Krishna Rao & Anr., AIR 1982 SC 1081; State of Rajasthan Vs. Padmavati Devi & Ors, 1995 Supp (2) SCC 290; and Mohammed Yunus Vs. Improvement Trust Jodhpur, AIR 1999 Raj 334).

13. Even in a suit under Section 6 of the Specific Relief Act, the question of title is not much relevant and matter for that purpose has to be agitated before the Civil Court separately. Presumption of title on the basis of possession under Section 110 of the Evidence Act can be drawn only where facts disclose no title in any party. (Vide New Service Society Ltd. Vs. K.C. Alexendar & Ors., AIR 1968 SC 1165).

14. In view of the above, we reach inescapable conclusion that in a matter where the issue of title is involved, the party has to get the grievance redressed through the Civil Court. Petitioner ought to have resorted to the same, and it is still open to him, even today, to do so.

15. In view of the above, it is not a fit case for indulgence in writ jurisdiction and the petitioner may approach the Civil Court for redressal of her grievances.

With the aforesaid observations, the petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2005

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 15566 of 2005

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

Counsel for the Petitioners:
Sri Ashok Khare
Sri V.D. Chauhan

Counsel for the Respondents:
Sri Neeraj Tiwari
Sri C.K. Rai
S.C.

Uttar Pradesh Absorption of retrenched Employees of Government Service Regulation, 1991-reseinded by उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छटनीशुदा कर्मचारियों का सरकारी सेवा में आमेलन (विखन्डन) नियमावली, 2003–**Reg. 3-Absorbtion of retrenched employee of cement Corporation-petitioner being retrenched employee of borrowing department can not claim absorption as a matter of right after completing the deputation period-provision of absorption-does not mean-borrowing department bound to absorb them.**

Held: Para 17 & 18

As regards the first question as to whether an employee on deputation working in the borrowing department has any lien or enforceable right for absorption in the borrowing department, suffice it to say that deputation is tripartite settlement. Consent of the concerned employee, approval of parent department and acceptance by borrowing department are the essential ingredients for deputation. An employee, on deputation, cannot claim an enforceable right for absorption in the borrowing department. If the borrowing department feels that the services of a particular employee, on deputation, are beneficial in public interest and it desires to retain such employee permanently, it can absorb him with the consent of concerned employee and the parent department. In the present case, the borrowing department is not prepared to retain the petitioners on expiry of their period of deputation and the services of all employees, including the petitioners, in the parent department have been terminated by virtue of closure of the establishment by an order of this Court. Therefore, the petitioners, cannot claim their absorption, as a matter of right.

So far as second question as to whether the petitioners have any legal and enforceable right under the Rules of 1991 for being absorbed, while on deputation, is concerned, the Rules of 1991 only provide that a retrenched employee can be provided alternate employment in the State Government establishments. This does not mean that the borrowing department is bound to absorb the petitioners and in any case the Rules of 1991 now stand rescinded. In the circumstances, the petitioners have no legal enforceable right for absorption in other Government departments.

Case law discussed:

1999(3) AWC-1456
2004 (2) AWC-1698
2005 (5) SCC-362
2002 (9) SCC-48
2004 (III) UPLBEC-2963

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

1. This writ petition has been filed by Sri Suresh Chandra and Sri Prem Chandra Verma- petitioner nos. 1 and 2 who were appointed as Clerk and muster roll clerk respectively in the U.P. State Cement Corporation Ltd., Churk, Sonbhadra (for short "Corporation'). The petitioners have sought the following reliefs in the petition:-

(i) for quashing the order dated 18.2.2005 passed by the Director, State Urban Development Agency, U.P., Lucknow repatriating the petitioners to the Corporation on account of completion of five years period of deputation in the State Urban Development Agency;
(ii) for a direction of a suitable nature commanding the respondents not to interfere in the working of the petitioners as Junior Clerk/Typist at District Urban Development Agency and to make regular payment of monthly salary;
(iii) writ, order or direction of a suitable nature commanding the respondents to treat the petitioners as absorbed on the post of Junior Clerk/Typist or to absorb the petitioners in alternative employment in Government service.

2. An advertisement dated 14.4.1999 was issued by the Director, State Urban Development Agency, U.P., Lucknow (for short "SUDA") inviting applications for appointment on deputation. The petitioners applied and were selected. They were consequently relieved from the

Corporation and joined SUDA on deputation.

3. The financial condition of the Corporation was not healthy and it deteriorated to the extent that this Court by order dated 8.12.1999 directed winding up of the Corporation and services of all the employees stood terminated on the winding up. The. Official Liquidator assumed charge of the Corporation on 31.7.2001.

4. It may be mentioned here that the State of U.P. had framed rules for absorption of retrenched employees in Government establishments known as Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991 (in brief "the Rules of 1991'). The aforesaid Rules of 1991 were rescinded by Government vide order dated 8.4.2002, which has been appended as Annexure 15 to the writ petition.

5. Counsel for the petitioner submits that the main prayer in the writ petition is the third prayer, which is based upon the fact that the petitioners were employees of the Corporation which has been wound up under a winding up order passed by this Court. As a consequence thereof the services of all the employees of U.P. State Cement Corporation, including the petitioners stood terminated on its closure. The counsel further submits that the retrenched employees of the Corporation are entitled to absorption in alternate employment in any other Government establishment in the State under the Rules of 1991; and that each of the petitioners fulfills the conditions stipulated under the Rules of 1991 but have not been absorbed in any Government establishment under the respondents. It is also submitted that this Court with regard to other retrenched employees of the Corporation has issued directions for their absorption and some of such retrenched employees have already been absorbed. In support of the contentions, the petitioners' counsel relied upon the judgment in ***Bageshwari Prasad Srivastava V. State of U.P. and others***- 1999(3) A.W.C-1456, which has been affirmed by a Division Bench vide judgement dated 19.11.2001 in Special Appeal No. 540 of 1999 as well as Hon'ble Supreme Court vide judgment dated 18.3.2002 in Special Leave to Appeal (Civil) No. 5397 of 2002.

6. The counsel for the petitioners then contends that the mere fact that the Rules of 1991 have been rescinded by notification dated 8.4.2003 does not have the effect of doing away with the entitlement of a person retrenched prior to such decisions in whose favour a right for absorption stands accrued under the aforesaid Rules. In support of this contention, he placed reliance upon a decision in ***Amar Nath and others V. State of U.P. and others***- 2004(2) A.W.C-1698.

7. It is vehemently urged that in view of citations above, the petitioners are entitled to absorption in alternative employment under the State Government itself. He urged that prayer nos. (i) and (ii) may be considered in the light of such entitlement of the petitioners for absorption and that there can be no justification, whatsoever, for repatriation of the petitioners to an establishment which has ceased to exist on its closure especially when there exists an independent right of absorption in alternative employment under the rules.

He urged that the only appropriate course appears to be to direct the State Government to absorb the petitioners in alternative employment in any of its establishment within a period specified by this Court and during the intervening period the petitioners may be continued in SUDA as they have been serving the Agency for the past several years.

8. The counsel for the respondents rebutting the arguments advanced on behalf of the petitioners submits that the petitioners are permanent employees of the Corporation and were working only on deputation in SUDA. He states that the petitioners could have been absorbed by the borrowing department with the consent of the lending department while on deputation. An employee on deputation is only sent by the parent department for short period with the consent of the employee concerned and he can continu on deputation in borrowing department only if he had his lien in the parent department.

9. It is submitted that in the present case, the petitioners have concealed the fact that their parent department, i.e., the Corporation had been wound up by the order of this Court and services of all its employees stood terminated upon closure of the establishment. It is submitted that the maximum period for deputation as per Government Order, which has also been adopted by SUDA is five years and on its expiry the borrowing department has repatriated the petitioners to their parent department, i.e., the Corporation as it did not want further services of the petitioner. It is urged that had the borrowing department been interested in retaining the petitioners it would have certainly made such request.

10. Counsel for the respondents has also emphasized the fact that SUDA is an autonomous body created under the Societies Registration Act, 1860 and its aim and object is only to implement different time bound central as well as State Government schemes and has no permanent establishment, i.e., no one is appointed in SUDA on permanent basis. It is urged that the order of absorption relied upon by the petitioners is not applicable to the facts and circumstances of this case and, therefore, they cannot be absorbed permanently in SUDA which, in fact, is a temporary establishment.

11. It is lastly urged that the interim order dated 9.3.2005 passed by this Court in this petition was challenged in Special Appeal No. 451 of 2005, which was allowed by the following judgement and order dated 13.4.2005 by the Division Bench of this Court holding that :-

"The appeal is taken up and summarily disposed of the allegations in the stay application cannot be treated to be admitted.

In the impugned order dated 9.3.2005, pending the disposal of the writ, the Hon'ble Single Judge has stayed the operation of the order by which the petitioners were repatriated to their parent organization.

It might be that the parent organization is in doll drums or that the official liquidator has already taken over but this does not mean that the appellant is compelled to keep the writ petitioners in their payroll and by doing so in many similar cases itself become sick.

The paper book contains instances where similar stay order have already been set aside in appeal. The interim order impugned in this appeal is set aside. The

writ petitions will be at liberty to pursue their remedies or obtain employment elsewhere as they might be entitled.

The appeal is allowed.

Dt. 13.4.2005 Sd/- Ajoy Nath Ray, C.J
Sd/- Ashok Bhusan, J"

12. Counsel for the respondents, in support of his contentions, placed reliance on the decisions in ***Kunal Nanda Vs. Union of India and another***-(2005)5 SCC-362; ***Mahesh Kumar Parmar and others V. S.I.G of Police and others***-(2002)9 SCC-48 and ***State Urban Development Agency (SUDA), Lucknow V. Dinesh Chandra Saxena and others***-(2004)3 UPLBEC-2963.

13. The questions for consideration in the present case are (i) whether an employee on deputation working in the borrowing department has any lien or enforceable right for absorption in the borrowing department and (ii) whether the petitioners have any legal and enforceable right under the Rules of 1991 for being absorbed in borrowing department claiming to be on deputation?

14. The absorption Rules of 1991 provide that an employee of a Government company on winding up would be a retrenched employee and he shall be entitled for absorption in Government service in accordance with orders issued from time to time. Since provisions of the Rules have been heavily relied upon by the parties in support of their case, for better understanding of the controversy they are quoted below:-

"In pursuance of the provisions of clause (3) of Article 348 of the Constitution, the Governor is pleased to order the publication of the following English translation of notification no. 1/4/90 Karmik 2 dfated May 9, 1991:-

No. 3/4/90- Karmik-2

Dated May 9, 1991

In exercise of the powers conferred by the proviso to Article 309 of the Constitution, the Governor is pleased to make the following rules to provide for the absorption in Government service of the retrenched employees of the Government or of public Corporations:

The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991.

1. (1) These rules may be called the Uttar Pradesh Absorption of Retrenched Employees of Government of Public Corporations in Government Service Rules, 1991.

(2) They shall come into force at once.

(3) They shall apply to the posts under the rule making power of the Governor of Uttar Pradesh under the proviso to Article 309 of the constitution.

2. Unless there is anything repugnant in the subject or context, the expression –

(2) "appointing authority" in relation to any post for which an employee was retrenched means the authority empowered to make appointment to such post:

(a) "Public Corporation" means a body corporate established or constituted by or under any Uttar Pradesh Act except a University or local authority constituted for the purpose of Local Self Government and includes a Government Company within the meaning of Section 617 of the Companies Act. 1956 in which the State Government has prepondering interest:

(b) "retrenched employee" means a person who was appointed on a post under the Government or a public

Corporation on or before October 1,1986 in accordance with recruitment to the post and was continuously working in any post under the Government or such Corporation upto the date of his retrenchment due to reduction in or winding up of, any establishment of Government or the public Corporation, as the case may be, and in respect of whom a certificate of being a retrenched employee has been issued by the appointing authority.

(c) "service rules" means the rules made under the proviso to Article 309 of the Constitution, and where there are no such rules, the executive instructions issued by the Government, regulating the recruitment and conditions of service of persons appointed to the relevant service.

3. (1) Notwithstanding anything to the contrary contained in any other service rules for the time being in force, the State Government may be notified order require the absorption of the retrenched employees in any post or service under the Government and may prescribe the procedure for such absorption including relaxation in various terms and conditions of recruitment in respect of such retrenched employees.

(2) The provisions contained in relevant service rules shall be deemed to have been modified to the extent of their inconsistency with the provisions made in the notified order referred to in sub-rule (1).

By order
Neera Yadav
Secretary"

15. The aforesaid rules for absorption remained in force for about 12 years and were rescinded by Government order dated 8.4.2003. The rescinding order is contained in Annexure 15 to the writ petition, relevant portion of the said Rules,2003 is as under :-

ष उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छअनीशुदा कर्मचारियों का सरकारी सेवा में आमेलन ;विखंडनद्ध नियमावली, २००३

संविधान के अनुच्छेद ३०६ के परन्तुक व्दारा प्रदत्त शक्ति का प्रयोग करके राज्यपाल उत्तर प्रदेश सरकार सार्वजनिक निगमों के छअनीशुदा कर्मचारियों का सरकारी सेवा में आमेलन नियमावली,१९९१ को विखंडित करनें की दृष्टि से निम्नलिखित नियमावली बनातें हैं :-

१- संक्षिप्त नाम और प्रारम्भ - ;१- यह नियमावली उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छअनीशुदा कर्मचारियों का सरकारी सेवा में आमेलन ;विखंडनद्ध नियमावली, २००३ कही जायेगी ।

२- यह तुरन्त प्रवृत्त होगी ।

२- परिभाषाएं- जब तक विषय या संदर्भ में कोई प्रतिकूल बात न हो इस नियमावली में

क- संविधान का तात्पर्य भारत के संविधान से है

ख- राज्यपाल का तात्पर्य उत्तर प्रदेश के राज्यपाल से है ।

३- विखंडन और व्यावृति - १- उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छअनीशुदा कर्मचारियों को सरकारी सेवा में आमेलन नियमावली,१९९१ एतदव्दारा विखंडित की जाती है, और ऐसे विखंडन के फलस्वरफप -

एक- उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छअनीशुदा कर्मचारियों का सरकारी सेवा में आमेलन नियमावली,१९९१ के अधीन प्रोदभूत आमेलन के लिए विचार किये जाने वाले **किसी छअनीशुदा कर्मचारियों का अधिकार, किन्तु जिनका उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छअनीशुदा कर्मचारियों का सरकारी सेवा में आमेलन ;विखंडनद्ध नियमावली,२००३ के प्रारम्भ होने के दिनांक तक आमेलन न किया गया हो, ऐसे दिनांक से समाप्त हुआ समझा जायेगा ।**

दो- सरकारी सेवा में किसी विशिष्ट सरकारी विभाग या सार्वजनिक निगम के छअनीशुदा कर्मचारियों के लिए आमेलन के सन्नियम विहित करनें में और वेतन संरक्षण सहित पारिणामिक प्रसुविधाओं को प्रदान करनें में समय समय पर जारी किये गये सरकार के आदेश, उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छअनीशुदा कर्मचारियों का सरकारी सेवा में आमेलन ;विखंडनद्ध नियमावली,२००३ के प्रारम्भ होने के दिनांक से निराकृत हो जायेंगे ।

२- ऐसे विखंडन के होते हुए भी -

एक- उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छअनीशुदा कर्मचारियों के सरकारी सेवा में आमेलन ;विखंडनद्ध नियमावली,

२००३ के प्रारम्भ होने के दिनांक के पूर्व किसी छअनीशुना आमेलन कर्मचारी को प्रदान की गई वेतन संरक्षण की प्रसुविधा वापस नहीं ली जायेगी ।

दो - उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छअनीशुदा कर्मचारियों का सरकारी सेवा में आमेलन ;विखंडनब्द्ध नियमावली, २००३ के प्रारम्भ होने के दिनांक के पूर्व उत्तर प्रदेश सरकार या सार्वजनिक निगमों के छअनीशुदा कर्मचारी, जिसे ऐसे दिनांक तक आमेलित न किया गया हो, ऐसे समूह ग और समूह घ के पद, जो उत्तर प्रदेश लोक सेवा आयोग की परिधि के बाहर के हों, पर सीधी भर्ती के लिए, उच्चतर आयु सीमा में उस सीमा तक शिथिलता प्राप्त करनें का हकदार होगा, जितनी उसने सम्बन्धित सरकारी विभाग या सार्वजनिक निगम में मौलिक हैसियत से पूर्ण किये गये वर्षो तक निरन्तर सेवा की श हो !ष

16. The question of absorption of retrenched employees was considered in the case of ***Bageshwari Prasad Srivastava*** (supra) wherein the Court, after considering the question of retrenchment and its meaning as well as Rules of 1991 decided the same on the anvil of object of framing of the Rules for absorption, quashed the order and directed the respondents to absorb the petitioners of that case, who were employees of Bhadohi Woolens Limited in Government service in accordance with their qualifications in class III and IV posts forthwith. The aforesaid order was passed in the backdrop that the employees/petitioners in that case were not being issued retrenchment certificate but the Managing Director had written for absorption of all the employees to the State Government. It was not a case of employees who were working in another concern on deputation or closure of parent establishment or winding up of the same. Thus this case is not applicable to the facts and circumstance of the present case. In this backdrop, neither the decision in ***Bageshwari Prasad Srivastava*** (supra) nor subsequent decisions in consequence thereof are applicable to the present case.

17. As regards the first question as to whether an employee on deputation working in the borrowing department has any lien or enforceable right for absorption in the borrowing department, suffice it to say that deputation is tripartite settlement. Consent of the concerned employee, approval of parent department and acceptance by borrowing department are the essential ingredients for deputation. An employee, on deputation, cannot claim an enforceable right for absorption in the borrowing department. If the borrowing department feels that the services of a particular employee, on deputation, are beneficial in public interest and it desires to retain such employee permanently, it can absorb him with the consent of concerned employee and the parent department. In the present case, the borrowing department is not prepared to retain the petitioners on expiry of their period of deputation and the services of all employees, including the petitioners, in the parent department have been terminated by virtue of closure of the establishment by an order of this Court. Therefore, the petitioners, cannot claim their absorption, as a matter of right.

18. So far as second question as to whether the petitioners have any legal and enforceable right under the Rules of 1991 for being absorbed, while on deputation, is concerned, the Rules of 1991 only provide that a retrenched employee can be provided alternate employment in the State Government establishments. This does not mean that the borrowing department is bound to absorb the petitioners and in any case the Rules of 1991 now stand rescinded. In the circumstances, the petitioners have no

legal enforceable right for absorption in other Government departments.

19. For the reasons stated above, the writ petition fails and is dismissed without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2005

BEFORE
THE HON'BLE V.C. MISRA, J.

Civil Misc. Writ Petition No.32302 of 1997

Virendra Prasad Dubey ...Petitioner
Versus
Senior Divisional Security Commissioner, RPF, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri P.N. Saxena
Sri R.K. Tiwari
Sri M.M. Srivastava
Sri R.K. Srivastava

Counsel for the Respondents:
Sri B.B. Paul
Sri Govind Saran
S.C.

Railway Protection Force Rules 1987-Rule-148, 153 read with fundamental Rules-Rule-56-Compulsorily Retirement-Petitioner-a constable in R.P.F. proceeded on medical leave-w.e.f. 4.11.93-10.11.94-time to time leave application-duly received by the authorities-after 10 years services-major punishment of compulsorily retirement awarded at the age 35 years-without serving the chargesheet, without affording opportunity-absence from duty cannot be termed as will full absence-No grave misconduct-impugned order can not sustained.

Held: Para 11

It is settled law that the order of dismissal/ removal from service can be awarded only for the acts of grave nature or as cumulative effect of continued misconduct preventing incorrigibility or complete unfitness for police service. Merely one incident of absence and that too because of bad health and being on valid and justified grounds/ reasons cannot become basis to award such punishment. It is an admitted fact that the respondents had received the application for leave alongwith medical certificates. In such circumstances it can never be termed as willful absence without any information to the competent authority and also can never be termed as grave misconduct. Under the above said facts and circumstances and the pleadings of the instant case, in my view no case to award such major punishment to the petitioner is made out and the decision of the disciplinary authority inflicting a penalty of removal from service by the impugned order dated 6.10.1994 (Annexure No. 1 to the writ petition) is ultra vires of Rule 56 (j) of the Fundamental Rules and is liable to be set aside. The major punishment of removal from service by way of compulsory premature retirement is thus also excessive and disproportionate.

Case law discussed:
AIR 1985 SC-931
2004(2) UPLBEC-1294

(Delivered by Hon'ble V.C. Misra, J.)

1. Heard Sri P.N. Saxena, Senior Advocate assisted by Sri R.K. Tiwari, learned counsel for the petitioner and Sri Govind Saran, Advocate learned standing counsel on behalf of the respondents Nos.1, 2 and 3.

2. The facts of the case in brief are that the petitioner was appointed as a constable in Railway Protection Force by posting at Allahabad on 18.5.1984. In

July 1989, the petitioner was transferred to the outpost Mughal Sarai (MGS) under the Incharge Protection Force (IPF), Chunar. On 19.8.1992, the petitioner proceeded on medical leave by taking sick memo and remained as outdoor patient in the Railway Hospital, Mughal Sarai till 4.1.1993. On 5.1.1993, the petitioner was discharged from sick list by the Divisional Medical Officer-I, Eastern Railway (DMO-I, E.R.), Mughal Sarai in the midst of the treatment without mentioning the fact that the petitioner was fit for duty. The petitioner had to under-go treatment by a private doctor Dr. A.K. Mehta at Ballia with effect from 6.1.1993 and remained under his treatment till 20th August 1994. During this period, the petitioner sent several notices and information's to the concerned authority through registered post with proper medical certificate (PMC) before the Incharge Protection Force, Chunar. The petitioner was referred by Dr. A.K. Mehta to Dr. D. Rai, at District Hospital, Ballia for further treatment where he remained under treatment from 20.8.1994 to 30.10.1994. Meanwhile, the disciplinary proceedings were initiated against the petitioner by the Railway authorities and in the proceedings, 2 charges were framed against him, which are as under :-

१. वह दिनांक 5.1.1993 से डी०एम०ओ०/ई०आर०/एम०जी०एस० द्धारा सिक लिस्ट से डिस्चार्ज किये जाने के बाद न आप कन्ट्रोलिंग अफसर के समक्ष उपस्थित हुए और न कोई सूचना भेजा।

२. वह दिनांक 5.1.1993 से आज (आरोप पत्र जारी करने की तिथि) तक अनाधिकृत रूप से अनुपस्थिति रहा।

3. The enquiry officer Sri D.L. Shah vide its report dated 8.9.1994 submitted before the respondent no.1 recommended that the proceedings be initiated against the petitioner under Rule 153 of the Railway Protection Force Rules, 1987 (hereinafter referred to as 'the Rules, 1987') and held that both the charges 1 & 2 mentioned hereinabove were proved. The disciplinary authority-respondent no.1 vide its order dated 6.10.1994 compulsorily retired the petitioner prematurely at the age of 35 years by imposing the major penalty, under the provisions of Rules 148 and 153 of the Rules, though he had only completed 10 years of service.

4. The relevant portions of Rules 148 and 153 of the Rules, 1987 are reproduced as under: -

"148. <u>Description of Punishments:</u>

148.1. Any of the following punishments may, for good and sufficient reasons and as hereinafter provided, be imposed on an enrolled member of the Force.

148.2 Major punishments:

(a) Dismissal from service (which shall ordinarily be a disqualification for future employment under the Government.)
(b) Removal from service (which shall not be a disqualification for future employment under the Government.)
(c) Compulsory retirement from service.
(d) Reduction in rank or grade.

148.3 Minor punishments:

(a) Reduction to a lower stage in the existing scale of pay.
(b) Withholding of next increment with or without corresponding postponement of subsequent increments.
(c) Withholding of promotion for a specified period.

(d) Removal from any office of distinction or deprivation of any special emoluments.
(e) Censure.

148.4: Petty punishments:

(a) Fine to any amount not exceeding seven days' pay.

(b) Confinement to quarter-guard for a period not exceeding fourteen days with or without punishment drill, extra guard duty, fatigue duty or any other punitive duty.

(c) Reprimand.

148.5: Explanation:……

"153 Procedure for imposing major punishments.-

(1) Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal, compulsory retirement or reduction in rank shall be passed on any enrolled member of the Force (save as mentioned in Rule 61) without holding an inquiry, as far as may be in the manner provided hereinafter, in which he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded a reasonable opportunity of defending himself.

(5) The disciplinary authority shall deliver or cause to be delivered to the delinquent member, at lease seventy-two hours before the commencement of the inquiry, a copy of the articles of charge the statement of imputations of misconduct or misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained and fix a date when the inquiry is to commence; subsequent dates being fixed by the Inquiry Officer.

(10) At the commencement of the inquiry the party charged shall be asked to enter a plea of 'guilty' or 'not guilty' after which evidence necessary to establish the charge shall be let in. The evidence shall be material to the charge and may either be oral or documentary. If oral -

(a) it shall be direct,
(b) it shall be recorded by the Inquiry Officer in the presence of the party charged; and

the party charged shall be allowed to cross-examine the witnesses.

(12) All the evidence shall be recorded, in the presence of the party charged, by the Inquiry Officer himself or on his dictation by a scribe. Cross-examination by the party charged or the fact of his declining to cross-examine the witness, as the case may be, shall also be recorded. The statement of each witness shall be read over to him and explained, if necessary, in the language of the witness, whose signature shall be obtained as a token of his having understood the contents. Statement shall also be signed by the Inquiry Officer and the party charged. Copy of each statement shall be given to the party charged who shall acknowledge receipt on the statement of witness itself. The Inquiry Officer shall record a certificate of having read over the statement to the witness in the presence of the party charged.

(13) Documentary exhibits, if any, are to be numbered while being presented by the

concerned witness and reference of the number shall be noted in the statement of the witness. Such documents may be admitted in evidence as exhibits without being formally proved unless the party charged does not admit the genuineness of such a document and wishes to cross-examine the witness who is purported to have signed it. Copies of the exhibits may be given to the party charged on demand except in the case of voluminous documents, where the party charged may be allowed to inspect the presence of Inquiry Officer and take notes.

(14) Unless specifically mentioned in these rules, the provisions by the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 shall apply to the departmental proceedings under these rules."

4. While passing the order of compulsory retirement against the petitioner, the respondent no.1 held that only one charge regarding unauthorized absence stood proved whereas the other charge, i.e., absence from duty without intimation was not proved in view of the required information and notice sent by the petitioner to the concerned authority from time to time.

5. After the passing of this order, the petitioner being still ill was treated in the nearest railway hospital, Ballia/N.E.R. with effect from 1.11.1994 to 10.11.1994 and a certificate was issued by the concerned Medical Officer that he was henceforth fit for duty. On 11.11.1994, the petitioner approached the Senior Divisional Medical Officer/ER Hospital, Mughal Sarai for necessary attestation and at the back of the fitness certificate it was endorsed that the petitioner was fit for duty. The petitioner approached the concerned authority with the written application to permit him to join his duty but he was not allowed on the ground that he had already been compulsorily retired with effect from 6.10.1994.

6. The petitioner being aggrieved preferred an appeal under the Rules before the respondent no.2, which was dismissed vide order-dated 31.7.1995. The said order was intimated to the petitioner by respondent no.1 annexed with its order-dated 2.8.1995. Being aggrieved by the order dated 31.7.1995 the petitioner preferred a revision on 7.12.1994 before the respondent no.3, which too was dismissed on 22.7.1996 the information of which was served on the petitioner through letter dated 26.7.1996.

7. This writ petition has been filed by the petitioner challenging the impugned orders dated 6.10.1994, 31.7.1995 and 22.7.1996 passed by respondents no. 1,2 & 3 respectively, on the ground that disciplinary proceedings under Rule 153 of the Rules were initiated against the petitioner without serving any charge sheet on him nor he was provided any reasonable opportunity or facility to defend his case, even the witnesses were not examined in accordance with procedure and law during the disciplinary proceedings. Learned counsel for the petitioner has also submitted that compulsory retirement of an employee can be made only after he has either attained the age of 50 years or 55 years, as the case may be, in terms of F.R. 56 (j) of the Fundamental Rules and Supplementary Rules Chapter IX (hereinafter referred to as 'the Fundamental Rules'), which deals with retirement and not otherwise, and thus the

petitioner had been wrongly and illegally retired compulsorily prematurely at the age of about 35 years only. He has further contended that there being no dispute that the petitioner had been ill and had been submitting proper medical certificates regularly, the award of punishment of removal from service by way of compulsory retirement was wholly unreasonable and disproportionate to the alleged charge of misconduct and also that no punishment could be awarded on the basis of the charge no. 2 which was only consequential to charge no. 1, which admittedly had not been proved and dropped by the disciplinary authority. It has been specifically stressed by the learned counsel for the petitioner that the impugned order of punishment of removal from service by way of compulsory retirement passed by the disciplinary authority, which was affirmed in appeal and revision, by quasi-judicial orders also demonstrates complete non-application of mind. Relevant portions of Rule 56 (j) of the Fundamental Rules reads as under:

"56 (j) Notwithstanding anything contained in this rule, the appropriate authority shall, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice:.

(i) if he is, in Group 'A' or Group 'B' service or post in a substantive, quasi-permanent or temporary capacity and hd entered Government service before attaining the age of 35 years, after he has attained the age of 50;
(ii)in any other case after he has attained the age of fifty- five years;

Provided that nothing in this clause shall apply to a Government servant referred to in clause (e), who entered Government service on or before the 23rd July, 1966."

Learned counsel for the petitioner in support of his arguments has placed reliance upon the decisions rendered in Marari Mohan Deb Vs. Secretary to the Government of India & others (AIR 1985 S.C. 931) and in Bhagwan Lal Arya Vs. Commissioner of Police, Delhi & others (2004) 2 UPLBEC 1294).

8. The case of the respondents, as referred to in paras-4 & 5 of the counter affidavit is that the petitioner had absented himself from duty without any authority and did not report thereafter till his services were dispensed with by virtue of his compulsory retirement under the provisions of Rule 153 of the Rules. Since the charges were of very serious nature, the petitioner deserved the punishment awarded to him. Learned counsel appearing for the respondents placed reliance on a decision of Punjab and Haryana High Court given on May 22, 1998 in the case of Raj Kumar Vs. Union of India & others (Writ Petition No. 9129 of 1997).

9. I have looked into the record of the case and heard learned counsel for the parties at length and on the above pleadings, the following questions of law arise for consideration;

1. Whether the impugned order of major punishment by way of compulsory retirement prematurely awarded to the petitioner who had only attained the age of 35 years and had completed only 10 years of

service is in breach of the Rule 56 (j) of the Fundamental Rules?

2. Whether the major penalty inflicted on the petitioner is grossly disproportionate to the misconduct alleged against him and, therefore, is totally unjust, unfair and inequitable as contended?

10. From perusal of the pleadings of the parties and after hearing learned counsel for the parties, I find that it is admitted by the respondents that out of two charges framed against the petitioner, one charge regarding absence from duty without intimation was not made out since required information's and notices regarding ill-health and treatment sent by the petitioner was duly received by the concerned authorities from time to time, whereas on the charge of unauthorized absence from duty he has been removed from service imposing major punishment of compulsory retirement prematurely. As per law the petitioner could be retired compulsorily prematurely only in strict compliance of the Rule 56 (j) of the Fundamental Rules and not otherwise. The learned counsel for the respondents has been unable to show any other provisions of law applicable to the case of the petitioner under which compulsory premature retirement order could be passed. Thus when no such compulsory premature retirement order could normally be passed in the case of the petitioner then the same could not be imposed by way of major punishment either.

11. The relevant Rule 56 (j) of the Fundamental Rules provides that the appropriate authority if is of the opinion that it is in the public interest to compulsorily retire prematurely a Government servant, he has the absolute right to retire the Government servant provided the Government servant had attained the age of 50 years as per sub-clause (i) or in any other case after he has attained the age of fifty five years as per sub clause (ii) of this Rule. In my view by no stretch of imagination the alleged misconduct against the petitioner can be considered to be an act of grave misconduct or continued misconduct indicating incorrigibility and complete unfitness for service of the petitioner. It is not the case of the respondents that the petitioner was habitual absentee. He had to proceed on leave under compulsion because of his grave condition of health. It is settled law that the order of dismissal/ removal from service can be awarded only for the acts of grave nature or as cumulative effect of continued misconduct preventing incorrigibility or complete unfitness for police service. Merely one incident of absence and that too because of bad health and being on valid and justified grounds/ reasons cannot become basis to award such punishment. It is an admitted fact that the respondents had received the application for leave alongwith medical certificates. In such circumstances it can never be termed as willful absence without any information to the competent authority and also can never be termed as grave misconduct. Under the above said facts and circumstances and the pleadings of the instant case, in my view no case to award such major punishment to the petitioner is made out and the decision of the disciplinary authority inflicting a penalty of removal from service by the impugned order dated 6.10.1994 (Annexure No. 1 to the writ petition) is ultra vires of Rule 56 (j) of the

Fundamental Rules and is liable to be set aside. The major punishment of removal from service by way of compulsory premature retirement is thus also excessive and disproportionate. Also looking into the circumstances of the case as the petitioner may not get any other job at his present age and also because of the stigma attached to him on account of the impugned punishment as a result of which not only he but also his entire family, which is totally dependant on him, will be forced to starve. Such mitigating circumstances warrant that the impugned order of punishment passed by the disciplinary authority by way of compulsorily retiring the petitioner prematurely should be quashed. The above said questions formulated for considerations are decided accordingly.

12. In the result, the impugned orders dated 6.10.1994 (Annexure No. 1 to the writ petition) passed by respondent no. 1- Senior Divisional Security Commissioner/ R.P.F., Northern Railway, Allahabad, order dated 31.7.1995 (Annexure No. 2 to the writ petition) passed by respondent no. 2- the Additional Chief Security Commissioner/ Railway Protection Force, Northern Railway, Baroda House, New Delhi and the order dated 22.7.1996 (Annexure No. 3 to the writ petition) passed by respondent no. 3- the Chief Security Commissioner/ Railway Protection Force, Baroda House, New Delhi are hereby quashed and the matter is sent back to the disciplinary authority for considering and passing a reasoned and speaking order afresh in the light of the above observations and in accordance with law and procedure after affording full opportunity to the petitioner within a period of three months from the date a certified copy of this order is placed before the disciplinary authority concerned by the petitioner.

The writ petition is allowed to the extent indicated above. No order as to costs.
