ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2006

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 17841 of 2002

Ajay Mishra ...Petitioner
Versus
Director General of Ordinance Service M.G.O. Branch (O.S.-8-C) Army Head Quarter, D.H.Q. and another ...Respondents

Counsel for the Petitioner:
Sri Rakesh Kumar
Sri Ranjit Asthana
Sri D.C. Tripathi
Sri Purnanad Misra (IN PERSON)
Sri Ajay Mishra (IN PERSON)
Sri Namwar Singh
Sri Sanjiv Singh
Sri Ranjit Saxena

Counsel for the Respondents:
Sri B.N. Singh
Sri N.P. Shukla
Sri A.K. Singh
S.S.C.

(A) Constitution of India Art.-226- validity of selection-challenged-by the petitioner-who participated but not selected-No material placed that the selection made against the statutory provisions or against law-held-once participated-can not be allowed to challenged.

Held: Para 16

Once the petitioner has appeared in the selection, he cannot be allowed to challenge the same after being declared unsuccessful. No material has been placed on record by the petitioner to show that the selection is vitiated in law either for violation of any statutory provision or for any other reason.

(B) Constitution of India Art.-226- Validity of Selection-challenged on the ground of malafide-authorities not impleaded by name-Court can not look into such issue.

Held: Para 11

It is a settled law where a mala fide is alleged, the authority, who has passed the order, which is said to be the result of the mala fide exercise of power, has to be impleaded *eo nominee*. In the absence of such impleadment, the Court neither can look into the plea of mala fide nor can consider the issue raising mala fide.

Case law discussed:
1992 Supply (1) SCC-222
AIR 1996 SC-326
J.T. 1996 (8) SC-550
AIR 2003 SC-1344

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard learned counsel for the parties. The counter and rejoinder affidavits have already been exchanged and with the consent of the parties, the writ petition being heard and decided finally under the Rules of the court at the admission stage.

2. The petitioner had challenged the advertisements dated 23rd July 2001 and 30th January 2002, (Annexure No. 5 & 7). However, a perusal of Annexure No. 5 shows that it is not an advertisement but the order dated 23rd October 2001 rejecting the representation dated 30th July 2001 of the petitioner against the selection held for the post of Messenger, in pursuance to the advertisements dated 14th February 2001 and 2nd June 2001. Similarly Annexure No. 7 is the order dated 30th January 2002, rejecting the

petitioner's representation against his non-selection for the post of Messenger in pursuance to the advertisements dated 2nd June 2001 and 20th July 2001.

3. However, instead of dismissing the petition on this ground alone, the court has considered the grievances of the petitioner on merits inspite of the aforesaid defects in the relief sought in the writ petition, which has not been rectified or corrected by the petitioner.

4. The case of the petitioner is that vide advertisement dated 14th February 2001, one post of Messenger was advertised and on 2nd June 2001 two posts of Messengers were advertised. It is further alleged that the Respondent No. 2, without making proper advertisement and following proper procedure, appointed illegally certain persons who are not eligible, in a hurried manner. The petitioner submitted that his mother made a complaint against the corrupt practices followed in making appointments, where after the petitioner also preferred a Writ Petition No. 27029 of 2001, challenging the entire selection, but the writ petition was dismissed vide judgment dated 25th July 2001, with the observation that the petitioner may make a comprehensive representation before the Respondent No. 1, and the concerned authority was directed to decide the same in accordance with law.

5. The petitioner claims that he made a representation in pursuance to the said order on 3rd August 2001, which was rejected, vide Annexure No. 5, which is an order dated 23rd October 2001. Similarly in respect to another advertisement for six posts of Messengers the petitioner approached this court in Writ Petition No. 32001 of 2001, which was also dismissed by the Hon'ble Court vide judgment dated 8th October 2001, with the observation permitting the petitioner to make a representation which was to be decided by a competent authority in accordance with law. In pursuance to the said direction the petitioner made representation dated 19th October 2001, which has been dismissed by the authorities vide order dated 30th January 2002.

6. The Contention of the learned counsel for the petitioner is that in making the aforesaid selection no procedure has been followed and the entire selection is illegal, arbitrary and suffers from corrupt practices adopted by the respondents. It is also submitted that the selection has been finalized in a hurried manner, which shows malafide involvement of the respondent and vitiates the entire selection.

7. Counter affidavit has been filed on behalf of Respondent No. 1 & 2, stating that one post of Messenger was advertised on 14th February 2001, two posts of Messengers were advertised on 2nd June 2001, and six posts were advertised on 20th July 2001. A large number of candidates appeared on 2nd March 2001, in pursuance to the advertisement dated 14th February 2001, in which the name of the petitioner find mention at Serial No. 161. However, in the merit list the petitioner was placed at Serial No. 33. It is stated that about 200 candidates in all had appeared in the aforesaid selection and one Mohd. Ziya Khan who obtained highest marks has been appointed on the post of Messenger, since there was only one vacancy.

8. In respect to the advertisement dated 2nd June 2001, 205 candidates appeared and the name of the petitioner was at Serial No. 17 of the list of the candidates who had applied in the said selection. One Sharma Parveen secured highest marks and she was appointed on 1st October 2001. The petitioner is at Serial No. 17 in the reserved seat in respect to the advertisement dated 20th July 2001. It is stated that a screening test was held wherein about 99 candidates qualified but the petitioner could not qualify, therefore, he was not called for interview. It is submitted that in pursuance to the aforesaid selection also the selected candidates have already been appointed. It is further stated that on the complaint made by the petitioner the matter was examined again but nothing illegal was found in the aforesaid selection, hence the representation of the petitioner were rejected.

9. Rejoinder affidavit has been filed by the petitioner wherein the factum that the petitioner appeared and participated in all the selections as aforesaid has not been denied but it is submitted that the respondents have not filed documentary evidence to show that such a large number of candidates were interviewed, although they ought to have filed the documents.

10. The learned counsel for the petitioner contended that since short time was allowed to appear in the selection and the selections have been finalized very hurriedly, it shows that the entire selection is malafide and vitiated. It is also stated that the name of the petitioner was also declared in the list of selected candidates along with Shama Parveen, but the petitioner has not been appointed and only Shama Parveen has been appointed. It is also submitted that respondents have selected their own wards and children and, therefore, the entire exercise is biased and malafide.

11. It is a settled law where a mala fide is alleged, the authority, who has passed the order, which is said to be the result of the mala fide exercise of power, has to be impleaded *eo nominee*. In the absence of such impleadment, the Court neither can look into the plea of mala fide nor can consider the issue raising mala fide.

12. In **State of Bihar Vs. P.P. Sharma, 1992 Supp (1) SCC 222** in para 55 of the judgment, the Apex Court held as under:-

"*It is a settled law that the person against whom mala fides or bias was imputed should be impleaded eo nominee as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made. Otherwise it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity. Admittedly, both R.K. Singh and G.N. Sharma were not impleaded. On this ground alone the High Court should have stopped enquiry into the allegation of mala fides or bias alleged against them.*

13. In **AIR 1996 Supreme Court 326, J.N. Banavalikar Vs. Municipal Corporation of Delhi**, in para 21 of the judgment, it has been held as under:-

"Further in the absence of impleadment of the ……the person who

had allegedly passed mala fide order in order to favour such junior doctor, any contention of mala fide action in fact i.e. malice in fact should not be countenanced by the Court."

14. In **JT 1996 (8) SC 550, A.I.S.B. Officers Federation and others Vs. Union of India and others,** in para 23, the Hon'ble Apex Court has said where a person, who has passed the order and against whom the plea of mala fide has been taken has not been impleaded, the petitioner cannot be allowed to raise the allegations of mala fide. The relevant observation of the Apex Court relevant are reproduced as under:-

"*The person against whom mala fides are alleged must be made a party to the proceeding. Board of Directors of the Bank sought to favour respondents 4 and 5 and, therefore, agreed to the proposal put before it. Neither the Chairman nor the Directors, who were present in the said meeting, have been impleaded as respondents. This being so the petitioners cannot be allowed to raise the allegations of mala fide, which allegations, in fact, are without merit."*

Recently in **AIR 2003 Supreme Court 1344, Federation of Railway Officers Association Vs. Union of India** it has been held as under:

"*That allegations regarding mala fides cannot be vaguely made and it must be specified and clear. In this context, the concerned Minister who is stated to be involved in the formation of new Zone at Hazipur is not made a party who can meet the allegations."*

15. In the present case, the plea of malafide has been raised without giving the details or relevant material and substantiating the same by furnishing the relevant documents. In the absence of any such material the said plea cannot be looked into and has to be rejected.

16. The learned counsel for the petitioner further submits that the selection was held in a hurried manner. However, it is not disputed that in all the selections, a large number of candidates appeared including the petitioner and those who have been successful have been appointed. Once the petitioner has appeared in the selection, he cannot be allowed to challenge the same after being declared unsuccessful. No material has been placed on record by the petitioner to show that the selection is vitiated in law either for violation of any statutory provision or for any other reason.

17. In these circumstances, I do not find any merit in the writ petition and it is accordingly dismissed.

No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2006

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No. 2766 of 2002

Ajay Kumar Kulshreshtha and others ...Petitioners
Versus
Director, Higher Education, U.P. and others ...Respondents

Counsel for the Petitioners:
Sri P.K. Jain
Sri Kshitij Shailendra

Counsel for the Respondents:
Sri S.M.A. Kazmi
Sri A.K. Trivedi
S.C.

B.R. Ambedkar University, Agra-First Statute-Art. 20.03 (6)(4)-Regular absorptions- Petitioners working on Post of Lab Assistant and Lab peon for the last 12 years-when the institution in question was given temporary recognition-subsequent on permanent grant-the other employees appointed in similarly situated condition-under political pressure got regular absorption-denied the case of petitioner held-not proper-all the petitioners possess much higher qualification than the requisite qualification-more than 12 years excellent working experience-held-entitled for regular absorption by forthwith effect in their respective post.

Held: Para 11 and 12

Applying the principles as propounded in the decisions noted above to the facts of the present case, there is no escape from the conclusion that the petitioners are entitled to be absorbed in the respective posts.

For the reasons given above, this petition succeeds and is allowed and the impugned order dated 5.11.2001 is hereby quashed. The respondents are directed to forthwith absorb/regularize the services of the petitioners against sanctioned post and release their salary from the salary account. However, no orders as to costs.
AIR 1992 SC-157
1997 (7) SCALE 277
AIR 1991 SC-295
2002 AWC (3) 2088 (D.B.)

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard counsel for the parties.

2. Shri Chitragupta Post Graduate College, Mainpuri was granted temporary recognition by the Chancellor, Bhim Rao Ambedkar University, Agra vide his order dated 10.8.1990 with effect from 1.7.1990 for a period of one year in the subjects of Mathematics, Physics, Chemistry, Zoology and Botany. Thus, the institution was permitted to start classes in the aforesaid subjects for preparing the students to take examination in the subjects of Physics, Chemistry, Zoology and Botany. As the students had to be prepared both for theoretical and practical papers, temporary teachers, Lab Assistants and Lab Peons were appointed by the institution. The petitioner nos. 1, 2,3 and 4 were granted appointment as Lab Assistants in the four subjects and the petitioner nos. 5 to 8 were appointed as Lab Peons in those subjects to prepare the students for practical examination and were being paid their salary by the Management from its own account. Subsequently, the University granted permanent recognition with effect from 1.7.1995, but when the Management sought to terminate their services in November, 1994, they obtained interim orders. Similarly, teachers namely Manoj Kumar Kudaisiya, Dr. Shalni Pandey and Sudhakar Dutt Dwivedi were also appointed on temporary basis by the Management. The Director of Higher Education created four posts of Lab Assistants and four posts of Lab Peons in the institution vide order dated 30.3.1999. the petitioners claimed absorption/regularization on those posts. Even the Management of the institution through its letter dated 1.2.2000 requested

the respondent no. 1 to absorb the petitioner in the said posts as they had been working since 1991 or later and the Management did not wish to make any other appointment on those posts. This was followed by subsequent letters also. The petitioners, having failed to receive any reply, preferred writ petition no. 24614 of 2000 claiming regularization/absorption. This writ petition was finally disposed off vide judgment and order dated15.5.2001 requesting the Director of Higher Education to consider the claim of the petitioners and pass a reasoned order. By the impugned order dated 5.11.2001, the claims of the petitioners have been rejected on the ground that their appointment was dehors the rules and without prior approval of the Director.

3. It is apparent that all the petitioners were appointed immediately after the grant of temporary recognition and each has a much higher qualification than what is provided under the First Statutes of the University. The following chart would give the minimum qualification, actual qualification possessed, the date of appointment and the length of service etc.

Petitioner No.	Post	Qualification Required Under Statute 20.06	Qualification Possessed by Petitioners	Date of appointment	Depart-Ment	Appointing Authority	Length of service
1	Lab Assistant	Intermediate	B.Sc.(1988) Phy. Chem. Maths.	23.8.1991	Physics	Committee Of Management	14 years
2	Lab Assistant	Intermediate	B.Sc.(1988) Chemistry Zoology, Botany	23.8.1991	Zoology	-do-	14 years
3	Lab Assistant	Intermediate	B.Sc.(1989) Chemistry, Zoology, Botany	23.8.1991	Botany	-do-	14 years
4	Lab Assistant	Intermediate	Intermediate	23.8.1991	Chemistry	-do-	14 years
5	Lab peon/boy	Class V	Class VIII	23.8.1991	Physics	Principal	14 years
6	Lab peon/boy	Class V	Class VIII	23.8.1991	Zoology	-do-	14 years
7.	Lab Peon/boy	Class V	Class VIII	22.10.94	Botany	-do-	11 years
8	Lab Peon/boy	Class V	Class VIII	23.8.1991	Chemistry	-do-	14 years

A perusal of the chart shows that all the petitioners were duly qualified and have been working for the last 11 to 14 years. As mentioned above, Sri Manoj Kumar Kudaisiya was also appointed as temporary Lecturer in Mathematics alongwith other teachers in different subjects. In accordance with the requirement of law, statement of the staff is sent by the institution to the University wherein names of both, teachers and the petitioners are duly mentioned. A copy of one such chart for the session 1995-96 is also enclosed as Annexure-11 to the petition. There is no denial or even suggestion on behalf of the respondents that all the petitioners and similarly situated teachers were working in the institution since their appointment and nobody had been appointed on the post created/sanctioned by the order dated 30.3.1999.

4. From a perusal of Annexures-1, 2, 5 and 6 it is apparent that even before creation of the posts, the Management and the Principal had sent letters to the District Inspector of Schools, District Employment Officer and the Regional Deputy director of Higher Education asking them to take part in the selection of Lab Assistants and Peons. These allegations have not been denied. It is also apparent that a Selection Committee was constituted as contemplated in clause (6) of Article 20.03 of the First Statutes of the University. However, none of the three officials took part in the selection. No doubt the aforesaid officials were a necessary part of the Selection Committee as contemplated by the aforesaid provision, neither the institution nor the petitioners could have forced them to take

part in the proceedings. The contention of the learned Standing Counsel that there was no question of their taking part as no post had, in fact, been created till then, is off the mark. Once the temporary recognition was granted, the provisions of the State University Act, 1973 and the Statutes became applicable to the institution and therefore it was incumbent upon the authorities to have taken part in the selection proceedings. After the creation of the posts, as is evident, the Management through its letter dated 1.2.2000 had sought the approval of the Director and thus had complied with the requirement of clause (4) of Statute 20.03. Thus, it cannot be said that the appointment of the petitioners was absolutely dehors the rules.

5. Assuming that the appointment of the petitioners was irregular, but it is not denied that they have been working satisfactorily for the last about 14 years. Let us examining the trend of the courts in such circumstances.

6. The Apex Court in the case of **N.S.K. Nayar Vs. Union of India (AIR 1992 SC 157)** was considering the case of an incumbent who had been working for 10 to 15 years without being given the grade of the post. It held that since the incumbent was working for such a long period and otherwise was fully qualified, their non-absorption would be arbitrary.

7. In **Arun Kumar Raut Vs. State of Bihar [1997 (7) SCALE 277]** the Supreme Court was considering the claim of an incumbent who had been appointed without following the due procedure, though it sounded a note of caution that such incumbent cannot be regularized as a matter of course, but considering the fact that they had been working for a very long period and otherwise were qualified and their service was satisfactory, it held that they may be entitled for appointment against the sanctioned post on human consideration.

8. Some appointments were made by the Chief Justice of the Kernataka High Court without the mandatory consultation with the Public Service Commission and when they were sought to be dismissed, they approached the High Court which rejected their claim but the Apex Court in **H.C. Putta Swami and others Vs. Hon'ble Chief Justice of Kernataka High Court (AIR 1991 SC 295)**, though held that the appointments were dehors the rules but it directed the appointees to be treated as regularly appointed on humanitarian ground.

9. A Division Bench of our Court in the case of **Dr. Sangeeta Srivastava Vs. University of Allahabad [2002 (3) A.W.C. 2088]** extended the benefit of regularization to a Guest Lecturer who had been appointed dehors the rules as she was working for about 12 years. The Apex Court affirmed the judgment in Special Leave to Appeal.

10. It is not denied that teachers who had been appointed along or after the petitioners but before the posts were created have been granted regularization on those posts but the case of the petitioners is sought to be distinguished on the basis of the Government Order by which the services of the teachers were regularized. These low paid employees hardly have the political or executive muscle to approach the Government for its order. Both the sets of employees were similarly placed and therefore the

petitioners ought to have been treated similarly.

11. Applying the principles as propounded in the decisions noted above to the facts of the present case, there is no escape from the conclusion that the petitioners are entitled to be absorbed in the respective posts.

12. For the reasons given above, this petition succeeds and is allowed and the impugned order dated 5.11.2001 is hereby quashed. The respondents are directed to forthwith absorb/regularize the services of the petitioners against sanctioned post and release their salary from the salary account. However, no orders as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2002

BEFORE
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No. 33685 of 2002

Akhilesh Kumar Chaubey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.M. Pandey
Sri Ramesh Chand
Sri K.K. Misra

Counsel for the Respondents:
C.S.C.

Dying in Harness Rules, 1974-rule 2 (a)(iii)-Employee-through not regularly appointed-3 years service on regular vacancy-The dependant of such employee entitled for the benefit of Compassionate appointment-12 years continuous service-benefit of leave etc. given-held requirement was perpetual and regular in nature hence come under the definition of Government servant for the purpose of appointment on compassionate ground.

Held: Para 13 and 14

Taking the present case it is not disputed that the petitioner's father was appointed in 1987 and he continued to work continuously till he died on 20.8.99. The appointment of the petitioner's father was initially for a period of three years on being selected by a Selection Committee. The said appointment was then converted and he was appointed as tube well assistant in 1992 also for three years. He continued to work and was paid his salary regularly and there was no break in his service. This fact is also not denied by the respondents. The fact that the respondents required the services of the petitioner's father continuously since 1987 to 1999 is indicative of the fact that the requirement was of a perpetual and regular nature. It is not the case of the respondents that the work of tube well operators no more exists. It has also not been pleaded that such tube well operators are no more required. On a vacancy which may occur of a part time tube well operator the tube well still has to be operated, therefore, the nature of work is existing day to day and the respondents have taken the services of the petitioner's father due to existence of work since 1987 continuously. During this period of nearly 12 years the salary has been disbursed by the respondents month to month. The nature of work required to be performed by the petitioner's father was of a regular nature as is apparent from a reading of the appointment letter dated 20.5.92 wherein the duties of the petitioner have been prescribed. It is also not disputed by the learned Standing Counsel that the part time tube well operators are being paid the same salary as regularly appointed tube well operators on the principle of 'equal pay for equal work'.

The duties, qualifications and hours of working of part time tube well operators and regular tube well operators are identical has been held by this court and the Hon'ble Supreme Court in SLP (C) No. 16219 of 1994 decided on 22.3.1995.

For the aforesaid reasons and the facts of this case it is concluded that the Government Order dated 26.10.1998 would not be applicable in the present case in as much as the petitioner's father would come under the definition of 'Government Servant' as defined under Rule 2 (a) (iii) of the Rules for the purpose of appointment of his dependants on compassionate grounds.

Case law discussed:

2005 (1) UPLBEC-1
2003 (1) LBESR-410
2005 (1) LBESR-571

(Delivered by Hon'ble Sanjay Misra, J.)

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

2. By means of this writ petition the petitioner seeks quashing of order dated 25.1.2000 communicated by letter dated 28.1.2000 passed by respondent no. 2 (Annexure-12 toe the writ petition) whereby the claim for appointment of the petitioner under Dying in Harness Rules, 1974 has been refused. It has been stated by the petitioner that in the aforesaid communication, no reason has been given for such denial and as such the same is liable to be quashed by this court. It is further stated that the petitioner is entitled for compassionate appointment in place of his deceased father who was a Tube-well Operator having been given appointment in the year 1987. The appointment letter dated 19.3.87 has been filed as Annexure-4 to the writ petition. The appointment was temporary for a period of three years and he could be considered for re-appointment. Prior to joining he was to be given fifteen days training and his salary was fixed at Rs.299.00 per month. He was also entitled to leave as per conditions given in the appointment letter.

3. It has been stated that late Kashi Nath Chaube had filed a writ petition no. 9507 of 1996 claiming parity of pay with other regular tube well operators in view of the decision of this Court in Writ Petition No. 3558 (S/S) 1992. By an order dated 20.5.92 he was posted as Tube-well Assistant on a salary of Rs.550.00 per month and the nature of his duties was also defined. It is stated that the petitioner's late father was posted as Gram Panchayat Vikas Adhikari by virtue of G.O. dated 30.6.99 and his name finds place at serial no. 40 of the list dated 9.7.99 prepared by the District Magistrate. It is the contention of the petitioner that his late father had worked for a period of nearly 12 years whereafter he died on 20.8.99 while in active service. The petitioner made an application dated 29.12.99 for appointment of the petitioner on compassionate ground claiming that the petitioner's qualification is Intermediate.

4. A counter affidavit has been filed by the respondents wherein the facts as averred by the petitioner have not been disputed. However, it has been stated that by virtue of Government Order dated 26.10.98 (filed as Annexure-4 to the counter affidavit) the dependants of part time Tube-well Operators are not entitled to the benefits of compassionate appointment under the Dying in Harness Rules, 1974.

5. Learned Standing counsel has placed reliance on the decision of Apex court reported in 2005 Vol. I UPLBEC page 1 State of U.P. and another Vs. Ram Sukhi Devi and has contended that the G.O. dated 26.10.98 was not considered in that case by the High Court while passing an interim order and Hon'ble Supreme Court was pleased to set aside the order of High Court, Paragraph 6 of the judgment is quoted hereunder:-

"To say the least, approach of the learned Single Judge and the Division Bench is judicially unsustainable and indefensible. The final relief sought for in the writ petition has been granted as an interim measure. There was no reason indicated by learned Single Judge as to why the Government Order dated 26.10.1998 was to be ignored. Whether the writ petitioner was entitled to any relief in the writ petition has to be adjudicated at the time of final disposal of the writ petition. This court has no numerous occasions observed that the final relief sought for should not be granted at an interim stage. The position is worsened if the interim direction has been passed with stipulation that the applicable Government Order has to be ignored. Time and again this court has deprecated the practice of granting interim orders which practically give the principal relief thought in the petition for no better reason than that of prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations. (See Assistant Collector of Central Excise, West Bengal Vs. Dunlop India Ltd., (1985) 1 SCC 260, State of Rajasthan Vs. M/S Swaika Properties; (1985) 3 SCC 217, State of U.P. and others Vs. Visheswar, (1985) Suppl (3) SCC 590, Bharatbhushan Sonaeji Kshirsagar Vs. (Dr.) Abdul Khalik Mohd. Musa and others, (1995) Suppl (2) SCC; Shiv Shanker and others Vs. Board of Directors, U.P.S.R.T.C. and another; (1995) Supp (2) SCC 726 and Commissioner/Secretary to Govt. Health and Medical Education Department Civil Sectt. Jammu Vs. Dr. Ashok Kumar Kohli, JT 1995 (8) SC 403). No basis has been indicated as to why learned Single Judge though the course as directed was necessary to be adopted. Even it was not indicated that a prima facie case was made out though as noted above that itself is not sufficient. We, therefore, set aside the order passed by learned Single Judge as affirmed by the Division Bench without expressing any opinion on the merits of the case we have interfered primarily on the ground that the final relief has been granted at an interim stage without justifiable reason. Since the controversy lies within a very narrow compass, we request the High Court to dispose of the matter as early as practicable preferably within six months from the date of receipt of this judgment."

6. Learned counsel for the petitioner on the other hand has argued that Rule 2 (a) (iii) of the Dying in Harness Rules provides that even though an employee is not regularly appointed but he has put in three years service in regular vacancy the benefits of said Rules flow to the dependant of the deceased employee. Learned counsel for the petitioner has relied upon the decision of this court in Sunil Kumar Vs. State of U.P. reported in 2003 (1) LBESR 410 Allahabad wherein this court considered the Dying in

Harness Rules 1974 and held that a daily wage employee working against a permanent requirement of Nagar Nigam for more than three years in the vacancy existing for more than 13 years even though he continued to wear the badge of daily wage employee his dependant would be entitled for the benefits under Dying in Harness Rules. In the aforesaid case this court has considered the G.O. dated 18.10.98 to the effect that the benefits under Dying in Harness Rules would be applicable to work charge employee. Learned counsel for the petitioner has placed reliance upon a decision of this court in Writ Petition No.52395 of 2004 (Shiv Sagar Vs. State of U.P. and others) wherein it was held by this court that although the petitioner's father was a Collection Amin and was not a permanent employee but had worked for 11 years even then the petitioner was entitled for the benefits of Dying in Harness Rules by virtue of Rule 2 (a) (iii) of the said Rules.

7. Learned counsel for the petitioner has also relied upon on the decision reported in 2005 (1) LBESR page 571 (Rajesh Kumar Vs. State of U.P. and others) wherein the benefit of Dying in Harness Rules was extended to the dependant of a deceased work charged employee.

8. It is admitted between the parties that the petitioner's father was initially appointed as part time tube well operator for a period of three years and that thereafter his appointment was extended and he worked as such from 1987 upto 1999 without any break in service. In the year 1999 he was sent to Gram Panchayat by virtue of a G.O. dated 30.6.99 and was designated as Gram Panchayat Vikas Adhikari and he worked till his death on 20.8.1999. The parent department of the State and he has worked since 1987 continuously although he was designated as tube well Assistant. He was retained in employment for nearly 12 years by the respondents for their requirement to operate tube wells. Such employment given by the respondents to the petitioner's father continued without break since 1987 to 1999. Having taken work and kept him on the rolls for such a long period of 12 years goes to show that the requirement of the respondents for the petitioner's services existed continuously and at no point of time the petitioners father was removed.

9. The Government order dated 26.10.98 has been brought on record by the respondents. It provides that there is no provision in the Dying in Harness Rules 1974 for giving benefit of the said Rules to dependants of part time tube well operators. On the basis of this government order the respondents have rejected the claim of the petitioner for appointment under Rules. The order dated 25.1.2000 (Annexure-CA2) states that in view of the letter dated 7.11.98 the petitioner cannot be given benefit of compassionate appointment. The letter dated 7.11.98 refers to the G.O. dated 26.10.98. In the counter affidavit the plea taken by the respondents is to the same effect that the benefit of the Rules of 1974 cannot be extended to the petitioner in view of the G.O. dated 26.10.98.

10. The Dying in Harness Rules 1974 have been made in exercise of powers under Article 309 of the Constitution of India. They came into force on 21.12.1973. Rule 2 defines Government servant as under:-

"2. Definitions:- In these rules, unless the context otherwise requires:

(a) "Government Servant" means a Government servant employed in connection with the affairs of Uttar Pradesh who-

(i) was permanent in such employment; or
(ii) though temporary had been regularly appointed in such employment; or
(iii) thought not regularly appointed, had put in three years' continuous service in regular vacancy in such employment."

11. It is apparent from a reading of Rule 2 (a)(iii) that a person though not regularly appointed but has put in three years continuous service in a regular vacancy in such employment he would come within the ambit of definition of 'Government servant' for the purpose of these Rules. Such person need not be regularly appointed but must have put in three years continuous service in a regular vacancy. The Rules no where provide the specific categories of persons who can avail benefit of Rules. The provision in the Rules are applicable to such persons who may be covered within the definition of 'Government servant' as defined in Rule 2 (a). Therefore, in order to be covered under the definition of 'Government servant' for the purpose of these Rules the conditions as contemplated therein have to be satisfied. The G.O. dated 26.10.98 states that part time tube well operators are not entitled to the benefit of the Rulers of 1974 in as much as there is no provision in the said Rules relating to part time tube well operators. The G.O. has been issued on the aforesaid reason alone.

12. Whether a part time tube well operator would satisfy the conditions to be included in the definition of 'Government Servant' as defined in the Rules of 1974 would depend on the facts of the case wherein such claim is made for taking benefit of the Rules of 1974. The claimant would have to demonstrate that the deceased employee satisfied the requirements of Rule 2 (a) (iii) and therefore was a 'Government servant' for the purpose of these Rules. If such a test is satisfied in a case then definitely the benefit of the Rule of 1974 would flow to the claimant who is dependant of a deceased employee. The G.O. dated 26.10.98 would therefore, apply only to those part time tube well operators who do not qualify the test for being included in the definition of 'Government servant' as defined in the Rules of 1974. However, in case any employee, may be part time tube well operator or a daily wager or a work charged employee, satisfies the conditions as inumerated in Rule 2 (a)(i)(iii) then he would be a 'Government servant' for the purposes of these Rules.

13. Taking the present case it is not disputed that the petitioner's father was appointed in 1987 and he continued to work continuously till he died on 20.8.99. The appointment of the petitioner's father was initially for a period of three years on being selected by a Selection Committee. The said appointment was then converted and he was appointed as tube well assistant in 1992 also for three years. He continued to work and was paid his salary regularly and there was no break in his service. This fact is also not denied by the respondents. The fact that the respondents

required the services of the petitioner's father continuously since 1987 to 1999 is indicative of the fact that the requirement was of a perpetual and regular nature. It is not the case of the respondents that the work of tube well operators no more exists. It has also not been pleaded that such tube well operators are no more required. On a vacancy which may occur of a part time tube well operator the tube well still has to be operated, therefore, the nature of work is existing day to day and the respondents have taken the services of the petitioner's father due to existence of work since 1987 continuously. During this period of nearly 12 years the salary has been disbursed by the respondents month to month. The nature of work required to be performed by the petitioner's father was of a regular nature as is apparent from a reading of the appointment letter dated 20.5.92 wherein the duties of the petitioner have been prescribed. It is also not disputed by the learned Standing Counsel that the part time tube well operators are being paid the same salary as regularly appointed tube well operators on the principle of 'equal pay for equal work'. The duties, qualifications and hours of working of part time tube well operators and regular tube well operators are identical has been held by this court and the Hon'ble Supreme Court in SLP (C) No. 16219 of 1994 decided on 22.3.1995.

14. For the aforesaid reasons and the facts of this case it is concluded that the Government Order dated 26.10.1998 would not be applicable in the present case in as much as the petitioner's father would come under the definition of 'Government Servant' as defined under Rule 2 (a) (iii) of the Rules for the purpose of appointment of his dependants on compassionate grounds.

15. Consequently the writ petition deserves to be allowed. The impugned orders dated 25.1.2000 and 29.1.2000 passed by the respondent no. 2 and no. 3 respectively are quashed. The matter is remitted back to the respondent no. 2 to re-consider the petitioner's application dated 29.12.99 under the Dying in Harness Rules 1974. The respondents no. 2 will take a decision on the same after giving full opportunity to the petitioner within three months from the date of a certified copy of this order is produced before him.

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

Petition Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: 22.12.2005 AND 05.01.2006

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

Special Appeal No.1321 of 2005

The Aligarh Muslim University, Aligarh
...Appellant/Respondent
Versus
Malay Shukla and another
...Respondent/Petitioner

Connected with:

Special Appeal Nos.1322 of 2005, 1323 of 2005, 1324 of 2005, 1327 of 2005, 1346 of 2005, 1347 of 2005, 1348 of 2005, 1395 of 2005, 1397 of 2005, 679 of 2005, 680 of 2005, 681 of 2005, 682 of 2005, 728 of 2005, 747 of 2005, 748 of 2005,

749 of 2005, 750 of 2005, 751 of 2005, 1396 of 2005 and 1320 of 2005.

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(A) Constitution of India Art.-30-Minority Institution-established by minority-never administered on claimed to be administered-can not be clothed as minority Institution.

Held: Para 52, 97,120, 140

The consequence therefore is, that the Court cannot stop from giving effect to the consequence of 2 (l). What is this consequence? The consequence is that Aligarh Muslim University becomes a minority institution. Is it a remote consequence? Not at all. Is it a direct consequence? Most certainly yes. Is it an proximate consequence? The answer is that it is so proximate that it is hardly possible to call it even a mere consequence of S. 2 (l); it was as if Parliament had said the Aligarh Muslim University is a minority institution, full stop.

The main issue arose in *Azeez Basha's* case was as to whether the Aligarh Muslim University is a minority institution entitled for protection under Article 30. The Apex Court held that Aligarh Muslim University was neither established nor administered by muslim minority, hence the challenge to the aforesaid 1951 and 1965 Acts as ultra vires to Article 30 is unfounded. For purposes of this case it is necessary to know as to what is the basis of *Azeez Basha's* judgment in holding that Aligarh Muslim University is not a minority institution. In *Azeez Basha's* case (supra) the Apex Court considered the entire scheme of 1920 Act and the Statutes and also the previous history and after analysing the same it was held that Aligarh Muslim University is not a minority institution entitled for protection under Article 30.

Thus it cannot be held that whenever a member of the minority community establish an institution the same shall be necessarily a minority institution irrespective of the fact as to whether it was contemplated to be a minority institution or an institution for the benefit of all sections of the society. This can be further illustrated by giving an illustration. A member of the minority community establishes an institution which is open to all sections of the society without reserving any right of administration in the persons founding the society. The institution is administered as a normal institution following the rules and regulations applicable to normal institution. The selection of teachers is made by selection board established under the Act. Can after lapse of several decades suddenly the institution claim to the benefit of minority character on the ground that it was established by minority member and claim right of administration of the institution as a minority. The answer will be obviously no because the character of the institution which came into existence was not a minority nor it was administered by minority. The right of all citizens to administer educational institution under Article 19 (1)(g) has also been recognised by the Apex Court in *T.M.A. Pai's* case. Following was laid down in paragraph 18 of the judgment:-

We are thus in full agreement with the view of learned single Judge that the basis of judgment in so far as establishment part is concerned was also not completely changed by 1981 Act so as to make the *Azeez Basha's* judgment ineffective. Thus in the establishment of the University the then government had its significant role and the establishment was not entirely the act of minority community.

(B) Constitution of India Art. 226-Writ jurisdiction-Locustandi petitioners have passed M.B.B.S.-challenging the policy of reservation of 50% Quota for candidates belonging to minority-adversely effected their chance to seek admission-held-petitioner have locus to filed the writ petition.

Held: Para 147, 76

The admission policy in so far it reserves 50% muslim quota was being challenged by the petitioners and the petitioners having passed the MBBS has right to challenge the policy of the institution which adversely effected their chance to seek admission in the year in question and even in future years. We are not convinced with the submission of counsel of Aligarh Muslim University that the writ petitioners have no locus to file the writ petition.

We are unable to dislodge the students, who are studying and we are aware that this will have to be at the cost of the cross appellants, who are 34 in number. Dr. Dhawan was at pains to show how only a few of them might still, in any event, be said to somewhat aggrieved, but we are of the opinion that it will not serve any useful purpose to enter into these details now, as we cannot grant them much relief. Even the locus standi of the students was challenged at first, but the issue of locus is such a narrow one that it would be impossible to say that none of the cross appellants had in any view of the matter any legal locus standi to challenge the Muslim quota. Locus on the part of the Minority Commission and the Union of India was also challenged by the cross appellants in their turn. We have found these objections to be not worthy of detailed, or even any, discussion in a heavy weight constitutional matter like this.

Case law discussed:

1969 (2) SCC-283
1989 (3) SCC-488
1997 (8) SCC-522
1996 (7) SCC-637
2004(12) SCC-588
1976 (4) SCC-750
1952 Appeal cases-109
AIR 1968 SC 662
1993 (Suppl.) SCC (1)-96
1969 (2) SCC-283
2003 (5) SCC-298
2004 (1) SCC-712
1966 (7) SCC-637
2002 (8) SCC-481
2000 (7) SCC-253
2005 (2) SCC-65
2002 (6) SCC-127

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

1. The short basic issue in all these appeals is whether the Aligarh Muslim University is a minority Institution. The point arises because suddenly some eighty five years after incorporation, they chose for the first time to reserve a Muslim quota, by way of a 50% reservation of post-graduate course seats meant for qualified MBBS doctors. The judgment under appeal before us has been delivered by an Hon'ble Single Judge of our Court on the 4th of October, 2005. Both sides, to be more accurate, all parties, felt aggrieved, and came up in appeal. The appeals will all be disposed of by this common order.

2. On the one side, who spoke first, were the Aligarh Muslim University, represented by Mr. S.S. Ray, leading Dr. Dhawan, the Union of India and the

learned Attorney General on whose behalf Mr. Gopal Subramaniam addressed us, two individuals one of whom is a member of the Court of the University, which is its administrative body, the Minority Commission whose case was put forward by Mr. Ravindra Srivastava, and groups of Muslim students, admitted on quota, represented by two learned counsel one of whom was Mr. Ashok Khare and another Mr. S.A. Shah.

3. On the other side were certain dissatisfied students whose case was put forward by Mr. Ravi Kant. Before we proceed any further, we make it clear that in spite of the most elaborate expertise and painstaking arguments on the part of the University and its supporters, we felt so utterly unconvinced that Mr. Ravi Kant was called upon to speak for about two hours whereas the other side had amongst themselves addressed us for some five days or so. Those hearings were substantially full day hearings.

4. Although we cannot say the same thing about the various reasons given by Hon'ble the Single Judge and the orders passed by his Lordship, we have no hesitation in upholding his Lordship's main and primary decision in these matters, which is that Basha still holds the field and the 1981 Act must give way before it wherever the two come in conflict.

5. ***Basha*** is the case of ***Azeez Basha***, a Five Judge Bench decision of the Supreme Court and the report of the case will be found at AIR 1968 S.C. 662. It ruled that the University is not a minority institution.

6. The 1981 Act is an Act of our Parliament, No.62 of 1981 being Aligarh Muslim University (Amendment Act 1981), which received assent of the President of India on the 31st December, 1981 and was published thereafter on the same day.

7. In ***Basha***, the Court spoke through the Hon'ble then Chief Justice K.N. Wanchoo; it is a decision running to about 12 pages of the All India Reporter.

8. That case has to be read by any reader of this judgment before proceeding any further herewith. On the simple principle of following higher and binding authorities, we have to give this case full and complete effect and none of the statements in this case can be discounted by us. It would be wrong for us to quote the case fully here and it would be a wholly unnecessary and unusual exercise; but the case should be treated as quoted herein fully and we must be understood hereafter as bearing in our minds all the time the basic and first principle that we in this Bench are forbidden to look behind the decision of a five Judge Bench of the Supreme Court of India.

9. The problem before us arose because Parliament, an equally binding source of law so far as we are concerned, chose to pass the amending Act of 1981 which, according to appellants, (by the appellants hereafter we shall mean the University and its supporters; we shall refer to the aggrieved non-Muslim students as the cross-appellants hereafter), the said Act of 1981 changed the basis of ***Basha*** and that too to such an extent that today, we as the appropriate pronouncing authority must pronounce the Aligarh Muslim University as a minority

Institution, the ***Basha*** case notwithstanding.

10. The task before the Hon'ble Single Judge was, and before us also is, to see whether the 1981 Act so altered the basis of the ***Basha*** case, legally and validly, as substantially to convert the Aligarh Muslim University into a minority Institution because, and only because, of the said amendment Act, or whether, if the Act by its words had succeeded in purporting to achieve that object, it, by that very reason, transgressed the permitted authority and limit of Parliament, which cannot, simply like a superior Court, overrule the decision given by any Court of law, least of all the Supreme Court of India. The issue is, did the 1981 Act make such changes as Parliament was entitled to make, and thereby achieve the effect of altering the non-minority character of the Aligarh Muslim University, or did it seek to achieve that end by simply and substantially overruling the Supreme Court decision, for which it has no competence.

11. Although the ***Basha*** case is to be treated as quoted here by us, we must recount here some of the salient points mentioned in that judgment, in the manner we respectfully read it.

12. It took into account, in some detail, the early history leading to the setting up of the Aligarh Muslim University by an Act of the Indian Legislative Council in 1920. That Act received the assent of the Governor General on the 14th of September, 1920. Several, but not all, property of the University earlier belonged to one MAO College, the full form being the Mohammadan Anglo Oriental College and the Muslim University Association. These were Mohammadan Institutions no doubt. The inception of these came sometime in the latter part of the 1870's; one of the leading gentlemen, who took a prominent part in this, was one Sir Syed, father of the illustrious Hon'ble Judge of Allahabad High Court Mahmood, J., the short lived Barabankian from Olympus. The idea was to set up a University and the ambition was to go on the lines of the University of no less a status than Oxford, or Cambridge. An interesting fund was raised to as large an extent as Rs.30 lac, even in those days, by collecting one rupee from every Mohammdan of the then British India. Whether this was followed to the letter or not, we need not inquire into.

13. Mr. S.S. Ray told us that a bare look at even some of the albums showing pictures of the Aligarh Muslim University would convince anybody of its deep green character. The architecture and the Quoranic inscriptions are all there.

14. Be that as it may, in the ***Basha*** case their Lordships went on to consider the effect of the Aligarh Muslim University Act of 1920 ((XL of 1920). Their Lordships were considering the issue for judging the validity of certain amendments made to the Act in the years 1951 and 1965.

15. Although the Union of India through Mr. Subramaniam has been at pains to argue before us that the Aligarh Muslim University is a minority Institution, the stand of the Union of India before the Supreme Court was radically different. We cannot make much of this opposing stand because Parliament had

intervened with the 1981 Act and the Union of India and the Attorney General are entitled to support the Acts of Parliament in courts of law. Whether they will succeed in their support or not, is quite another matter.

16. Before the Supreme Court, the Union of India argued that the Aligarh Muslim University was a free Institution and not a minority one; as such the amendments made in 1951 and 1965 were all supported by the Union. The Supreme Court accepted the Union's contention and ruled in as clear terms as possible that the Aligarh Muslim University was not a minority University; it is not necessary for us to enter again into details about the exact nature and scope of the 1951 and 1965 amendments. Suffice it for us to say that those dealt, amongst other things, with a recasting of the constitution of the Court of the University, which was originally dealt with amongst others by Section 23 of the act of 1920. All the members of the Court in 1920 had to be Mohammadans; there was a clause in Section 23 by way of a proviso, that unless one were a Mohammadan one would not be entitled to be a member of the Court. These were substantially changed; the proviso forbidding non-Mohammadans from becoming members of the Court was done away with, and ***Azeez Basha*** and some others were aggrieved, but to no effect. In ruling the Aligarh Muslim University to be non-minority, their Lordships considered several matters, but to our mind the most important one was about the grant of degrees, and incorporation of the University itself.

17. This matter must be dealt with specifically and in some detail. Prior to 1920, the MAO College was affiliated to the University of Allahabad; degrees were granted by the Allahabad University to students of this College; the College did not itself grant degrees then.

18. There has been some dispute raised before us whether in 1920 it would be possible for the Mohammadan community to found a University on their own, without intervention of an Act of the Legislature, for the purpose of granting degrees to their own students. In the Basha case, the Supreme Court has at least assumed that it would be possible for the Mohammadan community to set up a University on their own without any legislative Act. What the Supreme Court has said in this matter, we have to and we do accept. We only note that after 1956 and the passing of the University Grants Commission Act a University can only be set up by the appropriate legislature; on the basis of ***Yashpal's*** case, which was given to us by Dr. Dhawan, and paragraph 59 thereof (2005, 5 SCC 420), the safest way to go about it, would be to have the State Legislature utilize their power under List-II Entry-32. The University Grants Commission can of course make a deemed University as provided in the Act. It seems that even before the 1956 Act, and even way before we gained our Independence, the setting up of a University fair and square would need intervention of the Supreme Government. The word "University' might be referred to in this regard in Earl Jowitt's Dictionary of English law; the power of a University to grant degrees in general does not seem to be an exclusive right of theirs; there seems to be some doubt as the Encyclopedia Americana and also Jowitt's Dictionary seem to state that Colleges are as competent as Universities

to grant degrees. The passage at 15 Halsbury 256 can also be referred to; it states there that the essential feature of a University seems to be that it is incorporated as such by the sovereign power; Blackstone is referred to there.

19. For us these authorities need not and perhaps should not be looked into; in ***Basha*** the Supreme Court opined that it would be possible for the Mohammadans to set up a University on their own, but what they could not be certain about, in setting such an Institution up, would be the matter of recognition of the degrees.

20. It is not stated clearly in ***Basha*** what exactly this recognition means; however, with all due respect, we assume that the recognition of the degree would mean recognition by the sovereign power and all its subordinates of the validity and reliability of the degrees to be granted.

21. ***Basha*** clearly stated that the certainty of recognition of a University degree could be had by the Mohammadan community, if the University were brought into existence by the Legislature. In paragraph 26, on the left column of page 673 of the said report his Lordship the then C.J. said as follows:

"It seems to us that it must have been felt by the persons concerned that it would be no use bringing into existence a University, if the degrees conferred by the said University were not to be recognised by the Government."

It was later on said in the same left column:-

...it would not be possible for the Muslim minority to establish a University of the kind whose degrees were bound to be recognised by Government and therefore it must be held that the Aligarh University was brought into existence by the Central legislature and the Government of India. If that is so, the Muslim minority cannot claim to administer it, for it was not brought into existence by it. Article 30 (1), which protects educational institutions brought into existence and administered by a minority, cannot help the petitioners..."

22. In our respectful reading this was the cornerstone of the ***Basha*** judgment. Their Lordships held the University to be different from the pre-existing Mohammadan College; it is noted by their Lordships that there were long negotiations and a tussle between the Mohammadan community and the then Government; the Government did not wilt to the Mohammadan wish to have a Mohammadan institution for the benefit of the Mohammadan community, if not exclusively, at least substantially; this was not acceded to by the Government.

23. The Mohammadans gave way; they took what they got. In the affidavit before us the repeated requests made by the Mohammadan community for their own College are mentioned in several places. Mr. Subramaniam took us through those paragraphs to demonstrate that the wish of the community to set up a University of their own was indeed there, and they tried very hard, no doubt, to have their wishes granted.

24. India of 1920 is not same as the India of 2005 or 2006. Section 3 (28) of the General Clauses Act, 1897 as amended up to date clearly says that the

India of 1920 is British India; we do not have to go to a General Clauses Act definition to know that it was not a country where there were different political parties of any real power or importance; it was not an India where one community could wait for a more supportive and sympathetic political party to come in power and then gain their objective; there was no democracy. What the British said, went. For any public achievement the people of India, whether Mohammadans or not, had to be in the good books of the English people. Any other achievements had to be made underground. It was in this context that the University was set up by the then ruling Government; as soon as it was incorporated under the auspices of the English Government and the English Legislature, the University had all success and all support from the very beginning; the Mohammadan community chose the politically right path of inviting high English personages like Lord Lytton to be associated with their College; once they gave way to the manner in which the then Legislature desired to set up the University, the degrees of the University had full and 100% value. The degrees of a University, even if it could be set up independently then, which was in the bad books of the English Government, but wholly Mohammadan and wholly green, and perhaps wholly good, was of no practical value; it would either die or go underground. The other University, which was set up by the Act of 1920 started with a prospect of prosperity and prospered it has, right until date.

25. We are aware that their Lordships of the Supreme Court have not looked at the issue in the light that we have respectfully used above, but we feel confident, again respectfully, that we have not gone against what the Supreme Court has stated but only tried to support it, such support being necessary in the face of the current challenges.

26. It is on record that the finances of the Aligarh Muslim University became the headache of the Government after incorporation; it is on record that some 74 acres of extra land went to the Aligarh Muslim University as part of the prosperous setting up process; it is provided in the Act itself that the fund of Rs.30 lac would be utilized for recurring expenditure; this means that the Muslim fund would help the University and die out and no Muslim nucleus would remain even in the accounts of the Aligarh Muslim University.

27. In the ***Basha*** case certain supervisory powers of administration were clearly pronounced as important, e.g., it is stated in paragraphs 7, 8 and 9 as follows.

28. Section 6, the degree section so to speak, laid down that degrees, diplomas and other distinctions of the University shall be recognized by the Government like those of any other University. Section 8 provided that the University shall be open to all persons of either sex and whatever race, creed or class. Section 13 provided that the Lord Rector shall have the right to cause an inspection to be made and also cause an inquiry to be made. The Court had to comply with these provisions; the Lord Rector could issue directions and after explanations were considered his directions had to be complied with by the Court of the University. Section 14 contained the provision for the visiting board which also

had power to inspect; it had annulling powers; the Visiting Board also had overriding powers. Although the Court had to be composed in the beginning of Muslims only, their Lordships said in paragraph 9 of the ***Basha*** judgment that there was no condition that the Lord Rector had to be of the Muslim community.

29. A very great attempt was made before us to show that the Basha case, in any event, needed guarded reading in view of later Supreme Court cases.

30. It was said that in the ***PAI*** case 2002, 8 SCC 481 the Supreme Court has, in a much larger Bench than the Basha Bench gone into the issue of governmental control of even minority Institutions. The argument therefore ran, that the administrative control by, say, the Lord Rector or the Visiting Board, would not be factors robbing the Aligarh Muslim University of its minority status today in the light of the ***PAI*** judgment. We are of the opinion that this views the coin from a side, which is seriously opposite and wrong. That a minority institution, for the purpose of stopping maladministration and gross unfairness, is subject to governmental control does not mean that when it is to be decided whether an institution is a minority institution or not, the factors of governmental control ought to be discounted altogether. That would be a complete misreading of PAI and it would be viewing ***PAI*** from the wrong and opposite angle; that minority institutions can be controlled does not mean that control of institutions by the Government does not tend to show an institution up as basically a non-minority institution; when one is considering the degree of control permitted for a minority institution, one assumes the minority status; when the minority status or the non-minority status is not admitted or assumed, the factor of administration and control by free or non-minority groups becomes not only important, but very important.

31. Reference has been made to the ***St. Stephen's College*** case about the importance of administration in determining minority status. The report is at 1992, 1 SCC 558. Brother Bhushan in his Lordship's judgment has also dealt with the importance of administration as a determinative factor for judging minority status. I fully agree with his Lordship.

32. In answering Question 3 (a) in the ***TMA PAI*** case, Kripal C.J. said at page 587 of the report above mentioned as follows:-

"Q.3(a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person (s) belonging to a religious or linguistic minority or its being administered by a person (s) belonging to a religious or linguistic minority?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench".

33. That the question has been left unanswered by the Bench does not mean that all earlier Supreme Court Cases of lesser strength are overruled; one has to read the earlier cases and the openness of the question all together. We in the Division Bench of the High Court are in

the happy position that we have no problem in following **St. Stephen's**, and the other cases.

34. In our respectful opinion, the question of establishing and administering an institution is infinitely the most relevant at the point of time of its coming substantially into being. Attention must be focussed at that point of time. Who established it? Who was then administering it? What was the purpose of establishing it? The answers to these questions will enable the Court to determine whether the institution is a minority one or not. We are of the respectful opinion that not one of these questions can be held to be irrelevant in the matter of ascertaining whether an institution is a minority one or not. More than this on this issue we do not have any courage to say.

35. The question of administration in 1920 after the Act came into being was gone into in ***Basha***. The college and the Union however argued that the point of time for our inquiry is much before, perhaps even in 1870, when the M.A.O. College was founded. We do not agree; there is no doubt that the M.A.O. College, if it had remained as such would be a minority institution. The issue before us is not whether the MAO College was a minority College or not. The issue before us is whether the Aligarh Muslim University of 1920 is a minority institution or not. That certainly came into being in 1920. Whether it was established and administered by the minority community through the year 1920, is a question, which we must answer by taking into account both ***Basha*** and the 1981 Act. This brings us to the crux of the issue, i.e. whether the MAO College and the Aligarh Muslim University are one and the same thing and the process of the incorporation in 1920 is no more than something superficial, something procedural, some mere process, which cannot touch the substance of the matter.

36. We do not here again wish to set down under two tables the items in Aligarh Muslim University, which were green and the items in Aligarh Muslim University, which were free, so to speak, white. The Supreme Court has done so in ***Basha***; the history of the Mohammadan tint has been considered; the passing of all property of the Muslim association and the Muslim College, the passing of all their bequests and receipts to the University have been considered by the Supreme Court; their Lordships have considered all factors and we simply have to follow them. In following them, we cannot escape the conclusion that their Lordships treated the MAO College and the Aligarh Muslim University as two different and distinct entities; one was set up by the Mohammadan community and the other by the Legislature; one was affiliated to the University of Allahabad and was unable to grant degrees of its own; the other was set up by an Act of legislature and a Section permitted it to grant degrees as recognised as those of any other University; the one had Mohammadans completely in control of administration; the other had serious supervisory control over the Mohammadan Court by, inter alia, the Board; one had building, property and some money; the other had, may be the same building, but much more property and unlimited English funds.

37. Their Lordships did not opine that the MAO College permeated into the

Aligarh Muslim University, or that if it had changed anything, it had only changed into a *dinner jacket* from a Sherwani.

38. In the face of this, Parliament passed the said Act of 1981; the one and the most important sub-section in the said Act is sub-section 2 (l), which reads as follows:-

"2. (l) "University" means the educational institution of their choice established by the Muslims of India, which originated as the Muhammadan Anglo-Oriental College, Aligarh and which was subsequently incorporated as the Aligarh Muslim University".

39. Several other amendments were made in 1981, but this sub-section is the key to the lock. Is this sub-section good? Can this and ***Basha*** subsist? These are the basic questions.

40. The University was at pains to submit that this sub-section and ***Basha*** cannot subsist; if this sub-section were before the ***Basha*** Court, according to them, the decision would have been otherwise; they relate to the test of ***Prithvi Cotton***, 1969, 2 SCC 283. According to them 2(l) made all the difference; further according to them, this difference the Parliament was entitled to make.

41. Thus, we proceed on the basis that 2 (l) and ***Basha*** cannot subsist. We agree with the University to this extent, and to this extent therefore, we respectfully disagree with the Hon'ble Single Judge, who has read down 2 (l) only but not struck it down. But was Parliament entitled to insert 2 (l)? The point is the point of Parliament being disentitled to assume the role of a Court of appeal in regard to judgments of courts of law. There are two ways, basically, a judgment can get overruled. First, it might be by direct appeal; that is not possible in ***Basha***; in other matters, it might be that the same issue comes up before a court of higher authority and the earlier precedent is disapproved. This is another equally effective way of overruling in law; if the High Court had said that X is a minority institution in one case and thirty years later, the Supreme Court had said no, X is a non-minority institution, the High Court's judgment would get substantially overruled, practically as effectively as an appeal then and there would have overruled it.

42. Either way of overruling a judgment is forbidden to Parliament. Several cases in regard to this resolution of conflict between Court cases and legislative Acts have been considered by the Hon'ble Single Judge and also cited before us. Brother Bhushan has also referred to those.

We mention only three below:-

(i) 1989 (3) SCC 488: **Ujagar Prints (II) Vs. Union of India**
(ii) 1997 (8) SCC 522: **S.S. Bola & Others Vs. B.D. Saridana**
(iii) 1996 (7) SCC 637: **Indian Aluminium Company Vs. State of Kerala**.

43. We refer specifically however, to a case given by Dr. Dhawan, a very recent one, being the case of ***Virender Singh Hooda and others Vs. State of Haryana and another*** (2004) 12 SCC 588. At page 610 in paragraph 46, the

following sentence occurs in the beginning:-

"It is equally well settled that the legislature cannot by a bare declaration, without anything more, directly overrule, reverse or override a judicial decision; it may, at any time in exercise of the plenary power conferred on it by the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field, fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based (I.N.Saksena v. State of M.P. (1976) 4 SCC 750: 1977 SCC (L&S) 36).

44. This is the test that we apply. In our opinion, the test applies on all fours. Section 2 (l) is an enforced declaration of substantial identity. Even according to the University, on the basis of 2 (l) the minority status has to be declared. Thus, they themselves argue that the definition is a definition of substantial identity as between the Mohammadan College and the incorporated University.

45. The Supreme Court did not hold so; it held exactly otherwise; it was fully aware (said with the greatest of respect) of what it needs for an institution to qualify as a minority institution; it never said that incorporation and incorporation alone as a process was the sole factor why their Lordships were deciding the University to be a non-minority one; numerous factors were considered by their Lordships; by consideration of those factors, their Lordships reached a conclusion of separation, of distinctness, as between the minority College and the non-minority University.

46. What Section 2(l) does is that it both overrules the view taken by the Supreme Court of the situation prevailing in 1920 and it lays down, practically in so many words, that the University is an Article 30 establishment.

47. Why do we say that it does so? Because 2 (l) states that the University was only subsequently incorporated from and out only of the Anglo Oriental College, which was already there, and if that is so, and if there is no distinction between these two, then, because of the process of incorporation and the process of incorporation only, it is impossible to say that the minority institution has lost its minority character.

48. We have said that in ***Basha*** the Supreme Court took a view of the 1920 situation; the view was a reasoned view; there were many factors, which persuaded their Lordships to come to a final decision that the Aligarh Muslim University was different from the MAO College and was so substantially different as to make the one a free institution notwithstanding the other being a minority one. By Section 2 (l) the reasoning and the decision are directly ridden roughshod over by Parliament; it does away with the reasoning by enforcing by way of declaration that the MAO College became the Aligarh Muslim University by incorporation and that the one is the other excepting for incorporation and incorporation alone; at the same time it lays down in the definition a proposition; the necessary corollary of which is a statement that the Aligarh Muslim University partakes of the same minority status as its substantially indistinguishable predecessor had, that predecessor being

the MAO College. The necessary corollary is a very close second step and so close as to be practically indistinguishable from the definition itself. Section 2 (l) therefore seeks to state practically in stark terms that Parliament has overruled the ***Basha*** decision. This Parliament is not entitled to do.

49. We are again grateful to Dr. Dhawan for giving us authorities for the proposition that if a deemed provision is introduced by way of a statutory fiction or enactment, the Court must proceed consequently thereupon also, and not give the definition a truncated meaning by stopping with the definition and refusing to give it its due consequences also.

50. The root case is the House of Lords decision in the **Finsbury Borough Council case, reported at 1952 Appeal Cases 109: (1951) All.ER 587**.

This was approved in the case of Arooran Sugars Ltd, (1997) 1 SCC 326, see paragraph 11.

51. The Supreme Court reproduced the following dictum of Lord Asquith:-

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it ....The statute says that you must imagine a certain state of affairs. It does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

52. The consequence therefore is, that the Court cannot stop from giving effect to the consequence of 2 (l). What is this consequence? The consequence is that Aligarh Muslim University becomes a minority institution. Is it a remote consequence? Not at all. Is it a direct consequence? Most certainly yes. Is it an proximate consequence? The answer is that it is so proximate that it is hardly possible to call it even a mere consequence of S. 2 (l); it was as if Parliament had said the Aligarh Muslim University is a minority institution, full stop.

53. The learned Single Judge in the court below has opined that this case satisfied the test of Parliament seeking brazenly to overrule a judicial decision. We respectfully agree.

54. In the original 1920 Act, also, there was a definition. The definitions had not gone up to (l) at that time; Section 2 (h) of the 1920 Act originally defined the term University as follows:-

"2 (h) "University' means the Aligarh Muslim University."

55. This definition is changed; this Aligarh Muslim University is made to be substantially indistinguishable in form and succession from the MAO College; the definition Section might be a small one, but it is a vital one. Parliament had no authority in the face of the Basha ruling to make this type of change and sit in appeal or sit in review over a five Judge decision of the Supreme Court. It was not a mere change of basis; the basis which prevailed in 1920 had been looked at by the Court and the view had been taken thereon. A deemed fiction changing that basis by way of a definition section is

no different from saying that the decision is overruled and the view is not what the Supreme Court had taken but the view is, as we the Parliament now say it is. We are quite clear in our minds that Parliament overstepped its limits.

56. Just before 1981 there was another Amendment Act of 1972, which inserted Section 5 (9A), which defined the boundaries with respect to a University mosque. We think that this is neither here nor there. Even in the original statute Section 5 (2) as one of the object clauses laid down that the University would have powers to promote oriental and Islamic studies and give instruction in Muslim theology and religion and to impart moral and physical training. This type of mingling of Islamic study along with other matters does not at all alter the status of the University to a minority status.

57. Other changes than 2 (l) were also made in 1981, but those we will come to later. We must now more fully explain what it is exactly, in the practical world, that has compelled us to inquire into the free or minority status of this University. There have been time gaps in the list of dates and years in the history of the Aligarh Muslim University, which would make Rip Van Winkle look like suffering from lack of sleep. From 1920 until 1947 or 1950, nothing much happened; it was a period of dormancy. There were amending Acts of 1951, 1965, 1972 and 1981; there was a ***Basha*** case in 1967-68; it was, so to speak just a little stirring in bed, but not really getting out of it, because the non-minority institution continued to be non-minority institution through the Basha decision. The 1981 amendments were made, but those remained in the book; it hardly touched anybody; at least it did not touch anybody badly enough for him to come to Court or raise any public issue in the media. Dr. Dhawan said that after the 1981 Act, the University was awaiting the PAI decision; it needed a decision for its stand on reservation. May be so, but it awaited in a state of complete dormancy. There might have been committees within the University thinking of what to do if it is a minority institution, but the waves never went out of the University pond. Then came 2004-2005; examinations were held on the 31st of January, 2005 for the purpose of filing up 157 posts in the stream M.D., M.S., i.e. all Post Graduate Medical Courses. The qualification needed for these studies is that the students have to be already a qualified MBBS, i.e. a qualified practitioner. The Post Graduate Medical Course of the Aligarh Muslim University has been there for a long time and it is a reputed one. Many Post Graduate Doctors from the Aligarh Muslim University will be found in many a reputed Hospital and Nursing Home. We believe this to be so and our belief, in spite of our giving it expression during hearing, was not contradicted by anybody.

58. 50% of these 157 seats, (we shall not bother about the fraction) were attempted to be reserved for the Mohammadan students for the 2005 examinations.

59. The Mohammadan reservation there has never been for the last 85 years. The University was only in name a Muslim University. There were institutional reservations, but those are possible even for free institutions. The minority status might have been discussed

in the private Halls of the University; we do not know about that. The claiming of a Muslim quota came for the first time for the Post Graduate Doctoral courses starting in the year 2005 and the gap is from 1920 to 2005.

60. Examinations were held; the Muslim quota has been given effect to; 50% seats have been filled up by Mohammadan students who have been given preference on the basis of the their religion; students have felt aggrieved; they have come before the Court; criticism was made that only one or two came first, and then in groups, and mostly after the first interim order had been passed by the Court in a writ petition.

61. That might be so, but we are herein concerned with the claim of the Muslim reservation after long 85 years; we do not know what the practical effect of a change of a free post graduate doctoral course into a minority reserved post graduate doctoral course will be; it is not for us to inquire into the practicalities. It is for us only to note facts and to go about the law of the matter.

62. The Muslim reservation was claimed on the basis of and solely on the basis of the 1981 amendments; if there were no amendments in 1981, this litigation would not be on. Two other provisions entered in 1981 by way of amendment are, in our opinion, material, but the others, so far as this court is concerned, can remain on the statute book.

63. The next amendment after Section 2 (l) is Section 5 (2) (c). This is set out below:-

"5 (2)(c). to promote especially the educational and cultural advancement of the Muslims of India".

64. We are of the opinion that if the University is free, which according to our judgment it is, this sub-section cannot survive. It is flatly discriminatory. If a clause like this were to be introduced into the Charters of the Banaras Hindu University directing that it should promote especially the educational and cultural advancement of the Hindus of India, it would be discriminatory. This new Section 5 (2) (c) is discriminatory for exactly the same reason. It would be a wrong view to take that by introducing just 5 (2) (c) the Act has so changed the basis or the whole situation as to cause the Court to take a different view from ***Basha***. It would be placing an overmuch importance on a comparatively small thing. The main issue is 2 (l); the decision on that has to shape the decision on 5 (2) (c); we are of the clear opinion that it is not the other way round.

65. The cross appellants in the Court below asked for striking down of Section 2 (l) and Section 5 (2) (c); they did not specifically ask for striking out of another amendment which is certainly related to the minority issue.

In the preamble of the 1920 Act, it is stated as follows:-

"An Act to establish and incorporate a teaching and residential Muslim University at Aligarh".

66. By the 1981 Act, the words "establish and' have been removed. The reason is very simple; Article 30 uses the word establish; if establishment and

incorporation are even kept in proximity, there might be a doubt whether incorporation alone might rob the University of its minority status; incorporation is a single factor, but it is not an unimportant factor. It is a process, but it is a process of a very high order. It is only by incorporation that Universities could be brought into being in 1981, apart from a deemed status being given to it. Leaving the words "establish and incorporate' together would therefore militate with the object and purpose of introduction of Section 2 (l); it was therefore sought to be removed by the 1981 Act.

67. We are of the opinion that this removal is bad and must be struck down. The preamble of the Act must remain as it was.

68. The Supreme Court having taken a view that "incorporation and establishment' are connected and are importantly connected, that view taken in regard to the 1920 situation, cannot be summarily overruled by Parliament so as to bring into existence a new minority institution.

69. We are therefore of the opinion that along with 2 (l) Section 5 (2) (c) must also fall and there should be a restoration of the preamble as it was.

70. This brings us to a second point, which arose during the course of argument; it was not argued in the Court below, but the Court having felt the necessity of hearing views of both sides on it, put the query to them and answers came forth with all the usual compliance and learned expertise.

71. It is a point of legislative competence. We are concerned with a simple Act of Parliament of 1981. We are not concerned with a constitutional amendment or, as Dr. Dharwan prefers, an exercise of a constituent power by Parliament. Nor we are concerned with any such unprecedented thing as a referendum to the people of India and the change, or part breakdown as per Dr. Dhawan, of the Constitution on the basis thereof. These are different and higher matters. We are concerned only with a simple Act of Parliament, which cannot by itself amend the Constitution. The Aligarh Muslim University is not merely a University, but a field of legislative power. Entry-63 of List-I of the 7th Schedule of our Constitution runs as follows:-

"The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the [Delhi University; the University established in pursuance of Article 371-E;] any other institution declared by Parliament by law to be an institution of national importance".

72. Section 2 (l) of the 1981 Act defines the Aligarh Muslim University. It is a definition different from what prevailed on the date of adoption of the Constitution. The new purported definition is not mechanical or unsubstantial and not something to which the principle de minimis non curat lex is applicable. It is a substantially altered definition of an item mentioned in the Constitution. In our opinion, the definition of any word or item in the Constitution cannot be inserted by Parliament excepting by way of a

Constitutional amendment. On this ground, the 1981 Act suffers from the lack of legislative competence.

See how this works out in practice. If the 1981 Act were not there, Parliament would be legislating for Aligarh Muslim University, although the State of Uttar Pradesh would be legislating for other Universities situated in the State of Uttar Pradesh under Entry-32 of List-II. Parliament could not, say, in 1980, even purport to make a law or cause a subordinate legislation to come into being to the effect that 50% of the Aligarh Muslim University Post Doctoral seats would be reserved for Mohammadans. That is because Basha was holding the field. Aligarh Muslim University was a free University and 50% seats could be no more reserved for Muslims there than for Hindus in B.H.U. So Parliament could not do it in 1980. However, the 1981 Act then came into being. If it is good, then 2 (l) changes the free status of the University into a minority status, as a matter of definition and by force. And immediately direct consequences result. The University and its officials boldly put forward the Muslim reservation, which was incompetent even for Parliament to put forward in 1980. How has this power been purported to be assumed? Because of the 1981 Act and none other. So Parliament has given to a University a power to do something, which it was incompetent to do even by legislation; how has it given that power? It has given that power by simple legislation. If that legislation is valid, then it has succeeded in giving power beyond its own ordinary power as per the Constitution, to some other authority. This is absurd; the absurdity occurred because and only because Parliament has sought by a simple Act of Parliament to define a Constitutional institution and field.

73. Parliament is similarly incompetent from another point of view. A minority institution cannot be created by Parliament; only a minority can create it. Whether a minority has succeeded in creating an Article 30 institution of the Constitution or not, is in the peculiar province and jurisdiction of the courts of law to declare. Parliament is incompetent to declare by, at least a simple legislation, an institution to be a minority institution. If it could do that then it could add to Article 30 by saying A,B,C,D, etc. will be Article 30 institutions. Parliament cannot do it, not at least by a simple Act of Parliament, if by anything else. When a dispute arises as to the minority status, parties come to Court and the Court takes a view; the taking of this view either results in a declaration or otherwise of the minority status of the institution. In this instant case, the Court had taken a view. The view was taken on facts and on the effect of the rights, liabilities and duties attaching to the institution being the Aligarh Muslim University. It was within the province of the Court to take this view. Once this view is taken, it cannot be dislodged by an Act of Parliament; it cannot perhaps be dislodged by any means, and in this issue the point of changing the basis of the judgment, or brazenly overruling a Court's judgment is not involved. It is a point of incompetence of Parliament. It is only for a Court to decide whether an institution is a minority institution or not; the Court can take a different view at a different point of time, but Parliament has no authority to force the Court to take such a different view in a minority status matter. Just as a carpenter has no power to force the soil,

air and sunlight to produce a tree, Parliament has no power to force on to a Society a minority institution. Politics is not permitted in this restricted constitutional field. We would strike down the aforesaid provisions of the 1981 Act on this separate ground alone, and we make it clear that in this and the earlier ground of Parliament directly overruling ***Azeez Basha***, both of us have felt absolutely in agreement.

74. The reliefs, which we ought to grant, have now to be reasoned out; we have not fully heard out the admitted Mohammadan students on the basis of the quota, which we now declare to be invalid. We have heard their appeals and we take their appeals on record. These Post Doctoral courses last for a year or two. Those started in the beginning of the year 2005 and the year is over. We are unable to upset the study programme of these qualified Doctors, who have got in, so far as the records show, perhaps luckily but without any fault of their own. The fault might lie with the University because of its insufficient foresight and its insufficient publicity in taking in as many as 50% Mohammadan students when they were claiming the Mohammadan reservations after 85 years of the incorporation of the University for the first time, but we leave it to the conscience of the University and its key people and its advisors.

75. The University communicated with the Union of India before it claimed the reservation for itself and went ahead with the examinations. The concurrence of the Union was communicated to the University by its letter dated 25.2.2005. The concurrence therefore came far later than the examinations; the concurrence was rendered temporarily invalid within a fortnight by the passing of the interim order of Court. We cannot help saying that people in high positions should have thought a little more about the uncertainty they might be introducing in the career of students before they went ahead with a somewhat sudden claim of a Muslim minority quota.

76. We are unable to dislodge the students, who are studying and we are aware that this will have to be at the cost of the cross appellants, who are 34 in number. Dr. Dhawan was at pains to show how only a few of them might still, in any event, be said to somewhat aggrieved, but we are of the opinion that it will not serve any useful purpose to enter into these details now, as we cannot grant them much relief. Even the locus standi of the students was challenged at first, but the issue of locus is such a narrow one that it would be impossible to say that none of the cross appellants had in any view of the matter any legal locus standi to challenge the Muslim quota. Locus on the part of the Minority Commission and the Union of India was also challenged by the cross appellants in their turn. We have found these objections to be not worthy of detailed, or even any, discussion in a heavyweight constitutional matter like this. The relief that we grant to the students, if relief those can be called, are spelt out below. Before the 50% claim of Muslim quota, the Aligarh Muslim University had 75% institutional reservation and 25% free admission on all India basis. Dr Dhawan was at pains to argue that at present an institutional reservation above 50% is not possible. We are however not concerned with institutional reservation as a rule, but with moulding of relief for a year; the issues

are thus, so far as we understand, slightly different.

On the above basis, the following orders are passed.

(i) The judgment and order under appeal is affirmed excepting to the extent indicated below;

(ii) The Aligarh Muslim University is declared to have always been and is a free institution and not a minority institution within the meaning of Article 30 of the Constitution and that the ruling in Basha is in no way touched.

(iii) Sections 2 (l) and 5 (2) (c) introduced in the Aligarh Muslim University Act of 1920 by the said 1981 Amendment Act are invalid and those insertions are struck out.

(iv) The removal of the words "establish and' from the preamble of the 1920 Act by the 1981 Act is invalid and those words are restored to the preamble.

(v) The claim of 50% Mohammdan quota for the post graduate medical courses by the University is declared as unconstitutional and impermissible and they shall make no claim of minority quota in like or other manner in future.

(vi) The Union's communication dated 25.2.2005 vetting the purported minority status of the Aligarh Muslim University by permitting their claim of Muslim reservation is **quashed and set aside**.

(vii) The admission of Muslim students made on the invalidly claimed quota of 50% is maintained on account of pure practicality.

(viii) The University shall undertake an exercise of recasting the results of the examinations of 2005 and will ascertain thereby which of the cross appellants would have secured admission instead of which of the Mohammdan students admitted in the 50% quota; alternatively which of the 34 cross appellants would have obtained a more preferred choice of discipline according to their priorities, and instead, which Mohammdan students were permitted to have such disciplines because and only because of the 50% quota. The exercise shall be made by way of recorded writing and preserved in the documents and records of the University and communication shall be made by the University in this regard to the cross appellants or their advocates on record within a period of a fortnight from the date of completion of judgment.

(ix) The above exercise will not mean that any of the Mohammdan students will be dislodged by any of the cross appellants; the exercise will however mean that if possible, the University will offer the newly seen to be entitled cross appellants disciplines more of their choice, if according to the University they will be able to complete such disciplines within the limited time available in a reasonable manner.

(x) Furthermore, if any of the so seen newly entitled candidates have not secured admission to the Aligarh Muslim University at all and take the examinations for the post doctoral course in 2006, then and in that event, the better result of the two years shall be counted in favour of such cross appellants; it is clarified that such better results will be

counted only within the same institutional reservation.

77. In granting the above orders, we are aware that in the Court below the prayer for restoration of the preamble of the Act to its original form was not made; in this type of litigation, however, in our opinion, the procedure of amendment is infinitely less important than the arguments made on the relief, and the necessity of making as quickly as possible one full and compendious order, so far as one particular Court is concerned, at one and the same time.

Dt/-22.12.2005
RKK/RK

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

78. I have advantage of listening to the judgment dictated by Hon'ble the Chief Justice; I am in full agreement with the order passed by Hon'ble the Chief Justice. However, looking to the issues involved in these appeals, I would like to record my reasons for the orders passed in these appeals.

79. All these appeals have been filed against the common judgment dated 4.10.2005 passed in writ petition no. 15504 of 2005 and other connected writ petitions. The writ petitions were filed in this Court challenging the mode of admission in the Post Graduate Medical Courses of Aligarh Muslim University in so far as it provided for 50% Muslim quota for internal as well as external candidates. The claim of the petitioners before the writ court was that Aligarh Muslim University is not a minority institution entitled for protection under Article 30 of the Constitution of India nor it can provide for Muslim quota of 50%. All the writ petitioners have passed their M.B.B.S.; they were desirous of seeking admission in P.G. course in the internal quota of the Aligarh Muslim University. The petitioners' further claim in the writ petition is that prior to the examination 2005 which took place on 31.1.2005 there was no such Muslim quota of 50% in the University and in P.G. courses in fact prior to 2005 apart from 25% admission under all India quota 75% seats were filled up by examination conducted by Aligarh Muslim University. The petitioners have also claimed in the writ petition that Section 2 (l) and Section 5(2)(c) as inserted by Aligarh Muslim University Amendment Act 1981 (Act No. 62 of 1981) be struck down.

80. Notices were issued to the Attorney General since the vires of the Parliamentary Act was under challenge. The Aligarh Muslim University as well as Union of India contested the claim of the petitioners. Both the University as well as Union of India contended before the learned Single Judge that provisions of Aligarh Muslim University 1981 Act are not ultra vires and the Parliament had legislative competence to amend the provisions of Aligarh Muslim University Act 1920. It was contended that although the Apex Court in Azeez Basha case had declared that Aligarh Muslim University is not a minority institution, the Parliament having legislative competence under Entry 63 of List I of VII Schedule to the Constitution of India was fully competent to change the basis of the judgment. The contentions raised before the learned Single Judge has been elaborately noted by the learned Single Judge in the impugned judgment, which need no repetition in these appeals.

81. We have heard Sri S.S. Ray, learned Senior Advocate, Dr. Rajeev Dhavan, learned Senior Advocate appearing for the Aligarh Muslim University and Sri Gopal Subramaniam learned Senior Advocate, who has appeared on behalf of Union of India and also represented the learned Attorney General of India. Sri Ravi Kant, Senior Advocate, assisted by Sri J.J. Munir & Sri Arvind Srivastava has been heard for the writ petitioners, who are respondents in the appeals filed by Union of India and Aligarh Muslim University. Sri Ravi Kant has also been heard in support of the appeals filed by the writ petitioners challenging the part of the impugned judgement. On behalf of the National Commission for Minority Educational Institutes, Sri Ravindra Srivastava, Senior Advocate, has been heard who has also filed an appeal against the judgment as intervenor. Another intervention application has been filed at the instance of two individuals for whom we have heard Sri S.G. Hasnain, learned Senior Advocate.

82. Sri S.S. Ray, learned Senior Advocate, submitted that Parliament, having legislative competence to legislate on Aligarh Muslim University by virtue of Entry 63 List-I of VII Schedule of the Constitution of India, had amended the Aligarh Muslim University Act, 1920 by 1981 Amendment Act which entirely changed the basis of the Apex Court judgment in ***S. Azeez Basha and another Vs. Union of India etc***.; A.I.R. 1968 S.C. 662 (hereinafter referred to as Azeez Basha's case). The Amendment Act, 1981 is in consonance with the history of the establishment of the Aligarh Muslim University. Relying on the Apex Court judgment in ***Kaveri Water Disputes Tribunal's case*** reported in 1993 Supplement (1) S.C.C. 96, it is submitted that the legislature under the Constitution of India had, within the prescribed limit, power to make laws prospectively as well as retrospectively. By exercise of those powers the legislature can remove the basis of a decision rendered by a competent Court thereby rendering the decision ineffective. It is submitted that by amendment brought by 1981 Act specially in definition of the University, i.e., in Clause 2(l) and amendments brought in Section 5(2)(c), which are retrospective, the basis of the judgment of the Apex Court in ***Azeez Basha's*** case has gone and the University is a minority institution entitle to reserve 50% seats for muslim students. It is further contended that none of the writ petitions are entitled for any relief by this Court since either they had already been admitted in Aligarh Muslim University or have joined other institutions or have not turned for counselling except one petitioner, Dr. Naresh Agarwal, who did not appear in the entrance test. It is submitted that relevant history of the establishment of Aligarh Muslim University leads to only one conclusion that it was established by muslim minority. Reliance has also been placed on Paragraph 13.19 of the Constitutional Law of India (A critical commentary) Fourth Edition by H.M. Seervei. Reliance has also been placed on the Court of Appeal Judgment (1939)1 K.B. 363; ***Pratt Vs. Cook Son and Company (Sant Paul) Limited***. For the principle that a legislature is fully competent to change the basis of a judicial decision to make the judgment ineffective., reliance has been placed on 1969(2) S.C.C. 283; ***Sri Prithvi Cotton Mills Limited Vs. Broach Borough Municipality***, 2003(5) S.C.C. 298;

Bakhtawar Trust Vs. M.D. Narain and 2004(1) S.C.C. 712; ***Dharam Dutt Vs. Union of India***.

83. Dr. Rajeev Dhawan, elaborating the submissions on behalf of the Aligarh Muslim University, contended that writ petitioners are not entitled for any relief by this Court. It is submitted that appellants have no quarrel with the finding and ratio of ***Azeez Basha's*** case. It is submitted that parliament whose duty is to protect the fundamental rights of citizen, as a measure of positive intervention, brought 1981 amendment retrospectively amending 1920 Act to change the very basis of the judgment of the Apex Court in ***Azeez Basha's*** case. The parliament has every jurisdiction to disagree with a judgment of the Apex Court. The 1981 Act is not an usurpation of judicial power. The legislature may, by changing the basis of law or changing the basis on which the facts may be legally constitute or changing the date from which the law has application, make a judicial decision in effective and in the present case changes brought in 1981 Act, specially changes brought in the definition of University in Section 2(l), has changed the very basis of ***Azeez Basha's*** case. Present is not a case in which there is usurpation of judicial power but it is a case where amendment in 1920 Act has been brought by legislation for which the parliament is fully competent. Dr. Dhawan has placed reliance on ***Privithi Cotton Mills' case*** and also on several principles laid down by the Apex Court in Indian Aluminium Company Vs. State of Kerala; (1996)7 S.C.C. 637. Reliance has also been placed on several other judgments of the Apex Court where basis of a judgment was changed by changing the definition in various fiscal statutes. Reference has been given of the judgment of the Apex Court in Udai Raj Sharma (1968)3 SCR 41 (Deeming provision to cure a defect in a land acquisition case), Prithivi Cotton Mills (1969)2 SCC 283 (Rates under the invalidated Act redefined to make the validating Act valid), Hari Singh (1972) 2 SCC 239 (Meaning of public premises alter retrospectively), Trith Ram (1973)3 SCC 585 (accessing delegation cured by incorporating the notification under the Act), HMT (1975) Supp. S.C.R. 394 (changing the definition of AP Gram Panchayat case to validate the rates), Krishna Chandra (1975)2 SCC 302 (definition of luxury tax changed to validate the Act), Misri Lal Jain (1997)3 SCR 714 (validation by obtaining presidential consent), Hindustan Gum (1985) Supp. 2 SCR 630 (validation of Octroi), Utkal Contractors (1988)1 SCR 314 (change of basis to apply to government forest), Bhooveshwar Singh (1994)6 SCC 77 (change in definition of sales price of stock for compensatory purposes), Orissa v. Gopal Chandra Rath (1995)6 SCC 242 (definition of selection committee change), P. Kannadasan (1996)5 SCC 670 (parliament intervenes in mines matter to cure competence), Indian Aluminium (1996)7 SCC 637 (basis of tax changed), Lt. Col. Savai Bhawani Singh (1996)3 SCC 105 (legal incompetence cured), Mahe Beach Trading Company (1996) 3 SCC 741 (legal incompetence cured) and Meerut Development Authority (1996)11 SCC 462 (defect cured by changing the basis in land acquisition law).

84. Dr. Dhawan has further submitted that 1981 Act is exercise of curative and corrective power of the parliament. The statute is declaratory and

intended to be retrospective by the very nature of the amendment. The Aligarh Muslim University, a pre constitutional institution, is fully entitled for the protection of Article 30 of the Constitution as laid down by the Apex Court in ***Right Rev. Bishop S.K. Patro***; A.I.R. 1970 S.C. 259 and ***St. Stephens*** (1992) 1 S.C.C. 558. The minority community had an intent to found the institution for the benefit of the minority being fully qualified for the benefit under Article 30 as per the Apex Court judgment in ***Very Rev. Mother Provincial***, (1970)2 SCC 417. For identifying the minority character of an institution both purpose and presence test are fulfilled. It was founded by muslim resident in India, the impetus to found the institution came from the muslim community, the nucleus of the funds and other contributions came from the muslim communicty as also other sources, the transformation or conversion of the MAO College into a statutory frame work would not by itself deprive the original MAO College of its minority character, there can be little doubt that the claim of MAO College and its successor Aligarh Muslim University was bona fides and not dubious or devious and the regulatory control was consistent with and not destructive of the minority character of the institution. The right to establish and administer under Article 30 are subject to reasonable regulations. Establish means to found the institution and the guarantee of the right to administer is to ensure the autonomy of the institution. Both establish and administer are separated in point of time as laid down in ***Very Rev. Mother Provincial*** case (supra). The regulatory control in 1920 Act does not destroy the minority character of the institution as laid down in ***T.M.A. Pai's*** case, (2002) 8 SCC 481. Such control is regulatory in nature and does not come in the way of character of the institution.

85. Dr. Dhawan, elaborating his submissions on locus of the writ petitioners and relief claimed, submitted that none of the writ petitioners belong to All India Merit candidates. The admissions having already made, the writ petitioners cannot be admitted nor can be allotted or reallotted courses in view of the judgment of the Apex Court in bhairMadhu Singh, 2000 (7) S.C.C. 253 and Mridul Dhar, 2005(2) S.C.C. 65. Even if institutional quota is treated as 50%, the number of seats will come under the said quota as 77 and all the petitioners with ranks 1 to 77 has been given admissions. All the writ petitioners except one have filed the writ petition after declaration of the result and most of them filed the writ petitions when an interim order was granted by this Court in one writ petition on 11th March, 2005. The writ petitioners having appeared in internal examination, they have no right to challenge the examination process finding the result not of their liking. Reliance has been placed on the judgment of the Apex Court in Chandra Prakash Tiwari, (2002) 6 S.C.C. 127 and Om Prakash, 1996 (Supp.) S.C.C. 285. Dr. Dhawan further submitted that parliament was fully competent to amend 1920 Act and no constitutional amendment was necessary in facts of the present case.

86. Dr. Gopal Subramanium, in support of the appeal on behalf of the Union of India, has raised almost similar contentions, as noted above. Sri Subramanium contended that ***Azeez Basha's*** case having itself found that minority can establish University, the

mere fact that MAO College was raised to level of an University by act of legislature shall not deprive the minority character of the institution nor the mere change of form of the institution shall have any significance. Sri Subramanium submits that learned single Judge committed error in holding that rights under Article 30 cannot be claimed by the University which is a corporate body. The submission is that right under Article 30 is for members of the minority community which shall not be lost only because the University has been incorporated by 1920 Act. The existence of statute and the fact that the degrees will be recognised does not militate against Article 30 of the Constitution of India. 1981 Amendment Act was passed for recognition and restoration of character of the institution. The learned single Judge has not considered all the amendments in 1981 Act except Section 2 (l). Learned Single Judge has read down the provisions of Section 2 (l) whereas Section 5 (2)(c) which was very material was not even touched. The deep green history of the institution has not been correctly looked into. The statute is only a vehicle for minority institution and the statute cannot annihilate the character of the institution. 1981 Act is corrective statute amending the provisions retrospectively, although Union of India in ***Azeez Basha's*** case has taken the different stand but it can take different view on the facts of the present case. The amendment has restored the continuity. Reliance has also been placed on the affidavits dated 27.5.2005 filed before the learned single Judge. Sri Subramanium has referred to Vol.1 to 4 which has been filed before the learned single Judge containing various materials pertaining to history of establishment of Aligarh Muslim University, various letters written on behalf of the minority community and the addresses of the then Viceroy and Governor General of India. Right of administration under Article 30 can be claimed and reclaimed by minority. Section 2 (l) of 1981 Act is declaratory definition, retrospective in character to complete the facts which were incomplete in 1920 Act. It is further contended that 1981 Act has to be read along with the judgment of the Apex Court in ***T.M.A. Pai's*** case. All provisions of 1920 Act are part of regulatory provision which are permissible in an minority institution as held by the Apex Court in ***Ahmedabad St. Xavier's College Society Vs. State of Gujrat***; (1994)1 S.C.C. 717. The view of the learned single Judge that once administration is given away, the minority is lost is not correct. ***Azeez Basha's*** case says that control of Government disproves minority character whereas ***T.M.A. Pai's*** case accepts regulatory measures. ***T.M.A. Pai's*** case lays down comprehensive test for identification of minority. Minority also includes University. Article 29 (2) and 30 cannot jettison each other. There is ample evidence to show that what intended in 1870 was to establish a University. In 1920 Act there was only supervisory control which does not effect minority character. Sri Subramanium has taken us to different materials of Vols. 1 to 4 filed in the writ petition before the learned single Judge to show that even in 1870 it was intended to establish an University. The first members of the Courts were all muslims. The figures of the Courts shows that there was muslim presence. The right of administration has to be looked into in accordance with the test as laid down by the Apex Court in ***St. Xavier's*** case and ***T.M.A. Pai's*** case. The fact that non muslims are also members of

the Court does not effect the character of the minority. The parliament did not violate any judicial power by 1981 amendment. 1981 amendment was declaratory statute which cleared the ambiguity. In amendment of 1981 Act non mention of administration is not of much consequence. The committee was in de facto administration. Right of administration followed from definition given in Section 2(l) of 1981 Act. The picture of 1920 Act has to be seen to judge establishment and administration. Sri Subramanium submitted that 1981 Act is fully within the legislative competence of parliament and is not brazen overruling of ***Azeez Basha's*** case. By 1981 Act the basis of ***Azeez Bashs'a*** case has been changed. In view of 1981 Act the Aligarh Muslim University is entitled to be treated as a minority institution. The Aligarh Muslim University being autonomous body is fully entitled to formulate its procedure for admission. The approval of Union of India was not required for the admission policy in postgraduate course and only concurrence was accorded by the Union of India to the admission policy providing for 50% reservation for muslim students. The writ petitioners are not entitled for any relief under Article 226 of the Constitution of India.

87. Sri Ravindra Srivastava, Senior Advocate, has appeared on behalf of National Commission for Minority Educational Instututes as intervenor. It is contended by Sri Srivastava that ratio of ***Azeez Basha's*** judgment is in paragraphs 23 and 26 and the ratio is that since it was incorporated by the Act it cannot be held to be established by muslim minority. The reasoning of the learned single Judge that basis of the judgment is not changed is incorrect. He contended that either the duty of the Court was to declare 1981 Act ultra vires or to uphold the minority character of the Aligarh Muslim University. He submitted that nothing prevented the legislature to intervene and declare by amending the Act which required for changing the basis. The amendment in definition clause, i.e., Section 2 (l) embraces entire history of fact and history of legislation. It re-enforced de-facto establishment and de-jure culiminated the process of establishment. The incorporation is integral part of establishment without which no minority can qualify for protection under Article 30 of the Constitution. The character of the institution was always minority and incorporation was only affirmation and declaration. After 1981 the judgment of ***Azeez Basha's*** case has ceased to be relevant. It is not a case of brazen overruling but it is a case of change of basis.

88. Sri Ashok Khare, learned Senior Advocate, has appeared on behalf of the muslim students by filing special appeal against the impugned judgment as non party appellant. We have granted leave to the appellants to appeal against the judgment. Sri Khare submitted that the admission of the appellants has been quahsed by learned single Judge without any notice to the appellant. He contended that the direction of learned single Judge to hold fresh examination was uncalled for. He submitted that there was only one single examination by Aligarh Muslim University from which both internal and muslim quota admissions were made. He submitted that for the next year, i.e., 2006 the examination has already been announced from February, 2006 and neither there is any time left for any fresh

admission nor the admissions already made in February, 2005 can be disturbed at this stage. He submitted that appellants after being admitted in February, 2006 have been pursuing their postgraduate course and in view of the judgment of the Apex Court in ***Medical Council of India Vs. Madhu Singh***; 2002(7) S.C.C. 258, no mid-session admission can be permitted. He submitted that order of learned single Judge directing for holding fresh examination cannot be carried out. He further submitted that minority quota of 50% was rightly earmarked for muslim candidates. He also submitted that Aligarh Muslim University is a minority institution which was fully justified in providing 50% minority quota for the muslim candidates.

89. Another application for intervention has been filed on behalf of two individuals on whose behalf Sri S.G. Hasnain, Senior Advocate, has appeared. One of the intervenor claimed to be former member of the Court. He has referred to the internal University Act, 2004 which, according to him, is a minority University incorporated in the State of U.P. by an act of State legislature.

90. Sri Ravi Kant, Senior Advocate, appearing for the writ petitioners, refuting the submissions raised by counsel for the Aligarh Muslim University and Union of India, submitted that the judgment of the Apex Court in ***Azeez Basha's*** case still holds the field. He submitted that the amendments made in Section 2(l) and Section 5 (2)(c) are nothing but brazen overruling of the judgment in ***Azeez Basha's*** case. He submitted that judgment of ***Azeez Basha's*** case is judgment in rem declaring the status of University by which we all are bound. In ***T.M.A. Pai's*** case (supra) there was no issue of establishment. ***T.M.A. Pai's*** case does not overrule the judgment in ***Azeez Basha's*** case in any manner. Article 30 of the Constitution is a protective right. Government cannot endow that character to any institution. The finding in ***Azeez Basha's*** case that muslim had not established the Aligarh Muslim University cannot be touched by parliament by any declaratory statute. The Government was never in doubt about the character of the institution. The word "establish" as used in Article 30 has been used in several articles of the Constitution, namely, Articles 26 (a) and 28 (2) which means to bring into existence. The minority wanted University without control of the Government but they were given the University with full control of the Government. The parliament cannot introduce a friction for which it has no competence. Sri Ravi Kant further submitted that direction of learned single Judge for holding fresh examination requires modification since what appellants pray is not any fresh examination but fresh counselling on the basis of the examination already held. He submitted that after quashing the 50% muslim quota fresh counselling is required on the basis of same examination and the order of learned single Judge to that extent requires modification. In support of appeals filed by Sri Ravi Kant, he submits that the learned Judge committed error in only reading down the provisions of Sections 2(l) and 5(2)(c) instead of striking them out as ultra vires.

91. The principal issues, which emerge from the submissions raised by both the parties, are as to whether the Amendment Act, 1981 changes the basis

of judgment in Azeez Basha's case so as to hold that Aligarh Muslim University is a minority institution and as to whether the amendment by 1981 Act in Sections 2(l) and 5 (2)(c) are valid.

92. Learned counsels appearing for Aligarh Muslim University as well as Union of India have referred to and relied on the previous history before the establishment of Aligarh Muslim University. It is submitted that MAO College was established by minority and since the establishment of MAO College the idea was to establish an University. The idea which was with the minority ultimately fortified in the establishment of the University. Sri Gopal Subramanium has placed reliance on the affidavit of K.L. Nandwani filed on behalf of Union of India before the learned single Judge containing various enclosures running into Vols. 1 to 4. Reliance has been placed on the scheme of proposed Mohaddam Anglo Oriental College which is at Page 38 of Vol.1. The proposed scheme of Muslim Anglo Oriental College mentioned that "I think what we mean to found is not a College, but an University, and I hope the members will consent to my proposal that instead of the word College word University may be substituted". Reference is also made to the address dated 18.1.1877 on behalf of Anglo Orientle College Fund Committee to Viceroy and Governor General Lytton in which address desire was also expressed that college may expand into an University. The various letters and addresses show that establishment of University was contemplated after establishment of the MAO College and the minority community was keen to establish the University. Serious efforts for establishing the University started since 1911. In the affidavit filed on behalf of the Union of India reliance has been placed on the extract from the "Aligarh Movement (Origin and Early History) by Mumtaz Moin" (Vol.2 Pages 343 to 367). The extract shows that although members of the muslim community were desirous of establishment of a muslim university but the then Government was not ready to give full control of the University administration to the muslim minority. The then Government wanted to have final decision as to the distribution of power within various University bodies and wanted to reserve final control with itself. Even amonst propagandists of the muslim community two groups had emerged, one named as Aligarh Party which was agreeable to give control to the Government in the proposed University whereas the other group wanted full autonomy to the muslim minority. The aforesaid facts have been specifically noted at Page 353 (Vol.2) of the aforesaid Aligarh Movement, relevant extract of which are quoted below:-

"It may be mentioned that among the prominent workers of the University movement there had risen two schools of opinion. One group, often referred to as the Aligarh Party, was led by the Raja of Mahmudabad; among its chief representatives, the names of Ajtab Ahmad Khan, Ziauddin and Sheikh Abdullah may be mentioned specifically. They were in favour of giving wide powers to the Government in the constitution of the proposed University. In the other group, Mohamed Ali and Abdul Kalam Azad acted as leaders; they were against Government interference in the police and administration of the University and held that it should be fully autonomous"

93. The Government insisted that charter of muslim university be in the line of Banaras Hindu University. The Foundation Committee on 19th April, 1915 took a decision that a charter on the lines of Hindu University should be accepted. Thus issue of the full autonomy with regard to University and extent of control by the Government was subject to long debate and deliberation even before the establishment of the University. The then Government was not agreeable to give muslim minority the full control on administration of the University. The above is also demonstrated from Pages 518 and 519 of Vol.2 which is the presidential address by Hon'ble Justice Sir Abd-ur-Rahim in 29th Mohaddam Educational Conference at Pune on December 27/29, 1915. Extract of the address at Page 518 and 519 (Vol.2) are quoted below:-

"I have studied with some care the Benaras Hindu University Act and the correspondence on the subject of the Muslim University. The difficulty of the present position to my mind has arisen mainly from some unfortunate expressions in a letter addressed by Sir Harcourt Butler to the Raja of Mahmudabad on the 25th of September last. They were to the effect that he would meet a Deputation of the Muslim University Foundation Committee, only if they contented themselves with making a formal representation, simply applying for a charter on the basis of the decision on the questions of principle settled for the Hindu University. That has been understood to mean that although the Mahomedans were no party to the negotiations between the promoters of the Hindu University and the Government, although they had been moving for an University long before the Hindus appeared on the scene, and the interest that would be affected in their case as represented in the Aligarh College were larger and more deeprooted than those of the Benares College. They had to submit themselves unconditionally to the terms of the Benares Hindu University Act, so that the section of the Act might be bodily transferred into the Muslim University Act. The position being so understood, the representatives of the community thought that they had been treated with scant consideration and were naturally reluctant to appear before the then Education Member with their lips sealed and their hands and feet bond. After that letter I believe there has been no further correspondence between the Foundation Committee and the Government"

94. It is thus seen that issue of giving full autonomy to muslim minority was raked up and the then Government was not agreeable to give full control over the University to muslim minority and reserved final say with the Government in the affairs of the University. On insistence of the then Government charter of the muslim university in line of Banaras Hindu University was approved. For the purposes of the present case, the relevant is to see what was the nature and character of the institution which came into existence in 1920. The scheme of 1920 Act and the various provisions contained therein were consciously and deliberately incorporated with purpose and object. The above facts are clear from the previous history before establishment of the University as contained in the affidavits and materials filed by the Union of India before the learned single Judge.

95. It is relevant to have a broad view of the salient feature of 1920 Act before we proceed to examine the nature and character of the institution which came into existence in pursuance of 1920 Act. The preamble of the 1920 Act reads, "An Act to establish and incorporate a teaching and residential Muslim University at Aligarh". The most of the relevant provisions of the Act have been elaborately noted and considered by the Apex Court in ***Azeez Basha's*** case (supra) which shall also be shortly noticed while noticing the judgment in some detail. It is, however, relevant to refer to some of the provisions of the 1920 Act. Section 3 of the Act provided that first chancellor, Pro-Chancellor and Vice Chancellor shall be the persons appointed by notification of the Governor General in Council. The University was enacted as a body corporate by the name of Aligarh Muslim University. Section 8 provided that the University shall subject to the provisions of the Act and ordinances be open to all persons of either sex and whatever race, creed, caste or class. Section 12(2) provided that with the approval of the academic council and the sanction of the Governor General in Council on the recommendation of the Visiting Board, the University may admit intermediate colleges and schools in the Aligarh District to such privileges of the University as it thinks fit. Section 13(1) provided that Governor General shall be the Lord Rector of the University. Section 13(2) provided that Lord Rector shall have right to cause inspection by such person or persons as he may direct. Section 13 (5) gave power to Lord Rector to issue such direction as he thinks fit when the Court does not take within reasonable time the action with the satisfaction of the Lord Rector. Section 14 pertains to Visiting Board which had power to annal any proceeding. Section 15 provided that persons specified in the schedule shall be Rector of the University. Statute-1 (i) provided that all heads of the local Government shall be rectors of the University and such rulers of State in India and princes and other persons as the Lord Rector may on his own motion or with the recommendation of the Court appoint. Chancellor also could have been appointed persons of eminent position as members on the recommendation of academic council. Section 19 provided that successor to the first Vice Chancellor shall be elected by the Court which shall be subject to the approval of the Governor General in Council. Section 22 declared authorities of the University, namely, the Court, the Executive Council, the Academic Council and such other authorities as may be declared by the Statutes as authority of the institution. Section 23 provided that Court shall consist of the Chancellor, Pro Chancellor and Vice Chancellor and other persons as may be specified in the Statute. It also contained a proviso that no person other than a muslim shall be a member thereof. Section 24 provided that Executive Council shall be executive body of the University. Section 28(1) provided that first statutes are those as Statute in the schedule. Section 28(2) provided that no new statute or amendment or repeal of existing statute shall be valid until it has been submitted through the Visiting Board to Governor General in Council and has been approved by the latter. Similar provision is with regard to ordinances in Section 30. Section 32 deals with admission to the University. Section 32(1) provided that admission of students to the University shall be made by an admission committee

consisting of the Pro Chancellor, principal of an intermediate college who shall be selected by the Vice Chancellor and such other persons as may be appointed by the academic council. Section 36 related to conditions of service of officers and teachers. Section 36(2) provided that any dispute arising out of contract between the University or any of its officer or teachers shall at the request of the officer or teacher be referred to a Tribunal of Arbitration consisting of one member appointed by Executive Council, one member nominated by the officer or teacher concerned and an Umpire appointed by the Visiting Board. Section 40(1) of the Act provided that if any difficulty arises with respect to the establishment of the University or any authority of the University, Governor General in Council may by order make an appointment or do anything which appears to him necessary for the proper establishment of the University or any authority thereof. Statute 20 of the first statutes dealt with appointment of the teaching staff and other appointments.

96. The scheme of the Act as noticed above defines the nature and character of the institution which came into existence by Act No.XL of 1920. The amendments were made in 1920 Act after enforcement of the constitution, namely, Aligarh Muslim University (Amendment) Act, 1951 and the Aligarh Muslim University (Amendment) Act, 1965. The aforesaid amendments were challenged before the Apex Court in five writ petitions under Article 32 of the Constitution of India. In the writ petitions it was claimed that Aligarh Muslim University is a minority institution and the provisions of the amendment in so far as they effect and curtail the rights of minority to administer the institution under Article 30 are ultra vires and liable to be struck down. The writ petitions were contested by the Union of India. The stand taken by Union of India in those writ petitions was that Aligarh Muslim University was not established by minority and it was established by the legislative Act. Those writ petitions were decided which is the ***Azeez Basha's*** judgment.

97. The main issue arose in ***Azeez Basha's*** case was as to whether the Aligarh Muslim University is a minority institution entitled for protection under Article 30. The Apex Court held that Aligarh Muslim University was neither established nor administered by muslim minority, hence the challenge to the aforesaid 1951 and 1965 Acts as ultra vires to Article 30 is unfounded. For purposes of this case it is necessary to know as to what is the basis of ***Azeez Basha's*** judgment in holding that Aligarh Muslim University is not a minority institution. In ***Azeez Basha's*** case (supra) the Apex Court considered the entire scheme of 1920 Act and the Statutes and also the previous history and after analysing the same it was held that Aligarh Muslim University is not a minority institution entitled for protection under Article 30. The main reasons and basis are clearly noted in the judgment itself. Several provisions of 1920 Act has been relied in extenso in various paragraphs of the judgment. It is relevant to note the main reasons and findings of ***Azeez Basha's*** case on the basis of which the Apex Court came to the conclusion that the Aligarh Muslim University is not a minority institution. Following are some of the main reasons given by the Apex Court in ***Azeez Basha's*** judgment for

coming to the conclusion that Aligarh Muslim University is a minority institution:-

(i) According to Section 8 of 1920 Act, the University shall be open to all the persons of either sex and of whatever race, creed or class. Relevant observation of the judgment are as follows:-

"Section 8 provided that "the University shall subject to the provisions of this Act and the Ordinances, be open to all person of either sex and of whatever race, creed or class", which shows that the University was not established for Muslims alone. "

(ii) According to Section 13 of 1920 Act the Governor-General shall be the Lord Rector of the University. Section 13 gives power of inspection and enquiry tot he Lord Rector and according to Section 13(5) he had power to issue direction as he thought fit and the Court was bound to comply with such directions. Following was held in paragraph 8:-

"Finally the Lord Rector was given the power where the Court did not, within reasonable time, take action to the satisfaction of the Lord Rector to issue such directions as he thought fit after considering any explanation furnished or representation made by the Court and the Court was bound to comply with such directions. These provisions clearly bring out that the final control in the matter was with the Lord Rector who was the Governor-General of India."

(iii) Section 14 of 1920 Act provided for Visiting Board of the University consisting of Governor, the members of the Executive Council, the Ministers, one member nominated by the Governor and one member nominated by the Minister in charge of Education. The Visiting Board had the power to inspect the University. The Visiting Board was also given power by an order to annul any proceedings of the University. Following was held in Paragraph 9 of the judgment:-

"The Visiting Board was also given the power, by order in writing, to annul any proceedings not in conformity with the Act, Statutes and Ordinances, provided that before making such an order, the Board had to call upon the University to show cause why such an order should not be made, and to consider such cause if shown within reasonable time. This provision, though not so all pervasive as the provision in Section 13 of the 1920-Act, shows that the Visiting Board had also certain over-riding powers in case the University Authorities acted against the Act, Statutes and Ordinances. There is no condition that the Lord Rector and the members of the Visiting Board must belong to the Muslim community. "

(iv) Sections 28, 29, 30, 32 and 40 were also referred to and relied. Section 28 provided that no new Statute or amendment or repeal of an existing Statute shall have any validity until it has been submitted through the Visiting Board and has been approved b y the Governor-General in Council. Similar provision was there in Section 30 (2) with regard to Ordinances. In event of any dispute between the Executive and the Academic Council regarding power to make Ordinances the matter was required to be referred to Tribunal consisting of three members. Section 32; provided for admission of the students in the

University. Section 40 further give power to the Governor-General in Council to issue necessary order or make any appointment if any difficulty arises with respect to the establishment of the University. Following was held in paragraph 11 of the judgment which is quoted below:-

***"11**. .... There is an important provision in Section 28 which laid down that no new Statute or amendment or repeal of an existing Statute shall have any validity until it has been submitted through the Visiting Board (which may record its opinion thereon) to the Governor General in Council and has been approved by the latter, who may sanction, disallow or remit it for further consideration. This provision clearly shows that the final power over the administration of the University rested with the Governor-General in Council. ....*

Section 30(2) provided that "the first Ordinances shall be framed as directed by the Governor-General in Council and sub-section (3) thereof laid down that " no new Ordinance, or amendment or repeal of an existing Ordinance shall have any validity until it has been submitted through the Court and the Visiting Board (which may record its opinion thereon) to the Governor-General in Council, and has obtained the approval of the latter, who may sanction, disallow or remit it for further consideration". This again shows that even Ordinances could not be made by the University without the approval of the Governor-General in Council). If any dispute arose between the Executive and the Academic Council as to which had the power to make an Ordinance, either Council could represent the matter to the Visiting Board and the Visiting Board had to refer the same to a tribunal consisting of three members, one of whom was to be nominated by the Executive Council, one by the Academic Council, and one was to be a Judge of the High Court nominated by the Lord Rector. This again shows that in the matter of such disputes, the Court which is called the supreme governing body of the University, did not have the power to resolve it.".................. ....

Section 32 provided for admission of students to the University and sub-section (4) thereof provided that "the University shall not save with the previous sanction of the Governor-General in Council recognise (for the purpose of admission to a course of study for a degree) as equivalent to its own degrees, any degree conferred by any other University or as equivalent to the Intermediate Examination of an Indian University, any examination conducted by any other authority". This shows that in the matter of admission the University could not admit students of other institutions unless the Governor-General in Council approved the degree or any other examination of the institutions other than Indian Universities established by law. ....

Section 40 is important and laid down that " if any difficulty arises with respect to the establishment of the University or any authority of the University or in connection with the first meeting of any authority of the University, the Governor-General in Council may by order make

any appointment or do anything which appears to him necessary or expedient for the proper establishment of the University or any authority thereof or for the first meeting of any authority of the University". This again shows the power of the Governor-General in Council in the matter of establishment of the University."

(v) In the Act 1920 there is nothing which vests the administration of the University in the Muslim community. The following was held in paragraph 12 which is quoted below:-

"(12) This brings us to the end of the sections of the 1920-Act. There is nothing anywhere in any section of the Act which vests the administration of the University in the Muslim community. The fact that in the proviso to S.23 (1) it is provided that the Court of the University shall consist only of Muslims does not necessarily mean that the administration of the University was vested or was intended to be vested in the Muslim minority. If anything, some of the important provisions to which we have already referred show that the final power in almost every matter of importance was in the Lord Rector, who was the Governor-General or in the Governor-General in Council."

(vi) Strong reliance was placed on Section 6 of the Act. It was held that there was nothing in 1920-Act which prevented Muslim community to establish an University but if it did so the degrees of such University were not bound to be recognised by the Government. Section 6 of the Act made the degree recognisable by the Government. Following was held in paragraph 22:-

"Therefore when the Aligarh University was established in 1920 and by S. 6 its degrees were recognised by Government, an institution was brought into existence which could not be brought into existence by any private individual or body for such individual or body could not insist upon the recognition of the degrees conferred by any university established by it. The enactment of S. 6 in t he 1920-Act is a very important circumstance which shows that the Aligarh University when it came to be established in 1920 was not established by the Muslim minority, for the minority could not insist on the recognition by Government of the degrees conferred by any university established by it."

(vii) The Aligarh Muslim University was brought into being by the 1920-Act and must therefore, be held to have been established by the Central Legislature which by passing 1920-Act incorporated it. Following was held in paragraph 23 which is quoted below:-

"(23) It is true, as is clear from the 1920-Act, that the nucleus of the Aligarh University was the M.A.O. College, which was till then a teaching institution under the Allahabad University. The conversion of that college (if we may use that express) into a university was however, not by the Muslim minority; it took place by virtue of the 1920-Act which was passed by the Central legislature. There was no Aligarh University existing till the 1920-Act was passed.. It was brought into being by the 1920-Act and must therefore be held to have been established by the Central Legislature which by passing the 1920-Act incorporated it. The fact that it was based on the M.A.O. College, would make no difference to the question as to

who established the Aligarh University ..... It may be that the 1920 Act was passed as a result of the efforts of the Muslim minority. But that does not mean that the Aligarh University when it came into being under the 1920-Act was established by the Muslim minority."

(viii) Statute 8 of the Statute framed under the Act was referred to and relied in holding that even though the members of the Court had to be Muslims, the electorates were not exclusively Muslims. The following was held in paragraph 28 which is quoted below:-

"(28) It appears from paragraph 8 of the Schedule that even though the members of the Court had to be Muslims, the electorates were not exclusively muslims. For example, sixty members of the Court had to be elected by persons who had made or would make donations of five hundred rupees and upwards to or for the purposes of the university. Some of these persons were and could be non-Muslims. Forty persons were to be elected by the Registered Graduates of the University, and some of the Registered Graduates were and could be non-Muslims, for the University was open to all persons of either sex and of whatever race, creed or class. Further 15 members of the Court were to be elected by the Academic Council, the membership of which was not confined only to Muslims."

(ix) There were other bodies like the Executive Council and the Academic Council which were concerned with the administration of Aligarh University and there was no provision in the Constitution of these bodies which confined their members only to Muslims. The finding was recorded after analysing various provisions of 1920-Act that Aligarh Muslim University was neither established nor administered by Muslim minority. Article 30(1) of the Constitution does not apply to Aligarh Muslim University. Following was held in paragraph 29 which is extracted below:-

"(29)..... We are therefore of opinion that the Aligarh University was neither established nor administered by the Muslim minority and therefore there is no question of any amendment to the 1920-Act being unconstitutional under Article 30(1) for that Article does not apply at all to the Aligarh University."

98. The sheet anchor of the submissions on behalf of the Union of India and Aligarh Muslim University is the Aligarh Muslim University (Amendment) Act, 1981. On the basis of 1981 Act it has been contended that the basis of judgment has been changed and the ***Azeez Basha's*** judgment has been made ineffective by retrospectively amending the 1920 Act. To consider the submissions of the parties, it is necessary to look into relevant provisions of 1981 Act. Much emphasis has been laid down by counsels appearing for Aligarh Muslim University and Union of India on amendment in preamble, long title of the Act, Section 2(l) and Section 5(2)(c) of the 1981 Act. The aforesaid provisions as were contained in original 1920 Act and as amended in 1981 Act are set out below:-

1920 Act	**1981 Act**
(i) **Preamble:** An Act to establish and incorporate a teaching and residential Muslim University at	(i) Preamble: An Act to incorporate a teaching and residential Muslim University at Aligarh.

Aligarh. (ii) **Long Title**: Whereas it is expedient to establish and incorporate a teaching and residential Muslim University at Aligarh, and to dissolve the Societies registered under the Societies' Registration Act, 1860, which are respectively known as the Mohammadan Anglo Oriental College, Aligarh, and the Muslim University Association, and to transfer to and vest in the said University all properties and rights of the said Societies and of the Muslim University Foundation Committed. **Note:** The same definition of the University initially given in Section 2(h) was substituted in 2(l) by Act No.34 of 1972 as following:- **Section 2(l)**: 'University" means the Aligarh Muslim University.	(ii) **Long title:** Whereas it is expedient to incorporate a teaching and residential Muslim University at Aligarh, and to dissolve the Societies registered under the Societies' Registration Act, 1860, which are respectively known as the Mohammadan Anglo Oriental College, Aligarh, and the Muslim University Association, and to transfer to and vest in the said University all properties and rights of the said Societies and of the Muslim University Foundation Committed. (iii) **Section 2(l)** "University" means the educational institution of their choice established by the Muslims of India, which originated as the Muhammadan Anglo-Oriental College, Aligarh and which was subsequently incorporated as the Aligarh Muslim University. **Note:** There was no section 5(2)(c) in 1920 Act.	(iv) **Section 5(2)(c):** To promote especially the educational and cultural advancement of the Muslims of India

99. The above provisions have been said to be declaratory in nature and retrospective in operation. Looking to the nature of the amendment the above amendments do appear to be retrospective in operation. The other relevant provisions as amended by 1981 Act are Sections 8, 16, 17, 18, 20A, 21, 22, 23, 26, 26A, 27, 28, 29, 31, 34 and 35. Section 8 as amended provides, "The Pro-Chancellor shall be elected by the Court in such manner and for such term as may be prescribed by the Statutes". Section 16 is not material. Section 17 (1) as existed in 1920 Act reads, "The successor to the first Chancellor shall be elected by the Court". To the similar effect there is amendment in Section 18(1). Both these sections cannot have any retrospective operation since according to Section 3 of 1920 Act the first Chancellor, the Pro Vice Chancellor were appointed by notification by the Governor General in Council and which was so done. The above amendments uses the words "shall be elected" which clearly demonstrate that said amendments are for prospective operation. Section 20A relates to Honorary Treasurer. Section 22 contains some minor amendments which have no bearing. Section 23 on which much emphasis has been laid needs to be noted in full. Section 23 as it existed prior to amendment and as amended by 1981 Act are set out below:-

1920 Act	**1981 Act**
23. (1). The Court shall consist of the Chancellor, the Pro-Chancellor and the Vice-Chancellor for the time being and such other persons as may be specified in the Statutes: Provided that no person other than a Muslim shall be a member thereof. (2) The Court shall be the supreme governing body of the University and shall exercise all the powers of the University, not otherwise provided for by this Act, the Statutes, the Ordinances and the Regulations. It shall have power to review the acts of the Executive and the Academic Councils (save where such Councils have acted in accordance with powers conferred on them under this Act, the Statutes or the Ordinances) and direct that necessary action be taken by the Executive or the Academic Council, as the case may be, on any recommendations of the Lord Rector. (3) Subject to the provisions of this Act, the Court shall exercise the following powers and perform the following duties, namely:- (a) of making Statutes and of amending or repealing the same; (b) of considering Ordinances; (c) of considering and passing resolutions on the annual report, the annual accounts and the financial estimates; (d) of electing such persons to serve on authorities of the University and of appointing such officers as may be prescribed by this Act or the Statutes; and (e) of exercising such other powers and performing such other duties as may be conferred or imposed upon it by this Act or Statutes.	**23.** (1). The Court shall consist of the Chancellor, the Pro-Chancellor, The Vice-Chancellor and the Pro-Vice-Chancellor (if any) for the time being and such other persons as may be specified in the Statutes: (2) The Court shall be the supreme governing body of the University and shall exercise all the powers of the University, not otherwise provided for by this Act, the Statutes, the Ordinances and the Regulations and it shall have power to review the acts of the Executive and the Academic Councils (save where such Councils have acted in accordance with powers conferred on them under this Act, the Statutes or the Ordinances). (3) Subject to the provisions of this Act, the Court shall exercise the following powers and perform the following duties, namely:- (a) to make Statutes and to amend or repeal the same; (b) to consider Ordinances; (c) to consider and pass resolutions on the annual report, the annual accounts and the financial estimates; (d) to elect such persons to serve on authorities of the University and to appoint such officers as may be prescribed by this Act or the Statutes; and (e) to exercise such other powers and perform such other duties as may be conferred or imposed upon it by this Act or Statutes.

100. Amendments in Sections 26, 26A and 27 are not material. Section 28 as amended provides for making new or additional statutes or amendment or repeal of the statutes. A new procedure for statutes has been provided which

obviously is to be followed for future. Amendment in Sections 29, 31, 34 and 35 are not material and those amendments basically are for prospective operation. The amendment of the Statutes contains amendment in constitution of the Court which reveals that different categories of members are to be in Court from different sources. The amendment in Statute 14 regarding constitution of the Court is also for prospective operation.

101. From the various provisions of the Act as amended by 1981 Amendment Act, it is clear that retrospective operation at best can be given to provisions amending the preamble, long title, Section 2 (l), Section 5 (2)(c) and Section 8, most of other provisions are for prospective operation regarding constitution of various authorities and other allied matters. The provisions which are of prospective nature can have no effect on the basis of ***Azeez Basha's*** case (supra) in the present case. The issue to be answered in the present case is as to whether the Aligarh Muslim University was established by minority community in the year 1920 and administered by it after its establishment. What is to be seen and to examine is as to what was the nature and character of the body which came into existence in 1920 and whether it qualified for protection under Article 30 of the Constitution.

102. The submission on the strength of 1981 Amendment is that the amendment Act, 1981 changes the very basis of the judgment of ***Azeez Basha's*** case by retrospectively amending 1920 Act and had the Amendment Act, 1981 was before the Court deciding the ***Azeez Bashah's*** case, the decision would have been otherwise. It is submitted that although the legislature cannot overrule a judicial decision but it can always change the basis on which the decision is given to make the judgment ineffective. The submission is that 1981 Act is declaratory in nature and has been enacted in exercise of curative power of the Parliament. The Parliament has legislative competence with regard to Aligarh Muslim University by virtue of Entry 63 List-I Schedule-VII of the Constitution of India. It has been contended that 1981 Act cannot be termed as brazen overruling of the ***Azeez Basha's*** judgment.

104. Our federal Court long back in ***Mt. Atiqa Begum and another vs. United Provinces***; A.I.R. 1941 F.C. 70, held that the power of validation must be taken to be ancillary or subsidiary to the power to deal with the particular subjects specified in the Lists. There are numerous incidences of passing a validating statutes to cure invalidity or illegality found by a judicial decision in taxing statutes and other statutes. The off quoted and most celebrated enunciation of principle in above regard was laid down in 1969 (2) S.C.C. 282; ***Sri Prithvi Cotton Mills Ltd. Vs. Broach Borough Municipality and others***. In the said case the Validation Act, namely, Gujarat Imposition of Taxes by Municipalities (Validation) Act, 1963 was passed to remove the basis of the judgment of the Apex Court in ***Patel Gordhandas Hargovindas v. Muncipal Commissioner, Ahmedabad***; (1964)2 S.C.R. 608. The provisions of Municipal Borough Act, 1925 provided for rate on buildings or land at certain percentage of the capital value. The Apex Court in the ***Patel Gordhandas'*** case had held that the word 'rate' has acquired a special meaning in English Legislative history and practice and also in Indian Legislation and it

meant a Tax for local purposes imposed by local authorities. The basis of such tax was the annual value of the lands or buildings. After the judgment of the Apex Court the Validation Act, 1963 was passed and in that context considering the provisions of Section 3 of the Validation Act the principles were laid down in paragraph-4 of the judgment. Paragraph 4 of the said judgment is extracted below:-

"4. Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax."

104. The Apex Court after considering the Validation Act took the view that faced with the situation the Legislature exercised its undoubted power of redefining 'rate' so as to equate it to a tax on capital value and convert the tax purported to be collected as a 'rate' into a tax on land and buildings. The Legislature not only equated the tax collected to a tax

on lands and buildings, which it had the power to levy, but also to a rate giving a new meaning to the expression 'rate' and while doing so it put out of action the effect of the decisions of the courts to the contrary.

105. In (1976) 4 S.C.C. 750; ***I.N. Saxena Vs. State of M.P.*** the Constitution Bench of Apex Court again considered the validating statutes retrospectively changing the law thereby rendering the adverse judicial decision ineffective. It was held by the Apex Court that Legislature cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. Following was laid down in paragraphs 22 and 23 of the said judgment:-

*"**22**. While, in view of this distinction between legislative and judicial functions, the legislature cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it amy, at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. As pointed out by Ray, C.J. In Indira Nehru Gandhi v. Raj Narain, the rendering ineffective of judgments or orders of competent courts and tribunals by changing their basis by legislative enactment is a well-known pattern of all validating Acts.Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power.*

***23**. In Hari Singh v. Military Estate Officer, a Bench of seven learned Judges of this Court laid down that the validity of a vilidating law is to be judged by two test. Firstly, whether the legislature possesses competence over the subject-matter, and, secondly, whether by validation the legislature has removed the defect which the courts had found in the previous law. To these we may add a third: whether it is consistent with the provisions of Part III of the Constitution."*

106. Again the principles have been elaborately considered and laid down by the Apex Court in (1996)7 Supreme Court Cases 637; Indian Aluminium Co. and others vs. State of Kerala and others. Following tests were laid down in paragraph 36 for judging the validity of the Validating Act:-

(i) whether legislature enacting the Validating Act has competence over the subject-matter;

(ii) whether by validation, the legislature has removed the defect which the court had found in the previous law; and

(iii) whether the validating law is inconsistent (sic consistent) with the provisions of Chapter III of the Constitution.

107. Again in paragraph 56 of the said Judgement the Apex Court summed all the principles after considering the various other decisions of the Apex Court on the subject. Paragraph 56 of the said judgment is quoted below:-

*"**56**. From a resume of the above decisions the following principles would emerge:*

(1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the court to give effect to them;

(2) The Constitution delineated delicate balance in the exercise of the sovereign power by the legislature, executive and judiciary;

(3) In a democracy governed by rule of law, the legislature exercise the power under Articles 245 and 246 and other companion articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law.

(4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded. The smooth balance built with delicacy must always be maintained;

(5) In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

(6) The court, therefore, needs to carefully scan the law to find out; (a) whether the vice pointed out by the court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part-III of the Constitution.

(7) The court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the legislature. Therefore, they are not encroachment on judicial power.

(8) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The

changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.

(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same."

108. Again in (1997) 8 S.C.C. 522; ***S.S. Bola and others Vs. B.D. Sardana and others*** laid down that when a particular Rule or the Act is interpreted by a court of law in a specified manner and the law-making authority forms the opinion that that such an interpretation would adversely affect the rights of the parties and would be grossly in equitous and according a new set of rules or law is enacted, it is very often challenged as in the present case on the ground that the legislatures have usurped the judicial power. In such a case the Court has a delicate function to examine the new set of laws enacted by the legislatures and to find out whether in fact the legislatures have exercised the legislative power by merely declaring an earlier judicial decision to be invalid and ineffective or the legislatures have altered and changed the character of the legislation. Following observations were made in paragraph 174 of the judgment:-

*"**174**. ..... The function of the judiciary is to interpret the law and to adjudicate the rights of the parties in accordance with law made by the legislature. When a particular Rule or the Act is interpreted by a court of law in a specified manner and the law-making authority forms the opinion that that such an interpretation would adversely affect the rights of the parties and would be grossly iniquitous and according a new set of rules or law is enacted, it is very often challenged as in the present case on the ground that the legislatures have usurped the judicial power. In such a case the Court has a delicate function to examine the new set of laws enacted by the legislatures and to find out whether in fact the legislatures have exercised the legislative power by merely declaring an earlier judicial decision to be invalid and ineffective or the legislatures have altered and changed the character of the legislation which ultimately may render the judicial decision ineffective. It cannot*

be disputed that the legislatures can always render a judicial decision ineffective by enacting a valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively as was held by this Court in the case of Indian Aluminium Co. v. State of Kerala. What is really prohibited is that the legislature cannot in exercise of its plenary power under Articles 245 and 246 of the Constitution merely declare a decision of a court of law to be invalid or to be inoperative in which case it would be held to be an exercise of judicial power. Undoubtedly under the scheme of the Constitution the legislature does not possess the same. Bearing in mind the aforesaid principles it is necessary to examine the legality of the Act in question....."

109. From the propositions as laid down by above cases of the Apex Court, it is clear that curative and validating power of the legislature can be utilised only when the basis is capable of being removed. There is no such principal of law that basis of a judicial decision is always capable of being removed. If such a broad proposition is accepted then every judicial decision is liable to be overturned by legislature. In ***Madan Mohan Pathak and others Vs. Union of India***; 1978(2) S.C.C. 50 the seven Judge Bench of the Apex Court did not accept the broad submission that whenever any factual or legal situation is altered by the legislation the judicial decision rendered by the Court on the basis of such factual or legal situation prior to the alteration would straight away without more cease to be effective and binding on the parties. Following is extracted from paragraph 9 of the said judgment:-

"9*. ..... We do not think this decision lays down any such wide proposition as is contended for on behalf of the Life Insurance Corporation. It does not say that whenever any factual or legal situation is altered by retrospective legislation, a judicial decision rendered by a Court on the basis of such factual or legal situation prior to the alteration, would straight away, without more, cease to be effective and binding on the parties....."*

110. In ***Madan Mohan Pathak's*** case (supra) a settlement had taken place between the L.I.C. and its associates on 24th January, 1974 relating to terms and conditions of service including bonus payable to them. The L.I.C. by circular dated 25th September, 1975 informed all its offices that since the question of payment of bonus was being reviewed in the light of the Bonus Ordinance dated 25th September, 1975, no bonus should be paid to the employees. The All-India Insurance Employees' Association filed a writ petition in Calcutta High Court. A learned single Judge allowed the writ petition and issued mandamus to make payment of bonus and other directions were also issued. An Act was passed, namely, Life Insurance Corporation (Modification of Settlement) Act, 1976 providing for modification of the settlement dated 24th January, 1974. The Act did not set at nought the entire settlement but merely rendered without force and affect the provisions of the settlement in so far as they related to payment of annual cash bonus to Class-III and Class-IV employees. In the said judgment Apex Court observed following in paragraph-9:-

"9. ..... Here the judgment given by the Calcutta High Court, which is relied upon by the petitioners, is not a mere declaratory judgment holding an impost or tax to be invalid, so that a validation statute can remove the defect pointed out by the judgment amending the law with retrospective effect and validate such impost or tax....."

111. The Apex Court held that the said Modification Act is constitutionally not valid and observed that judgment of the Calcutta High Court was to be given effect to. There are other decisions of the Apex Court in which the validating statute was not found valid capable of removing the basis of a judicial judgment by an legislative act. In (1983)2 S.C.C. 33; ***State of Gujrat and another Vs. Raman Lal Keshav Lal Soni and others***, the Gujarat enacted Gujarat Panchayat Act, 1961 to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. By Section 11(1) of the Act a panchayat organisation was constituted. After enforcement of the Act several set of rules were promulgated and orders were issued directing that panchayat service shall consist of District Cadre, Taluqa Cadre and Local Cadre. The Gujarat Panchayat Service (Absorption, Seniority, Pay and Allowances) Rules, 1965 provided for equivalence of posts, fixation of pay scales and allowances. The State Government did not issue any order regarding staff in the Local Cadre and in spite of their scale of pay the benefit of revision of pay was not accepted which was made on the basis of recommendation of the Pay Commission. The employees of the Local Cadre filed a writ petition which was allowed directing holding that the members of the panchayat service belonging to the local cadre were government servants and directed for fixation under Gujarat Panchayat Service (Absorption, Seniority, Pay and Allowances) Rules, 1965 and some other relief. To overcome the judgment of the High Court Gujarat Panchayat (Third Amendment) Act, 1978 was enacted. Section 11(1) was omitted to get over the judgment that panchayat service is State service. A further clause (c) was introduced after clauses (a) and (b) of Section 102(1). An appeal was filed against the High Court's judgment and writ petition was also filed challenging the Gujarat Panchayats (Third Amendment) Act, 1978. While considering the writ petition the Apex Court declared the Third Amendment Act, 1978 as unconstitutional and following was laid down in paragraph 52:-

*"**52**. ..... The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the dos and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional*

rights accrued in the course of the 20 years. ..... Today's equals cannot be made unequal by saying that they were unequal 20 years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tampered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective laws....."

112. Again in A.I.R. 1996 S.C. 2930; Delhi Cloth & General Mills Co. Ltd. Vs. State of Rajasthan and others validity of Kota Municipal Limits (Continued Existence) Validating Act, 1975 was in question. The villages namely, Raipur and Ummedganj of district Kota were sought to be included in the Kota Municipality under the provisions of Rajasthan Municipalities Act, 1951 but subsequently the proposal was dropped out but the Kota Municipality continued to realise octroi from the appellants. The appellants filed suit praying for recovery of the Octroi illegally collected by Kota Municipality. Faced with the above, the State Government initially issued ordinance in 1975 which became Kota Municipal Limits (Continued Existence) Validating Act, 1975. The learned single Judge has struck down the provisions which was reversed by the appellate Bench. Thereafter the matter was taken to the Apex Court. The Apex Court held that the defects pointed out were not removed and without removing the defect the Validating Act cannot achieve the object. Following observations were made in paragraphs 16 and 17 of the said judgment:-

*"**16**. In validating Act provides that, notwithstanding anything contained in Sections 4 to 7 of the 1959 Act or in any judgment, decree, order or direction of any Court, the villages of Raipura and Ummedganj should be deemed always to have continued to exist and they continue to exist within the limits of the Kota Municipality, to all intents and for all purposes. This provision requires the deeming of the legal positio0nt hat the villagers of Raipura and Ummedganj fall within the limits of the Kota Municipality, not the deeming of facts from which this legal consequence would flow. A legal consequence cannot be deemed nor, therefrom, can be events that should have proceeded it. Facts may be deemed and, therefrom, the legal consequences that follow.*

*"**17**. Sections 4 to 7 remained on the statute book unamended when the Validating Act was passed. Their provisions were mandatory. They had admittedly not been followed. The defect of not following these mandatory provisions in the case of the villages of Raipura and Ummedganj was not cured by the Validating Act. The curing of the defect was an essential requirement for the passing of a valid validating statute, as held by the Constitution Bench in the case of Prithvi Cotton Mills Ltd. (AIR 1970 SC 192). It must, therefore, be held that the Validating Act is bad in law and it must be struck down."*

113. Before applying the propositions as laid down by the Apex Court in the above cases, in the present case to know as to whether 1981 Act

changes the basis of ***Azeez Basha's*** case, it is necessary to recapitulate the concept of minority institution under Article 30 of the Constitution of India and to look into as to what are the essential ingredients for qualifying protection under Article 30.

114. Article 30(1) of the Constitution of India reads, "All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their choice". Article 30 (1) uses the words "establish and administer". One of the issue in this case is as to whether an institution claiming to be a minority institution has to prove both factors i.e., establishment and administration by it for qualifying the benefit under Article 30 or as to whether automatically the right of administration shall follow if it is proved that institution was established by minority. It is relevant to note that one of the questions before the Apex Court in ***T.M.A. Pai's*** case (supra) was Question No.3(a) which is extracted below:-

"3 (a)*. What are the indicia for treating an educational institution as a minority educational institution?" Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?*

115. The Bench in ***T.M.A. Pai's*** case (supra) did not answer the aforesaid Question No.3 (a). However there are binding precedences which have relevance on the issue. It is now well settled by the Apex Court that pre-constitution institutions are entitled for protection under Article 30 of the Constitution. This has been held in the judgment reported in 1970 S.C. 259; ***Right Rev. Bishop S.K. Patro vs. State of Bihar is relevant***. In the above case the institution which was claiming benefit of Article 30 was also a institution founded before enforcement of the constitution. In paragraph 8 of the judgment it was held that protection under Article 30 is available to the institutions which have been established before the constitution and continued to be administered by the minorities, paragraph 8 of the judgment is quoted as below:-

"8. *..... The guarantee of protection under Article 30 is not restricted to educational institutions established after the Constitution: institutions which had been established before the Constitution and continued to be administered by minorities, either based on religion or language qualify for the protection of the right of minorities declared by Article 30 of the Constitution. In In Re. The Kerala Education Bill, 1957, 1959 SCR 995 = (AIR 1958 State Election Commission 956), Das, C.J., observed at p.1051 (of SCR)=(at p. 978 of AIR):*

"There is no reason why the benefit of Article 30(1) should be limited only to educational institutions established after the commencement of the Constitution. The language employee in Article 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions. It must not be overlooked that Article 30 (1) gives the minorities two rights, namely, (a) to establish, and (b) to administer, educational institutions of their choice. The second right clearly covers pre-Constitution schools just as

Article 26 covers the right to maintain pre-Constitution religious institutions."

116. What is the concept of administration has been subject matter of consideration by several cases of the Apex Court. The question was answered in 1974(1) S.C.C. 717; Ahmedabad St. Xavier's College Vs. State of Gujarat and another. It was held by the Apex Court that the right to administer is said to consist of four principals. The first is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons selected by them. Second is the right to choose its teachers, third is the right not to be compelled to refuse admission to students and fourth is the right to use its properties and assets for the benefit of its own institution. Paragraph 19 of the said judgment is extracted below:-

***"19**. The entire controversy centres round the extent of the right of the religious and linguistic minorities to administer their educational institutions. The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons selected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution."*

117. Again in ***T.M.A. Pai's*** case the concept of administration came for consideration and five components have been held to be comprised in administration, i.e., to admit students, to constitute a governing body, to appoint staff (teaching and non-teaching) and to take action if there is dereliction of duty on the part of any employees. Paragraph 50 of the judgment is extracted below:-

"The right to establish administer broadly comprises the following rights:

(a) to admit students;
(b) to set up a reasonable fee structure;
(c) to constitute a governing body;
(d) to appoint staff (teaching and non-teaching); and
(e) to take action if there is dereliction of duty on the part of any employees."

118. Another case which lend support to the interpretation that minority institution for seeking protection under Article 30 has to prove both establishment and administration is ***St. Stephen's*** case reported in 1992(1) S.C.C. 558. The ***St. Stephen's*** case (supra) was also a case of pre constitution institution. The Apex Court in the said judgment held that the words "establish and administer" used in Article 30 are to be read conjunctively. While considering the question as to whether St. Stephen's case (supra) qualifies for protection under Article 30, the Apex Court examined in details the character of the institution, the administration and finding was recorded that the Constitution as it stands today

maintains the essential character of the college as Stephen college without compromising the right to administer it as education institution of its choice. Ultimately in paragraph 46 it was observed:-

"From these facts and circumstances it becomes abundantly clear that St. Stephen's College was established and administered by a minority community."

119. Thus the above authorities do lay down that for seeking protection under Article 30 an institution has to establish both conditions, i.e., it has been established by minority and it has been administered by minority. An institution which might have been establish by minority but was never administered nor even claimed to have been administered cannot be clothed with the character of a minority institution as contemplated under Article 30 of the Constitution. If the interpretation is accepted that every institution established by minority irrespective of the fact whether it is administered by the minority will be minority institution then that interpretation shall lead to inequitable and incorrect results. Under Article 19(1)(g) of the Constitution of India every citizen has right to establish an educational institution. The right under Article 19(1)(g) having been given to every citizen, this right is also available to a citizen belonging to a minority. The right to establish and administer educational institution of their choice as guaranteed under Article 30 is special and additional right to the minorities. Interpreting Article 30 the Apex Court in A.I.R. 1970 S.C. 2079; ***State of Kerala Vs. Very Rev. Mother Provincial*** held as follows in paragraph 8:-

"8*. Article 30(1) has been construed before by this Court. Without referring to those to those cases it is sufficient to say that the clause contemplates two rights which are separated in point of time. The first right is the initial right to establish institutions of the minority's choice. Establishment here means the bringing into being of an institution and it must be by a minority community. It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions....."*

120. Thus for protection of Article 30, it is also to be proved that the institution was established by minority community for its benefit although extending the benefits to others is not destructive of the minority character. A citizen belonging to minority community can as well establish an institution for the benefit of public in general irrespective of benefits to his own community or any other community. There cannot be any restriction on the rights of the citizens belonging to minority community in establishing a normal, i.e., a free educational institution for the benefit of all. The character of such institution established by member of minority will entirely be different and different rights and obligations will follow with regard to the admission, condition of service of teachers and other rights. Thus it cannot be held that whenever a member of the

minority community establish an institution the same shall be necessarily a minority institution irrespective of the fact as to whether it was contemplated to be a minority institution or an institution for the benefit of all sections of the society. This can be further illustrated by giving an illustration. A member of the minority community establishes an institution which is open to all sections of the society without reserving any right of administration in the persons founding the society. The institution is administered as a normal institution following the rules and regulations applicable to normal institution. The selection of teachers is made by selection board established under the Act. Can after lapse of several decades suddenly the institution claim to the benefit of minority character on the ground that it was established by minority member and claim right of administration of the institution as a minority. The answer will be obviously no because the character of the institution which came into existence was not a minority nor it was administered by minority. The right of all citizens to administer educational institution under Article 19(1)(g) has also been recognised by the Apex Court in ***T.M.A. Pai's*** case. Following was laid down in paragraph 18 of the judgment:-

"18. *..... Article 19 (1)(g) and Article 26, therefore, confer rights on all citizens and religious denominations to establish and maintain educational institutions. There was no serious dispute that the majority community as well as linguistic and religious minorities would have a right under Articles 19(1)(g) and 26 to establish educational institutions In addition, Article 30(1), in no uncertain terms, gives the right to the religious and linguistic minorities to establish and administer educational institutions of their choice."*

121. Thus administration of the institution by minority is also one of essential factors before claiming right under Article 30 of the Constitution.

122. In ***Azeez Basha's*** case (supra) the Apex Court after considering the various provisions of 1920 Act has categorically held that the institution was not being administered by the minority. It found that the administration of the Aligarh Muslim University was not with the minority and was vested in the authorities and officers as noted in the judgment. There being categorical finding in ***Azeez Basha's*** case (supra) that the institution has not been administered by the minority, one of the requisite condition for qualifying the protection under Article 30 of the Constitution is lacking, the Aligarh Muslim University is not entitled for protection under Article 30 of the Constitution.

123. 1981 Amendment does not change any of the basis of ***Azeez Basha's*** case (supra) with regard to administration. In 1981 Amendment Act only provisions which have been emphasised are Sections 2(l) and Section 5(2)(c). These two provisions has nothing to do with administration. The other amendments by 1981, as noted above, were prospective in nature and can have no effect on the administration of the institution. The basis of the ***Azeez Basha's*** case in so far as administration is concerned having not been even touched, there is no question of accepting the submission that basis of judgment has been changed to make the judgment ineffective. The ***Azeez Basha's*** judgment still holds the field with full

force and the judgment of the learned single Judge holding that Aligarh Muslim University is not a minority institution is liable to be upheld on this finding alone.

124. One more submission which has been raised both by Dr. Dhawan and Sri Gopal Subramanium is that in Writ Petition No.54-57 of 1981 (Anjuman-e-Rahmania & others Vs. District Inspector of School and others), the Supreme Court vide its order dated 26th November, 1981 noted the doubts expressed on the correctness of the ***Azeez Basha's*** case and by the said order matter was directed to be placed before Hon'ble the Chief Justice for being heard by a Bench of seven Judges which writ petition was ultimately decided by order dated 11th March, 2003 with following observations:-

"These matters are covered by the decision of a Constitution Bench of this Court in Writ Petition No.317/1993- T.M.A. Pai Foundation & ors. Etc. Vs. State of Karnataka & Ors. Etc. and connected batch decided on 31st October, 2002.

All statutory enactments, orders, scheme, regulations will have to be brought in conformity with the decision of the Constitution Bench of this court in T.M.A. Pai Foundation's case decided on 31.10.2002. As and when any problem arises the same can be dealt with by an appropriate Forum in an appropriate proceeding.

The Writ Petitions are disposed of accordingly."

125. It has thus been submitted that present dispute requires consideration in the light of the judgment in ***T.M.A. Pai's*** case (supra). It is submitted that this case has again reiterated that there can be regulatory control over the minority institution and regulatory control itself does not amount in any manner destructive of the minority character of an institution. It is submitted that control and supervision in 1920 Act is only regulatory in nature and in the light of ***T.M.A. Pai's*** case the minority character of Aligarh Muslim University has to be declared. The answer to the above submissions are two fold. Firstly the judgment in ***Azeez Basha's*** case has considered all the provisions of 1920 Act and the Statutes framed thereunder and considering the scheme of the Act the ***Azeez Basha's*** judgment held that minority community has not been administering the institution. As observed above, the basis of the judgment of ***Azeez Basha's*** case regarding administration by minority has not even touched by 1981 Amendment Act, it is no more open for us to consider the submission that minority is administering the Aligarh Muslim University and it be declared as a minority institution. Secondly even if we look the question of administration in the light of judgment in ***T.M.A. Pai's*** case (supra), the result will be the same. As noted above in ***St. Xaviers College's*** case (supra) in paragraph 19 four principles have been laid down which are comprised in right of administration. In ***T.M.A. Pai's*** case also five principles have been laid down which comprises the administration, as noted above. The first factor mentioned in ***T.M.A. Pai's*** case is to admit students. Relevant provisions regarding admission of the students in 1920 Act are contained in Section 29, 30 and 32. Section 29 reads as under:-

"29. Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters, namely:-

(a)
(b)
(c) the conditions under which students may be admitted to the degree or diploma courses and to the examinations of the University, and shall be eligible for degrees and diplomas.
(d) the admission of students to the University;
....."

126. Section 30 provided that the Executive Council or in academic matters, the Academic Council may make Ordinances. Sub-section (2) of Section 30 provided that first Ordinances shall be framed as directed by the Governor General in Council and shall receive such previous approval as he may direct. Sub-section (3) provided that no new Ordinance, or amendment or repeal of an existing Ordinance shall have any validity until it has been submitted through the Court and Visiting Board to the Governor General in Council, and has obtained approval of the latter. Sub-section (4) again provided that if any question arises between the Executive and the Academic Council as to which has power to make an Ordinance, either Council may represent the matter to the Visiting Board who shall refer the same to a tribunal consisting of three members, one of whom shall be nominated by the Executive Council, one by the Academic Council, and one shall be a Judge of a High Court nominated by the Lord Rector. Section 30 makes it clear that power to make ordinances vests in the Executive Council and the first ordinances were made under the direction of the Governor General in Council. Further making of ordinances are subject to prior approval of the Government General at the relevant time. The Court which is claimed to be supreme governing body of the University is not vested with any power to make even ordinances for regulating admissions.

127. Section 32 deals with the admission and examinations. Section 32 provided that admission of students to the University shall be made by admission committee consisting of the Pro-Vice-Chancellor, the Principal of an Intermediate College who shall be selected by the Vice-Chancellor and such other persons as may be appointed by the Academic Council. The said provision again makes it clear that power of admission is not vested in the minority which claim to have established the institution nor even it is vested in the Court which is claimed to be supreme governing body. Thus the factor regarding admission of students is not present and militates against the claim of the Aligarh Muslim University of its minority character. The second factor given in ***T.M.A. Pai's*** case is to set up a reasonable fee structure. Section 29(h) provides:-

"29*. Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters, namely:-*

(a)
(b)
.....
.....

(h). the fees to be charged for courses of study in the University and for

admission to the examinations, degrees and diplomas of the University; ..
....."

Again with regard to fee structure power is not vested in the Court which is claimed to be supreme governing body of the Aligarh Muslim University.

128. The third factor in ***T.M.A. Pai's*** case is to constitute a governing body. It is now well settled that to constitute the governing body of a minority institution is the most important right vested in the minority. The supreme governing body is claimed to be Court. Statute 8 of the Statutes provides for constitution of the Court. There are four categories of members in the Court. Class-1- Ex-Officio members, Class II Foundation Members, Class-III Life Members and Class-IV Ordinary Members. The Chancellor, the Pro-Vice-Chancellor and the Vice Chancellor for the time being shall be Ex-Officio Members. The Foundation Members are those whose names are mentioned in the Schedule. Every person who has contributed to the Mohammadan Anglo Oreintal College, Aligarh, the Muslim University Association or the Muslim University Foundation Committee a donation of one lack of rupees or upwards or has transferred property of like value shall be the life member. There are several category of life members. There are nominations by States by the Chancellor. Election of forty members from registered graduates of the University. Statute 8 reveals that electorate for electing the members of the Court do not necessarily belong to minority community. The constitution of governing body according to the scheme of the Act and the Statutes is not wholly vested with the members of the minority who claimed to have established the institution. The question regarding the constitution of managing body/governing body by the minority came for consideration before the Apex Court in several cases. In A.I.R. 1970 S.C. 2079; ***State of Kerala Vs. Very Rev. Mother Provincial. Section*** 48 of the Kerala University Act, 1969 came for consideration. Sections 48 and 49 deal with governing body for private colleges and managing council for private colleges under corporate management. The 11 members of the governing body as contemplated by Section 48 were, (i) the principal of the private college; (ii) the manager of the private college; (iii) a person nominated by the University in accordance with the provisions in that behalf contained in the Statutes; (iv) a person nominated by the government; (v) a person elected in accordance with such procedure as may be prescribed by the Statutes of the University from among themselves by the permanent teachers of the private college; and (vi-xi) not more than six persons nominated by the educational agency. The Apex Court found the provisions of Section 48 violative of rights under Article 30. The Apex Court held that after the election of the governing body or the managing council the founders or community has no hand in the administration, they are not answerable to the founder in the matter of administration. Their power and functions are determined by the University laws. However desirable it might be to associate nominated members of the kind mentioned in Sections 48 and 49 with other members of the governing body or the managing council nominees, it is obvious that their voice must play a considerable part in management. Situations might be conceived when they

may have a preponderating voice In any event, the administration goes to a distinct corporate body which is in no way answerable to the educational agency or the corporate management. The founders have no say in the selection of the members nominated or selected except those to be nominated by them. It is, therefore, clear that by the force of sub-sections (2), (4) and (6) of Sections 48 and 49, the minority community loses the right to administer the institution it has founded. Relevant observations from paragraphs 14 and 15 of the judgment are extracted below:-

*"**14**. These sections were partly declared ultra vires of Article 30(1) by the High Court as they took away from the founders the right to administer their own institution. It is obvious that after the election of the governing body or the managing council the founders or even the community has no hand in the administration. The two bodies are vested with the complete administration of the institution. These bodies have a legal personality distinct from t educational agency or the corporate management. They are not answerable to the founders in the matter of administration. Their powers and functions are determined by the University laws and even the removal of the members is to be governed by the Statutes of the University. Sub-sections (2), (4), (5) and (6) clearly vest the management and administration in the hands of the two bodies with mandates from the University."*

15. *.....The Constitution contemplates the administration to be in the hands of the particular community. However desirable it might be to associate nominated members of the kind mentioned in Sections 48 and 49 with other members of the governing body or the managing council nominees, it is obvious that their voice must play a considerable part in management. Situations might be conceived when they may have a preponderating voice In any event, the administration goes to a distinct corporate body which is in no way answerable to the educational agency or the corporate management. The founders have no say in the selection of the members nominated or selected except those to be nominated by them. It is, therefore, clear that by the force of sub-sections (2), (4) and (6) of Sections 48 and 49, the minority community loses the right to administer the institution it has founded. ....."*

129. From the above case, it is clear that the managing body which had several nominees and other persons not appointed by the founder was held to be violative of right of the minority under Article 30. The next case which is relevant is ***St. Xaviers College's*** case (supra) in which Section 33-A (1-a) of Gujarat University Act, 1949 came for consideration. According to Section 33-A (1-a) every college shall be under the management of a governing body which shall include amongst its members, a representative of the University nominated by the Vice-Chancellor and representatives of the non teaching staff and students of the college. The Apex Court held that autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The provisions of 33-A(1-a) were found to be offending Article 30 of the Constitution. Section 33-A(1)(a) as quoted in paragraph 65 of the same judgment is extracted below:-

"33-A. *(1) Every college (other than a Government college or a college maintained by the Government) affiliated before the commencement of the Gujarat, University (Amendment) Act, 1972 (hereinafter in this section referred to as 'such commencement')-*

(a) shall be under the management of a governing body which shall include amongst its members the Principal of the college, a representative of the University nominated by the Vice-Chancellor, and three representatives of the teachers of the college and at least one representative each of the members of the non-teaching staff and the student of the college, to be elected respectively from amongst such teachers, members of the non-teaching staff and students; and

(b) that for recruitment of the Principal and members of the teaching staff of a college there is a selection committee of the college which shall include-

(1) in the case of recruitment of the Principal, a representative of the University nominated by the Vice-Chancellor, and
(2) in the case of recruitment of a member of the teaching staff of the college, a representative of the University nominated by the Vice-Chancellor and the Head of the Department, if any, concerned with the subject to be taught by such member.

(2) Every college referred to in sub-section (1) shall,-

(a) within a period of six months after such commencement, constitute or reconstitute its governing body in conformity with sub-section (1), and

(b) as and when occasion first arises after such commencement, for recruitment of the Principal and teachers of the college, constitute or reconstitute its selection committee so as to be in conformity with sub-section (1),

(3) The provisions of sub-section (1) shall be deemed to be a condition of affiliation of every college referred to in sub-section (1)."

Relevant observations were made in paragraphs 40 and 41 which are extracted below:-

"40*. The provisions contained in Section 33A(1)(a) of the Act state that every college shall be under the management of a governing body which shall include amongst its members, a representative of the university nominated by the Vice-Chancellor and representatives of teachers, non-teaching staff and students of the college. These provisions are challenged on the ground that this amounts to invasion of the fundamental right of administration. It is said that the governing body of the college is a part of its administration and therefore that administration should not be touched. The right to administer is the right to conduct and manage the affairs of the institution. This right is exercised thorough a body of persons in whom the founders of the institution have faith and confidence and who have full autonomy is that sphere. The right to administer is subject to permissible regulatory measures. Permissible regulatory measures are those which do not restrict the right of administration but facilitate it*

and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of the management of the educational institutions and without displacing the management. If the administration has to be improved it should be done through the agency or instrumentality of the existing management and not by displacing it. Restrictions on the right of administration imposed in the interest of the general public alone and not in the interests of and for the benefit of minority educational institutions concerned will affect the autonomy in administration.

***41**. Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration. The right of administration is day to day administration. The choice in the personnel of management is a part of the administration. The University will always have a right to see that there is no mal-administration. If there is maladministration, the university will take steps to cure the same. There may be control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students. In State of Kerala v. Very Rev. Mother Provincial, etc. (supra) this Court said that if the administration goes to a body in the selection of whom the founders have no say, the administration would be displaced. This Court also said that situations might be conceived when they might have a preponderating voice. That would also effect the autonomy in administration. The provisions contained in Section 33A(1)(a) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost. New elements in the shape of representatives of different types are brought in. The calm waters of an institution will not only be disturbed but also mixed. These provisions in Section 33A(a) cannot therefore apply to minority institutions."*

Justice Mathew in his concurring opinion laid down following in paragraph 181:-

***"181**. We think that the provisions of sub-sections (1)(a) and (1)(b) of Section 33A abridge the right of the religious minority to administer educational institutions of their choice. The requirement that the college should have a governing body which shall include persons other than those who are members of the governing body of the Society of Jesus would take away the management of the college from the governing body constituted by the Society of Jesus and vest it in a different body. The right to administer the educational institution established by a religious minority is vested in it. It is in the governing body of the Society of Jesus that the religious minority which established the college has vested the right to administer the institution and that body alone has the right to administer the same. The requirement that the collage should have a governing body including persons other than those who constitute the governing body of the Society of Jesus has the effect of divesting that body of its exclusive right to manage the educational institution. That it is desirable in the*

opinion of the legislature to associate the Principal of the college or the other persons referred to in Section 33A(1)(a) in the management of the college is not a relevant consideration. The question is whether the provision has the effect of divesting the governing body as constituted by the religious minority of its exclusive right to administer the institution. Under the guise of preventing maladministration, the right of the governing body of the college constituted by the religious minority to administer the institution cannot be taken away. The effect of the provision is that the religious minority virtually loses its right to administer the institution it has founded. "Administration means 'management of the affairs' of the institution. This management must be free of control so that the founders of their nominees can mould the institution according to their way of thinking and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right....."

130. Thus the nature and character of the Court which is claimed to be supreme governing body is not in the line of the characteristic of administration by a minority. The scheme of the Act spells out that the minority character was never clothed by the Act nor body which came into existence was contemplated as a minority institution. Apart from the Court the right of administration under 1920 Act is vested in other authorities of the University constituted by the Act itself. Executive Council, according to Section 24, is the executive body of the University which has right of administration in several respects as laid down in the Act and the Statutes itself. As noted above, the Lord Rector has overriding power over even the Court. The Visiting Board under Section 14 has right to annal any proceeding of the University. The first Chancellor, Pro-Vice-Chancellor and Vice Chancellor were appointed by the Governor General. The Vice Chancellor has wide administrative power under the Act. From the above scheme of the Act, it is clear that the administration was not vested in the Court which is claimed to be supreme governing body but the administration was vested on the administrative authorities of the University including the Vice Chancellor on whom the founder cannot claim to have any control.

The fourth factor mentioned in ***T.M.A. Pai's*** case is to appoint staff (teaching and non-teaching). The power to appoint staff is not vested in the founder minority community, even the Court has no power to appoint staff. The power of appointment of officers is given to the Court by virtue of Section 23 but the officers of the Court are defined in Section 16 and they are not the teaching or non teaching staff. Power to appoint staff is provided in Statute 20. Statute 20 provided that subject to the general control of the Court, all appointments on the teaching staff shall be made by the Executive Council from a list of persons recommended as suitable therefor by a Committee of Appointment consisting of the Pro-Vice-Chancellor, the Chairman of the Department of Studies concerned and three other persons appointed by the Academic Council. Other appointments, unless otherwise provided for, shall be made by the Executive Council. The

power of appointment is not vested with the founder nor is vested in the Court which is claimed to be supreme governing body. Power of appointment can be made by recommendation of the committee of appointment in which there is no person of Court or founders. The appointment committee is statutorily provided. The Court has only general control with regard to appointment of teaching staff. With regard to other appointments the sole power is given to the Executive Council. Statute 20 of the Statutes which gives power to make appointment is extracted below:-

*"**20**. Subject to the general control of the Court, all appointments on the teaching staff shall be made by the Executive Council from a list of persons recommended as suitable therefor by a Committee of Appointment constituting of the Pro-Vice-Chancellor, the Chairman of the Department of Studies concerned and three other persons appointed by the Academic Council. Other appointments, unless otherwise provided for, shall be made by the Executive Council."*

131. The Apex Court in ***St. Xavier's*** case (supra) had occasion to consider Section 33A(1)(b) of Gujarat University Act, 1949 as amended by Gujarat University Amendment Act, 1972. The said provision provided for constitution of selection committee for recruitment of principal and members of the teaching staff. Section 33A(1)(b) is quoted as below:-

*"**33-A**. (1) Every college (other than a Government college or a college maintained by the Government) affiliated before the commencement of the Gujarat, University (Amendment) Act, 1972 (hereinafter in this section referred to as 'such commencement')-*

(a) .....

(b) that for recruitment of the Principal and members of the teaching staff of a college there is a selection committee of the college which shall include-

(1) in the case of recruitment of the Principal, a representative of the University nominated by the Vice-Chancellor, and

(2) in the case of recruitment of a member of the teaching staff of the college, a representative of the University nominated by the Vice-Chancellor and the Head of the Department, if any, concerned with the subject to be taught by such member."

132. The Apex Court in ***St. Xavier's*** case (supra) declared Section 33A(1)(b) as violative of the right of the minority. Section 33A(1)(b) has been noted in paragraph 42 of the ***St. Xavier's*** judgement which has already been quoted above. In paragraph 45 of the judgment it was held that Section 33A(1)(b) violates the fundamental rights of the minority institution. In the Statute 20 of the Statutes, as quoted above, in the selection committee which is to make appointment of the teaching staff there is no person who can be said to be representative of the minority community. The Committee of Appointment consists of Pro-Vice-Chancellor, the Chairman of the Department of Studies concerned and three others persons appointed by the Academic Council. Thus the minority community has no say in the selection.

This provision militates against the minority character of the Aligarh Muslim University.

133. The fifth factor as mentioned in ***T.M.A. Pai's*** case is power to take action if there is dereliction of duty on the part of any employees. The power to take action normally vests in the authority who makes appointment. As noted above the power of appointment is not vested in the Court which is claimed to be supreme governing body and is vested in the Executive Council. Section 36 of the Act is relevant in this context. Section 36 is with regard to condition of service of officers and teachers. Section 36 (1) provided that every salaried officer and teacher of the University shall be appointed on a written contract, which shall be lodged with the University. Section 36 (2) provides that any dispute arising out of a contract between the University and any of its officers or teachers shall, at the request of the officer or teacher concerned, be referred to a tribunal of arbitration consisting of one member appointed by the Executive Council, one member nominated by the officer or teacher concerned and an umpire appointed by the Visiting Board. Even in resolving the disputes pertaining to any staff of the college the Court which is claimed to be the supreme governing body has no role.

134. Section 36 of the 1920 Act, as noted above, provides as under:-

"36*. (1) Every salaried officer and teacher of the University shall be appointed on a written contract, which shall be lodged with the University and a copy of which shall be furnished to the officer or teacher concerned.*

(2) Any dispute arising out of a contract between the University and any of its officers or teachers shall, at the request of the officer or teacher concerned, be referred to a tribunal of arbitration consisting of one member appointed by the Executive Council, one member nominated by the officer or teacher concerned and an umpire appointed by the Visiting Board. The decision of the tribunal shall be final, and no suit shall lie in any Civil Court in respect of the matters decided by the tribunal. Every such request shall be deemed to be a submission to arbitration upon the terms of this section within the meaning of the Indian Arbitration Act, 1899, and all the provisions of that Act, with the exception of section 2 thereof, shall apply accordingly."

An almost similar provision came for consideration before the Apex Court in ***St. Xavier's*** case (supra) i.e., Section 52 of the Gujarat University Act, 1949 which also pertains to dispute with regard to conditions of service of any member which was required to be referred to a tribunal of arbitration. Section 52A is quoted as below:-

"52A*. (1) Any dispute between the governing body and any member of the teaching, other academic and non-teaching staff of an affiliated college of recognized or approved institution which is connected with the conditions of service of such member, shall, on a request of the governing body, or of the member concerned be referred to a Tribunal of Arbitration consisting of one nominated by governing body of the college or, as the case may be, member of the recognized or approved institution, one member nominated by the member*

concerned and an Umpire appointed by the Vice-Chancellor.

(2) The provisions of Section 52 shall, thereupon mutatis mutandis apply to such request and the decision that may be given by such Tribunal."

135. Before the Apex Court the Section 52A was also challenged on the ground that it violates the rights of the minority and is contrary to the rights of the minority to have its own say on the disciplinary matters. The Apex Court held that Section 52A cannot apply to a minority institution. Following was laid down in paragraph 44:-

***"44**. The provisions contained in Section 52A of the Act contemplate reference of any dispute between the governing body and any member of the teaching, other academic and non-teaching staff of an affiliated college which is connected with the conditions of service of such member to a Tribunal of Arbitration consisting of one member nominated by the governing body of the college, one member nominated by the member concerned and an Umpire appointed by the Vice-Chancellor. These references to arbitration will introduce an area of litigious controversy inside the educational institution. The atmosphere of the institution will be vitiated by such proceedings. The governing body has its own disciplinary authority. The governing body has its domestic jurisdiction. This jurisdiction will be displaced. A new jurisdiction will be created in administration. The provisions contained in Section 52A of the Act cannot, therefore, apply to minority institutions."*

136. Khanna, J who delivered a concurring judgment to take same view in paragraph 107 on Section 52A, held that the effect of Section 52A would be that the governing body of an educational institution would be hardly in a position to take any effective disciplinary action against the member of the staff. Paragraph 107 is extracted below:-

"107. Section 52-A of the Act relates to the reference of disputes between a governing body and any member of the teaching, other academic and non-teaching staff of an affiliated college or recognised or approved institution connected with the conditions of service of such member to a Tribunal of Arbitration, consisting of one nominated by the governing body of the college or, as the case may be, of the recognized or approved institution, one member nominated by the member of the staff involved in the dispute and an Umpire appointed by the Vice Chancellor. Section 52-A is widely worded, and as it stands it would cover within its ambit every dispute connected with the conditions of service of a member of the staff of an educational institution, however, trivial of insignificant it may be, which may arise between the governing body of a college and a member of the staff. The effect of this section would be that the managing committee of an educational institution would be embroiled by its employees in a series of arbitration proceedings. The provisions of Section 52A would thus act as a spoke in the wheel of effective administration of an educational institution. It may also be stated that there is nothing objectionable to selecting the method of arbitration for settling major disputes connected with conditions of service of staff of educational institution.

It may indeed be a desideratum. What is objectionable, apart from what has been mentioned above, is the giving of the power to the Vice-Chancellor to nominate the Umpire. Normally in such disputes there would be hardly any agreement between the arbitrator nominated by the governing body of the institution and the one nominated by the concerned member of the staff. The result would be that the power would vest for all intents and purposes in the nominee of the Vice-Chancellor to decide all disputes between the governing body and the member of the staff connected with the latter's conditions of service. The governing body would thus be hardly in a position to take any effective disciplinary action against a member of the staff. This must cause an inroad in the right of the governing body to administer the institution. Section 52A should, therefore, be held to be violative of Article 30(1) so far as minority educational institutions are concerned."

137. From the above, it is clear that all the five factors which are essential ingredients of right of administration vested in a minority institution as per ***T.M.A. Pai's*** case are absent in the Aligarh Muslim University as spelled out from the scheme of 1920 Act. All the above five factors being absent and in any view of the matter majority of the factors which have been held to be essential ingredients of the rights of the minority being absent in the present case, it is abundantly clear that the institution which came into existence in the year 1920 was not an institution having character of minority institution. Thus applying the principles laid down in ***T.M.A. Pai's*** case also it cannot be held that there was any right of administration vested in the Aligarh Muslim University which constitute the essential components of the rights of administration of minority.

138. Apart from above even basis of ***Azeez Basha's*** case (supra) on "establishment" has not been completely changed by 1981 Amendment Act. The only amendment made by 1981 Act is, as noted above, in preamble, long title, Section 2(l), Section 5 (2)(c) and Section 8. In the preamble of the Act the words "an Act to establish and incorporate" has been given slight amendment by deleting the word "establish". The definition in Section 2 (l) was amended by which University has been defined with the meaning "educational institution of their choice established by muslims of India". The definition of the word "established" has been considered in paragraph 25 of the judgment in ***Azeez Basha's*** case. It was held that established means "to bring into existence". In A.I.R. 1970 S.C. 2079; ***State of Kerala Vs. Very Rev. Mother Provincial*** following was laid down in paragraph 8 while interpreting Article 30 of the Constitution it was held:-

".....Establishment here means the brining into being of an institution and it must be by a minority community...."

139. The Aligarh Muslim University, a body corporate, came into existence only by Act of legislature. By merely changing the definition of Section 2(l) by amending the preamble and long title can the fact that the University came into being by an Act of legislature be forgotten. It is true that 1920 Act was passed as a result of the efforts of the muslim minority which fact has been clearly noted in paragraph 23 of the ***Azeez Basha's*** judgment and is also clear from

previous history of the establishment of the University. The other provisions of the Act, namely, Sections 3 and 4 were also taken into consideration in paragraph 6 of the judgment in ***Azeez Basha's*** case which provided that first Chancellor, Pro-Vice-Chancellor and Vice-Chancellor shall be the person appointed by the notification of the Governor General in Council constituted a body corporate by the name of the Aligarh Muslim University. Section 6 was also taken into consideration and following was laid down in ***Azeez Basha's*** case:-

"..... Therefore when the Aligarh university was established in 1920 and by S. 6 its degrees were recognised by Government, an institution was brought into existence which could not be brought into existence by any private individual or body for such recognition of the degrees conferred by any university established by it....."

140. We are thus in full agreement with the view of learned single Judge that the basis of judgment in so far as establishment part is concerned was also not completely changed by 1981 Act so as to make the ***Azeez Basha's*** judgment ineffective. Thus in the establishment of the University the then government had its significant role and the establishment was not entirely the act of minority community.

141. Now comes the question as to whether Section 2(l) and 5(2)(c) are liable to be struck down. The learned single Judge in the impugned judgment has not struck down those provisions. Sri Ravi Kant has contended that those provisions are brazen overruling of the judicial decision of the Apex Court in ***Azeez Basha's*** case and the same is liable to be struck down on this ground alone. In view of the findings recorded in ***Azeez Basha's*** case that Aligarh Muslim University is not a minority institution, whether it was open to the parliament by legislative enactment to declare Aligarh Muslim University a minority institution? According to Article 245 of the Constitution parliament may make laws subject to provisions of the Constitution. According to Article 13 any law made by State which takes away or abridges the rights conferred by Part-III is void. Declaring the Aligarh Muslim University as minority institution by parliament enactment is not in the competence of parliament in view of the judgment of the Apex Court and if the parliament declares by the legislative enactment that Aligarh Muslim University is minority institution the said declaration shall contravene Article 30 since Article 30 provides that only institutions administered and established by minority are entitled for protection under Article 30. The parliament thus could not have directly declared by parliamentary enactment that Aligarh Muslim University is a minority institution. The amendments which has been brought by 1981 Amendment Act has not been able to change the basis of ***Azeez Basha's*** case (supra) and thus tend to overrule a judicial decision which is not in competence of the parliament.

142. The submission of Aligarh Muslim University and Union of India is that the amendment in preamble, long title, Section 2 (l) and Section 5 (2)(c) declare that institution was established by minority community. The said declaration being contrary to the ***Azeez Basha's*** case (supra) and the basis of the said judgment having not successfully changed, the

aforesaid provisions are nothing but overruling of a judicial decision which has been frawaned upon by the Apex Court in several judgements, as noted above. Consequently the provisions of Section 2(l) and Section 5(2)(c) as well as amendment in preamble and long title are liable to be struck down.

143. There is one more aspect of the matter which needs consideration. Article 29 (2) provides that no citizen shall be denied education into any educational institution maintained by the State or receiving the aid out of the State fund on the grounds only of religion, race, caste, language or any of them. Admittedly the Aligarh Muslim University is a Central University receiving aid from the State. It is contended that Article 29 (2) is also applicable on the minority institution and in view of the judgment in ***T.M.A. Pai's*** case even minority institutions are obliged to admit certain percentage of students belonging to majority and there is no infringement of the rights of the majority even in the minority institutions. In ***T.M.A Pai's*** case one of the question before the Apex Court was regarding interplay between Article 29(2) and Article 30 of the Constitution, i.e., Question No.4. The Apex Court while answering Question No.4 held that an aided minority institution shall be entitled to have the right of admission of students belonging to the minority group and at the same time shall be required to admit a reasonable extent of non-minority students so that the rights under Article 30(1) are not substantially impaired and further the citizens' rights under Article 29(2) are not infringed. The Apex Court further held that what would be the reasonable, would vary from the types of institution, the courses of education for which admission is sought and other factors like educational needs. The State Government concerned has to notify the percentage of the non-minority students to be admitted in the light of the above observations.

144. Question No.4 and its answer are extracted below:-

"Q.4. Whether the admission of students to minority educational institution, whether aided or unaided, can be regulated by the State Government or by the university to which the institution is affiliated?

A. *..... A minority institution does not cease to be so, the moment grant-in-aid is received by the institution. An aided minority education institution, therefore, would be entitled to have the right of admission of students belonging to the minority group and at the same time, would be required to admit a reasonable extent of any minority students, so that the rights under Article 30(1) are not substantially impaired and further the citizens right under Article 29 (2) are not infringed. What would be a reasonable extent would vary from the types of institution, the courses of education for which admission is being sought and other factors like educational needs. The State Government concerned has to notify the percentage of the non-minority students to be admitted in the light of the above observations. Observance of inter se merit amongst the applicants belonging to the minority group could be ensured. In the case of aided professional institutions, it can also be stipulated that passing of the common entrance test held by the State agency is necessary to seek admission. As regards*

non-minority students who are eligible to seek admission for the remaining seats, admission should be normally be on the basis of the common entrance test held by the State agency followed by counselling wherever it exists."

145. According to the law laid down by the Apex Court in ***T.M.A. Pai's*** case the right in a minority institution under Article 29(2) is not the same as it is with regard to non minority institution. An institution, if it is not minority, 100% seats will be available to all the citizen and no one can be discriminated on the ground of religion but in an institution declared minority institution it still permits admission to majority but right of the majority is substantially infringed and marginalised and it can not be said that the right under Article 29(2) are not effected when an institution which is receiving aid is declared as minority. The Apex Court in (1975) 2 S.C.C. 283; ***The Gandhi Faiz-e-am College Vs. University of Agra and another***, has held that abridgement of the constitutional right is as obnoxious as annihilation. Even if the right of citizens under Article 29(2) is abridged the fundamental right is infringed. Following observations were made in paragraph 19:-

"19. ..... *All the other learned Judges who are party to St. Xavier's College case (supra) and all the earlier rulings have negatived the untouchable absoluteness urged by the management. Equally fallacious is the simplistic submission which appears to have appealed to the High Court that Article 30 is disturbed only when the right is destroyed, not when it is damaged. St. Xavier's College case has dispelled doubts in this behalf: Abridgement of the constitutional right is as obnoxious as annihilation. To cripple is to kill."*

146. The observations of the Apex Court in ***State of Gujarat and another Vs. Raman Lal Keshav Lal Soni and others***; (1983)2 S.C.C. 33, (as quoted in preceding paragraph of this judgement) also do support that law must satisfy the requirements of the Constitution today. The rights of citizens under Article 29(2) which was being enjoyed by all the citizens since very inception of university were sought to be impaired by 1981 Amendment Act. It is admitted fact that prior to 2005 in the admission policy the Aligarh Muslim University never prescribed any quota for muslim candidates and all citizens had right under Article 29(2) to seek admission.

147. The next question comes is the question of locus and relief. It has been contended by counsel for the Aligarh Muslim University that the writ petitioners have no locus to challenge the rules for admission they having appeared and having taken a chance to get success. The admission in which the writ petitioners appeared was admission under internal quota which for the year 2005 was 25%. It has been stated that earlier years All India quota was 25% and rest of the seats were filled up as internal candidates. The writ petitioners have not been challenging the conduct of examination or any infirmity or irregularity in the examination, what they were challenging is the marginalisation of institutional quota by carving out 50% muslim quota. The admission policy in so far it reserves 50% muslim quota was being challenged by the petitioners and the petitioners having passed the MBBS has right to challenge the policy of the

institution which adversely effected their chance to seek admission in the year in question and even in future years. We are not convinced with the submission of counsel of Aligarh Muslim University that the writ petitioners have no locus to file the writ petition.

148. Now comes the question of relief. It has been submitted by counsel for the Aligarh Muslim University that no mid session admission can be directed by the Court and the learned single Judge by the impugned judgment has directed for holding a fresh examination against 50% muslim quota. Reliance has been placed on ***Medical Council of India's*** case (supra) which lays down that no mid session admission can be directed. Another judgment relied is 2005(2) S.C.C. 65; ***Mridul Dhar Vs. Union of India***. Paragraph 31 of the judgment provides for time schedule of postgraduate and super speciality course. The last date for joining the alloted college and course of postgraduate course is 1st May. The results for 2005 admission were declared on 26th February, 2005, thereafter the students even under 50% quota were admitted and are pursuing the course. It is true that by an interim order the admissions were made subject to the final decision. We have also been told that for the year 2006 the examination for fresh admission course is going to be held in February, 2006. The judgment of learned single Judge directing for holding examination cannot be given effect to at such distance of time. No fresh admission can be taken at this stage. The muslim students whose admission has been quashed by the learned single Judge are also before us by filing two appeals, we have granted leave them to file appeal. They complained that they were neither party nor noticed before quashing their admissions. We are not expressing any opinion on the effect of their being not party or not being noticed because we have already held that Aligarh Muslim University is not a minority institution and the muslim quota of 50% was invalid. However, in facts of the present case and the fact that those students who have passed MBBS and admitted in the courses have run for substantially long period, we are inclined to modify the judgment of learned single Judge permitting those admissions to continue in special facts of the present case.

149. In view of the reasons as given by Hon'ble the Chief Justice and some reasons given in this order, I am in full agreement with the orders passed as at (i) to (x) in the order of Hon'ble the Chief Justice.

150. All the appeals are disposed of accordingly

Parties shall bear their own costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.01.2006

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Application No. 690 of 2006

Amar Singh ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Tej Pal
Sri Sukhendu Pal Singh

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 482-Quashing of charge sheet in ST.No.511/06-u/s 307 I.P.C.-prima facie the offence against the applicant as well as the other co-accused made out-No illegality pointed out in the investigation-except the material collected by the investigation-No other material required to be considered-appreciation of evidence including probability and contraction can not be considered at this stage-application.

Held: Para 5

After considering the facts and circumstances of the case and the submission made by the learned counsel for the applicant and the learned A.G.A. and after perusing the material present on record and the charge dated 28.11.2005 framed by the trial court against the applicant, it appears that on the basis of allegations made against the applicant and other co-accused persons prima facie offence is made out and there is sufficient material to proceed further. There is no illegality in the investigation as well as in framing of the charge. At the stage of charge, the only material collected by the Investigating Officer is required to be considered, no other material is required to be considered and it is not a stage of appreciation of the evidence including the probability and contradictions etc. The Stage of appreciation of evidence shall come when the evidence is adduced at the stage of trial. At this stage it is to be considered whether on the basis of the allegation made against the accused prima facie offence is made out or material collected by the Investigating Officer is sufficient to proceed further. The apex court has decided this controversy in a case of State of Orrisa Vs. Devendra Nath Pathi reported in 2005(1) J.I.C. 289(SC).

Case law discussed:

2005 (1) JIC-289 (SC) relied on

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

1. This application is filed by the applicant Amar Singh with a prayer that entire criminal proceedings of S.T. No. 511 of 2005 State Vs. Ram Kumar and others under sections 307,302,504 and 506 pending in the court of learned Additional Sessions Judge, Court no. 3 Mathura and charge framed against the applicant on 28.11.2005 by the same court may be quashed.

2. It is contended by the learned counsel for the applicant that in the present case the evidence collected by the Investigating Officer during the investigation is not sufficient to frame the charge under section 307 I.P.C. against the applicant. The date of birth of the applicant is 1.1.1956. He was posted in July, 1993 in the State Bank of India on the post of clerk cum cashier, presently he is posted as Senior Assistant in village Tarauli district Mathura. He is a non-violent, peace loving and law abiding citizen and is not having any criminal antecedent. The allegations made against the applicant are hyperbolical, exaggerated and false. The first informant Dinesh is a harden criminal and history sheeter, the deceased Ramu was also a harden criminal and the witnesses Mukesh Misra is also a criminal and one of the eye witness Gopal has filed an affidavit mentioning therein that he has been falsely named as eye witness in the F.I.R. The participation of the applicant and the role of firing upon the complainant party from a distance of about 280 feet in the dark hours of night is absolutely false because it was not possible to identify a person from such a longdistance and from such a distance it was not possible to cause any injury. The

alleged occurrence has taken place on 20.5.2004 at 7.15 p.m. in the back side of Hindustan Petroleum Building where no source of light was available and in the present case no identification parade was held. According to the prosecution Dinesh, the brother of the deceased Ranu alias Ram Prasad, lodged an F.I.R. on 20.5.2004 at about 9.15 p.m. at P.S. Kotwali Mathura stating therein that co-accused Jeetu, Ram Kumar and Prashant are goondas, on 20.5.2004 at about 7.15 p.m. the first informant Dinesh who is the elder brother of Ramu went for walking in the Army Garden, his brother Vishnu, Mukesh Mishra, Gopal had also come for walking purpose. The co-accused Ramu, Jeetu and Prashant hurled abuses on the deceased and gave challenge, thereafter they caused injuries by using knife blows on the person of the deceased. The alleged occurrence was witnessesed by the first informant and other persons in the Mercury light, when they were chased. the applicant fired by gun and due to that firing, the first informant and another could not proceed further. The deceased was taken in an injured condition by the first informant and his brother Vishnu to hospital where he died.

3. It is further contended that there was over writing in the panchayatname and the name of the accused were not mentioned therein. The prosecution story was not corroborated by the postmortem report and there was no explanation of abrasion. The learned trial court has illegally famed charge against the applicant under section 307 I.P.C. because no offence under section 307 I.P.C. is made out and there was no sufficient material to frame of the charge under section 307 I.P.C. and the entire proceedings against the applicants are abuse of the process and are liable to be quashed.

4. It is opposed by the learned A.G.A. by submitting that in the present case F.I.R. was lodged against the applicant and other co-accused persons. The first informant and another persons are eyewitness and there was sufficient source of light. In the present case the brother of the first informant has been murdered. Thereafter the applicant has fired upon the first informant and another person with an intention to kill them. Active role of firing is given to the applicant but luckily no one received any injury. The investigation was completed by the I.O. who came to the conclusion that the applicant and other co-accused persons have committed the offence under section 307 I.P.C. The charge sheet was submitted and on the basis of the charge sheet submitted by the Investigating Officer, learned magistrate took cognizance. The case was committed to the court of sessions and charge was framed against the applicant on 28.11.2005. There is no illegality in the charge-dated 28.11.2005 and on the basis of the evidence collected by the Investigating Officer a prima facie offence is made out against the applicant and other co-accused persons and there is no ground to quash the criminal proceedings and the charge dated 28.11.2005 framed against the applicant.

5. After considering the facts and circumstances of the case and the submission made by the learned counsel for the applicant and the learned A.G.A. and after perusing the material present on record and the charge dated 28.11.2005 framed by the trial court against the applicant, it appears that on the basis of

allegations made against the applicant and other co-accused persons prima facie offence is made out and there is sufficient material to proceed further. There is no illegality in the investigation as well as in framing of the charge. At the stage of charge, the only material collected by the Investigating Officer is required to be considered, no other material is required to be considered and it is not a stage of appreciation of the evidence including the probability and contradictions etc. The Stage of appreciation of evidence shall come when the evidence is adduced at the stage of trial. At this stage it is to be considered whether on the basis of the allegation made against the accused prima facie offence is made out or material collected by the Investigating Officer is sufficient to proceed further. The apex court has decided this controversy in a case of State of Orrisa Vs. Devendra Nath Pathi reported in 2005(1) J.I.C. 289(SC).

6. In view of the above discussion, there is no illegality in the charge dated 28.11.2005 and there is no ground to quash the criminal proceedings pending against the applicant, the prayer for quashing the criminal proceedings of S.T. No. 511 of 2005 pending in the court of learned IIIrd Additional Sessions Judge Mathura and the charge dated 28.11.2005 framed by the learned Additional IIIrd Additional Sessions Judge, Mathura, is refused.

7. Accordingly this application is dismissed. Application Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2006

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No.44541 of 2002

Anshuman Singh Bhadoria ...Petitioner
Versus
Director of Education, U.P. Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Vinod Kr. Singh
Sri S.K. Rai

Counsel for the Respondents:
Sri S.M.A. Kazmi
S.C.

Constitution of India, Art.-226-Service Law-compassionate appointment-petitioner's father died in harness as clerk in Pt. S.L. Memorial P.G. College affiliate to Dr. B.R. Ambedkar University-claim based on G.O. 21.11.95 applicable to Non-Government Degree College-rejected on the ground his mother is already working as Asstt. Teacher in Girls Inter College-held-compassionate appointment can not be claimed as a matter of right financial situation of family recourse to this scheme can not be taken-rejection order upheld.

Held: Para 4

Compassionate appointment cannot be claimed as a matter of right in all circumstances as it is hedged by the condition that there is financial distress due to untimely death of the bread winner and requires immediate relief. It cannot be said that irrespective of a comfortable financial situation the family can yet take recourse to this rule or scheme, as it cannot be held that it is a new source of recruitment.

Case law discussed:
1994 (4) SCC-138
2004 (7) SCC-271
AIR 2001 SC-2415
AIR 2003 SC-1241
AIR 2003 SC-620
1999 (9) SCC-240

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard learned counsel for the parties.

This petition is directed against an order dated 3rd. September, 2002 by which the claim of the petitioner for compassionate appointment has been rejected.

2. Pandit Sunder Lal Memorial Post Graduate College, Kannauj, is affiliated to Dr. B.R. Ambedkar University, Agra, wherein Lakhan Pal Singh Bhadoria father of the petitioner, was working as clerk and expired in harness on 25.3.2002. The petitioner claimed compassionate appointment in pursuance of a Government Order dated 21.11.1995 by which the rules of compassionate appointment have been made applicable to aided non-governmental Degree Colleges. The claim of the petitioner has been rejected by the impugned order as admittedly his mother Smt. Indira Bhadoria is working as an Assistant teacher in Gomti Devi Girls Inter College, Kannauj.

3. Petitioner has firstly urged that in the scheme there is no such bar placed and, therefore, the impugned order cannot be sustained.

4. The rule or scheme of compassionate appointment is one of those few exception to the normal rule of recruitment which stands at the very brink of the fire of arbitrariness and equality as enshrined under Articles 14 and 16 of the Constitution and has been saved only on humane considerations. The only object is to give succour to the bereaved family whose sole bread winner has suddenly left them in a financial lurch. Compassionate appointment cannot be claimed as a matter of right in all circumstances as it is hedged by the condition that there is financial distress due to untimely death of the bread winner and requires immediate relief. It cannot be said that irrespective of a comfortable financial situation the family can yet take recourse to this rule or scheme, as it cannot be held that it is a new source of recruitment. The Apex Court in the case of **Umesh Kumar Nagpal v. State of Haryana and others [(1994) 4 S.C.C. 138]** while propounding the aforesaid principle has held that "……*mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that, but for the provision of employment, the family will not be able to meet the crisis that job is to be offered to the eligible member of the family."* This proposition has again been reiterated in **General Manager (D & PB) and others v. Kunti Tiwary and another [2004] 7 S.C.C. 271].** Applying the principle to the present facts, it is apparent that the petitioner is the only son and his mother is already employed, though, conveniently her salary has not been disclosed in the writ petition. Further, there is no pleading to show that financially the duo of mother and son cannot carry on or they are in such a financial position that needs the exception rule to be invoked. Only a

vague statement has been made that his mother does not maintain the petitioner, but he has failed to show who is maintaining him or how the petitioner is surviving. Thus, the court is not inclined to accept the first argument raised on behalf of the petitioner.

5. The second argument urged on behalf of the petitioner is that in an identical matter, appointment had been given to one Sharad Dixit by the District Inspector of Schools, Farrukhabad/ Kannauj, even though his mother Smt. Sushila Dixit was employed in another institution, while the petitioner is being discriminated. In support of his contention, the petitioner has relied upon a decision of the Apex Court in the case of ***Surya Kant Kadam v. State of Karnataka and others*** **[AIR 2001 S.C. 2415].**

6. Article 14 is not available to perpetuate illegality and the High Court cannot issue directions that a mistake be perpetuated on the ground of discrimination or hardship. This principle has been upheld by the Apex Court in the cases of **Yogesh Kumar and others v. Government of N.C.P. Delhi and others [A.I.R. 2003 S.C. 1241] Jallundhar Improvement Trust v. State of Punjab and others [A.I.R. 2003 S.C. 620] and State of Punjab v. Dr. Rajiv Sarwal [1999 (9) S.C.C. 240].** The facts of the case of Smt. Susheela Dixit have not been disclosed. Assuming that the petitioner is similarly placed, in view of the principles enshrined above, the appointment of Mr. Dixit would be illegal. Having perused the judgment in the case of Suryakant Kadam (Supra), it is apparent that it does not apply to the present set of facts.

7. For the reasons given above, I do not find that it is a fit case for interference under Article 226 of the Constitution of India. Rejected.

Petition dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED ALLAHABAD 27.01.2006

BEFORE
THE HON'BLE R.C. DEEPAK, J.

Criminal Misc. Bail Application No. 21348 of 2004

Arun ...Applicant (IN JAIL).
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Jagdish Sengar
Sri V.P. Srivastava
Sri Ajit Kumar Singh Solanki

Counsel for the Opposite Party:
Sri Nasiruzzaman
Sri A.N. Mulla
A.G.A.

Code of Criminal Procedure S-439-Bail Application offence under section 376. 506, 120 B IPC victim a worker in an institution named "Rapid Road Auto Agency" Sanjai Palace Agra–who was to secure customer for Registration of their vehicles- applicant accused person taken her to a semi constructed home all the four accused committed rape from (2.30 P.M. to 4 P.M. duly supported by medical report–one of the accused was granted Bail for short term–due to his terror and physical violence the victim and her family shifted to Aligarh–which resulted suicide–hence the Bail application was already rejected. Bail application of others co-accused rejected with direction to surrender before the court below forthwith–failing of which–

direction issued for coercive measures to ensure their arrest.

Held: Para 8 & 9

The bail application of accused-applicant Arun son of Subhash Lawaniya in case crime no. 284 of 2004 under section 376, 506, 120B IPC and Section 3(2)5SC/ST Act pertaining to police station New Agra, District Agra is hereby rejected. He is directed to surrender before the court below forthwith and in case of failure to do so, the court below shall initiate coercive measure provided under law to ensure his arrest and his remand.

I have only discussed the facts and circumstances of the case available on record and any finding in this regard shall in no way influence the trial court in deciding the case on merit.

(Delivered by Hon'ble R.C. Deepak, J.)

1. Heard Sri J.S. Sengar, learned counsel for the accused- applicant, Sri Nasiruzzaman, learned counsel for the complainant, learned A.G.A. for the State and perused the record.

2. The facts of the case are such that expose the man's brutality or display of beastly power to satiate the lust against the person of a helpless woman. She was a worker in an institution named Rapid Road Auto Agency, Sanjay Palace, Agra. Her duty was to secure customers for registration of their vehicles. The accused-applicant called her on a false pretext for providing her 2-3 customers who want to get their vehicles registered. She initially declined to go out and asked the accused-applicant to come with customers to her office. The accused-applicant came on his motorcycle to her office along with Sakir – co-accused. She was called out and taken on the same vehicle for the so called customers, but as per their plan, the accused drove her to a semi-constructed house, that on reaching the said house she noticed the presence of Saket and Bunty. Soon thereafter, two of the four went upstairs to smoke. Those two present were also named by her in the F.I.R. From this, it becomes clear that all the persons were known to her person, but the belief was shattered when co-accused Sachin and Yogendra started to misbehave with her despite her protest. They fell her on a cot and she was ravished one by one by all the four persons. This trauma was faced by her, that after the commission of the dastardly crime upon her. The co-accused Sachin drove her back. She narrated her tale of woes to her officers of the department. She also asked them not to disclose these facts to her father, who is a heart patient. She thereafter returned to her house and rested. Thereafter, she again went to her office on the next date wherein she was present in the office till evening. In the evening, when she went to toilet she fell unconscious and after regaining her consciousness she made the impugned F.I.R. In the process of being ravished or otherwise she had suffered injuries on her skull as well. In such circumstances, if these facts or omissions or if there is incoherence in the F.I.R. it is the most natural effect of the trauma that she suffered on her person allegedly at the hands of the accused-applicant and the other co-accused probability cannot be ruled out that she might have been pushed off the vehicle to eliminate her evidence at any later stage. The injuries could have been suffered subsequently in the said process.

3. I do not find any valid reason to have any doubt in her statement made

under Section 164 Cr.P.C. so far as it relates to the role attributed to this accused-applicant, she has categorically named the accused-applicant one of the participant of this case of gang rape of her's. The question that the incident did not occure on 11.8.2004 at 12.30 p.m., it cannot be believed at this stage. The medical officer has made a categorical statement in this regard that the incident could have occurred at the alleged time and date. The relevant portion of the statement is as follows : "*Dinank 11.8.2004 12:30 baje se 4:00 baje rape hona sambhav hai. Skin thodi see kati thi jo jor jabardasti balatkaar karne per aana sambhav hai"*. The accused-applicant claims himself to be the student of B.Sc. On the ground of his appearance in the examination of the said class, he was released on short-term bail vide order dated 25.2.2005 and till today he is availing the liberty granted to him. While releasing the applicant on short-term bail, the following conditions were imposed upon him:

4. The applicant shall furnish an undertaking also before the C.J.M. concerned that he will not indulge in any criminal activities and will not cause either any threat or any physical violence to the injured/complainant and their family members and to the witnesses of the case. If any such report is made by any of the above person either to the court or the police, it shall be properly inquired into and if any substance therein is found, it shall be open for the court below to report to this Court so that the bail may be cancelled.

5. It is alleged that on being released on short-term bail, the applicant and co-accused Sachin extended threats and ill-treated the victim and on account of this the family of the victim shifted to Alighrh from Agra where to she was threatened and due to torture and mental agony she committed suicide on 22.7.2005. The first information report relating to this subsequent offence was lodged on 23.7.2005 at Aligarh against the accused-applicant and co-accused Sachin.

6. The prayer for bail of the co-accused Sachin has already been rejected by Hon'ble Justice Ravindra Sing vide order dated 29.9.2005 passed on criminal misc. bail application no. 864 of 2005.

7. Taking into account the entire facts and circumstances of the case emerging from the record, tat the conduct of the accused-applicant and his abuse of the privileges of interim bail granted to him, I arrive at irresistible conclusion that the accused-applicant miserably failed to make out a case for bail.

8. The bail application of accused-applicant Arun son of Subhash Lawaniya in case crime no. 284 of 2004 under section 376, 506, 120B IPC and Section 3(2)5SC/ST Act pertaining to police station New Agra, District Agra is hereby rejected. He is directed to surrender before the court below forthwith and in case of failure to do so, the court below shall initiate coercive measure provided under law to ensure his arrest and his remand.

9. I have only discussed the facts and circumstances of the case available on record and any finding in this regard shall in no way influence the trial court in deciding the case on merit.

10. Let a copy of this order be furnished to the learned A.G.A. free of cost for intimating the authority concerned. Application Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2005

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 48590 of 1999

Ashok Kumar Srivastava ...Petitioner
Versus
U.P. Public Services Tribunal and others ....Respondents

Counsel for the Petitioner:
Sri K.N. Mishra
Sri P.K. Srivastava

Counsel for the Respondents:
S.C.

Constitution of India Art. 311 (2)- Departmental enquiry and Criminal Proceeding-difference explained-even after acquittal in criminal proceeding-the punishment of dismissal in departmental proceeding can not be altered-standard proof of both proceedings-held-quite different-nor can be termed as double jeopardy.

Held: Para 12 and 21

The question of considering reinstatement after decision of acquittal or discharge by a competent criminal court arises only and only if the dismissal from services was based on conviction by the criminal court in view of the provisions of Article 311 (2) (b) of the Constitution or analogous provisions in the statutory rules applicable in a case. In a case where enquiry had been held independently of the criminal proceedings, acquittal in a criminal court is of no help. The law is otherwise. Even if a person stood acquitted by a criminal court, domestic enquiry can be held, the reason being that the standard of proof required in a domestic enquiry and that in a criminal case are altogether different.

Thus, there can be no doubt regarding the settled legal proposition that as the standard of proof in both the proceedings is quite different, and the termination is not based on mere conviction of an employee in a criminal case, the acquittal of the employee in criminal case cannot be the basis of taking away the effect of departmental proceedings. Nor such an action of the department can be termed as double jeopardy. The submission made in this regard is untenable in view of the law discussed herein above.

Case law discussed:
AIR 1982 SC-1249
AIR 1917 P.C.-3
AIR 1921 Cal. 584
AIR 1926 P.C.-136
1995 (6) SCC-45
1997 (4) SCC-662
AIR 2003 SC-2182
AIR 1955 SC-566
AIR 1971 SC-1244
AIR 1999 SC-1416
AIR 2004 SC-4144
AIR 1967 SC-223
AIR 2004 SC-4127
2004 (8) SCC-200

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

1. This writ petition has been filed for setting aside the judgment and order dated 30.7.1999, passed by the U.P. Public Services Tribunal, Lucknow, hereinafter called the "Tribunal", dismissing the claim petition of the petitioner against the order of removal from service dated 16.7.1997.

2. The facts and circumstances giving rise to this case are that, petitioner who had been working as Assistant Wasil Baqi Nawis (AWBN) in the office of the S.D.O., Khaga, District Fatehpur, was assigned the duty of preparing salary bills of Collection Amins and Class IV employees of the Tehsil and to get the said bills cleared from the Treasury for distribution amongst the employees of the Tehsil. During the audit of accounts, it came to the knowledge of the authorities that the petitioner had embezzled a huge amount to the tune of Rs.10,88,454/. An F.I.R. was lodged immediately against the petitioner at the Police Station Khaga on 4.11.1995 under Sections 467/468, 409 I.P.C. The disciplinary proceedings were also initiated and the petitioner was put under suspension. He approached this Court by filing Writ Petition No. 37983 of 1994 against his suspension but the same was dismissed vide order dated 28.11.1994, directing the opposite parties to conclude the enquiry within six months, and the petitioner was directed to cooperate with the enquiry proceedings. A charge-sheet was served upon him on 1.5.1996 and a supplementary charge sheet on 20.06.1996. The petitioner did not submit any reply to the said charge-sheets; rather moved a large number of applications, requiring copies of certain documents for the purpose of preparing his reply. The Enquiry Officer was appointed and he conducted the enquiry on the said charges. The petitioner did not participate in the enquiry and the enquiry report was submitted on 19.2.1997. The disciplinary authority issued a show cause notice dated 28.2.1997, but the petitioner did not file any response to the same. The disciplinary authority accepted the enquiry report and imposed the punishment of removal of the petitioner from service vide order dated 16.7.1997. Petitioner claims to have filed an appeal on 19.9.1997 against the said order of punishment, but the respondent authorities denied having ever received the copy of the said appeal. Being aggrieved, he preferred a claim petition which was contested by the respondents on the ground that the department had suffered a huge loss because of the embezzlement by the petitioner. The documents were made available to him and certain documents which were considered to be confidential were shown to the petitioner in the presence of the S.D.O., Khaga, and therefore, there was no merit in the petition and it was liable to be dismissed. After considering the rival submissions made by the parties, the learned Tribunal rejected the claim petition vide judgment and order dated 30.07.1999. Hence this petition.

3. Shri K.N. Mishra, learned counsel for the petitioner has submitted that the enquiry was not conducted in accordance with law. The copies of the documents relied upon by the Enquiry Officer were never made available to the petitioner. Thus, he had no opportunity to defend himself. The criminal court has acquitted the petitioner vide judgment and order dated 7.5.2000 in respect of the same charges. This Court must examine the statement of the petitioner who deposed before the criminal court, on the basis of which order of acquittal dated 7.5.2000 has been passed. In fact during the pendency of the criminal case, disciplinary proceedings should have been kept in abeyance. The decision of the authority concerned is most arbitrary.Judgment impugned is against the record available. Therefore, the petition deserves to be allowed.

4. On the contrary, learned Standing Counsel has submitted that the petitioner had embezzled a huge amount. The State exchequer has suffered a loss. All the copies of the relevant documents have been furnished to the petitioner and where it was not possible to furnish the copy of the documents, he had inspected the said record in the presence of the S.D.O. Acquittal by the criminal court does not vitiate the order of the disciplinary authority removing the petitioner from service. The findings recorded by the criminal court are not binding, for the purpose of disciplinary proceedings against a delinquent. The statements made by the witnesses in the criminal court cannot be read, as the findings recorded by the criminal courts, cannot bind the authority while passing the order which entails civil consequences. The scope of judicial review is limited to the extent that proceedings have been conducted in accordance with law as it lies against the decision making procedure and not against the decision itself. No fault has been found by the Tribunal in holding the enquiry. The Court cannot examine the judgment of the Tribunal or the order of the disciplinary authority as an appellate authority, rather it has to satisfy itself that the enquiry has been conducted in accordance with law. Thus, the petition is liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

6. The Tribunal after examining the case microscopically recorded the findings of fact as under:-

(i) The conduct of the petitioner throughout had been of non-cooperation with the enquiry. Right from the stage he was suspended, he did not attend the office where he was attached, despite specific orders passed by the competent authority in this behalf. Even the charge-sheet could be served upon him with great difficulty.

(ii) He was supplied some of the documents as admitted by him. He was also informed that the documents of which copies could not be served under rules, could be got inspected by him on his making application to that effect.

(iii) It is also clear from the enquiry report that the documents demanded by the petitioner were supplied to him along with the charge-sheet dated 23/27.5.1996.

(iv) The petitioner was given ample opportunity to submit reply to the charge-sheets, but he did not avail the same. Petitioner deliberately avoided participation in the enquiry.

(v) The enquiry had been conducted in accordance with law.

(vi) The order of punishment had been passed on the basis of the material on record.

7. There is nothing on record, on the basis of which it can be held that any finding recorded by the Tribunal is perverse being based on no evidence or is contrary to the evidence

8. Relying on the contents of the supplementary affidavit, Sri Misra contends that the Tribunal failed to advert to the submissions and evidence referred to in the said affidavit and urged that the findings recorded do not reflect appreciation of the averments on behalf of the petitioner in correct perspective.

9. There is nothing in the supplementary affidavit to show that such documents had been placed before the Tribunal as the petitioner has not mentioned anywhere in the said affidavit that the said documents had been part of the record of the Tribunal. In the absence of such pleadings we are unable to deal with such submissions. If the petitioner was so aggrieved, he could have filed a review petition on the ground that the submission made on his behalf had not been dealt with by the learned Tribunal. (Vide State of Maharashtra Vs. Ramdas Shrinivas Nayak & Anr., AIR 1982 SC 1249; Madhusudan Chowdhri & Ors. Vs. Mst. Chandrabati Chowdhrain & Ors., AIR 1917 PC 30; Sarat Chandra Maiti & Ors. Vs. Bibhabati Debi & Ors., AIR 1921 Cal 584; The King Emperor Vs. Barendra Kumar Ghose, AIR 1924 Cal 257 (F.B.); R.M.K.R.M. Somasundaran Chetty Vs. M.R.M.V.L. Subramanian Chetty, AIR 1926 PC 136; Union of India & ors. Vs. N.V. Phaneendran, 1995 (6) SCC 45; Kanwar Singh vs. State of Haryana & ors., (1997) 4 SCC 662; and Transmission Corporation of A.P. Ltd & Ors. Vs. P. Surya Bhagvan, AIR 2003 SC 2182).

10. It has further been urged on behalf of the petitioner by Shri Mishra that the petitioner stood acquitted on similar charges in a criminal case vide judgment and order dated 7.5.2000. Even if it is assumed that the contents of para 7 of the supplementary affidavit dated 16.11.2005 are correct and petitioner had been acquitted of the charges in criminal case, in our humble opinion, it does not have any bearing on the case.

11. It is settled legal proposition that findings of fact recorded by the criminal court are not binding on civil Courts or upon the authorities while passing orders entailing civil consequences. It is settled law that decisions of Civil Courts are binding on Criminal Courts but the converse is not true. (Vide Anil Behari Ghosh Vs. Smt. Latika Bala Dassi & Ors., AIR 1955 SC 566; and M/s. Karamchand Ganga Pershad & Anr. Vs. Union of India & Ors., AIR 1971 SC 1244; V.M. Shah Vs. State of Maharastra & Anr., AIR 1996 SC 339; and K.G. Premshankar Vs. Inspector of Police, (2002) 8 SCC 87).

Therefore, the submission made in this respect is not worth acceptance.

12. The question of considering reinstatement after decision of acquittal or discharge by a competent criminal court arises only and only if the dismissal from services was based on conviction by the criminal court in view of the provisions of Article 311 (2) (b) of the Constitution or analogous provisions in the statutory rules applicable in a case. In a case where enquiry had been held independently of the criminal proceedings, acquittal in a criminal court is of no help. The law is otherwise. Even if a person stood acquitted by a criminal court, domestic enquiry can be held, the reason being that the standard of proof required in a domestic enquiry and that in a criminal case are altogether different. In a criminal case, standard of proof is beyond reasonable doubt while in a domestic enquiry it is probability of preponderances. In Nelson Motis Vs. Union of India & Anr., AIR 1992 SC 1981, the Hon'ble Supreme Court held as under:-

"The nature and scope of a criminal case are very different from those of a

departmental disciplinary proceeding and an order of acquittal, therefore, cannot conclude the departmental proceeding."

13. In State of Karnataka & Anr. Vs T. Venkataramanappa, (1996) 6 SCC 455, the Apex Court held that acquittal in a criminal case cannot be held to be a bar to hold departmental enquiry for the same misconduct for the reason that in a criminal trial, standard of proof is different as the case is to be proved beyond reasonable doubt but in the departmental proceeding, such a strict proof of misconduct is not required. In the said case, the departmental proceedings had been quashed by the Tribunal as the delinquent had been acquitted by the criminal court of the same charges. The Apex Court reversed the judgment of the court below observing as under:-

"It was, thus, beyond the ken of the Tribunal to have scuttled the departmental proceedings against the respondent on the footing that such question of bigamy should normally not be taken up for decision in departmental inquiries, as the decision of competent courts tending to be decision in rem would stand at the highest pedestal. There was clear fallacy in such view because for purposes of Rule 28, such strict standards, as would warrant a conviction for bigamy under Section 494 IPC, may not, to begin with, be necessary. We, therefore, explain away the orders of the Tribunal to the fore extent that Rule 28 can be invoked.... Let the inquiry be held."

14. Similarly, in Senior Superintendent of Post Offices Vs. A. Gopalan, (1997) 11 SCC 239, the Supreme Court held that "in a criminal case the charge has to be proved by standard of proof beyond reasonable doubt while in departmental proceeding, the standard of proof for proving the charge is preponderance of probabilities." The Tribunal was, therefore, in error in holding that "in view of the acquittal of the respondent by the criminal court on the charges.... the finding on the .....charge in the departmental proceedings cannot be up-held and must be set-aside

In State of Andhra Pradesh Vs. K. Allabaksh, (2000) 10 SCC 177, while dismissing the appeal against acquittal by the High Court, the Apex Court observed as under:-

"That acquittal of the respondent shall not be construed as a clear exoneration of the respondent, for the allegations call for departmental proceedings, if not already initiated, against him."

15. While dealing with a similar issue, a three-Judges Bench of the Hon'ble Supreme Court in Ajit Kumar Nag Vs. General Manager (PJ) Indian Oil Corporation Ltd., (2005) 7 SCC 764, held as under:-

"In our judgment, the law is fairly well settled. Acquittal by a criminal court would not debar an employer from exercising power in accordance with the Rules and Regulations in force. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in

accordance with the service rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused "beyond reasonable doubt", he cannot be convicted by a court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of "preponderance of probability."

16.The issue as to whether disciplinary proceedings can be held at the time when the delinquent employee is facing the criminal trial, has also been considered from time to time. In State of Rajasthan Vs. B.K. Meena & Ors., AIR 1997 SC 13, the Hon'ble Supreme Court while dealing with the issue observed as under:-

"It would be evident from the above decisions that each of them starts with the indisputable proposition that there is no legal bar for both proceedings to go on simultaneously and then say that in certain situations, it may not be 'desirable', 'advisable' or 'appropriate' to proceed with the disciplinary enquiry when a criminal case is pending on identical charges.....The only ground suggested in the above decisions as constituting a valid ground for staying the disciplinary proceedings is that 'the defence of the employee in the criminal case may not be prejudiced'. This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only the charges must be grave but that the case must involve complicated questions of law and fact. Moreover, 'advisability', 'desirability' or 'propriety', as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case.....One of the contending considerations is that the disciplinary enquiry cannot be - and should not be - delayed unduly. So far as criminal cases are concerned, it is well known that they drag on endlessly where high officials or persons holding high public offices are involved. They get bogged down on one or the other ground. They hardly ever reach a prompt conclusion.....If a criminal case is unduly delayed that may itself be a good ground for going ahead with the disciplinary enquiry even where the disciplinary proceedings are held over at an earlier stage. The interests of administration and good government demand that these proceedings are concluded expeditiously. It must be remembered that interests of administration demand that undesirable elements are thrown out and any charge of misdemeanour is enquired into promptly. **The disciplinary proceedings are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements**. The interest of delinquent officer also lies in a prompt conclusion of the disciplinary proceedings. If he is not

guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law. It is not also in the interest of administration that persons accused of serious misdemeanour should be continued in office indefinitely, i.e., for long periods awaiting the result of criminal proceedings. It is not in the interest of administration. It only serves the interest of the guilty and dishonest....."

17. In Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd., AIR 1999 SC 1416, the Hon'ble Supreme Court held that there can be no bar for continuing both the proceedings simultaneously. The Court placed reliance upon large number of its earlier judgments, including Delhi Cloth and General Mills Ltd. Vs. Kushal Bhan, AIR 1960 SC 806; Tata Oil Mills Co. Ltd. Vs. The Workmen, AIR 1965 SC 155; Jang Bahadur Singh Vs. Baij Nath Tiwari, AIR 1969 SC 30; Kusheshwar Dubey Vs. M/s. Bharat Coking Coal Ltd. & Ors., AIR 1988 SC 2118; Nelson Motis (Supra); and B.K. Meena (Supra), and held that proceedings in a criminal case and departmental proceedings can go on simultaneously except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common. In departmental proceedings, factors prevailing in the mind of the disciplinary authority may be many, such as enforcement of discipline or to investigate level of integrity of delinquent or other staff. The standard of proof required in those proceedings is also different from that required in a criminal case. While in departmental proceedings, the standard of proof is one of preponderance of probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt. Where the charge against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it is desirable to stay the departmental proceedings till conclusion of the criminal case. Where the nature of charge in a criminal case is grave and wherein complicated questions of fact and law are involved, will depend upon the nature of the defence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet. In case the criminal case does not proceed expeditiously, the departmental proceedings cannot be kept in abeyance for ever and may be resumed and proceeded with so as to conclude the same at the early date. The purpose is that if the employee is found not guilty his cause may be vindictive, and in case he is found guilty, administration may get rid of him at the earliest.

18. In State Bank of India & Ors. Vs. R.B. Sharma, AIR 2004 SC 4144, same view has been reiterated observing that both proceedings can be held simultaneously, except where departmental proceedings in criminal case are based on same set of facts and evidence in both the proceedings is common. The Court observed as under:-

"The purpose of departmental inquiry and of prosecution are to put a distinct aspect. Criminal prosecution is launched for an offence for violation of duty. The offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of a

public duty. The departmental inquiry is to maintain discipline in the service and efficiency of public service."

19. While deciding the said case a very heavy reliance has been placed upon the earlier judgment of the Supreme Court in Depot Manager, Andhra Pradesh State Road Transport Corporation Vs. Mohd Yousuf Miya & Ors., AIR 1997 SC 2232, wherein it has been held that both proceedings can be held simultaneously unless the gravity of the charges demand staying the disciplinary proceedings till the trial is concluded as the complicated questions of fact and law are involved in that case.

20. A similar view has been reiterated by the Apex Court in Kendriya Vidyalaya Sangathan & Ors. Vs. T. Srinivas, AIR 2004 SC 4127. A Three-Judge Bench of the Hon'ble Supreme Court in Krishnakali Tea Estate Vs. Akhil Bhartiya Chah Mazdoor Sangh & Anr., (2004) 8 SCC 200 reconsidered all earlier judgments and reiterated the same view, as the approach and the objective of the criminal proceedings, and the disciplinary proceedings are distinct and different. There can be no bar in carrying on the criminal trial and criminal proceedings simultaneously.

21. Thus, there can be no doubt regarding the settled legal proposition that as the standard of proof in both the proceedings is quite different, and the termination is not based on mere conviction of an employee in a criminal case, the acquittal of the employee in criminal case cannot be the basis of taking away the effect of departmental proceedings. Nor such an action of the department can be termed as double jeopardy. The submission made in this regard is untenable in view of the law discussed herein above.

22. In the instant case, the disciplinary proceedings stood concluded much earlier as the punishment orders had been passed on 16.7.1997 and order of his acquittal in criminal case dated 5.7.2000. The Tribunal decided the claim petition on 30.07.1999 and as the Tribunal also did not have any occasion to assess the impact of the judgment of the criminal Court which came much later on 05.07.2000. In this view of the matter, the impugned order cannot be either faulted or interfered with. The State has suffered a huge financial loss which has been embezzled by the petitioner, and the charge stood proved against the petitioner in disciplinary proceedings. In a limited scope of judicial review, we do not see any cogent reason to interfere with the judgment and order dated 30.7.1999, passed by the U.P. Public Services Tribunal, Lucknow.

23. The petition is devoid of merits and is accordingly dismissed. No costs.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2006

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

Civil Misc. Writ Petition No. 41759 of 1992

Baldeo Krishna, ...Petitioner
Versus
Rent Control and Eviction Officer, Saharanpur ...Respondents

Counsel for the Petitioner:
Sri R.B. D. Mishra

Counsel for the Respondent:
Sri H.S. Nigam
C.S.C.

U.P. Urban Building (Rent Control eviction) Act 1972, Act no. 13 of 1972– Section 12 Deemed vacancy–petitioner practicing lawyer in taxation side-earning good income accommodation in question-commercial in nature for Rs.5/- per month rent-said rent also not paid on ground of quarrel between landlord for ownership-eviction order passed on the ground the shop is not being used–held– order declaring vacancy can not sustain even if not used, even if tenant constructed his own shop direction issued for enhancement of rent from Rs.5/- to @ Rs.750/- per month.

Held: Para 4 and 6

Rent Control and Eviction Officer by the impugned order declared the vacancy on the ground that shop in dispute was not being used by the petitioner. In my opinion, the order is illegal. Even if a commercial accommodation is not being used. It does not give rise to vacancy under any of the provisions of Section 12 of U.P. Act No. 13 of 1972. Rent Control and eviction Officer also found that petitioner had constructed some shops which were adjacent to the shop in dispute. This also could not give rise to vacancy in the case of commercial accommodation. Acquisition of another accommodation is a ground of vacancy only in the case of residential building.

I have held in *Khursheeda vs. A.D.J.* 2004 (2) A.R.C.64 that while granting relief against eviction to the tenant in respect of building covered by Rent Control Act, writ court is empowered to enhance the rent to a reasonable extent. Rent of Rs. 5/- per month for a shop in Saharanpur is virtually as well as actually no rent. By paying such a highly inadequate rent for several decades petitioner must have saved a lot of money. Money saved is money earned. Accordingly it is directed that with effect from February,2006 onwards petitioner shall pay rent to the landlord @ 750/- per month. If there is any dispute of landlord ship then rent at the above rate may be deposited by the tenant under section 30(2) of U.P. Act No. 13 of 1972.

Case law discussed:
2004(2) ARC 64

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

1. List revised. No one appears for the respondents. Heard learned counsel for the petitioner.

2. This case illustrates utter abuse of the Ret Control Act by the tenant. It is most unfortunate that tenant-petitioner happens to be a lawyer. Lawyers are expected to show more regard towards law than ordinary people.

3. Accommodation in dispute is commercial in nature. Petitioner is a lawyer, practicing on the taxation side, hence he must be earning good income, Rent is Rs. 5/- per month. The said rent is also not being paid by the petitioner on the ground that some persons are quarrelling for landlord ship. This is excellent situation for the tenant-petitioner. the last nail in the coffin is the fact that in this writ petition landlord has not been impleaded as party. Petitioner who is tenant and respondent no. 2 Dhan Prakash, applicant for allotment are fighting for the tenanted shop and landlord is watching the drama from the gallery.

4. This writ petition is directed against the order dated 22.10.1992 passed by Rent Control and Eviction Officer/District Supply Officer, Saharanpur in case no. 53 of 1990. Rent

Control and Eviction Officer by the impugned order declared the vacancy on the ground that shop in dispute was not being used by the petitioner. In my opinion, the order is illegal. Even if a commercial accommodation is not being used. It does not give rise to vacancy under any of the provisions of Section 12 of U.P. Act No. 13 of 1972. Rent Control and eviction Officer also found that petitioner had constructed some shops which were adjacent to the shop in dispute. This also could not give rise to vacancy in the case of commercial accommodation. Acquisition of another accommodation is a ground of vacancy only in the case of residential building.

5. Accordingly, writ petition is allowed. Impugned judgment and order declaring vacancy is set aside.

6. I have held in ***Khursheeda vs. A.D.J.*** 2004 (2) A.R.C.64 that while granting relief against eviction to the tenant in respect of building covered by Rent Control Act, writ court is empowered to enhance the rent to a reasonable extent. Rent of Rs. 5/- per month for a shop in Saharanpur is virtually as well as actually no rent. By paying such a highly inadequate rent for several decades petitioner must have saved a lot of money. Money saved is money earned. Accordingly it is directed that with effect from February,2006 onwards petitioner shall pay rent to the landlord @ 750/- per month. If there is any dispute of landlord ship then rent at the above rate may be deposited by the tenant under section 30(2) of U.P. Act No. 13 of 1972.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2006

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

Civil Misc. Writ Petition No. 29283 of 1994

B.S. Negi ...Petitioner
Versus
General Manager, Syndicate Bank and others ...Respondents

Counsel for the Petitioner:
Sri P.K. Jain
Sri Hari Om Khare

Counsel for the Respondents:
Sri P.K. Singhal
S.C.

Constitution of India, Art.-226-appointment based on false declaration-belonging to a caste of 'Naik'-as S.T. Community-petitioner given certificate issued by Tehsildar Garh Mukteshwar-Regional office of Bank on the basis of information from-SC/ST commission-show cause notice issued-after reply the disciplinary authority held guilty of false declaration caste held-appointment based on false caste certificate-such employee deserves no sympathy-punishment of dismissal-held proper.

Held: Para 10 & 11

From the aforesaid decisions of the Supreme Court it is clear that where it is found that the petitioner does not belong to the caste indicated by him while seeking appointment then the very basis of his appointment is taken away and such appointment is no appointment in the eye of law and such a person also does not deserve any sympathy and indulgence of the Courts.

In view of the proposition of law laid down by the Supreme Court in the aforesaid decisions, we are of the opinion that the very foundation of the appointment of the petitioner was void and non-est and, therefore, the Disciplinary Authority was justified in imposing the punishment.

Case law discussed:

1994 (6) SCC-241
2004 (2) SCC-105
2005 (7) SCC-690
2005 (8) SCC-283

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

1. This writ petition has been filed for quashing the order dated 12th March, 1994 passed by the Deputy General Manager of the Syndicate Bank by which the petitioner was dismissed from the services of the Bank with immediate effect and the order dated 14th June, 1994 passed by the Appellate Authority dismissing the appeal filed by the petitioner against the aforesaid order.

2. The petitioner was served with a charge-sheet dated 14th January, 1988 containing the charge that he had joined the services of the Bank on 29th January, 1980 as a Clerk by declaring that he belonged to the Scheduled Tribe Community which fact was not true and, therefore, by wrongly deriving the benefit meant for candidates belonging to Scheduled Tribe he had committed act of gross misconduct. An enquiry was held and the Enquiring Authority submitted a detailed report dated 2nd December, 1993. It mentions that the petitioner had submitted an application on 26th October, 1979 for seeking appointment stating that he belonged to Scheduled Tribe Category and after getting through the examination he submitted the application dated 14th February, 1980 enclosing certain documents including the certificate dated 20th January, 1977 purported to have been issued by Sri Pratap Singh Negi M.P. Lok Sabha certifying that the petitioner belongs to Naik Caste which comes under Scheduled Tribe. The petitioner was asked to submit a certificate from the Competent Authority, as M.P. was not the competent authority to issue the certificate. The petitioner then submitted a certificate purported to have been issued by the Tehsildar Garh Mukteshwar stating that the petitioner belongs to village Haripur, Tehsil Kotdwara, district Pauri Garhwal and belongs to Naik caste which has been recognised as Scheduled Tribe. The Regional Office, however, informed the Bank on the basis of information received from the Commission for SCs/STs, Government of India, New Delhi that Naik Community is neither Scheduled Caste nor Scheduled Tribe in Uttar Pradesh. The petitioner was, therefore, asked to submit a certificate of the competent authority where he or his family normally resided. The petitioner this time submitted a certificate dated 31st December, 1984 issued by the Tehsildar Meerut that the petitioner belongs to Boksha Naik which is a Scheduled Tribe. The report of the Enquiry Officer further mentions that on making enquiries by the authority it was revealed that the petitioner does not belong to Boksha Naik but belongs to Sawarna Hindu Rajpoot Jati which is not a Backward Caste. This fact was also confirmed by the certificate issued by the District Magistrate Garhwal to which place the petitioner belongs. It has also been stated that the earlier certificate issued by the Tehsildar Meerut was, accordingly, annulled. In these circumstances the Enquiry Officer has concluded that the petitioner has wrongly

derived benefit which was made available to SC/ST Category by producing false certificates. The Enquiry Officer has also noted that initially the evidence was recorded ex-parte as the petitioner did not appear but subsequently the petitioner made an application before the Disciplinary Authority to advice the Enquiry Officer to permit him to depose with the stipulation that he will not seek permission for cross examination of the Management witnesses. On such an application having been filed, the petitioner was given an opportunity to place his case.

3. The Disciplinary Authority thereafter issued notice to the petitioner to submit his comments on the report of the Enquiry Officer as to why the proposed punishment should not be imposed upon him. The petitioner submitted a reply and the Disciplinary Authority after a careful analysis of the materials available on record concluded that the petitioner was guilty of the misconduct and imposed the punishment upon the petitioner. The petitioner filed an appeal against the said order. The Appellate Authority after noticing the factual position concluded that the documents produced during the enquiry amply prove that the petitioner did not belong to Scheduled Tribe as wrongly declared by him for the purposes of seeking appointment in the Bank and thus the very appointment of the petitioner was on the basis of misrepresentation of facts.

4. We have heard learned counsel for the petitioner and Sri P.K. Singhal learned counsel appearing for the respondent Bank and have perused the materials available on record.

Learned counsel for the petitioner submitted that the certificate issued by the Member of Parliament was valid and it was on the basis of this certificate that appointment had been given to him. He contended that in such a situation it was not open to the respondent Bank to impose the punishment subsequently on the basis that he did not belong to the Scheduled Tribe Category. He also submitted that the District Magistrate, Meerut had wrongly cancelled the earlier certificate declaring him to be a Scheduled Tribe Category and that the enquiry stood vitiated as he had not been given opportunity to cross-examine the witnesses produced on behalf of the Bank. Learned counsel for the Bank, however, submitted that as the petitioner had wrongly obtained appointment on the basis that he belonged to ST Category, the Bank was justified in imposing the punishment; that the District Magistrate, Meerut committed no illegality in cancelling the earlier certificate on the basis of enquiry and that as the petitioner himself had specifically in his application before the Disciplinary Authority stated that he would not cross-examine the witnesses of the Bank it was not open to him to now raise any grievance about the same.

5. We find from the records that the Enquiry Officer had given ample opportunity to the petitioner to substantiate his claim that he belonged to Scheduled Tribe Category. The certificates submitted by the petitioner were not found to be valid after enquiry by the Authorities which had issued the certificates. The District Magistrate, Garhwal to which place the petitioner belonged, on the other hand, had issued the certificate that the petitioner belonged

to Sawarna Hindu Rajpoot Jati which is not a Scheduled Tribe or Backward Caste. In such circumstances, in the face of the findings which has been recorded on the basis of the material available on the record, particularly when the learned counsel for the petitioner has not been able to substantiate any infirmity in the findings, we see no good reason to interfere with the punishment order imposed by the Disciplinary Authority or the appellate order rejecting the appeal filed by the petitioner.

6. The Tehsildar, Meerut, in our opinion, was not the Competent Authority to issue the certificate as the petitioner belonged to Garhwal area and not Meerut. In such circumstances, there is no infirmity in the order of the District Magistrate, Meerut cancelling the certificate issued by the Tehsildar, Meerut. The Hon'ble Supreme Court has time and again considered the validity of appointments secured by filing forged caste certificates.

In ***Kumari Madhuri Patil Vs. Addl. Commr., Tribal Development (1994) 6 SCC 241***, the Hon'ble Supreme Court pointed out the object for granting certain benefits to persons belonging to Scheduled Castes and Scheduled Tribes and the approach to be adopted in matters where benefits are fraudulently obtained was highlighted. In paragraph 13 of the judgment it was, inter alia, noted as follows:-

"13. The admission wrongly gained or appointment wrongly obtained on the basis of false social status certificate necessarily has the effect of depriving the genuine Scheduled Castes or Scheduled Tribes or OBC candidates as enjoined in the Constitution of the benefits conferred on them by the Constitution. The genuine candidates are also denied admission to educational institutions or appointments to office or posts under a State for want of social status certificate. The ineligible or spurious persons who falsely gained entry resort to dilatory tactics and create hurdles in completion of the inquiries by the Scrutiny Committee. It is true that the applications for admission to educational institutions are generally made by a parent, since on that date many a time the student may be a minor. It is the parent or the guardian who may play fraud claiming false status certificate. It is, therefore, necessary that the certificates issued are scrutinised at the earliest and with utmost expedition and promptitude. For that purpose, it is necessary to streamline the procedure for the issuance of social status certificates, their scrutiny and their approval, which may be the following:

1. The application for grant of social status certificate shall be made to the Revenue Sub-Divisional Officer and Deputy Collector or Deputy Commissioner and the certificate shall be issued by such officer rather than at the Officer, Taluk or Mandal level.

2. The parent, guardian or the candidate, as the case may be, shall file an affidavit duly sworn and attested by a competent gazetted officer or non-gazetted officer with particulars of castes and sub-castes, tribe, tribal community, parts or groups of tribes or tribal communities, the place from which he originally hails from and other particulars as may be prescribed by the Directorate concerned.

3. Application for verification of the caste certificate by the Scrutiny Committee shall be filed at least six

months in advance before seeking admission into educational institution or an appointment to a post.

4. All the State Governments shall constitute a Committee of three officers, namely, (I) an Additional or Joint Secretary or any officer higher in rank of the Director of the department concerned, (II) the Director, Social Welfare/Tribal Welfare/Backward Class Welfare, as the case may be, and (III) in the case of Scheduled Castes another officer who has intimate knowledge in the verification and issuance of the social status certificates. In the case of the Scheduled Tribes, the Research Officer who has intimate knowledge in identifying the tribes, tribal communities, parts of or groups of tribes or tribal communities.

5. Each Directorate should constitute a vigilance cell consisting of Senior Deputy Superintendent of Police in over-all charge and such number of Police Inspectors to investigate into the social status claims. The Inspector would go to the local place of residence and original place from which the candidate hails and usually resides or in case of migration to the town or city, the place from which he originally hailed from. The vigilance officer should personally verify and collect all the facts of the social status claimed by the candidate or the parent or guardian, as the case may be. He should also examine the school records, birth registration, if any. He should also examine the parent, guardian or the candidate in relation to their caste etc. or such other persons who have knowledge of the social status of the candidate and then submit a report to the Directorate together with all particulars as envisaged in the pro forma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the castes or tribes or tribal communities concerned etc.

6. The Director concerned, on receipt of the report from the vigilance officer if he found the claim for social status to be "not genuine' or "doubtful' or spurious or falsely or wrongly claimed, the Director concerned should issue show-cause notice supplying a copy of the report of the vigilance officer to the candidate by registered post with acknowledgment due or through the head of the educational institution concerned in which the candidate is studying or employed. The notice should indicate that the representation or reply, if any, would be made within two weeks from the date of the receipt of the notice and in no case on request not more than 30 days from the date of the receipt of the notice. In case, the candidate seeks for an opportunity of hearing and claims an inquiry to be made in that behalf, the Director on receipt of such representation/reply shall convene the committee and the Joint/Additional Secretary as Chairperson who shall give reasonable opportunity to the candidate/parent/guardian to adduce all evidence in support of their claim. A public notice by beat of drum or any other convenient mode may be published in the village or locality and if any person or association opposes such a claim, an opportunity to adduce evidence may be given to him/it. After giving such opportunity either in person or through counsel, the Committee may make such inquiry as it deems expedient and consider the claims vis-Ã-vis the objections raised by the candidate or opponent and pass an appropriate order with brief reasons in support thereof.

7. In case the report is in favour of the candidate and found to be genuine and true, no further action need be taken except where the report or the particulars given are procured or found to be false or fraudulently obtained and in the latter event the same procedure as is envisaged in para 6 be followed.

8. Notice contemplated in para 6 should be issued to the parents/guardian also in case candidate is minor to appear before the Committee with all evidence in his or their support of the claim for the social status certificates.

9. The inquiry should be completed as expeditiously as possible preferably by day-to-day proceedings within such period not exceeding two months. If after inquiry, the Caste Scrutiny Committee finds the claim to be false or spurious, they should pass an order cancelling the certificate issued and confiscate the same. It should communicate within one month from the date of the conclusion of the proceedings the result of enquiry to the parent/guardian and the applicant.

10. In case of any delay in finalizing the proceedings, and in the meanwhile the last date for admission into an educational institution or appointment to an officer post, is getting expired, the candidate be admitted by the Principal or such other authority competent in that behalf or appointed on the basis of the social status certificate already issued or an affidavit duly sworn by the parent/guardian candidate before the competent officer or non-official and such admission or appointment should be only provisional, subject to the result of the inquiry by the Scrutiny Committee.

11. The order passed by the Committee shall be final and conclusive only subject to the proceedings under Article 226 of the Constitution.

12. No suit or other proceedings before any other authority should lie.

13. The High Court would dispose of these cases as expeditiously as possible within a period of three months. In case, as per its procedure, the writ petition/miscellaneous petition/matter is disposed of by a Single Judge, then no further appeal would lie against that order to the Division Bench but subject to special leave under Article 136.

14. In case, the certificate obtained or social status claimed is found to be false, the parent/guardian/the candidate should be prosecuted for making false claim. If the prosecution ends in a conviction and sentence of the accused, it could be regarded as an offence involving moral turpitude, disqualification for elective posts or offices under the State or the Union or elections to any local body, legislature or Parliament.

15. As soon as the finding is recorded by the Scrutiny Committee holding that the certificate obtained was false, on its cancellation and confiscation simultaneously, it should be communicated to the educational institution concerned or the appointing authority by registered post with acknowledgment due with a request to cancel the admission or the appointment. The Principal etc. of the educational institution responsible for making the admission or the appointing authority, should cancel the admission/appointment without any further notice to the candidate and debar the candidate from further study or continue in office in a post."

7. In the case of ***R. Vishwanatha Pillai Vs. State of Kerala & Ors,. (2004) 2 SCC 105***, the Hon'ble Supreme Court observed as follows:-

"This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. ***When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eye of law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by playing a fraud and producing a false caste certificate."***

.....

The rights to salary, pension and other service benefits are entirely statutory in nature in public service. The appellant obtained the appointment against a post meant for a reserved candidate by producing a false caste certificate and by playing a fraud. His appointment to the post was void and non est in the eye of the law. The right to salary or pension after retirement flows from a valid and legal appointment. The consequential right of pension and monetary benefits can be given only if the appointment was valid and legal. Such benefits cannot be given in a case where the appointment was found to have been obtained fraudulently and rested on a false caste certificate. ***A person who entered the service by producing a false caste certificate and obtained appointment for the post meant for a Scheduled Caste, thus depriving a genuine Scheduled Caste candidate of appointment to that post, does not deserve any sympathy or indulgence of this Court****. A person who seeks equity must come with clean hands. He, who comes to the court with false claims, cannot plead equity nor would the court be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. Equity jurisdiction cannot be exercised in the case of a person who got the appointment on the basis of a false caste certificate by playing a fraud. No sympathy and equitable consideration can come to his rescue.* ***We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquired a status by practicing fraud."*** *(Emphasis supplied)*

8. In ***Bank of India & Anr. Vs. Avinash D. Mandivikar & Ors,. (2005) 7 SCC 690*** the Hon'ble Supreme Court again considered the consequences of filing a false certificate for seeking appointment and in this connection it was observed as follows:-

"Respondent 1 employee obtained appointment in the service on the basis that he belonged to a Scheduled Tribe. ***When the clear finding of the Scrutiny Committee is that he did not belong to the Scheduled Tribe, the very foundation of his appointment collapses and his appointment is no appointment in the eye of law.*** *There is absolutely no justification for his claim in respect of the post he usurped, as the same was meant for a reserved candidate.*

.....

The matter can be looked into from another angle. When fraud is perpetrated the parameters of consideration will be different. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. This Court in Bhaurao Dagdu Paralkar v. State of Maharashtra (2005) 7 SCC 605 dealt with the effect of fraud. It was held as follows in the said judgment:-

"12[14]. ... "Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false.'

* * *

13[15]. This aspect of the matter has been considered by this Court in Roshan Deen v. Preeti Lal (2002) 1 SCC 100, Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education (2003) 8 SCC 311, Ram Chandra Singh case (2003) 8 SCC 319 and Ashok Leyland Ltd. v. State of T.N. (2004) 3 SCC 1.

14[16]. Suppression of a material document would also amount to a fraud on the court. (See Gowrishankar v. Joshi Amba Shankar Family Trust (1996) 3 SCC 310 and S.P. Chengalvaraya Naidu v. Jagannath (1994) 1 SCC 1).

15[17]. "Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in Ram Preeti Yadav case.

16[18]. In Lazarus Estates Ltd. v. Beasley (1956) 1 QB 702 Lord Denning observed at QB pp. 712 and 713: (All ER p.345-C)

"No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.'

In the same judgment Lord Parker, L.J. observed that fraud vitiates all transactions known to the law of however high a degree of solemnity. (p. 722)

[19]. These aspects were recently highlighted in State of A.P. v. T. Suryachandra Rao (2005) 6 SCC 149." (Emphasis supplied)

9. The same view was reiterated by the Hon'ble Supreme Court in the case of ***Lillykutty Vs. Scrutiny Committee, SC & ST & Ors. (2005) 8 SCC 283*** and it was observed :-

"When, thus, a person who is not a member of a Scheduled Caste or a Scheduled Tribe obtains a false certificate with a view to gain undue advantage to which he or she was not otherwise entitled to, would amount to commission of fraud. Fraudulent acts are not encouraged by the courts.

.....Any action by the authorities or by the people claiming a right privilege under the Constitution which subverts the constitutional purpose must be treated as a fraud on the Constitution. The Constitution does not postulate conferment of any special benefit on those who do not belong to the category of people for whom the provision was made."

10. From the aforesaid decisions of the Supreme Court it is clear that where it is found that the petitioner does not belong to the caste indicated by him while seeking appointment then the very basis of his appointment is taken away and such appointment is no appointment in the eye of law and such a person also does not deserve any sympathy and indulgence of the Courts.

11. In view of the proposition of law laid down by the Supreme Court in the aforesaid decisions, we are of the opinion that the very foundation of the appointment of the petitioner was void and non-est and, therefore, the Disciplinary Authority was justified in imposing the punishment.

12. Learned counsel for the petitioner then submitted that the petitioner was not given any opportunity to cross examine the witnesses produced on behalf of the Bank. We are not inclined to accept this contention. In the first instance, as the petitioner earlier remained absent during the enquiry it was held ex-parte. The petitioner, however, submitted a representation before the Disciplinary Authority with the clear stipulation that he would not cross-examine the witnesses already examined by the Bank. The petitioner, therefore, waived his right to cross-examine the witnesses. We further find that the Enquiry Officer has also recorded a categorical finding that even after the matter was reopened at the instance of the Disciplinary Authority, the petitioner did not express any desire to cross examine the Management witnesses. In such circumstances the contention of the learned counsel for the petitioner cannot be accepted.

13. For all the reasons stated above, there is no merit in this petition. It is, accordingly, dismissed.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2006

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

Civil Misc. Writ Petition No. 2605 of 2006

Bhupendra Kumar Kushwaha ..Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Pandey

Counsel for the Respondents:
Sri P.D. Tripathi
S.C.

Constitution of India, Act 226-Compassionate Appointment–son of the predeceased son–dependent of grand father entitled for compassionate appointment–despite of repeated directions–officer not cared even to have a glance of judgment–practice adapted by the officer concern held–reprehensible and deprecated–direction issued to implement the judgment within 3 weeks.

Held: Para 8 & 9

The law, therefore, was settled by this court that the son of a predeceased son, who was dependent on his grand father was entitled to be considered for compassionate appointment in the event the grand father died in harness. There is absolutely no ambiguity in the law laid down by this court in the division Bench judgment referred to herein above, which is binding on me and was more binding on the officer concerned, who has passed this order.

The impunity with which the impugned order was passed clearly indicates that the officer concerned did not even care to have a glance of the judgment of the

Division Bench, which reference has been made in the direction of this court contained in the order dated 9.8.2005. The aforesaid procedure adopted by the respondent no. 2 is reprehensible and is deprecated.

Case law discussed:
1999 ACJ (I) 545
1999 ACJ (2) 1429 relied on

(Delivered Hon'ble A.P. Sahi, J.)

1. Heard learned counsel for the petitioner and learned standing counsel and Sri P.D. Tripathi for the respondents no. 1,2 and 3.

2. The goal of providing cheap and expeditious justice to the citizens of the State by this court is being thwarted, which is evident from the facts of this case. The respondent no. 2 was commanded by this court vide judgment dated 25.4.2005 to consider the claim of the petitioner for appointment on compassionate basis after the death of his grand father in view of the ratio of the decision of this court in Rajendra Kumar Vs. State of U.P. reported in 1999 A.C.J. (1) 545. The matter was examined by the respondent no. 2 and the claim of the petitioner was rejected on 20.7.2005.

3. The ground for rejection is that a grand son is not entitled for compassionate appointment, in view of the definition contained in relevant provisions for extending such benefits. The authority concerned has referred to the same in the order dated 20.7.2005.

4. The petitioner was compelled to challenge the said order once again by filing writ petition No. 54764 of 2005 and this court after examining the facts found that the authority had passed the order dated 20.7.2005 in breach of the directions issued by this court. The order dated 20.7.2005 was accordingly quashed and the respondent no. 2 was again directed to decide the claim of the petitioner keeping in view the ratio of the decision of Rajendra Kumar (supra)

5. The impugned order once again repeats the same mistake and the same opinion has been expressed by the authority stating therein that the petitioner being the grand son of the deceased employee was not entitled for compassionate appointment.

6. It is unfortunate that the officer of the rank of the Director has chosen conveniently to avoid the orders of this court on two occasions.

7. Before dealing with the same, it would be appropriate to deal with the law on the issue as has been with in the judgment, under which the respondent no.2 was commanded to provide compassionate appointment to the petitioner. In the case of Rajendra Kumar, a learned Single Judge of this court held that the son of a predeceased son was entitled to be considered for compassionate appointment keeping in view the fact that he was entirely dependent on his grand father and the claim was founded on destitution and in the circumstances that the sole bread winner of the family has expired in harness. The definite clause contained in clause 2 (c) of the Rules was interpreted as being inclusive of grand son. The said judgment of the learned Single Judge was challenged by the State in special Appeal No. 557 of 1999 and the Special appellate Bench upheld the decision of the learned Single Judge after dealing with the issues

elaborately, which decision is reported in 1999 A.C.J. (2) 1429.

8. The law, therefore, was settled by this court that the son of a predeceased son, who was dependent on his grand father was entitled to be considered for compassionate appointment in the event the grand father died in harness. There is absolutely no ambiguity in the law laid down by this court in the division Bench judgment referred to herein above, which is binding on me and was more binding on the officer concerned, who has passed this order.

9. The impunity with which the impugned order was passed clearly indicates that the officer concerned did not even care to have a glance of the judgment of the Division Bench, which reference has been made in the direction of this court contained in the order dated 9.8.2005. The aforesaid procedure adopted by the respondent no. 2 is reprehensible and is deprecated.

10. Learned standing counsel could not successfully defend the impugned order in view of the decision of the Division Bench of this court and therefore, has urged that appropriate orders be passed and the matter be finally disposed of.

11. Keeping in view the facts and circumstance, stated herein above and the law applicable to the controversy, the impugned order dated 13.12.2005 is quashed with a direction to the Director of Education Basis respondent no. 2 to issue necessary directions for appointment of the petitioner giving him the benefit of compassionate appointment Rules in the light of the observations made herein above.

12. This order is being passed in view of the fact that the respondent no. 2 ahs no where disputed the status of destitution of the petitioner, who claims himself to be solely dependent on his grand father.

13. The writ petition accordingly succeeds and is allowed. The impugned order dated 13.12.2005 Annexure VIII to the writ petition, is quashed and the respondents 2 and 3 are directed to implement this judgment within three weeks from today.

14. With the aforesaid directions, petition is disposed of. Petition disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2005

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 54962 of 2005

Bina Pandey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh
Sri Pradeep Kumar Pandey

Counsel for the Respondents :
S.C.

Constitution of India, Art. 226– appointment on deputation-Legal Right of such appointee-explained-petitioner working as health visitor-under chief medical officer–by order dated 8.2.2005 sent on deputation to work in rural Development authority for 3 years–by

order dated 21.7.2005 based on policy decision of government–petitioner was send to her parent department-held-deputanist has no right to claim the post on deputation–petition dismissed

Held: Para 9

In the case in hand, it is not the case of the petitioner, that her deputation has been cancelled on account of some misconduct or allegations attaching stigma to her service. It appears that the State Government took a decision not to make such deputations vide its order date 14th July 2005, and following the same the deputation of the petitioner has been cancelled by order dated 21st July 2005. In these circumstances, I do not find any reason to interfere with the order impugned in the present writ petition.

Case law discussed:
2000 (5) SCC 362
W.P. No. 52527 of 05 decided on 3.8.05
2004 (3) UPLBEC–2318
2005 (1) AWL 426
2003 (1) AWL 520 Para 4

(Delivered by Hon'ble Sudhir Agarwal, J.)

Heard learned counsel for the parties.

1. This writ petition has been filed against the order dated 21.7.2005, issued by Additional Commissioner (Administration), Gram Vikas, U.P. Lucknow (respondent No. 2) communicating the decision of the State Government issued on 14.7.2005 whereby all the posting on deputation have been directed to repatriate.

2. The petitioner working as health worker under Chief Medical Officer, Allahabad was sent on deputation vide order dated 8.2.2005 in Rural Development Authority, Allahabad for a period of three years. It is stated that the said deputation was without any deputation allowance.

3. learned counsel for the petitioner submitted that the appointment of the petitioner was fixed for a period of 3 yeas. Repatriation before expiry of the aforesaid period by means of the impugned order is arbitrary and discriminatory.

4. Learned counsel for the respondents however, submits that the Government servant has no right to continue on deputation and it is open to the parent department to recall the person sent on deputation at any time.

5. It is not disputed by the parties that the petitioner was sent on deputation vide an order dated 8th February 2005, to work as Assistant Project officer under District Rural Development Project, Allahabad, and the said deputation has been cancelled by means of the order dated 21st July 2005. It is not the case of the petitioner that the said order has been passed either with mala fide intention or to favour somebody else. The only case of the petitioner is that once she has joined on deputation, the same could not have been cancelled. A right of an employee to continue on deputation has been considered in a catena of cases. In **Kunal Nunda Vs. Union of India, 2000 (5) SCC 362**, the Apex Court held as under :

"……. The basis 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 to get absorpted Department to which he had gone on deputation . . . . . "(para 6)

6. This court in **Ashok Kumar Pandey Vs. State of U.P. and Others, writ petition no 52527 of 2005 decided on 3rd August 2005,** has held as under :

"…….It is well settled that a deputationist has no right to remain on deputation and he can be sent back to his parent Department at any time……."

In the case of **Devi Kumar Vs. Rajya Krishi Utpadan Mandi Parishad 2004, 3 UPLBC 2318,** this court observed as under :

"…….The period of deputation originally fixed can be cut short, if considering necessary, a deputationist has no right to continue in the deputation post. . . ."

A division Bench of this court in the **Gauri Shanker Vs. State of U.P. and Others 2005 (1) AWL 426** held as under :

"……..A deputationist has no right to remain on deputation and he can be sent back to his Parent Department at any time ……"

7. The same view has been followed by another Division Bench of this court in the case of **Dr. Seema Kundra Vs. State of U.P. 2003 (1) AWL520 para 4.**

8. It is not the case of the petitioner that as a result of cancellation of the deputation either her status would be adversely affected or salary to which she was entitled in the Parent Department would be reduced in any manner. Learned counsel for the petitioner submitted that once having been sent on deputation for a period of 3 years she had a right and legitimate expectation to expect that she would continue for a period of three years on deputation, cancellation of deputation pre mature is, therefore, arbitrary. In may view, the doctrine of legitimate expectation is not at all applicable and attracted in the present case. In the case of **National Buildings Construction Corporation Vs. S. Raghunathan and others,** the Apex Court has considered in detail the doctrine of legitimate expectation, its genus and development in detail:

18. The doctrine of "legitimate Expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statement cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "Legitimate Expectation" was evolved which has today become3 a source of substantive as well as procedural rights. But claims based on "legitimate Expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel.

19. *Lord Scarman in R.V. Inland Revenue Commissioners exp. Preston (1985) AC 835 laid down emphatically that unfairness in the purported exercise of power can amount to an abuse or excess of power. Thus the doctrine of "legitimate Expectation" has been developed, both in the context of reasonableness and in the context of natural justice.*

20. *Lord Diplock in Council of Civil Service Unions vs. Minister for the Civil Service (1985) AC 347 laid down that doctrine of "legitimate Expectation" can be invoked if the decision which is challenged in the court has some person aggrieved either (a) by altering rights or obligations of that person which are enforceable by or against him in private law; (b) by depriving him of some benefit or advantage which either 9i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should not be withdrawn.*

21. *The Indian scenario in the filed of "Legitimae Expectation" is not deifferent. In fact, this Court, in several of its decisions, has explained the doctrine in no uncertain terms.*

22. *In Navjyoti Co-op. Group Housing Society v. Union of India, 91992) 4 SCC 477 : (1992 AIR SCW 3075), the decision of the House of Lords in Council of Civil Service Unions v. Minister for the Civil Service (1985 AC 374) (Supra) was followed and that decision was summarized in the following words. (at p. 3089 of AIR SCW:*

"It has been held in the said decision that an aggrieved person was entitled to judicial review if he could show that a decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he was given reasons for withdrawal and the opportunity to comment on such reasons."

23. This court further observed as under (1992 AIR SCW 3075 paras 15 and 16):-

"The existence of 'legitimate expectation' may have a number of different consequences and one of such consequences is that the authority ought not to act to defeat the 'legitimate expectation' without some overriding reason of public policy to justify its doing so. In a case of legitimate expectation' if the authority proposes to defeat a persons 'legitimate expectation' it should afford him an opportunity to make representations in the matter……

It may be indicated here that the doctrine of 'legitimate expectation' imposes in essence a duty on public authority to act fairly by taking into consideration all relevant factors relating to such 'legitimate expectation'. Within the conspectus of fair dealing in case of 'legitimate expectation", the reasonable opportunities to make representation by

the parties likely to be affected by any change of consistent past policy, come in."

24. In Food Corporation of India v. M/s Kamdhenu Cattlefield Industries, 91993) 1 SCC 71 : (1993 AUR SCW 1509), it was held that in all State actions, the State has to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. It was further observed that there is no unfettered discretion in public law and a public authority possesses powers only to use them for public good. It was further observed as under (at p. 1513 of AIR SCW) :-

"The mere reasonable or legitimae expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the laimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal sysem in this manner and to his extent."

25. In Union of India v. Hindustan Development Corporation, 91993) 3 SCC 499 : 91993 AIR SCW 494), the meaning of word 'Legitimate Expectation" was again considered. Quoting from the case of Attorney General for New South Wales v, Quin, (1990) 64 Aust LjR 327, the following lines :-

"To strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short of a legal right) is too bebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law."

The Court observed as under"-

"If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the Court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognized general principles of administrative law applicable to such fact and the concept of ligitimate expectation which is the latest recruit to a long list of concepts fashioned by the Courts for the review of administrative action, must be restricted

to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the Court out of review on the merits", particularly when the element of speculation and uncertaintyh is inherent in that very concept."

26. This doctrine was reiterated in M.P. Oil Extration v. State of M.P., (19970 7 SCC 592: (1997 AIR SCW 4104) in which it was also laid down that though the doctrine of "Legitimate Expectation" is essentially procedural in character and assures fair play in administrative action, it may, in a given situation, be enforced as a substantive right.

9. In the case in hand, it is not the case of the petitioner, that her deputation has been cancelled on account of some misconduct or allegations attaching stigma to her service. It appears that the State Government took a decision not to make such deputations vide its order date 14th July 2005, and following the same the deputation of the petitioner has been cancelled by order dated 21st July 2005. In these circumstances, I do not find any reason to interfere with the order impugned in the present writ petition.

10. Lastly, the learned counsel for the petitioner, however, submits that as a result of cancellation of her deputation she could not have joined her Parent Department and now after such a long time, the parent Department is likely not to allow her to join her services and therefore, this Hon'ble Court may be pleased to protect her interest to the extent that the Parent Department may allow her to join her services.

11. This court hope and trust if the petitioner submits her joining report within a period of 6 weeks along with the certified copy of his order, the Parent Department would allow her to join her services. However, with respect to the past period for which the salary to the petitioner has not been paid, if any representation is made by the petitioner to the competent authority, it shall be considered and appropriate speaking order in accordance with law shall be passed by the competent authority within a period of 1 month from the date the representation is made by the petitioner.

With these observations the writ petition is dismissed.

Petition dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2006

BEFORE
THE HON'BLE M.K. MITTAL, J.

Criminal Misc. Application No. 308 o 2006

Bishan Singh ...Applicant
Versus
State of U.P. & another ...Opposite party

Counsel for the Applicant:
Sri Sanjay Srivastava

Counsel for the Opposite Parties:
Sri Ramesh Sinha
A.G.A.

Code of Criminal Procedure-Section-482-Quashing of Summoning order-offence under Section 630 of the Company Act-applicant while in service of company

was allotted the flat service terminated on 19.2.02 in spits of notice to-failed to vacate hence on complaint case after recording the statement under Section 200 and 202-summoning orders-held-proper application rejected.

Held: Para 12

Therefore this legal position shows that if the services of the employee or the officer have been terminated he is liable to vacate the premises of the company and if he fails to do so he can be prosecuted under Section 630 of the Companies Act.

Case law discussed:
1999 (1) SCC-119
1987 (4) SCC-361
1995 (Crl.) SCC-591
2005 (Crl.) SCC-993

(Delivered by Hon'ble M.K. Mittal, J.)

1. Heard Sri Sanjay Srivastava, learned counsel for the applicant, Sri Ramesh Sinha, learned counsel for the opposite party no. 2, learned A.G.A. and perused the record.

2. Application has been filed under Section 482 Cr.P.C. to quash the proceedings of complaint case no. 755 of 2004 (M/S Modi Industries (Modi Vanaspati Manufacturing Company Unit) Versus Bishan Singh, pending in the Court of Special Chief Judicial Magistrate, Meerut under Section 630 of the Companies Act.

3. Brief facts of the case are that applicant was employed in the company of the opposite party no.2 and was also allotted a quarter no. B-1/17 Mutanipura, Modinagar in connection with his employment in the Company. However the services of the applicant were terminated on 19.2.2002 and the applicant was required by the opposite party no. 2 to vacate the quarter but he did not do so and than the complaint was filed under Section 630 Companies Act and after examining the complainant and the witnesses under Section 200/202 Cr.P.C. learned Magistrate finding prima facie case against the applicant directed to summon the applicant vide order dated 24.7.2004.

4. Learned counsel for the applicant has contended that the applicant was working in the company in the capacity of Officer Instrument after his promotion on 16.8.1999. But his services were terminated on 19.9.2002 without giving any show cause notice and the termination matter is pending before Labour Commissioner, Ghaziabad. Learned counsel for the applicant has further contended that opposite party no.2 is neither the owner of the property nor lessee of the property and has no right to file complaint under Section 630 of Companies Act. He has further contended that the allegations as made disclose a dispute of Civil nature and the learned Magistrate has erred in summoning the applicant.

5. Against it learned counsel for the opposite party and the learned A.G.A. have contended that the quarter was given to the applicant in connection with his employment and when the services were terminated he was required to vacate and if he does not vacate he is criminally liable under Section 630 of the Companies Act. They have further contended that the learned Magistrate has rightly summoned the applicant and that the present application is misconceived and is liable to be dismissed.

6. The relevant portion of Section 630 of the Companies Act reads as follows:

Section 630:- Penalty for wrongful withholding of property:-

(1) If any officer or employee of a company-

(a) wrongfully obtains possession of any property of a company; or

(b) having any such property in his possession, wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorized by this act;

he shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine which may extend to one thousand rupees.

(2) The Court trying the offence may also order such officer or employee to deliver up or refund, within a time to be fixed by the Court any such property wrongfully obtained or wrongfully withheld or knowingly misapplied, or in default, to suffer imprisonment for a term which may extend to two years.

7. This section shows that if any officer or employee of the company who is in possession of the property of the company wrongfully withholds it he shall be liable to be prosecuted on the basis of the complaint that may be filed by the company. In the instant case, the services of the applicant were terminated in the year 2002 and therefore he does not have any right to continue in possession over the property of the company even if his case is pending before the Labour Commissioner. Learned Counsel for the applicant also could not show as to who is owner of this property if the company is not the owner of this property.

8. Learned counsel for the applicant has contended that the dispute is of civil nature and has cited the case of **Jagdish Chandra Nijhawan Vs. S.K. Saraf (1999) 1 SCC 119.** In that case the appellant was put in possession of the flat pursuant to agreement dated 29.4.1983 and some terms and conditions were laid down and it was held by the Hon'ble Apex Court that accused was granted rent free accommodation as part of conditions of employment contained in an agreement containing clauses stipulating employees right to retain flat in certain circumstances such as termination within a particular period. In that matter, the learned Magistrate had discharged the accused on the ground that it was a dispute of civil nature and that finding was confirmed by the Hon'ble Apex Court. In the present case the facts are different and there is no agreement between the parties as to what would happen in case of termination of the services, therefore, this ruling does not help the applicant.

9. Learned counsel for the opposite party has cited the case of **Baldev Krishna Sahi Vs. Shipping Corporation of India Limited and another (1987) 4 SCC 361,** where it has been held that the term officer or employee of a company applies not only to existing officers or employees but also to past officers or employees if such officer or employees either (a) wrongfully obtains possession of any property, or (b) having obtained such property during the course of his employment, withholds the same after the termination of his employment. It is the wrongful withholding of such property, meaning the property of the company after termination of the employment, which is an offence under Section 630 (1)(b) of the Act.

10. Learned counsel for the opposite party has also cited the case of **Sunita Bhagat (Mrs.) and others 1995 SCC (Crl) 591** where it has been held that once the right of the employee or the officer to retain the possession of the property, either on account of termination of services, retirement, resignation or death, gets extinguished, they (persons in occupation) are under an obligation to return the property back to the company and on their failure to do so, they render themselves liable to be deal with under Section 630 of the Act for retrieval liable to be deals with under Section 630 of the Act for retrieval of the possession of the property.

11. Learned counsel for the opposite party has also cited a recent case of **Shubh Shanti Services Ltd. Vs. Manjula S. Agarwalla 2005 SCC (Cri) 993.** In that matter a civil suit was pending between the employee and the company and the High Court had directed the company not to dispossess the legal representative of the deceased employee, of the flat, allotted to the deceased, except by due process of law. It has been held by the Hon'ble Apex Court that the remedy available to the company under Section 630 was nonetheless a proceedings taken in due process of law and it was further held that the criminal proceedings were not barred by interim order in civil proceedings.

12. Therefore this legal position shows that if the services of the employee or the officer have been terminated he is liable to vacate the premises of the company and if he fails to do so he can be prosecuted under Section 630 of the Companies Act.

13. In the circumstances, I do not find any illegality in the summoning order and there is no legal ground to quash the proceedings under Section 482 Cr.P.C. Application is devoid of merits and is liable to be dismissed.

14. Application is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 71261 of 2005

Brijesh Kumar Tripathi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shesh Kumar
Sri Ashok Gupta

Counsel for the Respondents:
S.C.

(A) U.P. Govt. Servant (Discipline & Appeal) Rules, 1999-rule 7 readwith Constitution of India Art. 226-alternative remedy-principle of natural justice violated-alternative remedy is no absolute bar.

Held: Para 13

Since this Court has come to the conclusion that the impugned order has been passed in manifest violation of statutory rules and in violation of principles of natural justice as have been stated by the Hon'ble Supreme Court in the case of Ministry of Finance and another (Supra), it would not be fair to insist upon the petitioner to avail the statutory alternative remedy.
AIR 1998 SC-853

1998 (8) SCC-I

(B) U.P. Government Servant (Discipline & Appeal) Rules 1999 Rule 9-after submitting its conclusion-enquiry officer-the report completely silent about the fixation of date regarding Oral evidence-enquiry being violation of statutory rules-could not be the basis for issue of show cause Notice-held-punishment order illegal.

Held: Para 12

Since the averments made in Paragraph-15 of the writ petition are collaborated from facts recorded in the enquiry report, which was brought on record, this Court is satisfied that the procedure prescribed under Rule-7 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999, has not been followed by the Inquiry Officer. Further the enquiry is not in accordance with law laid down by the Hon'ble Supreme Court in the Case of Ministry of Finance and another (Supra). In such circumstances the enquiry being, itself in violation of statutory rules could not form the basis for issuance of the show-cause notice as contemplated by U.P. Government Servant (Discipline and Appeal) Rules, 1999. As a result whereof the consequential order of punishment passed by the District Magistrate is also rendered illegal and in violation of principles of natural justice.

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

1. Heard Sri Shesh Kumar, Advocate on behalf of the petitioner and learned Standing Counsel on behalf of the respondents.

2. The petitioner, Brijesh Kumar Tripathi, who is employed as collection amin in District Banda, was served with a charge-sheet dated 15th July, 2005. The charge-sheet contained two charges and the Tehsildar (Judicial), Banda was appointed as the Enquiry Officer. The petitioner submitted a reply to the said charge-sheet vide his letter dated 11th August, 2004 and denied the allegations made against him in the said charge-sheet. Thereafter the Tehsildar submitted enquiry report to the District Magistrate, Banda vide order dated 9th June, 2005. On the basis of the enquiry report so submitted by the Tehsildar, a show-cause notice has been issued by the District Magistrate, Banda dated 22nd June, 2005, calling upon the petitioner to show-cause as to why orders for punishment may not be passed against the petitioner.

3. From the records it is not clear as to whether the petitioner has submitted any reply to the show-cause notice dated 22nd June, 2005 or not. However, the District Magistrate has proceeded to pass an order dated 25th September, 2005, whereby the petitioner has been reverted to the initial of the pay-scale admissible to the post of collection amin and an adverse entry has also been directed to be recorded. It is against this order of the District Magistrate dated 25th September, 2005 that the present writ petition has been filed. The said order has been challenged basically on the ground that the procedure prescribed for holding disciplinary proceedings for imposition of major penalty under Rules 7,8 and 9 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 has not been followed and therefore, the impugned order of punishment cannot be legally sustained. In that regard reliance has been placed upon Paragraph No. 15 of the writ petition.

4. Learned Standing Counsel on the other hand submits that the petitioner has

efficacious statutory alternative remedy by way of appeal under Rule 11 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 and thereof this Court may not interfere in the present writ proceedings and the petitioner may be relegated to his statutory alternative remedy.

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

6. So far as the preliminary objection raised by the learned Standing Counsel is concerned, normally this Court would insist upon the petitioner to avail his statutory alternative remedy. It is also settled law that availability of statutory alternative remedy is not an absolute bar in entertainment of a writ petition. (Reference, **Whirl Pool Corporation Vs. Registrar of Trade Marks, Mumbai and others; 1998 (8) SCC 1).**

7. In the facts of the present case, where the impugned order is alleged to have been passed in manifest violation of principles of natural justice as well as statutory rules which regulate the procedure prescribed for imposition of major penalty, the Court is of the opinion the allegations as to whether there has been a manifest violation of rules regulating the procedure prescribed for conducting an enquiry in respect of imposition of penalty or not, be examined to decide the question as to whether the petitioner should be delegated to his alternative remedy or not.

8. In order to examine the issue as to whether the procedure prescribed under the Rules for holding departmental enquiry in respect of imposition of major penalty have been followed or not, it is necessary to reproduce Rules 7,8 and 9 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999, which read as follows:

"7. Procedure for imposing major penalties.--*Before imposing any major penalty on a Government Servant, an inquiry shall be held in the following manner:*

(i) The Disciplinary Authority may himself inquire into the charges or appoint an Authority subordinate to him as Inquiry Officer to inquire into the charges.

(ii) .....

(iii) .....

(iv) .....

(v) .....

(vi) .....

(vii) Where the charged Government servant denies the charges the inquiry officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence:

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The Inquiry Officer may summon any witness to given evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of

Attendance of Witness and Production of Documents) Act, 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case, the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

(xi) .....

(xii) .....

8. Submission of inquiry report.-- *When the inquiry is complete, the Inquiry Officer shall submit its inquiry report to the Disciplinary Authority along with all the record of the inquiry. The Inquiry Report shall contain a sufficient record of brief facts, the evidence and statement of the findings on each charge and the reasons thereof. The Inquiry Officer shall not make any recommendation about the penalty.*

9. Action on Inquiry Report.-- *(1) The Disciplinary Authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation tot he charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7.*

(2) .....

(3) .....

(4) If the Disciplinary Authority, having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned speaking order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

9. From the aforesaid rules, it is apparently clear that if the charged employee denies the charges levelled against him, the Inquiry Officer appointed by the Disciplinary Authority, shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged employee and shall give an opportunity to the charged employee to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence, which the charged employee desired in his written statement to be produced in support of his case. Rule-7 further contemplates that the Inquiry officer may examine any witness to give evidence or require any person to produce documents before him in accordance with the U.P. Government Servant (Discipline and Appeal) Rules, 1999. The procedure as detailed in the aforesaid Rules is in conformity with the requirement of principles of natural justice and is

therefore, necessary to be adhered to in letter and in spirit.

10. The Hon'ble Supreme Court of India in the case of ***Ministry of Finance and another Vs. S.B. Ramesh*** reported in ***AIR 1998 SC 853*** has held that even in ex-parte disciplinary proceedings, wherein the employee is not participating in the departmental inquiry, it is necessary for the Inquiry Officer to fix a date for recording evidence in support of the charges and intimation of the date so fixed must be communicated to the employee concerned so that the employee concerned may cross-examine the witnesses. It has further been clarified that no documents can be received in evidence unless proved by some competent person, who has come-forward in evidence, un-proved documents cannot be relied upon for brining home the charges against the said employee.

11. From the enquiry report dated 9th June, 2005, which has been enclosed as Annexure-3 to the writ petition, it is apparently clear that the Inquiry Officer after recording a finding that a charge-sheet and the reply has been submitted thereto has proceeded to record his conclusion in respect of individual charges on the basis of record which was available before him. The Inquiry Report is completely silent about a date having been fixed to record oral evidence or the document which has been relied upon for brining home charges against the petitioner being proved as per the law applicable. In paragraph no. 15 of the writ petition it has been specifically submitted as follows:

"15. That it is well settled law that during enquiry proceeding the principle of natural justice must be followed i.e. the documents relied upon, provided to the charge employee, opportunity to adduce the evidence be provided, statement of witnesses for establishing the charges be recorded and opportunity to cross examine the witnesses be provided, whereas in the present case no such procedure has been followed. The petitioner has not been given opportunity to adduce the evidence and cross examined the witnesses has been provided to the petitioner and no witnesses has been examined by the enquiry officer in support of the charges if any levelled against the petitioner, thus the entire enquiry proceedings are violated and against the principle of natural justice and consequential impugned order is liable to be quashed by this Hon'ble Court."

12. Since the averments made in Paragraph-15 of the writ petition are collaborated from facts recorded in the enquiry report, which was brought on record, this Court is satisfied that the procedure prescribed under Rule-7 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999, has not been followed by the Inquiry Officer. Further the enquiry is not in accordance with law laid down by the Hon'ble Supreme Court in the Case of ***Ministry of Finance and another (Supra)***. In such circumstances the enquiry being, itself in violation of statutory rules could not form the basis for issuance of the show-cause notice as contemplated by U.P. Government Servant (Discipline and Appeal) Rules, 1999. As a result whereof the consequential order of punishment passed by the District Magistrate is also rendered illegal and in violation of principles of natural justice.

13. Since this Court has come to the conclusion that the impugned order has been passed in manifest violation of statutory rules and in violation of principles of natural justice as have been stated by the Hon'ble Supreme Court in the case of ***Ministry of Finance and another (Supra)***, it would not be fair to insist upon the petitioner to avail the statutory alternative remedy.

14. In view of the aforesaid findings, the writ petition is allowed. The order passed by the District Magistrate, Banda (respondent no.2) dated 25th September, 2005 is hereby quashed. The enquiry report submitted by the Inquiry Officer is also rendered illegal. The Inquiry Officer, namely, Tehsildar (Judicial) is directed to proceed with the enquiry afresh from the stage it has gone wrong in light of the Rules applicable. The aforesaid enquiry may be completed within three months from the date a certified copy of this order is filed before the District Magistrate (respondent no.2). The District Magistrate on receipt of the enquiry report shall take final decision in accordance with law, within a period of two months thereafter.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2006

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 4527 of 2006

Chandra Kant ...Petitioner
Versus
Addl. District Judge, Court No. 6, Jaunpur and others ...Respondents

Counsel for the Petitioner:
Sri P.N. Tripathi

Counsel for the Respondents:
Sri Harish Chandra
S.C.

Indian Limitation Act-Section-5-Condonation of delay-case dismissed in default-restoration application alongwith delay condonation application duly supported with affidavit filed-Trail Court by exercising it discretion condone the delay-allowed the restoration application-held-Trail Court did not commit any factual or the legal mistake-can not be interfered.

Held: Para 6

In the present case also, the trial court in the aforesaid facts and circumstances had condoned the delay in filing the restoration application and had exercised its discretion in favour of the respondent plaintiff. There is nothing in the judgment of revisional court challenged in this petition, which would indicate that the trial court while accepting the grounds, had acted arbitrarily or in perverse manner. The grounds for restoration and condonation of delay as had been taken by the respondent plaintiff and as discussed above, could not be said to be wholly untenable and thus, it is quite obvious that the trial court has rightly allowed the restoration application and did not commit any factual or otherwise legal mistake as to give justifiable occasion to the revisional court to interfere in its order.

Case law discussed:
J.T. 1998 (6) SC-242 relied on.

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

1. Heard the learned counsel for the parties.

Respondent counsel is not present in spite of the list having been revised

Counter affidavit was filed on some earlier date on behalf of respondent No. 2.

2. This petition challenges the order dated 20.10.2005 restoring the suit after granting the delay condonation application under Section 5 of the Limitation Act.

3. The learned counsel contends that the suit was initially filed by respondent No.3 for specific performance of contract of a registered agreement of sale and the petitioner was made a proforma defendant. Since the agreement of sale was also executed in favour of the petitioner he applied to the trial court to b e transposed as plaintiff and the same was allowed. The petitioner and respondents No. 3 and 4 are the real brothers. The petitioner was staying away from the village and was working in Calcutta. The Pairvi of the case was being done by his brother, respondent No.3. It is alleged that respondent No. 3 connived with respondent No.2, the defendant, and got the suit dismissed in default and no knowledge of that was had by the petitioner till a day before moving of the restoration application. The suit was dismissed on 10.2.2000 and restoration application was given b y the petitioner on 25.10.2000. The petitioner's plea as taken for the restoration of the suit was accepted by the trial court, but the revisional court giving one or the other reasons has interfered with that order of the trial court and rejected the restoration application.

4. In the facts of present case what is most striking is that the petitioner/plaintiff was residing away from the village and was working at a far distant place like Calcutta. The contention of the petitioner that the other plaintiff Lallan had got the suit dismissed in connivance with the defendant Smt. Hira Wati further finds support from the fact that no restoration application was moved by respondent No. 3 even though he was the original plaintiff in the suit doing Pairvi of the same. The agreement of sale is said to have been executed in favour of the three brothers, the petitioner and respondents No. 3 and 4. If the decree of specific performance of contract was to be obtained it would be obtained in favour of all the three. Why and under what circumstances respondent No. 3 who was made in-charge of the Pairvi of the case did not take any step to go ahead and get the suit restored, is also quite striking and appears to be unnatural that he did not inform his brother the petitioner working at Calcutta about the dismissal of the suit. Therefore, the allegations of his connivance with defendant/respondent No.2 is wholly probablized in the circumstances prevailing in the case. The revisional court appears to have wrongly appreciated the available facts and has twisted the case to take an adverse decision against the petitioner.

5. Otherwise also the discretion exercised by the trial court for permitting condonation of delay under Section 5 of the Indian Limitation Act is not to be usually disturbed by the court exercising revisional jurisdiction unless it is found that exercise of discretion was wholly on untenable grounds or arbitrary or perverse. In ***Balakrishnan Vs. M. Krishnamurthy, JT 1998 (6) SC 242***, the Apex Court in such matters has propounded as below:-

"It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammeled by the conclusion of the lower court."

6. In the present case also, the trial court in the aforesaid facts and circumstances had condoned the delay in filing the restoration application and had exercised its discretion in favour of the respondent plaintiff. There is nothing in the judgment of revisional court challenged in this petition, which would indicate that the trial court while accepting the grounds, had acted arbitrarily or in perverse manner. The grounds for restoration and condonation of delay as had been taken by the respondent plaintiff and as discussed above, could not be said to be wholly untenable and thus, it is quite obvious that the trial court has rightly allowed the restoration application and did not commit any factual or otherwise legal mistake as to give justifiable occasion to the revisional court to interfere in its order. In the aforesaid view of the matter the petition should be allowed and the order of revisional court should be quashed and the order of the trial court be restored.

7. In the result, the petition is allowed.

The impugned order dated 20.10.2005 passed by the revisional court is hereby quashed and the order of the trial court dated 17.5.2004 is restored.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2006

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No. 19993 of 2002

Chhama Shankar Pandey ...Petitioner
Versus
District Inspector of schools and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Vinod Kumar Singh
Sri Manish Goyal

Counsel for the Respondents:
Sri S.D. Shukla
S.C.

(A) U.P. Secondary Education Service Commission (Removal of Difficulties) (Second Order 1981-Clause-2 (3)- Deemed approval-short terms vacancy in L.T. Grade caused-due to promotion of permanent L.T. Grade Teachers

promotion on the post of Lecturer in Hindi-duly approved on 1.2.96-management advertised the short term vacancy of L.T. Grade Teacher on 26.12.96 in "Amar Ujala" and Pioneer" on 27.12.96-21.1.07 management submitted entire paper before D.I.O.S. for approval-No Order passed-held-legal fiction created-about deemed approval of the said proposal.

Held: Para 6

A bare perusal of the said provision would show that a mandate has been issued to the District Inspector of Schools to pass orders either approving or disapproving the proposed appointment and in case the order is not passed within seven days of the receipt of the proposal, a legal fiction has been created by which the said proposal would be deemed approved. This ratio has been accepted in several cases including by a Division Bench of this Court in the case of Ashika Prasad Shukla Vs. District Inspector of Schools and another [(1998) 3 U.P.L.B.E.C. 1722] and subsequently followed in several cases. Thus, the first ground given in the impugned order cannot be sustained as it was a case of deemed approval.

(B) Intermediate Education Act 1921-Short term vacancy' in L.T. grade teacher-due to the promotion of permanent incumbent on the post of lecturer on Ad-hoc basis-duly approved by the D.I.O.S.-appointment on short term vacancy made after due advertisement in two news paper, having vide circulation-appointment made without prior approval of D.I.O.S.-whether such appointment is bad? Held "No"-neither in impugned order nor in counters affidavit, not during course of argument any legal requirement disclosed-appointment governed by 2nd removal of Difficulties Order 1981-perfectly valid.

Held: Para 7

The second ground on which the claim has been rejected is based that without prior permission the advertisement inviting application for short-term appointment could not be issued. Neither in the impugned order or in the counter affidavit nor during arguments reference to any provision of law where such a requirement is mandatory has been disclosed. The appointment to short term vacancies, at the relevant time, was governed by Second Removal of Difficulties Order as explained by the Full Bench decision of this Court in the case of Radha Raizada and others Vs. Committee of Management [(1994) 3 U.P.L.B.E.C. 1551]. The only requirement in law was for advertising the short-term vacancies in at least two newspapers having wide circulation. As already noted above, the short-term vacancy was advertised in two widely circulated newspapers on 26.12.1996 and 27.12.1996. Thus, the second ground also cannot be sustained.

(C) Intermediate Education Act-1921-Short term vacancy in L.T. grade teacher-appointment made ignoring the circular dated 9.6.95 issued by the Director-held-circular relate only for substantial vacancies and not for short term vacancy-moreover the circular has no overriding effect upon the provisions of 2nd Removal of Difficulties Order 1981.

Held: Para 10

The fifth ground taken in the impugned order is that in view of circular dated 9.6.1995, no appointment could be made by the Management and appointment could only have been made by the Board. A copy of the circular dated 9.6.1995 is annexed alongwith the writ petition. The said circular issued by the Directorate of Education stipulates that no appointment should be made on any vacancy by the Management as the Board has been set up for selecting candidates and recommending appointment. This circular appears to relate only to substantial vacancies. As

already observed hereinabove, the appointments to short-term vacancies are governed by Second Removal of Difficulties Order. This view is supported by a Single Judge decision of this Court in the case of Mukesh Kumar Vs. State of U.P. (1996 A.W.C. 556). In any event, a circular cannot over ride the provisions of the Second Removal of Difficulties Order. Therefore, this ground also cannot be sustained.

Case law discussed:
1996 AWC 556
1994 (3) UPLBEC 1551
1998 (3) UPLBEC-1722

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard counsel for the parties.

2. This petition is directed against an order dated 19.4.2002 rejecting the claim of the petitioner for grant of financial approval to his appointment as Assistant Teacher.

3. Guru Narain Khatri Inter College, Kanpur Nagar, Kanpur is a duly recognized and aided intermediate college (here-in-after referred to as institution). One Ram Asrey Awasthi permanent Lecturer in Hindi retired causing substantial vacancy which was filled up by adhoc promotion of Ram Kripal Mishra, a Assistant Teacher in the LT Grade. The aforesaid adhoc promotion of Ram Kripal Mishra was approved by the District Inspector of Schools on 1.2.1996, thus, creating a short term vacancy in the L.T. Grade on the post of Assistant Teacher. The Management advertised the said adhoc vacancy in "Amar Ujala' on 26.12.1996 and "Pioneer' on 27.12.1996. Several persons, including the petitioner, who holds Master of Art Degree in Hindi and is Bachelor of Education, also applied and he was selected on the basis of quality point whereafter the entire papers relating to his selection were submitted to the District Inspector of Schools for his financial approval through the management's letter dated 21.1.1997. However, no orders were passed by the District Inspector of Schools, thus, an appointment letter dated 3.2.1997 was issued to the petitioner in pursuance of which he joined on 4.2.1997 and started teaching. As the District Inspector of Schools did not pass any order and salary was not being paid to the petitioner, he preferred writ petition no. 39636 of 1997 which was finally disposed off vide order dated 18.11.1997 with a direction to the District Inspector of Schools to decide the claim of the petitioner in accordance to law by a speaking order. In pursuance thereof, the present impugned order has been passed.

4. The District Inspector of Schools has refused grant of financial approval on six grounds and each would be dealt with in the subsequent paragraphs.

5. The first ground in the impugned order is that the appointment was made without prior approval. From the facts as noted hereinabove, the approval of adhoc promotion of Ram Kripal Mishra to the Lecturer's grade necessarily created a short term vacancy in the L.T. Grade. After due advertisement, the petitioner was selected and the papers were served through a covering letter of the Management dated 21.1.1997. This allegation in paragraph no. 12 of the writ petition has not been denied in the counter affidavit. It is apparent that in spite of receiving the papers for grant of approval, the District Inspector of Schools did not pass any order. Clause 2 (3) (iii) of the U.P. Secondary Education Service

Commission (Removal of Difficulties) (Second) Order, 1981 provides as under:-

"The District Inspector of Schools shall communicate his decision within seven days of the date of particulars by him failing which the Inspector will be deemed to have given his approval."

6. A bare perusal of the said provision would show that a mandate has been issued to the District Inspector of Schools to pass orders either approving or disapproving the proposed appointment and in case the order is not passed within seven days of the receipt of the proposal, a legal fiction has been created by which the said proposal would be deemed approved. This ratio has been accepted in several cases including by a Division Bench of this Court in the case of **Ashika Prasad Shukla Vs. District Inspector of Schools and another [(1998) 3 U.P.L.B.E.C. 1722]** and subsequently followed in several cases. Thus, the first ground given in the impugned order cannot be sustained as it was a case of deemed approval.

7. The second ground on which the claim has been rejected is based that without prior permission the advertisement inviting application for short-term appointment could not be issued. Neither in the impugned order or in the counter affidavit nor during arguments reference to any provision of law where such a requirement is mandatory has been disclosed. The appointment to short term vacancies, at the relevant time, was governed by Second Removal of Difficulties Order as explained by the Full Bench decision of this Court in the case of **Radha Raizada and others Vs. Committee of Management [(1994) 3 U.P.L.B.E.C. 1551].** The only requirement in law was for advertising the short-term vacancies in at least two newspapers having wide circulation. As already noted above, the short-term vacancy was advertised in two widely circulated newspapers on 26.12.1996 and 27.12.1996. Thus, the second ground also cannot be sustained.

8. The third ground given in the impugned order is that before filling the vacancy, the Management ought to have obtained financial approval of the post. It is not the case of the respondents that Ram Kripal Mishra, the incumbent who was working as Assistant Teacher in the L.T. Grade, was not drawing his salary after financial approval. It is also not the case of the respondents that at any time financial approval to that post was withdrawn by the respondents either before or after the adhoc promotion of Sri Mishra. Once the financial approval had been granted for a post, there is no requirement of law to obtain further approval while making short-term appointment on that post except when the post had been abolished, but that is not the case here. Learned Standing Counsel has failed to point out any provision of law by which such a requirement has been placed upon the Management. Therefore, the third ground also cannot be sustained.

9. The next ground on which the impugned order has been passed is that in accordance to the actual strength of the students only 10 sections were being operated and thus, according to the applicable ratio, 13 teachers were necessary though 27 teachers were working and thus there was no vacancy to be filled up. The case set up by the Management before the District Inspector

of Schools was that there were 21 sanctioned sections in the institution and this fact has not been denied either in the counter affidavit or during argument. Further, even number of students has not been disclosed in the impugned order which goaded the Inspector to hold that only 10 sections were being operated. Even in the counter affidavit the strength of student has not been disclosed and the case set up in the writ petition especially in paragraph nos. 27 and 28 that in fact 21 sections were functioning in the institution at the relevant time has not been specifically denied in the counter affidavit. Further, Para 293 (1) of the U.P. Education Code prohibits the Management to add or close down any existing sanctioned section in the institution without previous approval of the Inspector. Assuming, for the sake of argument, that at the relevant time there were lesser number of students and thus there may not be any necessity to fill up any vacancy, but that cannot be a ground to hold that there was, in fact, no vacancy. Thus, this ground also cannot be sustained.

10. The fifth ground taken in the impugned order is that in view of circular dated 9.6.1995, no appointment could be made by the Management and appointment could only have been made by the Board. A copy of the circular dated 9.6.1995 is annexed alongwith the writ petition. The said circular issued by the Directorate of Education stipulates that no appointment should be made on any vacancy by the Management as the Board has been set up for selecting candidates and recommending appointment. This circular appears to relate only to substantial vacancies. As already observed hereinabove, the appointments to short-term vacancies are governed by Second Removal of Difficulties Order. This view is supported by a Single Judge decision of this Court in the case of **Mukesh Kumar Vs. State of U.P. (1996 A.W.C. 556).** In any event, a circular cannot over ride the provisions of the Second Removal of Difficulties Order. Therefore, this ground also cannot be sustained.

11. The last pillar on which the impugned order stands is only to be stated to be rejected. The District Inspector of Schools has held that since section 18 of the Commission Act and the Second Removal of Difficulties Order having been repealed by notification dated 25.1.1999, no financial approval could be granted. As already observed while noting the facts, the short-term vacancies arose on 1.2.1996 and the Management served the entire papers for obtaining financial approval on 21.1.1997 and as such the subsequent repeal would be irrelevant as by then the rights of the petitioner stood crystallized and appointment stood approved in view of the deeming clause of the Second Removal of Difficulties Order.

12. For the reasons given above, this petition succeeds and is allowed and the impugned order 19.4.2002 is hereby quashed. The petitioner shall be entitled to his salary alongwith arrears payable to him within two months from the date of submission of a certified copy of this order. No order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2006

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No.4250 of 1999

Chemical Workers Union ...Petitioner
Versus
Labour Court at Ghaziabad and another ...Respondents

Counsel for the Petitioner:
Sri K.P. Agrawal
Km. Suman Sirohi

Counsel for the Respondents:
Sri Satish Chaturvedi
S.C.

Constitution of India-Article-226-Power of labor court-confined with dispute as referred by the government under section 4-K of Industrial dispute Act.

Held: Para 9

Admittedly from the reference it is clear that there was no dispute between the petitioners and the respondents, which was referred by the State Government and in view of the Apex Court judgment. It is well settled that the Labour Court has to act according to the reference and cannot go beyond it. In such a way I am of opinion that the finding recorded by the Labour Court is correct and it needs no interference by this Court under Article 226 of the Constitution of India.

Case law discussed:
2005 SCC (L&S) 372
AIR 1959-1111

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

1. This writ petition has been filed for setting aside the award dated 22.12.1995 published on 27.9.1997 in Adjudication Case No.253 of 1987 and further prayer is for commanding the Labour Court to treat the termination of the services of the 12 workmen w.e.f. 12.3.1987 and to rehear the matter of dispute and decide the same on the basis of the dismissal having taken place on 12.3.1987. The writ petition has been filed on behalf of one Sri Virendra Garg, Member, Executive Committee of the Chemical Works Union, 231, Lal Jhanda Bhavan, Ambedkar Road, Ghaziabad against the award dated 22.12.1995 by which the claim of the workmen has not been accepted by the Labour Court.

2. The facts arising out of the writ petition are that the workmen who are working under respondent no.2, there was some dispute and they went on strike and then they have stated that they wanted to join from 12.11.1987 but the employer has not permitted them to join the duties as such the dispute arose. The matter was referred to the State Government and the State Government has referred the dispute to the Labour Court for adjudication. The reference is being reproduced below:

`क्या सेवायोजकों व्दारा संलग्न परिशिप्ट में उल्लिखित अपने १२ श्रमिकों को दिनांक १२.३.८७ से कार्य से प्रथक वचित किया जाना उचित तथा अथवा वॅधानिक है यदि नहीं तो सम्बधित श्रमिक क्या लाभ पाने का अधिकारी है तथा अन्य किन विवरणों सहित?

3. The Labour Court has rejected the claim of the petitioner only on the ground that the date which has been mentioned by the petitioner as 12.3.1987, there was no termination order and as the respondent has come with a case that the services of these workmen have been terminated on 9.4.1987 and there is no reference regarding consideration of the

order dated 9.4.1987, therefore, the matter beyond the reference and had dismissed the claim of the petitioner.

4. Sri K.P. Agarwal, learned Senior Advocate has submitted that from the reference it is clear that the petitioner wanted to join on 12.3.1987 but as the same has not been permitted by the employer, therefore, that date may be taken into consideration regarding the order of termination or cessation of work. Admittedly the petitioners were not permitted by the employer from 12.3.1987 to join, therefore, the Labour Court ought to have taken into consideration that as the petitioners were not permitted to work on the said date, therefore, inspite of the fact that employer came with the case that their services have been terminated on 9.4.1987 and there was no reference for consideration of the order of termination dated 9.4.1987, therefore the Labour Court has got no jurisdiction to adjudicate the dispute. Reliance has been placed upon A.I.R. 1976 S.C. Page 1111 The State Bank of India Vs. Shri N. Sundar Money and has submitted that the Labour Court ought to have considered the jurisdiction vested in law by refusing to enter into the merits of the case and holding that cause of action has not arisen on 12.3.1987 is an illegal view taken by the Labour Court. The Labour Court did not take into consideration that for the workmen it was termination of their services when they have been refused permission to enter into the factory on 12.3.1987 when they had called off the strike and wanted to resume work. Inspite of the fact that if the order of dismissal of the workmen even if it is accepted, it had taken place on 9.4.1987 but as no departmental/domestic inquiry has taken place, the order is bad and the Labour Court will not adjudicate the Labour Court ought to have taken into consideration the order dated 9.4.1987. It is well settled law by the Apex Court in case of Phulbari Tea Estate Vs. Its Workmen which was decided in 1959- vide A.I.R. 1959 S.C. Page 1111 that before punishing a workman, he must be charge-sheeted and a domestic inquiry should be held because 12 workmen has been denied opportunity of being heard as such the same was against the principles of natural justice.

5. On the other hand, the counsel for the respondent no.2 Sri Satish Chaturvedi has submitted that after the strike the petitioners workmen have not joined and as they were involved in the strike, the intimation regarding the charges and order of suspension were sent individually to the concerned workman and others by registered post and also under insured cover and a copy of that was affixed on the main gate of the factory. The charge sheet -cum-suspension order was also published in the issue date 15.3.1987 in the local Hindi Daily "Hint' but no reply was submitted inspite of the repeated opportunity given to them. It has further been submitted on behalf of the respondents that a specific averment was made in the written statement filed before the Labour Court that as the Managing Director and another director was involved as victim and witness in the case, therefore, there was a bonafide apprehension that it will not be possible to hold a peaceful and domestic inquiry as such it was decided not to hold any domestic inquiry. The services of the workmen were not terminated in order to reference and they continued to be unauthorized absent, therefore, it will be presumed that they have all voluntarily

abandoned their jobs. It has further been submitted on behalf of the respondents that on the basis of the document and on the basis of the evidence it was fully proved that the workmen petitioner has not joined the services after 12.3.1987 inspite of the end of the strike and services of the petitioner were terminated on 9.4.1987. No order was passed on 12.3.87; therefore, the Labour Court has rightly refused to go beyond the reference of the State Government. It has also been brought to the notice of the Court that there was some quarrel and order of suspension of the workmen were withdrawn by the employer on 27.1.86 but the strike was continued and there was no compromise. The workmen themselves have finished the strike on 12.3.1987. The Labour Court has recorded a finding to this effect that inspite of the end of the strike as stated by the workmen, they have not turned up for work in the organization. The finding of fact has been recorded by the Labour Court that the workmen have failed to prove that they wanted to work from 12.3.87 but respondent no.2 has not permitted them to enter into the premises. The notices which were sent to the workmen regarding termination of their services were filed before the Labour Court and the finding to this effect has been recorded that there is no reason to disbelieve the documents which have been submitted by respondent no.2 and the services of the workmen have been terminated by the employer vide its order dated 17.4.1987. The Labour Court has also recorded a finding of fact that the services have been terminated by a written order and no order was passed on 12.3.1987 and the Labour Court cannot go beyond the reference made by the State Government, therefore, there cannot be any interference.

6. From the evidence it is also clear that the workmen gave a notice on 11.3.87. The same was given by the Union but there is no signature of the workman and no information to this effect that respondent no.2 has not permitted to work these workmen has been given to the Labour Court Commissioner. It has also come in the statement that no complaint to the City Magistrate has been made as the petitioners have failed to prove that they tried to join on 12.3.87. On the other hand, a finding to this effect has been recorded by the Labour Court that respondent no.2 has sent a registered notice on 9.9.87 and the same has been proved by producing the receipts and by oral evidence and as such, has recorded a finding that there was no dispute on 12.3.1987, therefore, the reference is bad.

7. I have heard the learned counsel for the petitioner and Sri Satish Chaturvedi who appears for the respondents and have perused the record. From the record it is clear that the reference was to the effect that whether the services of the workmen have been dispensed with from 12.3.1987 and what is the effect? The Labour Court has recorded a finding to this effect that as the reference was regarding consideration of retrenchment and cessation of work from 12.3.1987 and from the record it has been proved that the services of the petitioners were terminated and there was no reference by the State Government regarding the order dated 9.4.1987, the Court has no jurisdiction to go beyond the reference made by the State Government, as such has dismissed the claim on the ground that there was no dispute on 12.3.1987. In the case reported in 2005

SCC (L & S) 154, Mahendra L. Jain Vs. Court has clearly held that the Labour Court can only decide the dispute referred to it. The Labour Court has got no jurisdiction to go beyond it.

8. In 2005 S.C.C. (L & S) Page 372, Management of Madurantakam Corporation Sugar Mills Ltd. Vs. S. Vishwanathan the Apex Court has held regarding the scope of interference under Article 226 of the Constitution of India and has held that the Labour Court or Industrial Court is final Court of fact unless and until it is proved that it is illegal apparent on the face of record, the Court should not interfere in the finding of fact recorded by the Labour Court.

9. Admittedly from the reference it is clear that there was no dispute between the petitioners and the respondents, which was referred by the State Government and in view of the Apex Court judgment. It is well settled that the Labour Court has to act according to the reference and cannot go beyond it. In such a way I am of opinion that the finding recorded by the Labour Court is correct and it needs no interference by this Court under Article 226 of the Constitution of India.

10. The writ petition is devoid of merit and is hereby dismissed. No order as to costs.

Indore Development Authority, the Apex

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 41591 of 2002

Committee of Management, Beni Singh Vaidic Vidyawati Inter College Baluganj, Agra and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri Vishnu Shankar Gupta
Sri Vinod Kumar Singh

Counsel for the Respondents:
Sri O.P. Sharma
Sri G.K. Singh
Sri V.K. Singh
S.C.

U.P. Recognised Basic Schools (Junior High Schools) Recruitment and condition of service of teachers, 1978–Rule IV–read with National council of Teachers Education Act 1993–S 14–G.O. Dated 31.1.1998 providing compassionate appointment on the post of Asstt. Teacher in junior high school–to such dependent who does not possess even minimum qualification held ultra vires–even rules of dying in harness rules 1974 refers the relation in age and procedure for appointment but no relaxation given with minimum qualification.

Held: Para 17

Learned counsel for respondent no. 6 has relied upon Rule 8 of the U.P. Appointments of Dependants of Government Servant Dying in Harness Rules 1974. A perusal of the Rule 8 Shows, it refers to age and the procedure

for appointment to be relaxed, but no relaxation is provided for minimum qualification for the post. There is no provision under these rules to relaxing essential educational qualification and training qualification. The respondent no. 6 as such could not be appointed as Assistant Teacher in the institution and to that extent I hold that the Para 3 of the Government Order dated 31.1.1998 is ultra, vires Rule 14 of U.P. Recognised Basic Schools (Junior High Schools) (Recruitment and conditions of Service of Teachers) Rules 1978 as well as the provisions of Section 14 of the National Council of Teachers Education Act 1993.

Case law discussed:

1981 UPLBEC 336 (F.B.)
W.P.No. 17422 of 2003 decided on 23.5.2003
1981 UPLBEC 6521

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

1. Heard Sri Vinod Kumar Singh, learned counsel for the petitioner and Sri O.P. Sharma for Sri Agam Prakash Deepak–respondent no. 6. Learned standing counsel appears for the State respondents, and the Basic Shiksha Adhikari.

2. The back ground facts in brief are as follows;

3. The Beni Singh Vaidic Vidyawati Inter College Baluganj, Agra is an education institution running classes up to International level. It was initially recognised only up to High School and was receiving grant-in-aid from the state government. The U.P. Junior High Schools (Payment of Salary to Teachers and Other Employees) Act 1978 (in short the Act of 1978) was applicable to the institution. On 21.12.198 the Regional Secretary, Board of High School and Intermediate Education gave recognition to the school as unaided (Vitta Viheen) High School with permission for the students of the institution to appear in the High School examination of the year 1990. A Consequential order was issued by the District Inspector of Schools, Agra on 13.10.1989. The Accounts Officer in the office of Basic Shiksha Adhikari, Agra informed the Management on 17.5.1990, that after the school has received the recognition for conducting the classes up to High School. It is not possible to pay the salaries under the Act of 1978.

4. The Committee of Management filed a writ petition No. Nil of 1990 (Badam Singh and 13 others vs. State of U.P. and others) for payment of salaries to its teachers. On 25.5.1990 the court passed an interim order directing respondent no. 2 and 3 to pay the petitioner's salary as they were entitled to prior to the up gradation of the institution as High School. The writ petition is still pending and the salary is being paid upto Junior High School level from the office of Basic Shiksha Adhikari, Agra in accordance with the Act of 1978.

5. The Act of 1978, was amended by U.P. Junior High School (Payment of Salaries to Teachers and Others Employees) Amendment Act 2000 (U.P. Act no. 34/2000) insieting Section 13-A in U.P. Act no. 7 of 1979. the newly inserted section is quoted as under : -

"13-A Transitory provisions in respect of certain upgraded institution (1) Notwithstanding anything contained in this Act, the provisions of this Act shall, mutates mutandis, apply, to an institution which is upgraded to High School or Intermediate standard and, to such teachers and other employees thereof in respect of whose employment

maintenance grant is paid by the State Government to such institution

(2) For the purpose of this section the reference to the students wherever they occur in Section 5, shall be construed as reference to the students of classes up to junior High School level only."

6. The school applied and that the Additional Secretary, Board of High School and Intermediate Education by his order dated 16.10.1995 passed an order giving un-aided (Vitta Viheen) recognition to the institution at the Intermediate level. The School is now imparting classes from Class VI to XII and that the students are regularly appearing in High School and Intermediate examination. The salary of the staff upto Junior High School level is being paid from the Government grants through Basic Shiksha Adhikari, Agra. There are five substantive vacancies on account of retirement and deaths of Assistant Teachers at Junior High School level. The Committee of Management took initiative in 1998 and 1999 for making selections and appointment but no selection could be made on account of objections taken by the Basic Shiksha Adhikari on the ground that the institution has been upgraded upto intermediate level and thus no selection can be undertaken treating the institution as a Junior High School.

7. The Basic Shiksha Adhikari, however, passed an order on 6.6.202 directing the management to appoint Sri Agam Prakash Deepak- respondent no. 6 as untrained Assistant Teacher in the institution on compassionate grounds. The petitioner protested to this appointment and in their representation dated 11.6.2002 they stated that no resolution has been passed to appoint the respondent no. 6 on compassionate grounds. The management took objection to the fact that when the Basic Shiksha Adhikari did not agree to initiate proceedings to fill up the post on the ground that the institution has been upgraded up to Intermediate level, how could be exercising powers of making compassionate appointments. The Basic Shiksha Adhikari by his order dated 4.9.2002 again issued orders for appointment of respondent no. 6 failing which the salaries of the Head Master and other teachers shall be stopped. By interim order dated 4.10.202 the operation of these orders dated 6.6.2002, and 4.9.2002 passed by Basic shiksha adhikari, Agra were stayed.

8. The first question to be decided in this writ petition is whether in the facts and circumstances when an aided Junior High School is upgraded as unaided Higher School and thereafter an Intermediate College, the Basic Shiksha Adhikari continues to have the administrative control for payment of salaries under the Act of 1978; and second, whether in such case the Basic Shiksha Adhikari can direct a compassionate appointment to be made in the institution, in pursuance of Government Order dated 31.1.1997.

9. Learned counsel for the petitioner has relied upon the newly inserted Section 13-A in the Act of 1978 and the Government Order dated 24.11.2001 by which the Principal Secretary, Government of U.P. provided in para-5, that for administrative purpose the aided Junior High School and unaided High School/Intermediate College situate in same campus and under same management, shall be treated as separate

units and that all administrative functions in such cases shall be performed by the concerned District Basic Education Officer, and District Inspector of Schools separately, and for all purposes the Accountant Officers shall continue to discharge their functions. He submits that the Basic Shiksha Adhikari having objected to the initiation of the appointment process to fill up the five vacancies in Junior High School section on the ground that the school has been upgraded as High School and then Intermediate college cannot turn around and make compassionate appointment without there being any resolution of the Committee of Management. It is further submitted that once the school has been upgraded with High School and thereafter as Intermediate for the purpose of appointment of teachers the provisions of U.P. Intermediate Education act 1921 and the U.P. Secondary Education Service Selection Board 1982 will be applicable. The Basic Shiksha Adhikari can have administrative control only for payment of salaries upto Junior High School, and has not been provided with the administrative control over the appointment.

10. Sri O.P. Sharma, learned counsel for respondent no. 6 submits that the grant of un-aided, recognition to High School and Intermediate Sections, does not take away the control of the Basic Shiksha Adhikari over the Junior High School, and that so long as U.P. Act of 1978 is applicable the Basic Shiksha Adhikari has administrative powers including the powers to make compassionate appointment. The Selection Committee constituted under Regulation 105 of the U.P. Intermediate Education Act 1921, in its meeting held on 18.9.2000 considered the petitioner's application and decided in his favour. However, since the institution was under administrative control of District Basic Education Officer, Agra, the District Inspector of Schools, Agra by his letter dated 2.10.2000 directed the District Basic Education Officer to take appropriate action. The father of respondent no. 6 died in harness on 27.05.1998. The respondent no. 6 is fully qualified for appointment. The committee of Management has not complied with the order and thus the Basic Education officer, Agra was left with no other option to stop the salary of teachers and employees of the institution. The Government order dated 24.11.2001 has divided the administrative control of the aided Junior High School and upgraded unaided High School/Intermediate under same management and same campus between the District Basic Shiksha Adhikari and District Inspector of Schools.

11. Once an aided Junior High School is up graded as an unaided High School/Intermediate and the State Government has taken liability for payment of salary of teachers of High Schools and Intermediate classes, the salary continues to be paid to the teachers under the provisions of the Act of 1978, which is applicable to the institutions as defined in Section 2 (e) to mean, a recognised junior high school for payment being receiving maintenance grants from the State Government. This Act of 1978 (U.P. Act No. 6/1979) regulates the payment of salaries to the teachers and other teachers of Junior High school receiving aid out of the State funds. Section 3 of the Act provides for the payment of salary within time and without unauthorized deductions. The power of

inspections is given in Section 4, and Section 5 provides for procedure for payment of salary. The enforcement of provisions and directions age given in Section 6 and the Appeal is provided in Section 7. Section 9 restricts the institution to create a new post of teachers or other employee except with previous approval of the Director, or such other officers. The recruitment and conditions of services of teachers of aided Junior High School not being institution belonging to or wholly maintained by the U.P. Board of Basic Education, is provided under the U.P. recognised Basic School (Junior High Schools) (Recruitment and Conditions of Services of Teachers) Rules 1978, made under the U.P. Basic Education Act 1972. The minimum qualifications for appointment on the post of Assistant Teacher of recognised school is Intermediate Examination by the Board of High School and Intermediate Education, U.P., or an equivalent examination with Hindi, and a teachers training course recognised by the State Government or the Board such as Hindustani Teaching Certificate, Junior Teaching Certificate, Basic Teachers Teaching Certificate and Certificate of Training.

12. The payment of salary is linked with the sanction of post and validity of the appointments. The Rules of financial management require that the salary is paid to the determined number of validly appointed teachers. Where the institution has been upgraded as High School/Intermediate without sanction of maintenance the financial control over the institution is restricted only upto junior high school level. The management may be under supervision for maintaining the standards of education which include adherence to the qualifications of teachers as prescribed under the U.P. Intermediate Education Act 1921, but unless the financial liability is taken over the District Inspector of Schools will not get any financial control over the institution. The State Government has clarified such a dichotomy of administrative and financial control over the aided junior high schools upgraded as unaided high school/intermediate classes, vide Government Order dated 24.11.2001.

13. Learned counsel for the respondent no. 7, has rightly placed reliance of Section 9 (iv) of the U.P. Intermediate Education Act 1921, which confers wide powers to the State Government to make any regulations modify and rescind it in respect to any matter under provisions of the Act. In **Krishna Pal Singh vs. Government of U.P. 1981 UPLBEC 6521** a Division Bench of this Court had held that any order issued by the State Government under the Section 9 (iv) will acquire statutory character and the same would be effective, notwithstanding any regulation framed by the board. The submission of the petitioner based upon the judgment of learned single judge of this court in **Ramesh Singh vs. State of U.P. & others (Writ Petition No. 17422 of 2003, decided on 23.5.2003),** holding that para 5 of the Government Order dated 16.11.2001, is inconsistent with the provisions of Section 16-A of the U.P. Intermediate Education Act 1921, is not a relevant decision for the present case. In that case the Court was dealing with the powers of the District Basic Education Officer to decide the question of no confidence motion passed by the Committee of Management against its Manager. After examining the provisions

of the U.P. Intermediate Education Act 1921 and the act of 1978 it was held relying upon **State of U.P. vs. District Judge, Varanasi 1981 UPLBEC 336** (Full Bench, para 17) that the Junior High School and High School or Intermediate College are distinct legal entities. Once a Basic School or a Junior High School is upgraded as a High School its identity as a Basic School or Junior High School is lost. It ceases to exist as legal entity and it place another institution with new legal entity comes into being. Learned Judge held that once a Committee of Management is recognised and the Memorandum of Association is approved under Section 16-A of the U.P. Intermediate Education Act 1921, the District Basic Education Officer ceases to have any authority or jurisdiction to deal with the upgraded junior high school. These observations were made in the context of a management dispute, where the Deputy Director had approved the scheme of administration, having in exercise of powers under Section 16-A of the U.P. Intermediate Education Act 1921. In this case we are concerned with the financial control and consequently the validity of appointment of the Assistant Teacher in the Junior High School.

14. The up gradation of an aided Junior High School as unaided High School/Intermediate College does not take away the institution from the financial control of the Basic Shiksha Adhikari. The power of the State Government to issue Government Order dated 24.11.2001 can be traced to Section 9 (iv) of U.P. Intermediate Education Act 1921. In order to remove difficulties and smooth functioning of the powers, where they are not so clearly defined the State Government can always, fill in the gap. The Basic Education officer as such does not cease to have administrative or financial control over the institution. He, however, ceases to have control over the management in so far as it touches and deals with the scheme of administration and the functioning of the High School and Intermediate classes are concerned.

15. The petitioner does not have any teaching qualification. He was appointed without consent and resolution of the committee of management of the institution. The District Basic Education Officer has defended his action under Government Order dated 31.1.1997, which provides for compassionate appointment. Para 3 of this Government Order provides with such appointment can be given even to untrained teachers provided he completes the training after he is appointed.

16. I find substance in the submission of learned counsel for the petitioner that the Government Order dated 31.1.1997 is in conflict with Rule 4 of the U.P. Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Services of Teachers) Rules 1978 which provides for educational qualification for appointment as assistant teachers in junior high school including the teaching qualifications. These rules do not provide for any exception from the teaching qualifications. Further, I find that after enforcement of National Council of Teachers Education Act 1993 no untrained teacher can be appointed even on compassionate grounds in any school receiving grant-in-aid from the State Government.

17. Learned counsel for respondent no. 6 has relied upon Rule 8 of the U.P.

Appointments of Dependants of Government Servant Dying in Harness Rules 1974. A perusal of the Rule 8 Shows, it refers to age and the procedure for appointment to be relaxed, but no relaxation is provided for minimum qualification for the post. There is no provision under these rules to relaxing essential educational qualification and training qualification. The respondent no. 6 as such could not be appointed as Assistant Teacher in the institution and to that extent I hold that the Para 3 of the Government Order dated 31.1.1998 is ultra, vires Rule 14 of U.P. Recognised Basic Schools (Junior High Schools) (Recruitment and conditions of Service of Teachers) Rules 1978 as well as the provisions of Section 14 of the National Council of Teachers Education Act 1993.

18. The writ petition is consequently allowed. The order of the District Basic Education Officer, Agra dated 6.6.2002 and 4.9.2002 (Annexure 8 and 10 to the writ petition) are set aside with no order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2005

BEFORE
THE HON'BLE R.K. AGARWAL, J.
THE HON'BLE PRAKASH KRISHNA, J.

I.T.R. No. 103 of 1987

The Commissioner of Income Tax (Central) Kanpur ...Applicant
Versus
Dr.(Miss) ChandraKanta Rohatgi,Kanpur ...Respondents

Connected with
I.T.R. NUMBER 125 of 1990

The Commissioner of Income Tax Kanpur ...Applicant
Versus
Dr.(Miss) ChandraKanta Rohatgi, Kanpur ...Respondent

Counsel for the Applicant:
Sri Bharat Ji Agrawal
S.C.

Counsel for the Respondent:

Income Tax Act-S-12-A read with Indian Registration Act-Section 17-Exumption from Tax-assessee placed the copy of trust deed-Registration certificate by which public Trust created-plea not accepted by I.T.O.-I.T. Commission held although house property utilized by the assessee as a founder and managing Trustee legal ownership still vested with assessee-so income from such property has to be assessed u/s 22 of the Act-purpose of Trust-rendering medical Services to the poor and weaker Section of Society-1.4.77 the assessee endowed and dedicated the house property declaration deed dated 07.04.1977-whehter a Hindu can create religions and charitable Trust Orally? Held- 'Yes' the cession of ownership of assessee complete-when it dedicated to general publice for religions object-Registration of deed immaterial can not be treated the income of assessee.

Held: Para 12

When such dedication is complete a public trust is created in contradistinction to a partial dedication which would only create a charity. A dedication for public purposes and for the benefit of the general public would involve complete cessation of ownership on the part of the founder and vesting of the property for a religious object. Although the dedication to charity need not necessarily be by instrument or grant, there must exist cogent and satisfactory evidence of conduct of the parties and user of the properties which

show the extension of the private secular character of the property and its complete dedication to charity. It has been further held that dedication would mean complete relinquishment of the right and ownership and proprietary.

Case law discussed:

AIR 1957 SC-133
AIR 1963 SC-1638
2003 (5) SCC-46
2005 (1) SCC-457

(Delivered by Hon. Prakash Krishna,J.)

1. The assessee respondent, a medical practioner, filed her return of Income for the assessment year 1978- 79 and 1979-80. In the return she did not include income from the property No.16/72 Civil Lines, Kanpur. In reply to the show cause notice issued by the Income Tax Officer it was submitted by her that the said property with hospital has been irrevocably set apart and dedicated for public charitable purpose in favour of Chandra Kanta Jawahar Lal Public Charitable Trust, Kanpur on 1-4-1977. The assessee placed a copy of trust deed and other details along with the certificate under Section 12-A of the Income Tax Act (herein after referred to as the Act) before the Income Tax Officer, Kanpur in support of her case.

2. The Income Tax Officer rejected the aforesaid contention of the assessee on the ground that property no.16/72 Civil Lines, Kanpur was not transferred to the trust by means of registered deed as required under section 17 of the Registration Act, meaning thereby the assessee continues to be owner of the said property. Such act of the assessee amounts to transfer within the meaning of Section 63(b) of the Act. It was brought to the notice of the Income Tax Officer that the said trust namely Chandra Kanta Jawahar Lal Public Charitable Trust, Kanpur, has been granted registration by the Commissioner of Income Tax, Kanpur under section 12-A of the Act. This plea was not accepted by the Income Tax Officer with the observation that whether income of the trust is exempt or not will be decided on merits of the case. In appeal, against the assessment order the plea of the assessee was partly accepted. The appellate authority namely C.I.T (A) took the view that there is no material on record to show that the trust was a benami of the assessee and that the assessee had charged any fee for personal services rendered by her to the trust. The Commissioner of Income Tax (A) was of the view that although house property no.16/72 Civil Line Kanpur was utilized by the trust but as the assessee was the founder and managing trustee , therefore the legal ownership over the property still vested with the assessee and the income from this property had to be assessed under section 22 of the Act at the hands of the assessee

3. The assessee took up the matter before the Income Tax Appellate Tribunal, in respect of inclusion of income from the aforesaid property in her hands. The Tribunal allowed the appeal of the assessee as it was of the view that no registered document was required to be executed by the assessee to create a religious endowment with respect to the property in question. The Tribunal found that the property was dedicated by the assessee by renouncing her right in favour of the trust for Public charitable trust on 1-4-1977 and, therefore, the trust became its owner from that date. The assessee confirmed her renunciation of the disputed property in favour of the trust by means of writing dated 7-4-1977. The

Tribunal was of the view that the assessee ceased to be the owner of the property in question with effect from 1-4-1977 and the property has been vested with effect from that date in the trust for Public charitable purposes and as such its income is not liable to taxed at the hands of the assessee. According to the Tribunal the provision of Transfer of Property Act and the Registration Act would not apply to such dedication.

4. The Tribunal at the instance of the department has referred the following common questions of law under section 256(1) of the Act:

1. WHETHER in law and on facts the Tribunal was justified in excluding the income from property at 16/72 Civil Lines, Kanpur from the hands of the assessee?
2. WHETHER transfer of an immovable property by any person without any consideration to a Trust which is not regarded as Charitable Trust, is covered under the definition of dedication/ endowment?

3.WHETHER to complete such transfer as described in question no.2 above, there is no need of an instrument duly registered as prescribed in section 123 of the Transfer of Property Act as well as under section 17 of the Indian Registration Act, 1908?

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

It appears from the record that the assessee founded a Public Charitable trust in the name of Chandra Kanta Jawahar Lal Public Charitable Trust, Kanpur by means of a registered deed on 18-4-1976 and she settled Rs.1100/- on the trust. Eight persons were appointed as trustees of the trust. The trust came into existence on account of deed of declaration which was executed on 18-4-1976. The objects of the trust admittedly were charitable in nature. The Commissioner of Income tax has recognized the said trust as charitable trust under section 12-Aof the Act on 28-9-1979. It was also granted a certificate on the same date under section 80-G of the Act by the Commissioner of Income Tax. The Trust maintained regular books of account, which are duly audited. According to the assessee she on 1-4-1977 endowed and dedicated the aforesaid property situate at 16/72 Civil Lines, Kanpur together with the hospital and Nursing home including all buildings, land and the right therein or appurtenant therein for the Public charitable purposes of rendering medical services and relief to the poor and weaker section of the society in particular and the public in general. Subsequently the assessee confirmed the endowment through a declaration dated 7-4-1977, which is an unregistered document in favour of the aforesaid trust. The said declaration has been reproduced in verbatim by the Tribunal in its order and, therefore, it is not necessary to reproduce again except the last portion of the said document.:

"And whereas in order to avoid any difficulty, disputes or misunderstanding in future, it is expedient to confirm the facts stated herein before;

Now, therefore it is hereby declared that the hospital and nursing home situated at 16/72 ,Civil Lines, Kanpur including all other buildings, lands and rights therein or appurtenant thereto (as described in the Plan annexed hereto) have been

irrevocably , set apart, endowed and dedicated by me on 1-4-1977 for the public charitable purposes or providing medical services and relief to the poor and weaker sections of the society in particular, and the public in general, and I have no right, title or interest therein except as Trustee of the aforesaid trust; and for all intents and purposes, the said trust has all the rights, title and interest to hold ,run and manage the said hospital and nursing home for the purposes aforesaid as part of the corpus of the Trust for the aforesaid public charitable purposes." (underlining by us)

6. Besides the above the Tribunal has found that the property in question has been mutated in the Municipal record in favour of the trust. It has also come on record that a declaratory decree by the Court of Civil Judge, Kanpur has been passed on 10-9-1985 in a Suit viz. **Manzoor Alam Vs. Dr Miss Chandrakanta Rohatgi, Kanpur**. The Civil Court has granted a declaration under the aforesaid decree that the aforesaid property is in the ownership of the said trust.

7. The objection by the Revenue is that the property in question cannot be treated as trust property in view of the fact that the declaration in writing dated 7-4-1977 dedicated the property in question to the trust is unregistered. Elaborating the argument the learned Standing Counsel submitted that in view of provision of Section 17 of the Registration Act as well as of the Trust Act, the document compulsory required registration under the aforesaid two Statutes. The failure on the part of assessee to execute a registered document in favour of the trust would amount that the assessee continues to be legal owner of the property in question and in this view of the matter the Income Tax Officer was fully justified in adding the income from the said property in the hands of the assessee.

8. In contra, learned Counsel for the assessee submitted that the trust was already created by means of registered deed dated 18-4-1976. The creation of the said trust is not in dispute. It is also not in dispute that the said trust was created for charitable purposes and admittedly its object are charitable in nature. In view of the order passed by the Commissioner of Income Tax under section 12-A of the Act treating the said trust as charitable trust, it is no longer open to the any Income Tax authority to treat the property in question as belonging to the assessee.

9. After hearing the learned counsel for the parties at length we are of the opinion that the main question which required determination in the present references is whether it is necessary for a Hindu to execute a registered deed for creation of the religious and charitable endowment. In other words whether a Hindu can create religious and Charitable endowment orally as it was done in this case on 1-4-1977 and the declaration was reduced in writing subsequently on 7-4-1977.

10. To begin with, we find that Section 1 of the Trust Act specifically excluded its applicability to the Public trust or Charitable endowment etc. The Apex Court has pointed out distinction in the case of **Deoki Nandan Vs. Murlidhar A.I.R. 1957 SC 133** between private and public trust. In the private trust the beneficiaries are specific individuals but in Public trust they are

general public or Class thereof. In the private trust the beneficiary or person are ascertained or capable of being ascertained but in the public trust the beneficiaries constituted a body which is incapable of ascertainment. The religious endowment must be held to be private or public according to the beneficiaries therein specific person or any general public or section thereof. In the case in hand it is not the case of the department that the trust namely Chandra Kanta Jawahar Lal Public Charitable Trust, Kanpur is not a public trust. The said trust has been created for public charity purposes of rendering medical service and relief to the poor and weaker section of the society in particular and the public in general.

11. The Constitution Bench of the Apex Court in the case of **Sri Govindlalji Vs. State of Rajasthan A.I.R.1963 SC 1638** in Para 68 of the report has held that dedication of private property to a charity need not be made by a writing; it can be made orally or even can be inferred from its conduct. It has disapproved the view of the High Court in not giving effect to a transfer of property dedicated to temple of Shrinathji on the ground that no gift or trust deed had been executed by the settler in that behalf.

12. The above view has been reiterated by Apex Court on numerous occasions. Recently in the case of **Kuldip Chand and another Vs. Advocate General to Government of H.P. and others (2003) 5 SCC 46** it has been held by the Apex Court that a Hindu is entitled to dedicate his property for religious and charitable purposes and for this even no instrument in writing is necessary. A Hindu however, in the event wishes to establish a charitable institution must express his purpose and endow it. Such purpose must clearly be specified. For the purposes of creating an endowment, what is necessary is a clear and unequivocal manifestation of intention to create a trust and vesting thereof in the donor and another as trustees. Subject of endowment however must be certain. Dedication of property either may be complete or partial. When such dedication is complete a public trust is created in contradistinction to a partial dedication which would only create a charity. A dedication for public purposes and for the benefit of the general public would involve complete cessation of ownership on the part of the founder and vesting of the property for a religious object. Although the dedication to charity need not necessarily be by instrument or grant, there must exist cogent and satisfactory evidence of conduct of the parties and user of the properties which show the extension of the private secular character of the property and its complete dedication to charity. It has been further held that dedication would mean complete relinquishment of the right and ownership and proprietary.

13. Very recently the Apex Court again examined the aforesaid issue in the case of **Thayarammal Vs. Kanakammal and others (2005) 1 SCC 457.** It was a case where a Hindu dedicated the property as " Dharmachatram, meaning " Choultry" of South India where Travellers or pilgrims can take shelter and can be provided with refreshment. The said dedication was inscribed on a stone which was fixed in the property itself. The stone inscription is of the year 1805. The Supreme Court on the basis of contents of the stone inscription came to the

conclusion that the owner has dedicated property for use as "Dharmachatram", meaning resting place of pilgrims visiting "Thyagaraja Temple" and it has observed as follows:

"Such dedication in the strict legal sense is neither a gift nor a "trust" as understood in the Transfer of Property Act which requires an acceptance by the donee of the property donated nor is it a "trust". The Indian Trust Act as is clear by its preamble and contents is applicable only to private trusts and not to public trust. A dedication by a Hindu for religious or charitable purposes is neither a "gift" nor a "trust" in the strict legal sense (See B.K.Mukherjea on Hindu Law of Religious and Charitable Trusts, 5th Edi by A.C.Sen 102- 03) It has been further held that a religious endowment does not create title in respect of the property dedicated in anybody's favour. A property dedicated for religious or charitable purpose for which the owner of the property or the donor has indicated no administrator or manager becomes res nullius which explains ass property belonging to no body."

14. In our view the controversy presently involved in these references is fully covered by the aforesaid judgment of Apex Court specially in **Thayarammal Vs. Kanakammal** (Supra).

15. In view of the aforesaid authoritative pronouncements it does not lie in the mouth of Revenue to contend that for creation of religious and charitable endowment a registered deed is sine qua non. It has been established beyond doubt that such an endowment for public charitable purposes can be created orally. What is required is that there should be sufficient evidence to establish complete relinquishment by the settler. A dedication of property by Hindu renouncing his/ her entire right, title or interest in the property for religious charitable purposes for the benefit of public at large or for part of it is sufficient to create such endowment. Reverting to the fact of the present case we find that the Tribunal has recorded a finding that the assessee dedicated the property in question to the trust on 1-4-1977. Subsequently on 7-4-1977 she executed a deed of declaration to avoid any future dispute or conflict in the matter. The dedication of the property by the assessee on 1-4-1977 has not been seriously disputed by the department. The only objection to such dedication is with regard to non- registration of the deed of declaration dated 7-4-1977. We are of the view that the dedication of the property on 1-4-1977 is fully established on record. It is supported by clinching material. The trustee of the trust accepted the said dedication by passing a resolution and giving thanks to the assessee for such dedication. It has been followed by action such as the property in question has been mutated in the municipal record in favour of the trust. It has been further followed by declaration granted by the Civil Court through a decree in a suit in which the assessee was impleaded as a defendant. In view of the surrounding facts and circumstances of the case the dedication of the property in question by the assessee cannot be disputed and was rightly not disputed by the department.

16. Now we will consider the cases relied upon by the learned Standing Counsel in support of his submission .The earliest case relied upon by the learned Standing Counsel is **Commissioner of**

Income Tax Vs. Syed Saddique Imam and others (1978) 111 I.T.R.475. This is a Full Bench judgment of Patna High Court. The issue before the Full Bench was with regard to the taxability of income from the house property. The said house was transferred by a Mohamdan to his wife in lieu of dower debt. The issue was whether such transaction amount, sale or gift. The transfer was not made by registered deed. The Court held that the income from such property is assessable in the hands of transferor. The said case was decided under Mohamdan Law and it was held that a gift in lieu of dower debt is not "*hiba- bil- iwaz*" but is to be by a registered instrument as required under section 54 of the Transfer of Property Act, if immovable property transferred is valued more than at Rs.100/-. We find hardly any application of the ratio laid down therein in the facts of the case in hands.

17. Similarly another case relied upon by the learned Standing Counsel in **Radha Printers Vs. Commissioner of Income Tax, Kerala and others (1981) 132 I.T.R.300** has hardly any application to the present case as in that case the question of development rebate granted to the firm ,was involved. Certain assets of the firm were transferred by the partner to a trust and all partners were beneficiaries of the trust. The beneficiaries also included some minor who was admitted to the partnership for benefits. It was held by the Court that there was transfer of assets and liability of the firm to the trustee ,as the going concern and the fact that one of the trustee was founder did not make any difference. The High Court held that transfer by the firm constitute transfer of the assets and liability of the firm to the trust within the meaning of Section 34 (3)(b) read with Section 155 (5) of the Act.

18. The next case, which according to the Standing Counsel is the sheet anchor of his argument is **Commissioner of Income Tax Vs. Poddar Cement Pvt.Ltd. and others, (1997) 226 I.T.R.625 (SC)**. Strong reliance was placed by the learned Standing Counsel on the aforesaid judgment of Supreme Court and it was contended that the assessee continues to be the owner of the property in question within meaning of Section 22 of the Act and, as such, income of the property is liable to be taxed in her hands. The said contention of the learned Standing Counsel is misconceived and is liable to be rejected for the reasons more than one. In that case the Apex Court was called upon to interpret the meaning of word "owner" in the context of Section- 22 of the Act. In this connection the Apex Court has held that since the focal point of tax under Section 22 is to tax income from the house property, the real intention is to tax income of house property at the hands of such person who is beneficiary or the person who is receiving income from such property.

19The Apex Court has considered the concept of ownership as given by different jurists in their jurisprudence. The decision has taken into account the "Dias on Jurisprudence wherein the concept of ownership has been dealt with in the following manner:

"The position therefore seems to be that the idea of ownership of land is essentially not of the "better right" to be in possession and to obtain it where as with chattels the concept is a more, absolute one. Actual possession implies a

right to retain it until the contrary is proved and to that extent a possessor is presumed to owner.

Again at page 404 the learned Author says

"Special attention should also be drawn to the distinction between "legal" ownership recognized at common law and "equitable" ownership recognized at equity. This occurs principally when there is a trust, which is purely the result of the peculiar historical development of English Law. A trust implies the existence of two kinds of concurrent ownership, that of the trustee at law and that of the beneficiary at equity."

20. After reproducing the above passage Supreme Court added the word of caution to the following effect:

"We are not concerned in this case with any case of trust either under the equitable principles or under the law as engrafted in the Indian Trusts Act. Because the beneficiary might himself be a trustee of his interest for a third person, in which case his equitable ownership is as devoid of advantage to him as the legal ownership is to the trustee. So, when described in terms of ownership, the distinction between legal and equitable ownership lies in the historical factors that govern their creation and function; in terms of advantage the distinction is between the bare right, whether legal or equitable, and the beneficial right" (vide PP 404 -405 of Dias on Jurisprudence ,4th Edn"

Through the above passage it has been clarified by Supreme Court that by assigning appropriate meaning to the word ownership under section 22 of the Act it has excluded the case of trust either in the equitable principles or under law as engrafted in the Indian Trust Act. Thus we are of the considered opinion that the aforesaid judgment cannot be relied upon by the Revenue in the cases relating to trust.

21. Lastly the learned Standing Counsel submitted that such dedication or renunciation of property by the assessee amounts to gift and is, therefore, it has to be compulsory registered under section 122 of the Transfer of Property Act, failing which there is no transfer. Reliance has been placed upon the judgment of Supreme Court in the case of Commissioner of Income tax Vs. Sirehmal Nawalakha (2001) 251 I.T.R.108. The Apex Court while interpreting Section-4 of the Gift Tax Act, 1958 has held that there can be no doubt that certain transaction may not be regarded as gift for the purposes of Transfer of Property Act but would fall within the ambit of expression "gift" by virtue of Section- 4 of the Gift Tax Act. In this case the assessee who was the owner of immovable property by declaration sought to give gift of certain out houses attached to a building to his wife. The declaration which was made was not registered .The said gift was not treated as valid gift by the department but was so held by the High Court. Reversing the judgment of High Court the Apex Court observed that what is important is that there is to be valid transfer of property and whether the transfer amounts to gift or not would bring into the question of applicability of provisions of Gift Tax Act. Meaning thereby it was held by Supreme Court that immovable property can be gifted only in accordance with

Section 122 of the Transfer of Property Act. The ratio laid down in the aforesaid case is distinguishable in as much as in the case in hand the question of validity of gift is not at all involved. As held by Apex Court in the case of Kuldeep Chandra and another Vs. Advocate General of State of Himachal Pradesh (supra) and **Thayarammal Vs. Kanakammal and others** (supra) dedication of property by a Hindu to public religious and charitable endowment is neither a gift as understood in the Transfer of Property Act nor is a trust, the argument of the learned Standing Counsel is liable to be rejected.

We fail to understand for what purpose the learned Standing Counsel has relied upon the judgment of Supreme Court in the case of **(2005) 6 SCC 202 Annai Nuthu Thevar (dead) by L.Rs Vs. Alagammal and others**. The reliance placed on the said judgment is wholly misplaced one.

22. It may not be out of place to notice a very recent decision of the Apex Court, **State of Rajasthan and others Vs. Basant Nahata J.T. 2005 (8) SC 171** wherein it has been held that the Registration Act only strikes at the documents and not at the transactions. The whole aim of the Registration Act is to govern documents and not the transaction embodied therein, whereby only the notice of the public is drawn. It has quoted a passage from **M.E. Moola Sons Ltd. Vs. Official Assignee, A.I.R.1936 P.C.230**. The Privy Council while commenting on Sections 17 and 49 of the aforesaid Act, has stated:

"It is to be observed upon a comparison of these different sections that while the Registration Act only requires certain documents to be registered on pain of the consequences entailed by section 49. T.P.Act, by section 54 enacts that (with a limited exception) the sale of immovable property can be made only by registered instrument. The provisions of the Registration Act by themselves would not operate to render invalid a mere oral sale. On the other hand the somewhat wide phrase "any interest...to or in immovable property" which occurs in Clause (b). Section 17(1), Registration Act, does not occur in Section 54 of the other Statute."

23. It may be placed on record that the assessee expired during the pendency of the above references on 5-6-2003 and an application was filed by Sandeep Rohatgi on the basis of registered Will dated 3-2-1998 executed in his favour who claimed inheritance of the assets of the assessee after her death and sought for and was granted permission to contest the proceeding.

24. I.T.R.No.103 of 1987 relating to the assessment year 1978- 79 and I.T.R.No.125 of 1990 for the assessment year 1979-80, since the facts were identical, were heard together and are being disposed of by common judgment.

25. The up shot of the above discussion is that the Tribunal was justified on the facts and circumstances of the case to exclude the income from the property situate at 16/72 Civil Lines, Kanpur from the hand of the assessee; there was no need to execute registered instrument for dedication of the aforesaid property for Public Religious and Charitable trust . We answer all the three questions, referred to us, in affirmative

i.e. in favour of the assessee and against the Revenue.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2005

BEFORE
THE HON'BLE R.K. AGARWAL, J.
THE HON'BLE RAJES KUMAR, J.

Income Tax Reference No. 127 of 1993

The Commissioner of Income Tax (Central), Kanpur ...Applicant
Versus
M/s Pateshwari Electrical & Associated Industries (P.) Ltd., Gonda ..Respondent

Counsel for the Applicant:
Sri Shambhu Chopra
S.C.

Counsel for the Respondent:

<u>Income Tax Act 1961-Section 256 (2)</u>- Income from leasing of Balrampur lodge to S.B.I.-receipts from workshop, cold storage Motor garage, Raj Oil pump of Development Division whether should be taxed under head of business income or the income from other sources?-held- should be taxed as income from business-accordingly the question no. 1, 2 and 3 answered affirmative.

Held: Para 15

So far as question no. 3 is concerned, Tribunal has given reasoning for coming to the conclusion that the rent from cold storage, motor garage, Raj Oil Mill and approval charges may be taxed under head income from business and not under head income from other sources. We do not find any error in the view of the Tribunal.

<u>Case law discussed:</u>
51 ITR 353
20 ITR 451
147 ITR 692
83 ITR 700
249 ITR 47
263 ITR 143
247 ITR 516

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

1. At the instance of Commissioner of Income Tax, Tribunal has referred three questions 1,2,3 and at the instance of assessee Tribunal has referred the following question, which is marked as question no. 4 under section 256 (2) of the Income Tax Act, 1961, (hereinafter referred to as *"**the Act**"*) for opinion of this Court relating to the assessment year 1987-88 and 88-89:

"1. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was correct in holding that income from leasing of Balrampur Lodge to S.B.I., was assessable as business income and not as income from house property?
2. Whether on the facts and in the circumstances of the case, the Hon'ble I.T.A.T., was correct in holding that expenses incurred on Nainital Property be allowed as business expenses ignoring the fact that these expenses were not at all related to business activity?
3. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was correct in holding that treatment of receipts from workshop, cold storage, motor garage, Raj Oil Pump and supervision charges, of Development Division should be taxed under the head Income from business and not under the head income from other sources?
4. Whether the Tribunal was justified in law in holding that the Bank interest on Fixed Deposits representing the particular amount received from U.P.

State Electricity Board against a Bank Guarantee furnished by the assessee was taxable for the Assessment Years 1987-88 & 1988-89 on the particular facts and circumstances of the case?"

2. The brief facts of the case are follows:

The assessee company has income from letting out of house property at Nainital and in addition has lease rent from letting out of workshop, cold storage, motor garage, Raj Oil and interest income plus Miscellaneous Income. During the year under consideration the assessee's claimed income from letting out of Nainital Lodge to S.B.I. on monthly rent of Rs.22,500/- Rs.2,77,410/- as business income was rejected and assessed as income from property. Expenses on the property claimed as business expenses were also disallowed. Similarly, receipts from workshop, cold storage, motor garage, Raj Oil Pump, supervision charges of Development Division, amounting to Rs.10416/-;Rs. 45,000/-; Rs.11,321/-; Rs.9,000/- and Rs.20,300/- for the A.Y. 1987-88 as well as Rs.6,250/-; Rs.72,000/-; Rs.18781/- and Rs.12,000/- respectively for the A.Y. 1988-89 respectively were assessed as income from other sources. Aggrieved with the decision of the Assessing Officer, the assessee preferred appeal before the Ld. C.I.T. (Appeals), who vide his consolidated order dated 30.01.1991 has decided the issues against the assessee. Being dissatisfied with the decision of Ld. C.I.T. (A) the matter was taken up by assessee before I.T.A.T., who vide its consolidated order dated 21.09.1992 has decided the issue in favour of assessee.

3. The contention of the assessee before the Tribunal, which his referred in the order of the Tribunal were as follows:

"i) The entire property is divided into two parts by a nalla, the main part comprising of the main building and the extensive grounds appurtenant thereto and the other side of the nalla comprising of outhouses and servant quarters.
ii) Upto assessment years 1984-85 the main building was in the possession of the assessee and used as a guest house and was assessed to tax as a business assets.
(iii) The guest house and servant quarters were unauthorisedly occupied by Govt. servants, etc, the income from which was offered to tax under property. However, for the years under appeal, there is no property income, the assessee has filed eviction proceedings against the unauthorized occupants of the servant's quarters.
(iv) The assessee in conjunction with PICCUP had got the main building and the property surveyed by an expert and a report from him was received for the conversion of the property into a Hotel.
(v) During the process of conversion a proposal was received from S.B.I. for the main building and furniture with 30 beds accommodation for trainees alongwith other facilities for conducting a training center.
(vi) As the activity was akin to hotel business, the offer was accepted especially in view of the fact that the offer was for use of the premises throughout the year in contract to the seasonal character of the tourist trade in Nainital.
(vii) The trainees attending the Training Centre came from various part of the

country and their stay varied from 3 days to 10 days.

(viii)A Sarai Licence was obtained from the D.M. for carrying on the above activity as Balrampur Lodge and also a licence from the District Health Officer. Such licences have been issued from year to year upto date.

(ix) The Municipality gave a notice for revision in the Municipal Taxes after the SBI started the Training Centre. The assessee represented their case for being assessed as a business activity as in the case of any hotel. The Nainital Municipality accepted the contention.

(x) Nearly 1/3rd of the main building is still in use of the assessee housing a Branch Office and the office of the Deputy Agent and quarters for the visiting Directors, Secretary and other staff of the Company, Gardeners, Sweepers etc. have also been engaged for maintenance and upkeep of the property, the lawns and the garden which are in the exclusive possession of the assessee.

(xi) The assessee also relies on the fact that the lease with SBI was for a period of 5 years with an option for renewal for further 5 years. It is assessee's case that the lease is for a temporary period and the assessee has already indicated to S.B.I. that after the ten year period they want vacant possession of the property for being developed into a proper tourist facility.

(xii) It is the assesse's case that in view of the huge and continuous losses suffered by it over the past several years, the leasing of the property for a period of 10 years could be considered as a business activity as per decided case law.

(xiii) The assessee has also referred to the fact that it has set up another hotel at its headquarter in Balrampur from October, 1987, the income from which has been assessed to tax by the A.C. in the immediately succeeding assessment year 1989-90 under the head 'Business'. This according to the assessee is a pointer to the assessee's objective of conducting hotel and restaurant business.

(xiv) The Tribunal in its earlier order has missed on most of the points. It is argued that the authority under the Sarai Act is the D.M. and the Tribunal is obliged to accept the D.M.'s authority rather their find fault with the D.M.'s action. Besides, if the D.M. should order the closure of the establishment under the Sarai Act, the assessee is bound to close down the establishment of the Training Centre.

(xv) It is further pointed out that the assessment by the Nainital Municipality of the property as a business asset and that the assessee had suffered continuous and huge losses in the past and the lease to SBI was for a short duration were not kept in view in the earlier years.

(xvi) The recent Inspection report amply supports the above submissions.

(xvii) In any case, the lease to S.B.I. is not a lease of property simpliceter and its assessment under the head property for the earlier years appears to have been in error."

4. Apart from the aforesaid submissions, perusal of the assessment order for the assessment year 1987-88 shows that the assessee had also submitted that the assessee had to maintain a guest register, showing all details of guest like their names, address, date of arrival, period of stay, number of occupants, coming from, destination, room number etc.

Tribunal on the aforesaid fact held as follows:

"After hearing the rival submissions and after going through the material placed before us and also after on-the-spot inspection, we are of the view that it is a case of exploitation of an asset by a businessman for getting the maximum return on a commercial asset, although temporarily let out to State Bank of India with certain modification. At the time of inspection of the property, we noticed that there was a nalla passing through the land, which separates the main building from the quarters. Some rooms were still being used for housing the Administrative Office faculty Members' Office while others were used as hotel accommodation for the visiting trainees. It was also notices that structural changes had been made in the building to suit the requirements of the visiting trainees. The licence granted by the District authorities under the Sarai Act was found displayed in the front portion of the building. The back portion of the building was housing the office of the company and the Resident Representative of the assessee-company was having his office. One room was being used as the office of the visiting Officers of the Company, two rooms were used for the stay of the Officers of the company visiting Nainital on company's work. The lawns were found to be in the possession of the company and they are maintained by the employees of the company. The State Bank of India was not allowed to use the lawns. From the copy of the correspondents roduced in the court, we notice that the Chief General Manager, State Bank of India, Moti Mahal Marg, Lucknow has already been informed to quit and vacate the premises by the end of the year i.e. by 31.12.1992. Upto assessment year 1984-85 this Nainital Lodge property was used and accepted by the department as a business asset. The Expert Project report was commissioned with a view to convert the property into hotel. During the process of conversion of the property into a lodge house, an offer was received from S.B.I. to provide this place with furniture and fittings for the use of their training center with accommodation of 30 beds, for the visiting trainees. The hotel business in Nainital was seasonal and the offer of the S.B.I. was accepted. A Sarai licence was obtained from the District Magistrate, Nainital for carrying on the said business as also a licence from the District Health Officer and this licence has been renewed from year to year. Nearly 1/3rd of the accommodation was in the use of the assessee housing a Branch Office of the company. The Municipality of Nainital has assessed the property as a hotel establishment. This is clear from pages 121 to 124 of the Paper Book II. The servant's quarters on the other side of the nalla had been offered to tax under the head property, but those occupants were given notices to vacate and the assessee was not receiving anything from the under the head property income. The continuous losses incurred by the company in the past years seriously eroded the paid up capital of the company and in an effort to partly recoup these losses with a short term lease agreement was entered into with S.B.I. The entire building came in the use of the S.B.I. from May, 1984 only indicating the temporary natura of the arrangement. In vie of these facts, we are of the view that leasing out the Nainital lodge to S.B.I. was nothing

except exploitation of a business asset and the same was assessable as income from business. The assessee's contention in this regard are accepted by us for both the years under consideration, and the contention relied to the contrary on behalf of the department are found not tenable. This point is decided in favour of the assessee."

With regard to the question no. 3 Tribunal has recorded the following findings:

"The next controversy relates to the treatment of receipts from workshop, Cold Storage, Motor Garage, Raj Oil Pump and supervision charges of Development Division. It was argued before the first Appellate Authority that the income from commercial asset was treated as business income for earlier years, that the case laws cited by the Assessing Officer were not new and despite those case laws income from commercial asset was used as business income and was taxed as such in earlier years, that the leasing was not of house property but a complex operation involving machinery and plant etc. that no new facts were brought to the notice of the Assessing Officer and that his decision to assessee the income under the head "Other Sources" represented only a change of income, that the letting out was a temporary phase and not a permanent arrangement, that the assessee possessed the cold storage, that the 'Supervision charges' received for supervision of Construction of Digvijaya Complex could not be assessed as income from "Other Sources". The C.I.T. (A) rejected the submission of the assessee and held that the income was a assessable under the head "Other Sources". We notice that the finding recorded by the learned first Appellate Authority in paragraph 14 of his order for these two years is not based on evidence when he says that the assessee's task was confined only to taking of lease rent without any intention to resume the business and that it could not be equated with the period of lull or temporary exploitation of assets. From the whole lot of correspondence produced before us, it could not be said that it was a permanent arrangement in the case of the appellant-company. The inference of the Ld. C.I.T. (A) that it premises having been leased was almost a permanent arrangement is not based on the proper appreciation of the facts and material on record. It is noted that the cold storage was re-possessed by the assessee. Therefore, the inference that it was a permanent arrangement stands automatically rebutted. Therefore, we are of the view that the treatment of receipts from workshop, cold storage etc. should be taxed under the head income from business and not under the head income from 'Other Sources'. This point is decided in favour of the assessee and contentions to the contrary raised by the learned Department Representative are found not tenable."

With regard to the question no 4 referred at the instance of the assessee brief facts of the case as follows:

5. The assessee undertaking for the manufacture and distribution of electricity was acquired by UPSEB on 13.5.1964. A dispute arisen about the quantum of compensation payable by UPSEB to the assessee. The matter was referred to the Arbitrators who in addition to the compensation already paid, granted under

their award dated 24.12.1973; further a sum of Rs.43,82,000/- with interest @ 6% from the date of the award until the dated of payment of the additional compensation awarded. The UPSEB disputed the award before the District Judge and the High Court, who confirmed the award. Under the High Court's judgment the assessee was entitled to a sum of Rs.67,68,514/- inclusive of interest @ 6%. The UPSEB approached the Supreme Court under Special Leave of Appeal disputing, inter-alia, the award of 6% interest by the Arbitrators. The assessee approached the Supreme Court for interim relief and the Supreme Court by its order dated 04.05.1982 awarded 50% of the claim against provision of bank guarantee. The payment received from UPSEB was lodged in Fixed Deposit @ 10% interest against hich the bank issued bank guarantee as required by Supreme Court. Assessee transferred the interest @ 6% interest earned from the fixed deposit to the suspense account in which a sum of Rs.33,84,257/- stood credited to the account of UPSEB until the final outcome of the decision before the Supreme Court. Supreme Court dismissed the appeal on 01.02.1991. In these facts, Tribunal held that the in view of the dismissal of the appeal filed by UPSEB, all doubt about the uncertainty of the accrual of interest of compensation has come to an end and it can not be argued by the assessee now that the compensation claim of the assessee is in jeopardy. The argument raised on behalf of the assessee that the interest earned on the part of such compensation is in jeopardy and can not be rightly treated as income, has no legs to stand. Tribunal accordingly, held that the interest account on the fixed deposit was the income of the assessee.

6. Heard Sri Shambhu Chopra, learned Standing Counsel appearing on behalf or the Revenue. No one has appeared on behalf of the assessee.

7. We have perused the order of the Tribunal and the authorities below. We do not find any error in the order of the Tribunal. Before coming to the facts of the case, it would be appropriate to examine the various cases on the subject.

8. In the case of **Sultan Brothers Pvt. Ltd. Vs. CIT, reported in 51 ITR, 353**. The Apex Court while considering whether income from letting out a building is a business income or a property income. Apex Court observed as follows:

"Whether a particular letting is business has to be decided in the circumstances of each case. Each case has to be looked at from a business point of view to find out whether the letting was the doing of a business or exploitation of his property by an owner."

9. In the case **Commissioner of Excess Profits Tax, Bombay City Vs. Shri Lakshmi Silk Mills Limited, reported in 20 ITR 451,** the assessee company was manufacturer of silk cloth and as a part of its business it installed a plant for dying silk yarn. Due to the war the said plant was unused and was lying idle for sometime and therefore, was let out to a person on a monthly rent. The question for consideration was whether the rent received was chargeable to tax as profit of business or income from other sources. Apex Court held that it was chargeable to tax as income from business. While dealing with the aforesaid question, Apex court observed as follows:

"We respectfully concur in the opinion if the learned Chief Justice that if the commercial asset is not capable of being used as such, then its being let out to others does not result in an income which is the income of the business, but we cannot accept the view that an asset which was acquired and used for the purpose of the business ceased to be a commercial asset of that business as soon as it was temporarily put out of use of let out to another person for use in his business or trade. The yield of income by a commercial asset is the profit of the business irrespective of the manner in which that asset is exploited by the owner of the business. He is entitled to exploit it to his best advantage and he may do no either by using it himself personally or by letting it out to somebody else. Suppose, for instance, in a manufacturing concern the use of its plant and machinery can advantageously be made owing to paucity of raw materials only for six hours in a working day, and in order to get the best yield out of it, another person who has got the requisite raw materials is allowed to use it as a licensee on payment of certain consideration for three hours; can it be said in such a situation with any justification that the amount realized from the licensee is not a part of the business income of the licensor. In this case the company was incorporated purely as a manufacturing concern with the object of making profit. It installed plant and machinery for the purpose of its business, and it was open to it if any time it found that any part of its plant "for the time being" could not be advantageously employed for earning profit by the company itself, to earn profit by leasing it to somebody else.

We are therefore of the opinion that it was a part of the normal activities of the assessee's business to earn money by making use of its machinery by either employing it in its own manufacturing concern or temporarily letting it to others for making profit for that business when for the time being it could not itself run it. The High Court therefore was in error in holding that the dyeing plant had ceased to be a commercial asset of the assessee and the income earned by it and received from the lessee Messrs. Parakh & Co. was not chargeable to excess profits tax."

10. In the case of **CIT Vs. Shanmugham, reported in 147 ITR 692**. Assessee constructed a building consisting of 68 rooms and provided various amenities therein for the purpose of letting them out individually. The assessee's claim that the rent received from the tenants by letting out the rooms should be assessed as business income was rejected by the ITO, who held that the same should be assessed as property income. Tribunal however, accepted the claim of the assessee. In reference, High Court has upheld the view of the Tribunal. High Court has held that it is not possible to have any axiomatic principle to find out whether in running a particular lodging house, the assessee had been carrying on a business or merely letting out the property and the question has to be decided on the basis of the facts of each case. In the instant case, the various features satisfied the requirements of the lodging house being run on a commercial basis rather than as the owner of a property. The Tribunal was therefore, right in its view that the income derived by the assessee by letting out the lodging should by assessed as business income.

11. In the case of **S.G. Mercantile Corporation P. Ltd. Vs. CIT, reported in 83 ITR, 700**. Company was incorporated with the object specified in its memorandum of association to take on lease or otherwise acquire and to hold, improve, lease or otherwise dispose of land, houses and other real and personal property and to deal with the same commercially. Company took on lease a market place for initial term of 50 years spent Rs.5 lacs for the purpose of remodeling and repairing and sublet to the various persons. Question was whether the income arising from subletting was the business income. Apex Court held as follows:

"i) that since the appellant-company was not the owner of the property or any part thereof, no question of making the assessment under section 9 arose;

ii) that the definition of "business" in section 2 (4) was of wide amplitude and it could embrace within itself dealing in real property as also the activity of taking a property on lease, setting up a market thereon and letting out shops and stalls in the market;

iii) that, on the facts, the taking of the property on lease and subletting portions thereof was part of the business and trading activity of the appellant and the income of the appellant fell under section 10 of the Act."

12. In the present case Tribunal found that property in dispute was being used as a guest house upto the assessment year 1984-85 and this Nainital lodge was used and accepted by the department as a business property. The Expert Project report was commissioned with a view to convert the property into hotel. During the process of conversion of the property into a lodging house, an offer was received from SBI to provide this place with furniture and fitting for the use of their training center with accommodation of 30 beds for the visiting trainees. The hotel business in Nainital was seasonal and the offer of the SBI was accepted. A sarain licence was obtained from the District Magistrate, Nainital for carrying on the said business and had also licence from the District Health Officer and this licence has been renewed from year to year. The municipality of Nainital has assessed the property as a hotel establishment. It was also observed that continuous losses incurred by the company in the past years seriously croded the paid up capital of the company and in an effort to partly recoup these losses with a short term lease agreement was entered into with S.B.I. On these facts Tribunal held that leasing out the Nainital lodge to SBI was nothing except exploitation of a business asset and was assessable as income from business. It was also contended by the assessee before the assessing authority that they have also maintained a guest registration register in which details of the guest namely their names, address date of arrival, number of occupant etc. have been maintained. This shows that as part of running of the lodge, the entire room of the lodge had been let out for the short period to SBI. Now it is seen that now a days it is common feature that the big hotels used to let out rooms to the various companies for year or more than year. Therefore, it appears that intent of the assessee was to run the lodge and letting out of the all rooms to SBI for a particular period was incidental and in as much as letting out of the rooms to SBI for their trainees was a part of the running of the lodge business. Therefore, Tribunal has

rightly held that the receipt from SBI was liable to business income and the necessary expenditure incurred as business expenditure was liable to be allowed.

Decision cited by learned Standing Counsel are distinguishable on the facts of the case.

13. In the case of **CIT Vs. Shambhu Investment Pvt. Ltd. reported in 249 ITR 47**, which has also been approved by the Apex Court in the case of **Shambhu Investment Pvt. Ltd. Vs. CIT, reported in 263 ITR 143.** A portion of the property was used by the assessee itself or its own business purpose, the rest of the property had been let out to various occupants with furniture and fixtures and air conditioners for being used as table space. The assessee provided services like watch and ward staff, electricity and water and other common amenities. Service rendered to the various occupants according to such agreement was not separately charged and the monthly rent payable was inclusive of all charges to the assessee. Calcutta High Court held that agreement shows that assessee had let out office to the occupants on monthly rent which was inclusive of all charges to the assessee and the entire cost of the property was let out to the occupants and owner had been recovered as rent from premises by the assessee, therefore, could not be said that the assessee was exploiting the property for its commercial business activity.

14. In the case of **CIT Vs. Purshottam Dass, reported in 247 ITR 316** property constructed as a residential unit was let out to Government department was temporary used for office purpose earlier. Division Bench of Delhi High Court held that construction was made for residential purpose in a residential area and was mere temporary non-user as residence and consequent temporary user for office purposes will not make the rent chargeable as business income. It has been held that liable to be taxed as property income.

15. So far as question no. 3 is concerned, Tribunal has given reasoning for coming to the conclusion that the rent from cold storage, motor garage, Raj Oil Mill and approval charges may be taxed under head income from business and not under head income from other sources. We do not find any error in the view of the Tribunal.

16. We accordingly, answer the question nos. 1,2 and 3 in affirmative, i.e. in favour of the assessee and against the Revenue. So far as question no. 4, which has been referred at the instance of the assessee we refuse to answer the said question in the absence of assessee.

17. In the result, question nos. 1,2 and 3 are answer in affirmative, i.e. in favour of the assessee and against the Revenue and question no.4 is returned unanswered. There shall be no order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2006

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

First Appeal No. 23 of 2006

Desh Raj Singh ...Appellant/objector
Versus
Smt. Vandana Chaudhary ...Respondent

Counsel for the Appellant:
Sri Anil Kumar Sharma

Counsel for the Respondent:
Sri M.K. Gupta

Code of Civil Procedure Order 23 rule 2 and 3-Execution of Decree-family court judgment-the judgment Debtor-had to pay Rs.1,40,000/- judgment debtor an practicing Advocate in civil Court-taken plea that entire amount has been paid out of the Court-neither any documentary evidence produced-no Payment made through cheque either in favor of decree holder or the execution court-nor such application filed within 30 days-for certification of payment-held-execution court shall not recognize any un certified payment.

Held: Para 10

The law has been laid down in the above cited Sultana Bengums's case by Hon'ble Apex Court that Order XXI Rule 3 places a restraint on the exercise of that power by providing that the executing court shall not recognize or look into any uncertified payment of money or any adjustment of decree. If any such adjustment or payment is pleaded by the judgment-debtor before the executing court the later in view of the legislative mandate has to ignore it if it has not been certified or recorded by the court.

Case law discussed:
1988 ALJ 1200

AIR 1997 SC-1006

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

1. Heard learned counsel for the parties and have gone through the record.

2. Instant appeal has been preferred against order dated 16.12.05 passed by Addl. District Judge, court no.13, Agra whereby the application 4-C and 12-C moved by appellant judgment debtor Desh Raj Singh under Order 21 Rule 55, 58 and 59 CPC was rejected and objection 8-C filed by decree holder Smt. Vandana Chaudhary was allowed.

3. The fact of the case as disclosed from the record is that Smt. Vandana Chaudhary filed suit no.660 of 1991 Smt. Vandana Chaudhary v. Desh Raj Singh under section 13 of Hindu Marriage Act for divorce. It was decided on 31.8.01. The suit was decreed on the condition that in case Rs.1,40,000/- is paid to the appellant by the respondent the marriage will stand dissolved. According to Desh Raj Singh Rs.1,40,000/= which includes Rs.1 Lakh for permanent maintenance and Rs.40,000/- as valuation of articles belonging to the respondent-decree holder was given to her on 9.11.01. Smt. Vandana Chaudhary executed the receipt on the same day. But again she moved application for execution. According to the appellant this amount was withdrawn from his Account No. 2664, which was being maintained in Canara Bank but Smt. Vandana Chaudhary denied to have received any such amount and has moved for recovery of Rs.1,40,000/- and therefore the application was moved to Stay the execution. Prayer was made to the court below to obtain signature of Smt. Vandana Chaudhary and send the

signature alleged to have been executed on the receipt an specimen signature to the hand writing expert so that it may be ascertained as to whether she had really received Rs.1,40,000/- from the appellant on 9.11.01. Being rejected instant appeal has been filed. A copy of the receipt vide paper No. 32 and 32 A has been filed and there are three witnesses of the receipt.

4. When the appeal was filed Sri Pankaj Agrawal Advocate opposed admission of the appeal and placed reliance on order 21 Rule 2 and 3 CPC. It is submitted that if payment of decretal amount is made outside the court, there is a mandatory provision that it will be taken to be really paid if the payment is certified by the decree holder to the court whose duty is to execute the decree and the court shall record the execution or satisfaction of the decree. It is submitted that since in this case even though it is said payment of Rs.1,40,000/- was made on 8.11.01 but never any application was moved by judgment debtor that such heavy amount was paid outside the court. No such application was moved by judgment debtor within 30 days and decree holder uptil now, rather decree holder denies receipt of such money and therefore execution of the decree should not be stayed.

5. The objection alongwith affidavit was filed by decree holder Smt. Vandana Chaudhary in court below containing the fact that decree dated 30.8.01 was passed by the Principal Judge Family court, Agra in civil suit No.608 of 1991 Smt. Vandana Chaudhary v. Desh Raj Singh. On the basis of compromise the amount of Rs.1,40,000/- was to be paid within one month. She waited upto 18th March, 2002 but not even a single penny was paid to her. Therefore, she moved execution application no. 6/02 Smt. Vandana Chaudhary v. Desh Raj Singh in the court of Principal Judge, Family court, Agra which was transferred to the District Judge, Agra. In the court of the District Judge, Agra it was marked Execution No. 4 of 2004. The execution court passed order for attachment of the property of the appellant. Smt. Vandana Chaudhary has no means of livelihood she was left by Desh Raj Singh and that is the reason she filed application under section 125 Cr.P.C. for maintenance. Desh Raj did not appear in the case. It was decreed exparte but only Rs.14,000/- was given tow her Rs.18,000/- has not been given even till today. Desh Raj Singh is an Advocate in civil court, Agra and he got a forged receipt prepared. It was also deposed in the affidavit of Smt. Vandana Chaudhary that there is Account of Family court, Agra in the branch of State Bank of India, Nagar Mahapalika, Agra and in such compromise matter the money is to be deposited in the court which should have been deposited in the State Bank of India, Nagar Mahapalika, Agra branch, Agra.

6. Desh Raj Singh is an Advocate he had no problem to issue cheque in the name of the court which would have been deposited in the State Bank of India and there would have been documentary evidence that the money was given to Smt. Vandana Chaudhary through process of the court. The learned counsel for the respondent decree holder submitted that when he is an Advocate in civil court such heavy amount could not be given outside the court merely on receipt when the parties are contesting the case between them since last 14 or 15 years and even the whole amount of maintenance which was granted under section 125 Cr.P.C. by

the court, was not given by the judgment-debtor. It is submitted for the respondent that when the relations between the parties are so tense and they had no faith on each other, the judgment-debtor is illiterate person having no knowledge about the proceeding of the case. If really he had paid Rs.1,40,000/- he would have deposited the amount through cheque in the court with the prayer that it be given to the decree holder rather than cash would have been given through receipt. It is also submitted that mere issue of cheque was sufficient rather than to encash it from Bank and then give it to Smt. Vandana Chaudhary.

7. In **1988 ALJ 1200 Shanti Prasad Jain v. M/s Badri Prasad Biraj Bhan** it has been held by this Court that under order 21 Rule 2 the judgment debtor has been given an opportunity for making an application showing satisfaction. For making such an application there is limitation of 30 days under Article 134 of Indian Limitation Act 1963. When no such application was made by the judgment-debtor for several years, it cannot be said that the judgment-debtor had really paid for the satisfaction of the decree. Besides it the application was barred by time and it could not be considered under Order 21 Rule 2 CPC. The fact of the cited case applies to the fact of the instant case.

8. In **AIR 1997 SC 1006 Sultana Begum v. Prem Chand Jain** it was laid down by Hon'ble the Apex Court that:-

"*Interpreting the provisions of Section 47 and Order XXI Rule 2 in the light of the above principles, there does not appear to be any antithesis between the two provisions. Section 47 deals with the power of the court executing the decree while order XXI, Rule 2 deals with the procedure which a Court whose duty it is to execute the decree, has to follow in a limited class of cases relating to the discharge or satisfaction of decree either by payment of money (payable under the decree) out of Court or adjustment in any other manner by consensual arrangement. The general power of deciding questions relating to execution, discharge or satisfaction of decree under section 47 can thus be exercised subject to the restriction placed by Order XXI, Rule 2 including sub-rule (3) which contain special provisions regulating payment of money due under a decree outside the Court or in any other manner adjusting the decree. The general provision under section 47 has, therefore, to yield to that extent to the special provisions contained in Order XXI, Rule 2 which have been enacted to prevent a judgment-debtor from setting up false, or cooked up pleas so as to prolong or delay the execution proceedings. Thus, though it is open to the parties to adjust or compromise their rights under the decree but if it amounts to adjustment of decree, it must be reported to the Court whose duty it is to execute the decree so that that Court may record or certify the same. If it is not done, the Court before whom the execution proceedings are initiated will proceed to execute the decree.*

Where in an execution proceedings of a decree of eviction, the tenant took the objection on the ground that the possession was already delivered by him to the power of attorney holder of the landlord who again permitted him to continue in possession as a licensee, however, such fact of delivery of possession was not recorded and certified as provided by Order 21 Rule 2, order of

the executing Court in refusing to execute the decree for eviction of the tenant on the ground that possession having been delivered to the landlord's attorney, the decree, to that extent, stood satisfied, was erroneous."

9. It was also held in this case that the judgment-debtor may set up a false case of compromise if it take place outside the court or decree is executed outside the court. It is in order to prevent such judgment-debtor that Order 21 Rule 2 has been enacted so that is such compromise or creation of fresh tenancy has not been recorded, the judgment-debtor be not encouraged to initiate another round of litigation under section 47 Cr.P.C.

10. In instant case Smt. Vandana Chaudhary is contesting case against here husband judgment-debtor Desh Raj Singh since the year 1991 when she filed case under section 125 Cr.P.C. it was decreed but only part payment was made and part amount is still to be paid. Thus the parties have no faith on each other. Their relations are strained. Such a long litigation is evidence of the fact that if any payment is made outside the court, it may give birth to further litigation. In such circumstance if any payment is made in normal course, it will be made through documentary evidence or through the process of the court when Desh Raj Singh is an Advocate he has Account in the Bank as is evident from the record, normally he would have issued cheque in favour of the court or Smt. Vandana Chaudhary so that it could have been given to Smt. Vandana Chaudhary. Therefore considering the facts and circumstances of this case it cannot be believed that Rs.1,40,000/= was paid outside the court and receipt was obtained. The mandatory provision Order XXI Rule 2 CPC prohibits the judgment-debtor to take the plea to payment if the judgment-debtor fails to move application in the court concerned that payment was made to the decree holder even though payment is said to have been made on 9.11.01 but no application was moved by the judgment-debtor in the court that he had paid Rs.1,40,000/- and fact be recorded by the court when the judgment-debtor is an Advocate at the same place there was no hurdle in moving such application to the court. It shows that such application was not moved because really payment was not made that is why when execution application No. 6/02 was moved in the family court it was transferred to the court of District Judge and process for attachment started. The objection was raised by moving application 4-C and 12-C. The law has been laid down in the above cited Sultana Bengums's case by Hon'ble Apex Court that Order XXI Rule 3 places a restraint on the exercise of that power by providing that the executing court shall not recognize or look into any uncertified payment of money or any adjustment of decree. If any such adjustment or payment is pleaded by the judgment-debtor before the executing court the later in view of the legislative mandate has to ignore it if it has not been certified or recorded by the court.

In view of above discussion if the court below has rejected the application of the appellant there is no illegality in the order.

Appeal is **dismissed** as the admission stage. Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2006

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 18371 of 2004

Devendra Kumar Tiwari ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri J.P. Singh
Sri Sudhir Solanki

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

U.P. Intermediate Education Act-1921-Section 7 (7)-Date of Birth recorded in High School certificate-held-conclusive and final-under the provisions of Section 79 to 81 of the Evidence Act.

Held: Para 11

The High School examination certificate issued by the Madhyamik Shiksha Parishad U.P., Allahabad, records the date of birth of the petitioner as 13.12.1985. Under the provisions of Section 7 (7) of the Intermediate Education Act, the result of the petitioner has been declared in the official gazette. In view of the aforesaid facts read with Section 79 to 81 of the Evidence Act, the High School certificate produced by the petitioner is to be taken to be factually correct, unless and until established by some cogent evidence to be otherwise. The respondents have disclosed no material to doubt the correctness of the date of birth as mentioned in the High School certificate nor they could have insisted upon the petitioner to get himself medically examined. Even the report of the Radiology Specialist which is based on mere presumption drawn from certain biological examination records the approximate age of the petitioner as more than 20 years only. The report even if accepted did not establish that the petitioner was beyond the maximum age limit prescribed. There is hardly any appreciable difference in the date of birth as recorded in the High School certificate viz. a viz. the age presumed under the report of the Radiology Specialist.

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

1. Heard Shri J.P. Singh on behalf of the petitioner, Shri N.C. Nishad on behalf of respondents.

2. Director Recruitment, Recruitment Office Amethi, Sultanpur published an advertisement inviting applications for recruitment in Indian Army selections whereof were scheduled to take place at Allahabad between 16.1.2004 to 23.1.2004. Under the advertisement, candidates belonging to the district of Sultanpur, Rae Bareily and Kaushambi were required to appear at Allahabad New Cantt. On 19th and 20th of January, 2004.

3. Petitioner being a permanent resident of Kaushambi accordingly appeared for selections at Allahabad for Soldier (G.D. Category). It is stated that after physical examination the petitioner also participated in the written examination, the petitioner was successful. Vide telegram dated 9th March, 2004 the petitioner was required to report at the Branch Office at Amethi with all original documents. In the original certificates produced by the petitioner his High School examination

certificate issued by the Madhyamic Shiksha Parishad, Uttar Pradesh, Allahabad, recorded the date of birth of the petitioner as 13th December, 1985.

4. Although there was no material before the Recruiting Officer to have any doubts with regards to the age of the petitioner specifically in view of the High School certificate produced by the petitioner, he however directed the petitioner to appear before the medical specialist for investigation on 21.4.2004 with regards to his age. The petitioner complied with the directions so issued, the Radiology Specialist submitted his report to the effect that the age of the petitioner appears to be more than 20 years.

5. On the basis of the aforesaid medical report the respondents vide order dated 21.4.2004 declared the petitioner unfit on the ground that age of bones of the petitioner is more than 20 years.

6. It is against the said action of the respondents that the present writ petition has been filed.

7. On behalf of the petitioner it is submitted that there is no justification, to disbelieve the age of the petitioner as mentioned in the High School certificate, even otherwise the report of the Radiology Specialist only recorded that the age of the petitioner appears to be more than 20 years. The maximum age limit prescribed for recruitment as Soldier was 21 years and, therefore, even if the report of the Radiology Specialist is accepted the petitioner was not disqualified in any manner or he was beyond the maximum age fixed.

8. A counter affidavit has been filed on behalf of the respondents. Despite further time being granted absolutely no explanation has been furnished as to under what circumstances the date of birth of the petitioner as mentioned in the High School certificate could have bee doubted by the Recruiting Officer. Counsel for the respondents has not been able to point out any rule or provision under which the Recruiting Officer could refer the candidate for medical examination for determination of his age even where the High School certificate has been produced.

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

10. In paragraph 34 of the counter affidavit the respondents have tried to justifying the action taken against the petitioner. It is worthwhile to reproduce paragraph 34 and 43 of the Counter Affidavit:

"**34. That since his stated age was 18 years 3 months according to High School certificate on the planned day of enrolment (i.e. 26th March, 2004) and his biological age was determined to be definitely more than 20 years, the difference of 01 year 9 months or more sufficiently proves that the petitioner has willfully concealed his true age and provided false information in writing about his date of birth both to U.P. Board of Education and military authorities. (Reference petitioner's High School certificate and Mart Sheet at Annexure VI to the attached writ petition and Annexure counter affidavit-6 of this counter affidavit).**

43. That the contents of paragraph No. 21 ground (A) of the writ petition are factually incorrect. Determination of age is one of the responsibilities of Enrolling Officer. There is no denying the fact that date of birth entered in education certificate, particularly High School certificate is normally accepted at the time or enrollment. But candidates on their part are also required to give correct age through their documents/statements. In order to detect candidates using unfair means to seek enrollment by reducing their age such cases are referred to Military Hospital authorities for their decision. As the date of birth entered in High School certificate in such fraud cases can be verified through well established medical norms only. The petitioner has attempted to get enrolled by fraudulent means by giving false proof of age. His candidature thus stands automatically rejected irrespective of the fact whether he still fulfills other eligibility criteria or not.

11. In the opinion of the Court the stand so taken by the respondents is totally misconceived. It is admitted that the petitioner had passed High School examination in the year 1985. The High School examination certificate issued by the Madhyamik Shiksha Parishad U.P., Allahabad, records the date of birth of the petitioner as 13.12.1985. Under the provisions of Section 7 (7) of the Intermediate Education Act, the result of the petitioner has been declared in the official gazette. In view of the aforesaid facts read with Section 79 to 81 of the Evidence Act, the High School certificate produced by the petitioner is to be taken to be factually correct, unless and until established by some cogent evidence to be otherwise. The respondents have disclosed no material to doubt the correctness of the date of birth as mentioned in the High School certificate nor they could have insisted upon the petitioner to get himself medically examined. Even the report of the Radiology Specialist which is based on mere presumption drawn from certain biological examination records the approximate age of the petitioner as more than 20 years only. The report even if accepted did not establish that the petitioner was beyond the maximum age limit prescribed. There is hardly any appreciable difference in the date of birth as recorded in the High School certificate viz. a viz. the age presumed under the report of the Radiology Specialist. In these circumstances the respondents were not justified in declaring the petitioner unfit for the post of Soldier (G.D.). The order dated 21.4.2004 is quashed. The respondents are commanded to admit the petitioner as Soldier (G.D.) within four weeks from the date a certified copy of this order is filed before the Respondent No. 3. Writ petition is allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.01.2006

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Misc. Application No. 3215 of 2004

Dharam Pal and others ...Applicants
Versus
State of U.P. and another ...Opposite parties

Counsel for the Applicants:
Sri S.K. Dubey

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

Code of Criminal Procedure-Section-155(4)- of Investigation-without order of Magistrate in NCR cases-offence u/s 323/504 IPC-if the one offence is cognizable and the other one non cognizable-Investigation officer has power of investigation without permission of Magistrate-held-such irregularity does not vitiates the proceeding-application rejected with observation of expectation disposal of bail application.

Held: Para 4 and 8

It may be notices that the aforesaid passage itself refers to section 155 (4) of the Cr.P.C. which clearly provides that if one of the offences for which an accused is being implicated is cognizable, then the case shall be deemed to be a cognizable case notwithstanding that the other offence was not cognizable. If that was the position, then as the applicants were also allegedly involved in an offences under sections 325 and 308 IPC, which are clearly cognizable offences under sections 325 and 308 IPC, which are clearly cognizable offences, hence the investigating officer had the power of investigating the case even without an order of the Magistrate.

I also find that the alleged irregularity of the police officer in not being empowered to investigate the case is not one of the irregularities mentioned in section 461 Cr.P.C. which vitiates proceedings and moreover in section 460(b) it is even provided that if any Magistrate not empowered by law orders, under section 155, the police to investigate an offence, then the irregularity does not vitiate the proceedings. Moreover, it is not claimed that there was any miscarriage of justice or that the applicants had been prejudiced in any manner by the police investigating the offence without obtaining permission of the Magistrate.

Case law discussed:
2001 (1) UPCRR-147 distinguished
2003 (6) SCC-195 relied

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

1. I have heard learned counsel for the parties and perused the record.

2. In this case, initially the FIR was lodged as a non-cognizable report (NCR) at police station Phoolpur, District Allahabad under sections 323 and 504 IPC on 8.7.1999 at 5 pm about an incident dated 8.7.1999. The allegations in the NCR lodged by Jagnnath were tat as the cattle of the accused had entered his field, when his wife and son tried to drive the animals out of the field, there was an exchange of hot words with the applicants who beat Devkali and Kamlesh with lathies and dandas, and caused injuries on the head of Devkali and arms and fingers of Kamlesh. Subsequently, it appears that on the basis of the medical report the case was converted to one under sections 323, 324 and 325 IPC by the investigating officer and subsequently he even added section 308 IPC when he submitted the charge-sheet on 12.10.1999.

3. The main contention of the learned counsel for the applicants was that the investigation by the investigating officer was unauthorized as it was a non-cognizable case and in view of section 155(2) Cr.P.C. the investigation could not have been initiated in the case without any order of a Magistrate who had power to try or commit the case for trial. Learned counsel for the applicants also relied on paragraph 34 of *State of Haryana Vs. Ch. Bhajan Lal: 1992 Supp*

(1) 335. The said passage reads as follows:

"*In this connection, it may be noticed that though a police officer cannot investigate a non-cognizable offence on his own as in the case of a cognizable offence, he can investigate a non-cognizable offence under the order of a Magistrate having power to try such non-cognizable case or commit the same for trial within the terms under Section 155 (2) of the Code but subject to Section 155 (3) of the Code. Further, under the newly introduced sub section (4) to Section 155, where a case relates to two offences of which at least one is cognizable, the case shall be deemed to be a cognizable case notwithstanding that the other offences are non-cognizable and, therefore, under such circumstances the police officer can investigate such offences with the same powers as he has while investigating a cognizable offence."*

4. It may be notices that the aforesaid passage itself refers to section 155 (4) of the Cr.P.C. which clearly provides that if one of the offences for which an accused is being implicated is cognizable, then the case shall be deemed to be a cognizable case notwithstanding that the other offence was not cognizable. If that was the position, then as the applicants were also allegedly involved in an offences under sections 325 and 308 IPC, which are clearly cognizable offences under sections 325 and 308 IPC, which are clearly cognizable offences, hence the investigating officer had the power of investigating the case even without an order of the Magistrate.

5. It is then contended that that investigating officer only on the basis of the medical report without taking opinion of the doctor made it a case under sections 325 and 308 IPC. In my opinion, there is no fetter on the investigating officer converting the case under sections 325 and 308 IPC on the basis of the injury report if in his opinion the circumstances even if he does not examine the medical officer.

6. Learned counsel also relied on a single-Judge decision of this Court in the case of *Surendra Vs. State of U.P., reported in 2001 (1) UP Cr R 147.* This is a judgment of two paragraphs which may be quoted as under:

"Heard learned counsel for the Parties.

It has not been disputed that a report was registered at the police station and, therefore, in view of the prohibition imposed by sub-section (2) of Section 155 Cr.P.C. the police had no power to investigate the said non-cognizable case without permission of the magistrate and to submit charge sheet under Section 308 IPC. The Charge-sheet is, therefore, illegal and deserves to be quashed.

2. The application is allowed. The impugned charge-sheet is quashed. However, it shall be open to the investigating officer to investigate the case after obtaining the permission of the magistrate to investigate it."

7. This decision does appear to support the prosecution case but the opinion appears in per incuriam of the decisions of the Apex Court which have clearly provided that even if there is some irregularity in the investigation, the charge-sheet on its basis is not rendered illegal. In this connection reference may be made to section 21 of the decision of

Apex Court in Union of India Vs. Prakash P. Hinduja: (2003) 6 SCC 195. The said paragraph is being extracted hereunder:

"***21***. *An incidental question as to what will be the result of any error or illegality in investigation on the trial of the accused before the court may also be examined. Section 5-A of the Prevention of Corruption Act, 1947 provided that no police officer below the rank of a Deputy Superintendent of Police shall investigate any offence punishable under Section 161, Section 165 and Section 165-A IPC or under Section 5 of the said Act without the order of a Magistrate of the First Class. In H.N. Rishbud AIR 1955 SC 196 the investigation was entirely completed by an officer of the rank lower than the Deputy Superintendent of Police and after permission was accorded a little or no further investigation was made. The Special Judge quashed the proceedings on the ground that the investigation on the basis of which the accused were being prosecuted was in contravention of the provisions of the Act, but the said order was set aside by the High Court. The appeal preferred by the accused to this Court assailing the judgment of the High Court was dismissed and the following principle was laid down: (AIR pp. 203-04, para 9)*

'9. The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 of the Code of Criminal Procedure as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 of the Code of Criminal Procedure is one out of a group of sections under the heading 'Conditions requisite for initiation of proceedings'. The language of this section is in marked contrast with that of the other sections of the group under the same heading i.e. Sections 193 and 195 to 199.

These latter sections regulate the competence of the court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of Section 190 (1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under clause (a) or (b) of Section 190 (1), (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial.'

The Court after referring to Parbhu v. Emperor AIR 44 P.C. 73 and Lumbhardar Zutshi v. R. AIR 1950 P.C. 26 held that if cognizance is in fact taken on a police report initiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial, which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice and that an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the court for trial. This being the legal position, even assuming for the sake of argument that CBI committed an error or irregularity in submitting the charge-sheet without the approval of CVC, the cognizance taken by the learned Special Judge on the basis of such a charge-sheet could not be set aside nor could further proceedings in pursuance thereof be quashed. The High Court has clearly erred in setting aside the order of the learned Special Judge taking cognizance of the offence and in quashing further proceedings of the case."

8. I also find that the alleged irregularity of the police officer in not being empowered to investigate the case is not one of the irregularities mentioned in section 461 Cr.P.C. which vitiates proceedings and moreover in section 460(b) it is even provided that if any Magistrate not empowered by law orders, under section 155, the police to investigate an offence, then the irregularity does not vitiate the proceedings. Moreover, it is not claimed that there was any miscarriage of justice or that the applicants had been prejudiced in any manner by the police investigating the offence without obtaining permission of the Magistrate.

9. In this view of the matter, I find no error in the order taking cognizance on the basis of the charge-sheet submitted against the applicant. According, there is no force in this application and it is rejected.

However, in the circumstances of the case if the applicants have not already been released on bail, if they appear before the courts below and apply for bail within a month, the same shall be disposed of expeditiously.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2005

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

Civil Misc. Writ Petition No.67402 of 2005

Diwakar Rai ...Petitioner
Versus
The Deputy Director of Consolidation, Azamgarh and others ...Respondents

Counsel for the Petitioner:
Sri Rajendra Rai

Counsel for the Respondents:
S.C.

U.P. Consolidation of Holdings Act-1956- Section-9, 12 and 27-Partition of chak-once the possession given based upon records of rights-chak attains the status of Holdings-as such partition of holding-possible if the cause of action arises before the date of notification under section 52 of the Act.

Held: Para 11 & 12

In view of the above, this court does n9eot agree with the arguments of the learned counsel for the petitioner that right of partition is available to a tenure holder of the holdings and not of chak holdings. Once the possession is given on the basis of new record of right, chak attains the status of a holding and same rights which had accrued to a tenure holder on the basis of final record prepared under section 10 will accrue to the same tenure holder in so far as chak which is called as holding after handing over possession on the chak allotted to a tenure holder in the consolidation scheme.

In the galaxy of the above provisions and regard being had to scheme of U.P. Consolidation of Holdings Act, it leaves no manner of doubt that the provision of partition of a joint holding is applicable on all fours to the partition of a chak if cause of action or changes arise at all stages i.e. on publication of record under section 9, after preparation of revised record under section 12 or after possession is handed over after carvation of chak and preparation of new record of rights under section 27 of the U.P.C.H. Act. The right of parties will apply till a notification under section 52 of the U.P. Consolidation of Holdings Act is made.

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

1. Impugned herein is the order dated 28.7.2005 passed by Deputy Director Consolidation whereby revision preferred by petitioner was dismissed and orders dated 12.3.2003 and 19.10.2004 passed by Consolidation Officer and Settlement Officer Consolidation respectively were lent affirmance.

2. It would appear from the record that the dispute revolves round Chak no. 65 situated in village Muzaffarpur Pargana Nizamabad Tahsil Sadar District Azamgarh of which Gorakh Rai, father of the parties was the recorded tenure holder. The disputants are three brothers namely, petitioner Diwakar Rai and respondents Vijay Bahadur Rai and Sudhakar Rai. The Asstt. Consolidation Officer by means of order dated 8.7.1991 passed order by which all the three sons were pronounced successors of Gorakh Rai of the chak no. 65, and the said chak was partitioned to the extent 1/3 share each. There is no dispute in so far as shares of the contesting parties are concerned.

3. The learned counsel for the petitioner argued that there is no provision for partition of Chak in the entire scheme of the U.P. Consolidation of Holding Act and that the only provision in the Act is contained in section 9-C of the Act which contemplates partition of holding. He further argues that in case the partition has not been effected on publication of record under section 9 of the U.P. Consolidation of Holdings Act and chak was carved out in the allotment proceeding, in that event, the chak cannot be partitioned. It is lastly argued that the impugned orders by which chak was partitioned by the consolidation authorities are vitiated by reason of being without jurisdiction.

4. I have considered the arguments advanced across the bar and have gone through the materials on record with the assistance of the learned counsel.

5. From a perusal of scheme of Consolidation of Holdings Act, it crystallizes that annual register is subjected to revision and record are prepared under section 10 of the U.P. Consolidation of Holding Act. Section 10

of the Act being germane is quoted is below:-

"10. Preparation and maintenance of revised annual registers- (1) The annual register shall be revised on the basis of the orders passed under sub-section (1) and sub-section (2) of Section 9-A. It shall thereafter be prepared in the form prescribed and published in the unit.
(2) Where any entry in the annual register, published under sub-section (1), is modified in pursuance of an order passed under this Act or under any other law; a reference to the order alongwith an extract of its operative portion shall be noted against the said entry."

6. It is further explicit from a perusal of the scheme that in case cause of action arises thereafter, the same shall be dealt with according to provision embodied in section 12 of the Act being relevant is quoted below:-

"12. Decision of matters relating to changes and transactions affecting rights or interests recorded in revised record:-
(1) All matters relating to changes and transfers affecting any of the rights or interests recorded in the revised records published under sub-section (1) of Section 10 for which a cause of action had not arisen when proceedings under section 7 to 9 were started or were in progress, may be raised before the Assistant Consolidation Officer as and when they arise, but not later than the date of notification under Section 52, or under sub-section (1) of Section 6.
(2) The provisions of Sections 7 to 11 shall mutatis mutandis, apply to the hearing and decision of any matter raised under sub-section (1) as if it were a matter raised under the aforesaid sections."

Section 12 as quoted above, envisages that all matters relating to changes and transactions affecting rights or interests recorded in the revised records published under section 10 (1) for which a cause of action had not arisen and proceedings under section 7 to 9 were started or where in progress, may be raised before Asstt. Consolidation Officer as and when they arise but not later than the date of notification under section 52 or under sub-section (1) of Section 6 after allotment of chaks, proceedings came to a close and possession was handed over.

7. In the present, it brooks no dispute that Gorakh Rai, father of the petitioners and contesting Opp. Parties was recorded in the final revised record and cause of action arose after his death and all the three sons of Gorakh Rai succeeded their respective 1/3rd shares in the chak, any by this reckoning, the cause of action for partition arises after preparation of final record under section 10 of the Act and hence the dispute could be raised under section 12 of the Act. It is further obvious from perusal of section 12 (2), that the provisions of sections 7 to 11 shall mutates mutandis apply to the decision on any matter raised under sub-section (1) of section 12 if it were a matter raised under the aforesaid section. In this perspective, considering that section 7 to 11 have been made applicable to the provisions of section 12 of the Act, a dispute shall be deemed to have arisen within the province of section 12 of the Act. The matter of partition of holding is contemplated under section 9-C of the U.P.C.H. Act which runs as under:

"Partition of Joint Holdings.- (1) The Assistant Consolidation Officer, or the Consolidation Officer, may partition joint

holdings under Section 9-Add the Quick Launcher on Panel, notwithstanding anything to the contrary contained in Section 178 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, or any other law, and may also partition the same suo motu.

(2) The partition of joint holdings shall be effected on the basis of shares, provided that where the tenure holders concerned agree, it may be effected on the basis of specific plots."

8. The provisions for partition applicable to the holding of a tenure holder under sections 9 and 12 of the U.P. Consolidation of Holdings Act will also be applicable to a chak of which a tenure holder was given possession after preparation of new record of right under section 27 in case a cause of action arose thereafter and before notification under section 52 of the U.P. Consolidation of Holdings Act.

9. At this stage, new revenue records are prepared under section 27 of the U.P. Consolidation of Holdings Act. And right, title and interest of tenure holder cease to exist in the erstwhile plots and same rights are created under section 30 of the U.P. Consolidation of Holdings Act. In this regard, section 30 (a), (b) and (e) of the U.P. Consolidation of Holdings Act may be referred and the same being relevant are excerpted below:-

"30. Consequences which shall ensue on exchange of possession.-With effect from the date on which a tenure holder enters, or is deemed to have entered into possession of the chak allotted to him, in accordance with the provisions of this Act, the following consequences shall ensue-

(a) the rights, title, interest and liabilities-

(i) of the tenure-holder entering, or deemed to have entered into possession, and

(ii) of the former tenure-holder of the plots comprising the chak, in their respective original holdings shall cease; and

(b) the tenure holder entering into possession, or deemed to have entered into possession, shall have in his chak the same rights, title, interests and liabilities as he had in the original holding together with such other benefits of irrigation from a private source, till such comprising the chak had in regard to them;

X X X X X

(e) the encumbrances, if any, upon the original holding of the tenure-holder entering, or deemed to have entered, into possession, whether by way of lease, mortgage or otherwise, shall, in respect of that holdings, cease, and be created on the holdings, or on such part thereof, as may be specified in the final Consolidation Scheme.

10. Under section 30 (b) of the U.P. Consolidation of Holdings Act, it is clearly provided that a tenure holding entering possession or deemed to have entered into possession shall have in his chak the same right, title, interest and liabilities as he had in the original holding together with such other benefits of irrigation from a private source till such source exists as the former tenure holder of the plots comprising the chak had in regard to them. Section 30 (e) of the Act also makes it clear that encumbrances if any upon the original holding of the tenure holder entering or deemed to have entered into possession, whether by way of lease, mortgage or otherwise shall in respect of the holding cease and be created on the holdings or on such part

thereof as may be specified in the final consolidation scheme. It is clear from the U.P.C.H. Act that a tenure holder in whose favour the final records were published under section 10 of the U.P.C.H. Act and new records of rights are prepared under section 27 he will have the same rights, in so far as new holding after allotment of chak is concerned.

11. In view of the above, this court does not agree with the arguments of the learned counsel for the petitioner that right of partition is available to a tenure holder of the holdings and not of chak holdings. Once the possession is given on the basis of new record of right, chak attains the status of a holding and same rights which had accrued to a tenure holder on the basis of final record prepared under section 10 will accrue to the same tenure holder in so far as chak which is called as holding after handing over possession on the chak allotted to a tenure holder in the consolidation scheme.

12. In the galaxy of the above provisions and regard being had to scheme of U.P. Consolidation of Holdings Act, it leaves no manner of doubt that the provision of partition of a joint holding is applicable on all fours to the partition of a chak if cause of action or changes arise at all stages i.e. on publication of record under section 9, after preparation of revised record under section 12 or after possession is handed over after carvation of chak and preparation of new record of rights under section 27 of the U.P.C.H. Act. The right of parties will apply till a notification under section 52 of the U.P. Consolidation of Holdings Act is made. In the present case Gorakh Rai father of the petitioner and contesting opp. parties was the tenure holder in whose name chak was allotted and who had taken possession of the new chak in accordance with law. The aforesaid Gorakh Rai died before notification under section 52 of the U.P. Consolidation of Holdings Act and chak which became holding of Gorakh Rai after taking possession was inherited by petitioner and contesting opp. parties. The cause of action arose thereafter as all the brothers were not ready to keep the holding joint and hence application was move and chak was partition. This Court does not agree with the argument of the learned counsel for the petitioner that chak cannot be partitioned.

13. On merits also, it is borne out from the record as also from a perusal of order dated 26.7.1996 passed by Collector/District Deputy Director Consolidation that compromise relied upon by the petitioner was not acceptable to all the parties. The order passed by District Deputy Director Consolidation refusing to act on the compromise between the parties has attained finality and cannot be dug out for being acted upon. It would appear that by the impugned order, the partition was effected in such manner that all the three brothers got their land after partition in main road and canal and as such the impugned orders do not suffer from any blemish of error of law apparent on the face of record. However, as is clear from the materials on record that one of the brother had already constructed a house. While taking into reckoning the house constructed on apart of land in dispute, in case partition is effected that portion of the land on which house was constructed may be allocated to the share of that brother. This will not impinge upon the partition already made in accordance with law. In case the brother concerned who

had constructed house on a particular land, was not allotted the house over the land allotted by the impugned order, he may move application before Deputy Director consolidation for redressal of his grievance to that extent only.

14. In view of above discussion, it is held that the chak could also be partitioned before notification under section 52 of the U.P. Consolidation of Holdings Act in case cause of action for partition arises.

15. As a result of foregoing discussion, the writ petition being devoid of merit is dismissed accordingly subject to the above observations. There will be no order as to costs. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2006

BEFORE
THE HON'BLE BHARTI SAPRU, J.

Civil Misc. Writ Petition No.23854 of 1989

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

Counsel for the Petitioner:
Sri R.C. Gupta

Counsel for the Respondents:
Sri M.M. Chaturvedi
S.C.

U.P. Imposition of Ceiling on Land Holding Act, 1960, Section 5 (6)-Gift deed in favour of grand son (daughter's son)-being irrevocable instrument-can not be termed as "Benami Transaction"-Order declaring surplus land-can not sustained.

Held: Para 10 and 13

The proviso (b) aforesaid as it stands says that private transaction is not a *benami* transaction if it's not made for the immediate or deferred benefit of the tenure-holder or other members of his family. The gift deed in the present case is irrevocable instrument and because it was registered, it was not *benami* transaction nor it had been to the members of the family of the donee. Because it cannot be said that the daughters son is the member of the family of the donee, the daughter's son was not included as member of the family of donee at the relevant time. Such being the case, the submission made by the learned counsel for the petitioner have force in it.

Taking into consideration the entire facts and circumstances, I am of the opinion that the submissions made by the learned counsel for the petitioner have substance and are liable to be accepted and the impugned order of the appellate authority suffers from manifest error law which is liable to be set aside.

(Delivered by Hon'ble Bharti Sapur, J.)

1. This petition has been filed against an order dated passed by the appellate authority under section 13 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960, by which the appellate authority has rejected the claim of Dhyan Singh that the gift deed made in his favour on 16.2.1972 could not get the benefit of proviso (b) of section 5 (6) of the Act aforesaid.

2. The facts of the case are that one Ramdhar was tenure holder in Village Nagnedhi, Pargana Naraini, District Banda. Ramdhar made two transactions on 16.2.1972 i.e. to say after coming into force of U.P. Imposition of Ceiling on

Land Holdings Act, 1960 (hereinafter referred to as the Act) on 24.01.1971. By a registered sale deed he passed on some plots to one of his grand son i.e. daughter's son and on the same date, he executed gift deed on 16.2.1972, which was registered in favour of the petitioner who was on that date a minor. By the gift deed the petitioner also a grandson was given plots no. 946 to 950, 856 to 864, 866, 867, 945, 227, etc. During the course of consolidation operations, the plots were converted into plots no. 449 and 481. The plots were then included n the petitioner's chak.

3. According to the petitioner during the consolidation proceedings, the aforesaid chaks were recorded in his name and he was also held to be in possession of the same. The fact that consolidation authorities passed order in favour of the petitioner, has not been denied in the counter affidavit in reply to para 3 of the writ petition.

4. It is the petition's case that in the month of August, 1982 when the petitioner attained majority, he came to know about the judgment and order passed by the consolidation authorities in respect of plots which have been gifted to him. He also came to know that the said plots have been declared surplus. Thereafter the Ceiling proceedings were initiated in which the petitioner participated and an order was passed against the petitioner on 22.5.1986, by which it was held, that because the gift deed was without consideration, it would be *benami* transaction and the land would have to be declared as surplus. Aggrieved the order dated 22.5.1986, the petitioner moved an appeal under section 13 of the Act, which was rejected by the appellate authority vide order dated 3.8.1989. It is this order which is impugned in the present writ petition.

5. Learned counsel for the petitioner has argued that the impugned order is bad because the authorities below had committed manifest error of law in holding that the registered gift deed was a *benami* transaction. He has further argued that the appellate authority has committed manifest error in holding that earlier orders had become final against the petitioner and that the land has been wrongly declared as surplus. He has further argued that the appellate authority has taken a view which is erroneous by saying that the gift deed was not executed for consideration and therefore it could not be called a transfer and the appellate authority has wrongly come to the conclusion that gift deed was not a proper document of transfer which can be taken into consideration under the proviso (b) to section 5 (6) of the Act.

6. Learned counsel for the petitioner has also brought into the notice of this Court that on 16.2.1972 a sale deed was registered in favour of the brother of the petitioner who was also a daughter's son and the plots which were transferred to him by way of the gift deed dated 16.2.1972 were excluded from ceiling. Learned counsel for the petitioner has informed that against the order releasing the said land from ceiling, the State had filed a writ petition no. 35 of 1989 and the said writ petition was dismissed by this Court on 7.1.1998. The State has not filed appeal against the order dated 7.1.1998 and therefore that order has become final.

7. Learned counsel for the petitioner has also argued on the basis of parity that

the plots which were gifted to petitioner, should have been excluded from ceiling.

8. It is the contention of the learned counsel for the petitioner that the gift deed dated 16.2.1972 was a registered document and the conclusion drawn by the appellate authority that it was without consideration is patently erroneous because a gift is a good transaction if it is registered document. The word "gift" is defined under sub-section (xii) of section 2 of the Gift Tax Act, 1958, which is reproduced below:

"*(xii) "gift" means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer or conversion of any property referred to in section 4, deemed to be a gift under that section."*

9. The gift made on 16.2.1972 was a registered document. This is denied by the State. I have perused the provision of section 5 (6) of the Act, which reads as under:

"5. Imposition of ceiling-

(6) In determining the ceiling area applicable to a tenure-holder, any transfer of land made after the twenty-fourth day of January, 1971, which but for the transfer would have been declared surplus land under the Act, shall be ignored and nor taken into account:

Provided that nothing in this sub-section shall apply to-

(a) a transfer in favour of any person (including Government) referred to in sub-section (2).

(b) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable instrument not being a benami transation or for immediate or deferred benefit of the tenure-holder or other members of his family.

Explanation I- For the purpose of this sub-section, the explanation transfer of land made after the twenty-fourth day of January, 1971 includes-

(a) a declaration of a person as a co-tenure-holder made after the twenty-fourth day of January, 1971 in a suit or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty-fourth day of January, 1971;

(b) any admission acknowledgement, relinquishment or declaration in favour of a person to the like effect, made in any other deed or instrument or in any other manner.

Explanation II- The burden of proving that a case falls within clause (b) of the "proviso shall rest with the party claiming its benefit."

10. The proviso (b) aforesaid as it stands says that private transaction is not a *benami* transaction if it's not made for the immediate or deferred benefit of the tenure-holder or other members of his family. The gift deed in the present case is irrevocable instrument and because it was registered, it was not *benami* transaction nor it had been to the members of the family of the donee. Because it cannot be said that the daughters son is the member of the family of the donee, the daughter's son was not included as member of the family of donee at the relevant time. Such being the case, the submission made by

the learned counsel for the petitioner have force in it.

11. In support of his argument, learned counsel for the petitioner has relied upon a decision of this Court in the case of *Dayal Singh vs. State of U.P.,* reported in 1981 ALJ 808 in which this Court has held that where the transfer is made by irrevocable instruments such as sale deeds, the benefit of proviso (b) to sub-section (6) of section 5 of the Act can be given.

12. Learned counsel for the petitioner has argued that the impugned order is discriminatory against the petitioner and is violative of Article 14 of the Constitution of India, on account of the fact that benefit of exclusion of land from the purview of land ceiling by virtue of sale deed dated 16.2.1972 will be given to one grand son of the daughter while the another grand son from the daughter i.e. the petitioner was deprived of the benefit of proviso (b) to sub-section (6) of section 5 of the Act.

13. Taking into consideration the entire facts and circumstances, I am of the opinion that the submissions made by the learned counsel for the petitioner have substance and are liable to be accepted and the impugned order of the appellate authority suffers from manifest error law which is liable to be set aside.

14. The writ petition is allowed. The impugned order dated 03.08.1989 passed by the appellate authority i.e. Additional Commissioner (Nyayik), Jhansi is quashed. There will be no order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2005

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

Civil Misc. Writ Petition No. 32717 of 2003

Dr. Subash Chand ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri A.K. Singh
Sri R.N. Singh
Sri V.K.S. Chandel

Counsel for the Respondents:
C.S.C.

U.P. Govt. Servant (Discipline & Appeal) Rules 1999-rule 4,6, 7-Suspension Order-prolong suspension without serving charge sheet. No allegation like fabrication of false record or embezzlement-which require investigation-nor pendency of any Criminal trail-despite of court's direction No charge sheet served-for long period of 2 years-held-authorities can not be allowed sit idle without any disciplinary inquiry it can be termed as arbitrary, malafide-suspension order vitiates from its very inception quashed.

Held: Para 54 & 55

It is also not the case in the counter affidavit that the allegations are of such a nature, like fabrication of false records or embezzlement of money, which requires investigation or scrutiny of record which may take some considerable time in ascertaining the facts for framing the charges. It is also not the case of respondents that suspension has been resorted to during investigation, inquiry or pendency of

criminal trial, or in any other situation envisaged by other sub-rules of Rule 4 of 1999 Rules. Contrary to it impugned order recites suspension under contemplation of departmental inquiry as envisaged by Rule 4 (1) of Rules 1999. Besides this, it is also necessary to mention that no interim order has been granted by this Court at any point of time either staying suspension order or staying the disciplinary inquiry contemplated against the petitioner. In such circumstances we have no hesitation to hold that inspite of lapse of a period of more than 2 years the respondent could not be able to frame the charge and issued any charge-sheet and initiate any disciplinary proceeding as contemplated in rule 7 for imposition of major penalty against the petitioner.

Thus there was no scope for the respondent to sit idle without holding disciplinary inquiry to be initiated against the petitioner. Thus we have no hesitation to hold that keeping the petitioner under suspension for such a long period without holding any disciplinary inquiry against him as indicated in the order of suspension, the respondents have no justification under law. Suspension of the petitioner in such a circumstances cannot be said to be bonafide action of the respondent and accordingly the same can be termed as arbitrary, malafide and resorted to as administrative routine, which would not be justified under law. Thus in given facts and circumstances of the case impugned order of suspension vitiates from its very inception and liable to be quashed. Accordingly impugned order of suspension dated 21.7.2003 (Annexure-5 of the writ petition) is hereby quashed.

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

Feeling aggrieved against the order dated 21.7.2003 (Annexure-5 of the writ petition) passed by State Government, whereby while working on the post of Veterinary Officer in Animal Husbandry Department of the Government the petitioner was placed under suspension in contemplation of disciplinary inquiry against him, the petitioner has filed above noted writ petition.

(2) The facts in brief have material bearing on the question in controversy involved in the case are that the petitioner was appointed as Veterinary Officer in Animal Husbandry Department of the State Government on 11.2.1991 after due selection by U.P. Public Service Commission. During the service he was transferred at different places from time to time in the period from July 1997 to 9.7.2003. On 30.6.2003 the petitioner was transferred from Mobile Unit Azamgarh and posted as Veterinary Officer, Sahaar, district Auraiya. In pursuance of which he was relieved from Azamgarh on 9.7.2003 and joined at the office of Chief Veterinary Officer, Auraiya/Etawah on 10.7.2003. According to the petitioner, his work and conduct through out his service career has been found fully satisfactory and no cause of complaint has ever been arisen against his work and conduct during the aforesaid period. Surprisingly enough he was placed under suspension by the Government vide order dated 21.7.2003 in contemplation of disciplinary inquiry against him on the allegation of defiance of order of superiors and working in arbitrary manner, failure to achieve target of prescribed policies and not working be fitting to the post inasmuch as using of vulgar language against the other officials while working as Veterinary Officer, Bachat Ekai, Azamgarh. The petitioner has challenged the aforesaid order of suspension mainly on the ground that allegations mentioned in the impugned

order are vague and not serious warranting impugned action taken against him.

(3) A detailed counter affidavit has been filed on behalf of State wherein mainly in para 6, 9 and 12 an attempt has been made to justify impugned state action taken against the petitioner by precisely making averment that during the posting of petitioner in Azamgarh Mobile Unit there were a lot of complaints regarding arbitrary functioning and dis-obeying the orders of superior officers inasmuch as allegations against the petitioner of misbehaviour with officials and also with the superior officers of the department. For ready reference para 6,9,12 of counter affidavit is quoted as under:-

"6. That in reply to the contents of paragraphs 8,9,10 and 11 of the writ petition it is stated that there are many complaints against the petitioner. It is further stated that during the posting of the petitioner at Azamgarh Mobile Unit there were lot of complaints regarding irregular functioning and not obeying the orders of the superior officers against the petitioner. It is further submitted that the petitioner also used to misbehave the officials, and consequently disciplinary proceeding was directed to be initiated against the petitioner and he was also placed under suspension as will be evident from annexure-5 of the writ petition.

9. That in reply to the contents of paragraphs 15 and 16 of the writ petition it is stated that the petitioner was transferred from Mobile Unit, Azamgarh to Sahar Auraiya as per Scheme of the State Government in Public Interest. However, his suspension has been done as he misbehaved his superior officers, not obeyed the orders of his superior officers and also for misbehaving the officials.

12. That the contents of paragraphs 20,21,22 and 23 of the writ petition are wrong and denied. In reply it is submitted that work and conduct of the petitioner was not found satisfactory and as such adverse entry was made in his character roll for the year 2001-02. It is further stated that as there were lot of complaints against the petitioner and his behaviour was also not found satisfactory, consequently he was placed under suspension and departmental enquiry is being initiated against him. It is further stated that under the departmental proceeding the charge sheet will be served against him at an early date. "

(4) We have heard Sri Ram Niwas Singh, learned counsel for the petitioner and learned Standing counsel appearing for the respondents and also perused the records. Since the necessary affidavits have been exchanged between the parties and case was ripped for final disposal, with the consent of learned counsel for the parties, therefore, the case has been heard for final disposal.

(5) The thrust of the submission of learned counsel for the petitioner is that the allegations mentioned in the order of suspension are vague, false and flimsy in nature, even if assumed to be correct for the sake of argument the same do not constitute misconduct of such a serious nature warranting any major penalty against the petitioner so as to enable the respondents to place the petitioner under suspension in contemplation of disciplinary inquiry against him. In support of his submission he placed reliance upon the reported decision of a

Division Bench of this Court rendered in Ram Dular Tripathi Vs. State of U.P. and others, 1997 (2) Alld. Civil Journal, 1416.

Contrary to it learned Standing Counsel has submitted that in given facts and circumstances of the case since the order of suspension has been passed against the petitioner in contemplation of disciplinary inquiry against him, thus the same cannot be said to be punishment and cannot be called in question before this Court under Article 226 of the Constitution of India.

(6) Having regard to the rival contentions and submissions of the learned counsel of the parties, a short question arises for consideration as to whether the petitioner can be placed under suspension on the allegations mentioned in the order of suspension and/or as to whether in given facts and circumstances of the case, the same is justified or not?

(7) At the very out set it is necessary to point out that while entertaining the writ petition a Division Bench of this Court on 31.7.2003 has directed the learned Standing Counsel to file reply within a period of two weeks along with a copy of charge-sheet/proposed charge-sheet against the petitioner and no interim order either staying the order of suspension or staying the disciplinary inquiry to be held against the petitioner has been passed by this Court during the pendency of the writ petition but till now neither any charge-sheet has been filed by the respondents alongwith counter affidavit nor the Court has been informed regarding the issue and service of such charge-sheet upon the petitioner for holding any disciplinary inquiry against him and a period of more than two years have been passed since then the petitioner is under suspension. Thus it is also a case of keeping the petitioner under suspension without holding any disciplinary inquiry against him.

(8) Before dealing with the rival submissions of learned counsel for the parties it is necessary to examine the law regarding suspension of government servants. In this regard it is necessary to point out that petitioner is government servant and provisions of **U.P. Government Servant (Discipline and Appeal) Rules, 1999** herein after referred to as new Rule of 1999 are relevant rule dealing with the matter of discipline including suspension of government servant of State of U.P. Rule 4 of the aforesaid rules deals with the suspension as under:

"4. Suspension.- *(1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority:*

Provided that suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established may ordinarily warrant major penalty:

Provided further that concerned head of the Department empowered by the Governor by an order in this behalf may place a Government servant or class of Government servants belonging to Group "A' and "B' posts under suspension under this rule:

Provided also that in the case of any Government servant or class of Government servants belonging to Group

"C' and "D' posts, the appointing authority may delegate its power under this rule to the next lower authority.

(2) A Government servant in respect of, or against whom an investigation, inquiry or trial relating to a criminal charge, which is connected with his position as a Government servant or which is likely to embarrass him in the discharge of his duties or which involves moral turpitude, is pending, may, at the discretion of the appointing authority or the authority to whom the power of suspension has been delegated under these rules, be placed under suspension until the termination of all proceedings relating to that charge.

(3) (a) A Government servant shall be deemed to have been placed or, as the case may be, continued to be placed under suspension by an order of the Authority competent to suspend, with effect from the date of his detention, if he is detained in custody, whether the detention is on criminal charge or otherwise, for a period exceeding forty eight hours.

(b) The aforesaid Government servant shall, after the release from the custody, inform in writing to the Competent Authority about his detention and may also make representation against the deemed suspension. The Competent Authority shall, after considering the representation in the light of the facts and circumstances of the case as well as the provisions contained in this rule, pass appropriate order continuing the deemed suspension from the date of release from custody or revoking or modifying it.

(4) Government servant shall be deemed to have been placed, as the case may be, continued to be placed under suspension by an order of the Authority competent to suspend under these rules, with effect from the date of his conviction if in the event of a conviction for an offence he is sentenced to a term of imprisonment exceeding forty eight hours and is not forthwith dismissed or removed consequent to such conviction.

Explanation - The period of forty-eight hours referred to in sub-rule will be computed from the commencement of the imprisonment after the conviction and for this purpose, interment periods of imprisonment, if any shall be taken into account.

(5) Where a penalty of dismissal or removal from service imposed upon a Government servant is set aside in appeal or on review under these rules or under rules rescinded by these rules and the case is remitted for further inquiry or action or with any other directions:

(a) if he was under suspension immediately before the penalty was awarded to him, the order of his suspension shall, subject to any such directions as aforesaid, be deemed to have continued in force on and from the date of the original order of dismissal or removal;

(b) if he was not under suspension, he shall, if so directed by the appellate or reviewing authority, be deemed to have been placed under suspension by an order of the appointing authority on and from the date of the original order of dismissal or removal:

Provided that nothing in this sub-rule shall be construed as affecting the power of the disciplinary authority in a case where a penalty of dismissal or removal

in service imposed upon a Government servant is set aside in appeal or on review under these rules on grounds other than the merits of the allegations which, the said penalty was imposed but the case is remitted for further inquiry or action or with any other directions to pass an order of suspension pending further inquiry against him on those allegations, so however, that any such suspension shall not have retrospective effect.

(6) Where penalty of dismissal or removal from service imposed upon a Government servant is set aside or declared or rendered void in respect of or by a decision of a Court of law and the appointing authority, on a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal or removal was originally imposed, whether the allegations remain in their original form or are claimed or their particulars better specified or any part there of a minor nature omitted-

(a) if he was under suspension immediately before the penalty was awarded to him, the order of his suspension shall, subject to any direction of the appointing authority, be deemed to have continued in force on and from the date of the original order of dismissal or removal;

(b) if he was not under such suspension, he shall, if so directed by the appointing authority, be deemed to have been placed under suspension by an order of the competent authority on and from the date of the original order of dismissal or removal.

(7) Where a Government servant is suspended or is deemed to have been suspended (whether in connection with any disciplinary proceeding or otherwise) and any other disciplinary proceeding is commenced against him during the continuance of that suspension, the authority competent to place him under suspension may, for reasons to be recorded by him in writing, direct that the Government servant shall continue to be under suspension till the termination of all or any of such proceedings.

(8) Any suspension ordered or deemed to have been ordered or to have continued in force under this rule shall continue to remain in force until it is modified or revoked by the competent authority.

(9) A Government servant placed under suspension or deemed to have been placed under suspension under this rule shall be entitled to Subsistence allowance in accordance with the provisions of Fundamental Rule 53 of the Financial Hand Book, Volume-II, Parts II to IV."

(9) From a bare reading of various provisions contained in the different sub-rules of the aforesaid rule, it is clear that although there are different situations envisaged in the aforesaid provisions of rule under which a government servant can be placed under suspension or shall continue to be under suspension, but we need not to embark on the inquiry of all the provisions contained under Rule-4 of the aforesaid rules rather we have to confine our scrutiny only with regard to the Rule 4(1) along with first proviso appended to it, which alone have material bearing with the question in issue involved in the case.

(10) From the perusal of aforesaid rule 4 (1) of Rules 1999 it is clear that a

government servant can be placed under suspension against whose conduct inquiry is either contemplated or is proceeding, pending conclusion of such inquiry in the discretion of appointing authority, meaning thereby the appointing authority in his discretion can place a government servant under suspension in aforesaid two situations i.e. an inquiry is either contemplated or is proceeding pending conclusion of such inquiry. The first proviso appended to the aforesaid rule further provides that the suspension should not be resorted to unless the allegations against the government servant are so serious that in the event of their being established may ordinarily warrant major penalty. Thus it is necessary to examine true import and scope of the rule 4 (1) of aforesaid rules quoted herein before along with the first proviso appended thereto. For that purpose it would be useful to go into the history of rules regarding suspension prior to the commencement of the aforesaid rules.

(11) In this connection it is necessary to mention here that prior to commencement of new Rules of 1999, the Civil Services (Classification, Control & Appeal) Rules, 1930 (in short CCA Rules) and the Punishment and Appeal Rules for Sub-ordinate Services Uttar Pradesh, 1932 (in short Punishment and Appeal Rules) were relevant rule in operation in connection of disciplinary action including the suspension of government employees. For ready reference Rule 49-A of erstwhile CCA Rules amended by Notification dated 30th October, 1976 existing earlier i.e. immediately preceding to commencement of Rules 1999 is reproduced as under:

"49-A. This section has been amended vide Notification No. 18.4.1976-Personnel I, dated 30th October, 1976. It is as under:

"49-A. (1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority:

Provided that in the case of any Government servant or class of Government servants, not belonging to a State Service, the appointing authority may delegate its power under this sub-rule to next lower authority:

Provided further that any other authority empowered by the Governor by general or special order in this behalf, may place a Government servant under suspension under this sub-rule:"

(12) Earlier to it Rule 49-A (1) of erstwhile CCA Rules was as noticed by a Full Bench of this Court in para 10 of the decision rendered in **State of U.P. Vs. Jawahar Lal Bhargava and another, 1974 A.L.J. 282** as under:

"10. The material part of Rule 49-A may be conveniently quoted here .-

"49-A(1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority."

Note- "As a rule, suspension should not be resorted to unless the allegations against the Government Servant are so serious that in the event of their being established, they may ordinarily be expected to warrant his dismissal, removal or reduction, Suspension, where deemed necessary should, as far as

possible, immediately precede the framing of charges and their communication to the Government, servant charged."

(13) In this case the content and import of expression "inquiry", and "contemplated" in the light of footnote appended to the aforesaid rule as extracted herein before was under consideration. The scope of aforesaid expressions have been elaborately dealt with by the Full Bench in para 14, 15 and 16 of the decision, which are quoted as under:

"14. The submission of the learned counsel for the respondent appears to be well founded that the contents of the Note ought to be given full effect in construing the material provisions of Rule 49-A. When the Note is taken into consideration then the meaning of the word "Inquiry' used in clause (1) becomes clear, which means the departmental inquiry as envisaged by Rule 55, as held by Seth, J. The instructions given by the Government as extracted above show that the disciplinary proceedings are most often preceded by an investigation of an informal character and the immediate superior officer on whom the responsibility for initiating formal proceedings lay is directed to complete the investigation as soon as possible without undue delay occurring at any stage. When the investigation, if any, has been completed and it has been decided to undertake formal disciplinary proceedings, a time schedule has to be observed. The charge or charges should be handed over to the charged officer within 15 days from the date of taking the decision to start formal proceedings and it is at the same time that a decision should be taken whether the Officer be placed under suspension pending inquiry. Thus the word "inquiry' means nothing but the formal disciplinary proceeding and not the investigation of an informal character which most often precedes the initiation of formal disciplinary proceeding envisaged by Rule 55. When the appointing authority takes a decision to start formal proceedings, then within 15 days of taking that decision charge or charges should be handed over to the charged officer. Thus there is a time lag of 15 days permitted between taking the decision to start formal proceedings and the service of charges on the charged officer. The direction given by the Governor envisages that at the time when a decision is taken by the appointing authority to start formal proceedings it must also simultaneously decide whether the Officer should be placed under suspension pending the inquiry. It is at this stage that it can be said that an inquiry is contemplated against the conduct of the Government servant. The only meaning that can be given to the phrase "against whose conduct an inquiry is contemplated', occurring in clause (1) of Rule 49-A, would be against whose conduct an inquiry under Rule 55 is to be initiated." That will be when a decision has been taken on the basis of the material collected on preliminary investigation and the appointing authority is prima facie satisfied that they have substance and the starting of formal proceedings would be justified. At any point of time prior to the taking of such a decision it could not be said that an inquiry under Rule 55 was contemplated.

15. Though the verb "contemplate' has many meanings and has somewhat an ambiguous import, yet it has to be given a

definite meaning in the context in which it has been used in harmony with the scheme laid down in the Civil Services (Classification, Control and Appeal) Rules pertaining to conduct and discipline of the Government servant who fall within the rule making power of the Governor under Article 309 of the Constitution. With great respect the meaning given by Seth, J. in Rajendra Shanker Nigam Vs. State of U.P. appears to be correct, that is to have in view an inquiry under Rule 55 or to hold an inquiry under Rule 55. This stage would not be reached unless the appointing authority decides in the circumstances of the case that it will proceed to hold an inquiry under Rule 55. Viewed in this light and the directions of the Governor as given in para 2 of the Appendix IV, quoted above, the substance of which is contained in the Note, the phrase "suspension, where deemed necessary should, as far as possible immediately precede the framing of charges and their communication to the Government servant charged' occurring in the Note will mean where it is decided to suspend a Government servant pending an formal inquiry under Rule 55 the order of suspension as far as possible be passed immediately preceding the framing of the charges and their communication. By the use of the words " as far as possible' an intention is manifest that when the appointing authority considering the prevailing circumstances finds some practical difficulties, it may not take a decision to suspend a Government servant at the point of time immediately preceding the framing of charges and their communication to the Government servant charged and may defer the decision to suspend to a later date. The Note does not permit the appointing authority to suspend a Government servant before it decides to initiate a formal inquiry under Rule 55 against the Government servant. The Note fixes the earliest point of time for the exercise of the power of suspension. The phrase "as far as possible' cannot be construed as leaving a power with the appointing authority to suspend a Government servant at a point of time earlier then the earliest point of time fixed by the Note.

16. The first part of the Note which says "as a rule suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established they may ordinarily be expected to warrant his dismissal, removal or reduction" shows that only in cases where major punishments, that is dismissal, removal or reduction, can be imposed on the basis of the nature of the allegations, against the Government servant that he may be suspended. Whether the seriousness of the allegations warrant in the ordinary course his dismissal, removal or reduction will certainly depend on the contents of those allegations. In as much as under clause (1) of Rule 49-A the power of suspension can be exercised only when a decision has been taken to start an inquiry under Rule 55 as held by us what is envisaged by the Note in its first part is that when on preliminary investigation such material has been collected which has substance to justify the departmental proceedings and it is expected that on the evidence brought before the inquiry officer such misconduct on the part of the Government servant will be established which in normal course would justify the infliction of either of the major punishments dismissal, removal or reduction in rank, then the power of suspension be resorted to. The

expression "as a rule', occurring in the beginning of the Note, implies that that is always the rule to be observed. The word "allegations' used in first part of the Note do not mean the allegations contained in the complaint received against a Government servant but would mean the allegations having substance revealed by the investigation of an informal nature. The same conclusion would be reached if the provisions of rule 55-B are examined. When only minor penalties are decided to be imposed, like censure or stoppage at an efficiency bar even framing of formal charge or calling for explanation of the Government servant is dispensed with. Where other minor penalties are to be imposed, then only formal proceedings embodying the statement of the Offence or fault are to be drawn up, explanation of the person concerned obtained and the reason for punishment recorded. In this case also no formal charge need be framed and communicated to the person charged. Thus where minor punishments are to be imposed no formal inquiry as envisaged under Rule 55 is required. It is only in a case where prima facie material justifies the imposition of major penalties that charges are to be framed. The major penalties cannot be inflicted unless the requirement of Rule 55 has been complied with. It is the framing of the charge or charges and their communication to the Government servant charged which initiates or marks the start of the formal departmental proceedings under Rule 55. Since the suspension of a Government servant is not envisaged under the rules unless in the ordinary course on the charges framed it is expected that major punishment could be imposed, the suspension is to be resorted to either when an inquiry under Rule 55 is contemplated or is proceeding against a Government servant under that rule. The exercise of power of suspension thus is circumscribed under the scheme of the rules and it is to be resorted to at a point of time and under circumstances indicated therein. The exercise of power is not unbounded depending on the sweet will of the appointing authority. It is difficult, therefore, to accept the contention of the learned Chief Standing Counsel as his contention tends to confer on the appointing authority a power to be exercised on the basis of the subjectivity and not objectivity which Rule 49-A intends to achieve. For the above reasons it is also not possible to accept the view of the Division Bench in the case of State of Uttar Pradesh Vs. Rajendra Shanker Nigam that if there are compelling and exceptional circumstances the power of suspension can be exercised even before deciding to hold a departmental inquiry under Rule 55 against a Government servant or that will again leave the matter to the subjective satisfaction of the appointing authority and to call upon it to justify the exercise of its power by establishing the existence of "compelling and exceptional circumstances' will hardly be of any benefit to the Government servant against whom the power of suspension is exercised. Even a review by a Court of law in this regard will hardly be an adequate safe-guard against discrimination as the concept of "compelling and exceptional circumstances' being elusive in its import and somewhat ephemeral in its content will introduce uncertainty in the situation which Rule 49-A with the Note appended aims to avoid."

(14) Thus from a close analysis of the observations made by full Bench of this Court, it is clear that the expression

"inquiry" used in the Rule 49-A (1) means the departmental inquiry as envisaged by Rule-55 which means nothing but the formal disciplinary proceeding and not an investigation of informal character which most often precedes the initiation of formal disciplinary proceeding envisaged by Rule-55. So far as the meaning of phrase "against whose conduct an inquiry is contemplated" is concerned, the full Bench observed that against whose conduct an inquiry is expected or to be initiated under Rule-55 of the C.C.A. Rules. That will be when a decision has been taken on the basis of material collected on preliminary investigation and the Appointing Authority is prima facie satisfied that they have substance to justify either of the major punishments and initiation of formal proceeding would be justified. At any point of time prior to taking of such a decision it could not be said that an inquiry under Rule-55 was contemplated. This stage would not be reached unless the appointing authority decides in circumstances of the case that it will proceed to hold an inquiry under Rule-55. It is framing of charge or charges and their communication to the charged government servant, virtually initiates the formal departmental proceeding.

(15) While explaining the nature, scope and impact of note appended to Rule 49-A (1) of C.C.A. Rules the full Bench has held that the first part of the note which says " as a rule suspension should not be resorted to unless the allegation against the government servant are so serious that in event of their being established they may ordinarily be expected to warrant his dismissal, removal or reduction shows that only in cases where major punishment can be imposed on the basis of nature of the allegation against government servant that he may be suspended whether seriousness of allegation warrant in the ordinary course his dismissal, removal or reduction will certainly depend on the contents of those allegations. In as much under clause (1) of rule 49-A the power of suspension can be exercised only when decision has been taken to start an inquiry under Rule-55 which can be done only when on preliminary investigation, such material has been collected which have substance to justify the formal departmental proceeding and it is expected that on evidence brought before inquiry officer, such misconduct on the part of government servant will be established, which in normal course would justify either of the major penalties viz. dismissal, removal or reduction in rank, suspension is resorted to". The court further held that the expression "as a rule" occurring in the beginning of the note implies that that is always the rule to be observed.

(16) The word "allegations" used in the first part of the note do not mean that allegation contained in the complaint received against the government servant but would mean the allegations having substance revealed by an investigation of informal nature. As held earlier it is framing of charge or charges and their communication to the government servant virtually marks starting point of formal inquiry. Since the suspension of government servant is not envisaged under the rules unless in ordinary course on the charges framed it is expected that major penalties could be imposed hence the suspension is to be resorted to either when an inquiry under Rule-55 is contemplated or is proceeding against

government servant under that rule. The exercise of power of suspension thus circumscribed under the scheme of rules and it is to be resorted to at a point of time and under circumstances indicated therein. The exercise of power is not unbounded depending on the sweet will of the appointing authority." This is what in substance, the aforesaid full Bench of this Court has held regarding the matter pertaining to suspension in context of the rule with Note below appended thereto.

(17) Later on the aforesaid footnote appended to rule 49-A of erstwhile C.C.A. Rules and Rule 1-A of erstwhile Punishment and Appeal Rules was deleted by Notification dated 23rd March 1974 which has been noticed in para-5 of the decision of subsequent Five Judges Full Bench of this Court rendered in **State of U.P. Vs. Jai Singh Dixit & others, 1974 A.L.J. 862** as under:

"5. The Note below Rule 49-A of the C.C.A. Rules was deleted under Notification No. 16/111-1973-Apptt.(3) dated March 23, 1974, and the Note below Rule 1-A of the Punishment and Appeal Rules under Notification No. 18/111-1973 (3) Apptt. (3) dated March, 1974, and in both the cases the deletion was to take effect from October 29, 1968."

(18) The question for consideration before Five Judges Full Bench was that what is meant by word "inquiry" and "contemplated" used in Rule 49-A of CCA Rules and Rule 1-A of Punishment and Appeal Rules particularly in context and reference of deletion of note below which was earlier appended to the aforesaid rule? And in other words what is true content and import of the aforesaid rules after deletion of the aforesaid Note below? This subsequent five Judges Full Bench in Jai Singh Dixit's case has dealt with the issue at length and para 30 and 31 of the decision recorded its concluded opinion regarding the meaning of expression "inquiry" used under aforesaid rules as under:-

"30. The word "inquiry' has also been used in Rules 55 and 55-A of the C.C.A. Rules. Rules 55 and 55-A relate to formal departmental inquiry where major punishment of dismissal, removal or reduction can be imposed. Such an inquiry is invariably preceded by framing of charges. It is of significance that in the other rules governing cases in which minor punishment can be awarded the word "inquiry' has been omitted and the rules merely provide for the award of punishment. It is true that most of the minor punishments shall be awarded after some inquiry, but when the rule making authority intentionally avoided making a reference to this term in the other rules and used the word "inquiry' in rule 49-A and also Rule 55 and 55-A the underlying intention was that the inquiry contemplated by Rule 49-A is the one held under Rules 55 and 55-A. It must, therefore, be held that the power under Rule 49-A can be exercised only in those cases where one of the major punishment-dismissal, removal or reduction shall ordinarily be imposed.

31. The inquiry contemplated by Rule 49-A cannot have reference to an informal preliminary inquiry or a fact-finding inquiry preceding the actual disciplinary proceeding, otherwise it shall be permissible to suspend a Government servant pending such informal inquiry, but not after charges have been framed and regular departmental proceeding is

pending. This shall lead to an anomalous situation. We are, therefore, of opinion that the "inquiry" contemplated by Rules 49-A and 1-A has reference to the formal departmental inquiry, and not to any informal preliminary or fact-finding inquiry preceding the initiation of the formal disciplinary proceeding.

(19) While dealing with the meaning and import of the phrase " a Govt. servant against whose conduct an inquiry is contemplated" the subsequent five Judges Full Bench in paragraph 32 to 39 and para 41 of the decision held as under:-

"32. The scope of Rule 49-A or 1-A does not appear to have come up for consideration before the Supreme Court, but the difference between "contemplated' and "initiated" was noticed in P.N. Nayak Vs. Union of India.A.I.R. 1972 SC 554. This is a case governed by the All India Services (Discipline and Appeal) Rules, 1969 where suspension during disciplinary proceeding could be ordered if such proceeding had been initiated, and not, as in the present cases, where such proceeding was under contemplation. It was observed in para 15 of the Report:

"It does not suggest that suspension can be ordered merely when disciplinary proceedings are contemplated…….

The legislative scheme……..is thus clearly indicative of the intention of the rule making authority to restrict its operation only to those cases in which the Government concerned is possessed of sufficient material whether after preliminary investigation or otherwise and the disciplinary proceedings have in fact commenced and not merely when they are contemplated……..Again the fact that in other rules of service an order of suspension may be made when "disciplinary proceedings were contemplated' should not lead us to take the view that a member of an All India Service should be dealt with differently."

It was further observed in para 19:

"But independently of this consideration we think that the plain language of Rule 3(1) (a) and (b) which concerns us does not authorize suspension when disciplinary proceedings have not been initiated but are only contemplated."

The meaning of the word "contemplate" has been given in Shorter Oxford English Dictionary, Volume I, as:

"1. To look at the continue attention, gaze upon, observe. BEHOLD. 2. To view mentally; to meditate upon, ponder, study. 3. To consider in a certain aspect, regard. 4. To have in view; to expect, take into account as a contingency; to purpose"
and in the New International Dictionary, Volume I, as :

"1. To view with sustained attention: gaze at thoughtfully for a noticeable time : observe with ostensibly steady reflection.

2. to view mentally with continue thoughtfulness, attention, or reflection : muse or ponder about, 3. to view mentally in a stated or implied way with though "fulness and reflection : A. to think about or regard from a certain view point or in a certain light or respect, B. to have in view as a purpose: anticipate doing or performing : plan on : INTEND , PLAN c. to dream of as a cherished aim: ENVISION -D: to presume or imply as a con-comitant or result: POSTULATE, PRESUPPOSE 4: to view or regard (as an object or an objective fact) with detachment."

33. The proper meaning which can be assigned to the word "contemplate"

used in Rule 49-A or in Rule 1-A, therefore, is to have in view', "to expect', "take into account as a contingency'. Therefore, whenever it is in the mind of the appointing authority that in due course a formal departmental inquiry shall be held or there exists a contingency for such an inquiry, one can say that a formal departmental inquiry is contemplated. It is, however, necessary that there should be application of mind, in the eye of law, in good faith, and not arbitrarily.

34. A formal departmental inquiry is invariably preceded by an informal preliminary inquiry which itself can be in two phases. There can be a summary investigation to find out if the allegation made against the Government servant have any substance. Such investigation or inquiry is followed by a detailed preliminary or fact finding inquiry, where after final decision is taken whether to initiate disciplinary proceeding. The first preliminary inquiry may be in the shape of secret inquiry and the other, of an open inquiry. In the alternative, when complaints containing serious allegations against a government servant are received, the authority may peruse the records to satisfy itself if a more detailed preliminary inquiry be made.

35. In many instances the appointing authority will be in a position to form an opinion after the summary investigation, secret inquiry or inspection of records that the allegations made against the Government servant have substance and in due course formal departmental action shall be taken against him. These all would be cases covered by Rule 49-A, i.e. cases where formal departmental inquiry is contemplated.

36. In a few cases it may be possible for the appointing authority to form such an opinion at an earlier stage also, i.e., at the stage of receiving or entertaining a complaint. These also shall be cases where it can be said, in good faith, that formal departmental inquiry is contemplated.

37. To put it in brief, a departmental inquiry is contemplated when on objective consideration of the material the appointing authority considers the case as one which would lead to a departmental inquiry, irrespective of whether any preliminary inquiry, summary or detailed, has or has not been made or it (if) made, is not complete. There can, therefore, be suspension pending inquiry even before a final decision is taken to initiate the disciplinary proceeding, i.e., even before the framing of the charge and the communication thereof to the Government servant.

38. This view finds support, not only from the difference in the phraseology noticed in P.N. Nayak Vs. Union of India but also from the provisions contained in Rule 49-A and Rule 1-A. A departmental inquiry proceeds from the stage a final decision is taken to initiate such inquiry, in any case, when charges are framed and communicated to the Government servant. If the rule making authority had intended that the power to suspend under Rule 49-A was to accrue on taking a firm and final decision to hold an inquiry it would not have incorporated therein the expression "an inquiry is contemplated'; in any case, would have in its place used the

expression "an inquiry has been decided upon'. No part of the rule can be regarded as superfluous. Hence the word "contemplated' must be given its ordinary meaning, as already indicated above.

39. Naturally, it shall depend upon the facts and circumstances of each case whether, prior to the framing of the charge and communication thereof to the government servant, it can be said that a departmental inquiry is expected.

41. As already discussed above, that is the stage for initiating the departmental inquiry and the stage contemplated by Rule 49-A is much earlier when the appointing authority is satisfied that disciplinary proceeding would eventually be taken against the government servant."

(20) In para 43,44 and 45 of the decision the subsequent five Judges full Bench has also considered the opinion of earlier full Bench in respect of meaning and import of expression "an inquiry is contemplated' and expressed its dis-agreement thereon regarding the scope and meaning of the aforesaid expression in context of Rule 49-A or Rule 1-A of the aforesaid Rules as under:-

"43. It shall be noticed that in the opinion of the Full Bench also, the expression an "inquiry is contemplated" means an inquiry is expected. However, a restricted view was taken of the expression to mean the decision to hold an inquiry under Rule 55 or the decision to initiate regular departmental proceeding. Once a firm and final decision has been taken to hold a formal departmental inquiry, such an inquiry is certain and not merely expected. Consequently, we are in respectful disagreement with the view expressed by the Full Bench regarding the scope of Rule 49-A or Rule 1-A.

"44. The Full Bench also accepted the submission made on behalf of the Government servant that "the contents of the Note ought to be given full effect in construing the material provisions of Rule 49-A", and held that an inquiry is contemplated against the conduct of the government servant when a decision is taken by the appointing authority to start formal proceedings and at the same time it is decided whether the officer be placed under suspension pending inquiry. It was further observed that at any point of time prior to the taking of such a decision, it could not be said that an inquiry under Rule 55 was contemplated. At another place it was observed:

"The Note does not permit the appointing authority to suspend a Government servant before it decides to initiate a formal inquiry under Rule 55 against the Government servant. The Note fixes the earliest point of time for the exercise of the power of suspension. The phrase "as far as possible" cannot be construed as leaving a power with the appointing authority to suspend a Government servant at a point of time earlier than the earliest point of time fixed by the Note."

45. Under Rule 49-A suspension pending inquiry is permissible where the departmental inquiry is proceeding or where the departmental inquiry is contemplated. Once the charges have been framed and communicated to the Government servant, the inquiry comes into existence and is being proceeded with. Consequently, if the intention of the makers of the rule was not to permit

suspension pending inquiry before the framing of the charges, it was not necessary to authorize such suspension when the inquiry was contemplated.

(21) In para 46 of the decision subsequent Full Bench has considered the import of expression "allegations" used in the first part of the note below appended to the rules in question and expressed its disagreement with view taken by earlier Full Bench as under "

"46. The Full Bench interpreted the word "allegations' used in the first part of the Note "as allegations having substance revealed by the investigation of an informal nature", and not "allegations contained in the complaint received against a Government servant." When allegations are substantiated and charges are framed, allegations take the shape of charges and they are invariably called charges, and not mere allegations. There is, therefore, no reason why a restricted meaning be given to the word "allegations' used in the Note."

(22) In para 48,52,53 and 55 of the decision the subsequent full Bench has recorded its concluded opinion on the questions under consideration as under:-

"48. In case the matter is considered in the manner already suggested by us above, there shall always be objective satisfaction of the appointing authority before the Government servant can be suspended pending inquiry. To suspend a Government servant on receipt if complaints containing allegations of dishonesty or of misconduct, without the appointing authority being satisfied that the allegations made have substance, which would later justify taking disciplinary proceeding, shall be on subjective consideration and has to be disapproved by the Courts of law. But where there exist circumstances to satisfy the appointing authority that the allegations made have substance, suspension pending inquiry shall be on objective consideration, and not subjective. It is a different thing that the appointing authority may like to have the matter investigated or further investigated so that the total material may come on the record and a proper departmental inquiry can be held.

52. For the reasons indicated above, we are of the opinion that even when the Note below Rule 49-A or Rule 1-A was a part of the main rule it did not restrict the scope of the relevant rule. The power of suspension pending inquiry under this rule could be exercised at an early stage also, i.e., before the framing of charges and communication thereof to the Government servant, provided that on objective consideration of the material the appointing authority was satisfied that after investigation or further investigation there shall be a formal departmental inquiry under Rule 55 and 55-A. This power was to be ordinarily exercised in the manner contemplated by the Note.

53. While deleting the Note below Rule 49-A or Rule 1-A, under notifications dated March 24, 1974, the Government did not amend the executive instructions contained in the two G.Os. referred to in the earlier part of this judgment. These instructions are still in existence, but they cannot in any way affect the scope of Rule 49-A or Rule 1-A. They can be utilized as laying down guiding principles for the information of the appointing authority. As such they

can, to the most, be said to be advisory in nature, of course, entitling the State Government to pass a proper order on a representation being made to it by aggrieved Government servant.

55. To conclude, suspension pending inquiry under Rule 49-A of the U.P. Civil Services (Classification, Control and Appeal) Rules or Rule 1-A of the U.P. Punishment and Appeal Rules can be ordered at any stage prior to or after the framing of charges, when on objective consideration the authority concerned is of the view that a formal departmental inquiry under Rules 55 and 55-A of the C.C.A. Rules or Rules 5 and 5-A of the U.P. Punishment and Appeal Rules is expected, or such an inquiry is proceeding. At what stage the power under the above rules can be exercised shall always depend on the facts and circumstances of each case."

(23) Thus the aforesaid legal proposition set out by Five Judges full bench of this Court in Jai Singh Dixit's case (supra) appears to be settled legal position and holding the field regarding the interpretation given to the provision of Rule 49-A(1) of CCA Rules and Rule 1-A of U.P. Punishment and Appeal Rules as contrary thereto nothing has been brought to our notice with regard to the aforesaid legal propositions. Besides, the law laid down by subsequent five Judges full Bench of this Court is also binding upon this Division Bench as binding precedent. Thus at this juncture the only question remains to be considered by this Court that what would be the effect and impact of changes brought about in respect of relevant rules of suspension set out in the new rules of 1999?

(24) In this connection at the very out set it is necessary to point out that Rule 4 (1) of new rules of 1999 deals with the suspension of Govt. servant against whose conduct "an inquiry is either contemplated" or "is proceeding". Clause (1) of Rule 4 of new rules as reproduced earlier is pari materia clause of Rule 49-A (1) of CCA Rules but the similar provisions as contained under first proviso appended to Rule 4(1) of the rule were not existing in Rule 49-A (1) of CCA rules existing immediately preceding the commencement of this Rule 1999. However, earlier to it under Rule 49-A of CCA rules a note containing some what similar provisions was appended but later on deleted on 23rd March 1974 as noticed in the earlier part of this judgment. The aforesaid note has two parts as noticed in para 27 of the decision and while explaining the legal nature, function and impact of the Note appended to Rule 49-A(1) of erstwhile C.C.A. Rules in para 26 and 27 of the decision the Five Judges Full Bench of this Court in Jai Singh Dixit's case (supra) held as under:

"26. At this place it may, however, be observed that the Note appended to a rule or to an enactment does not, ordinarily, restrict or enlarge the scope of the main provisions; it generally serves as a guide line for the officers authorised to take action under the rule. The Note has, however, to be read along with the main provision. Consequently, where the Note is directory and not mandatory, it shall, in no way, restrict the powers conferred under the main provision; but if the Note has been worded in a manner which restricts the power conferred under the main provision, and is as mandatory as the provision itself, it can be said that the Note is an important part of the rule and

has the effect of placing restrictions in the exercise of jurisdiction. To put it differently, if the directions contained in the Note are directory by nature, they shall not have the effect of restricting the scope of the main provision, though while exercising the jurisdiction, the guiding principles contained in the Note must be kept in mind. The difference is only this that the breach of the directory provisions of the Note will not by itself invalidate the order."

"27. Coming to the instant case, the Note has two parts:

(1) As a rule, suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established, they may ordinarily be expected to warrant his dismissal, removal or reduction.

(2) Suspension, where deemed necessary, should, as far as possible, immediately precede the framing of charges and their communication to the Government servant charged.

It shall be noticed that the rule-making authority has used different words in the two parts--"as a rule" in the first part and "as far as possible" in the other. Even if the first part is regarded as mandatory, the same cannot be said about the other. The second part being directory cannot restrict the scope of the main provision and in suitable circumstances suspension pending inquiry can be ordered even though in formal preliminary inquiry or the fact finding inquiry is not complete and no firm final decision has been taken to initiate departmental proceeding against the Government servant. In other words, there can be suspension pending inquiry even before the framing of charges and the communication thereof to the Government servant charged."

(25) At this juncture it is to be seen that the first proviso appended in new rule 4(1) of 1999 Rules is also pari materia clause and similarly worded as first part of the note appended to Rule 49-A(1) of CCA Rules before its deletion, with a slight variance. As a different phraseology, by deleting the words "as a rule" used in beginning of the first part of the note expression "provided that" and in place of expressions "dismissal, removal or reduction" used in concluding part of first part of the note, the expression "major penalty", has been substituted in the proviso to Rule 4 (1) of the new rule in place of first part of the note appended to old rule. However, the second part of Note has been completely omitted in the new rule, therefore, it is necessary to examine what would be the effect and impact of the first proviso appended to Rule 4 (1) of the new rules in the light of law enunciated by this Court referred herein before? But before examining this question it is necessary to point out that the note appended to the earlier rule 49-A (1) of C.C.A. Rules was interpreted as part and parcel of same statute made by same rule making authority namely Governor of State of U.P., first part of the note was treated to be mandatory, which imposes restriction on the exercise of power of appointing authority whereas second part was regarded as directory, as such could not restrict the scope of the main provision, however, could be regarded as advisory in nature and providing guidelines for the officers authorised to take action under the rule.

(26) Besides this Five Judges Full Bench of this Court no doubt has

interpreted the provisions contained in the note earlier appended to the Rule-49-A(1) of C.C.A. Rules by analyzing the same in two parts wherein first part of it was regarded as mandatory and second part as directory in nature and also explained its scope and role which it had to play in context of statute to which it was appended but with due respect it is to be pointed out that the Full Bench did not indicate the exact legal nature of note in the judgment in the sense as to whether it could be classified as "explanation" or "proviso" to the aforesaid rule. However interpretation given to it clearly indicates its legal nature and actual role, which was assigned to it. Therefore, in order to have a distinction between the "proviso" and "explanation" appended to statute it would be useful to have a glance over legal aspect of the matter.

(27) In **S. Sundaram Pillai Vs. V.R. Pattabiraman, A.I.R. 1985 S.C. 582**, Hon'ble Apex Court in para 52 of the decision, while dealing with the issue at length in the earlier part of the decision has summarized the legal nature and functions of the "explanation" appended to the statute as under:

"52. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

(28) At this juncture it would also be useful to examine the legal nature, functions, object and impact of "proviso" appended to the statute. In this connection a reference can be made to the same decision of Hon'ble Apex Court rendered in **S. Sundaram Pillai Vs. V.R. Pattabiraman** (supra), wherein while dealing with the legal nature, functions and impact of the proviso appended to the particular statute or enactments in para 26 to 43 of the decision Hon'ble Apex Court has held as under:

"26. The next question that arises for consideration is as to what is the scope of a proviso and what is the ambit of an Explanation either to a proviso or to any other statutory provision. We shall first take up the question of the nature, scope and extent of a proviso. The well-established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein, which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the

main enactment nor can it be used to nullify or set at naught the real object of the main enactment.

27. Craies in his book "Statute Law' (7th Edn.) while explaining the purpose and import of a proviso states at page 318 thus:

"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it...The natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso."

28. Odgers in "Construction of Deeds and Statutes' (Fifth Edn.) while referring to the scope of a proviso mentioned the following ingredients:

P.317"Provisos - These are clauses of exception or qualification in an Act, excepting something out of, or qualifying something in, the enactment which, but for the proviso, would be within it."

P.318"Though framed as a proviso, such a clause may exceptionally have the effect of a substantive enactment."

29. Sarathi in "Interpretation of Statutes' at pages 294-295 has collected the following principles in regard to a proviso:-

"(a) When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held a repeal of the section as the proviso speaks the later intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to its interpretation; but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.

(j) A proviso may sometimes contain a substantive provision."

30. In the case of Local Government Board Vs. South Stoneham Union, 1909 AC 57, Lord Macnaghten made following observation:

"I think the proviso is a qualification of the preceding enactment, which is expressed in terms too general to be quite accurate."

31. In Ishverlal Thakorelal Almaula Vs. Motibhai Nagjibhai, (1966) 1 SCR 367: (AIR 1966 SC 459) it was held that the main object of a proviso is merely to qualify the main enactment. In M & S.M. Railway Co. Ltd. Vs. Bezwada Municipality, AIR 1944 PC 71, Lord Macmillan observed thus:

"The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general

language of the main enactment, and its effect is confined to that case."

32. The above case was approved by this Court in Commr. Of Income Tax, Mysore, Vs. Indo Mercantile Bank Ltd., 1959 Supp. (2) SCR 256: (AIR 1959 SC 713), where Kapur, J. held that the proper function of a proviso was merely to qualify the generality of the main enactment by providing an exception and taking out, as it were, from the main enactment a portion which, but for the proviso, would fall within the main enactment. In Shah Bhojraj Kuverji Oil Mills & Ginning Factory Vs. Subhash Chandra Yograj Sinha, (1962) 2 SCR 159: (AIR 1961 SC 1596), Hidayatullah, J., as he then was, very aptly and succinctly indicated the parameters of a proviso thus:

"As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule."

33. In West Derby Vs. Metropolitan Life Assurance Co. 1897 AC 647 while guarding against the danger of interpretation of a proviso, Lord Watson observed thus:

"a very dangerous and certainly unusual course to import legislation from a proviso wholesale into the body of the statute."

34. A very apt description and extent of a proviso was given by Lord Oreburn in Rhodda Urban District Council Vs. Taff Vale Railway Co. 1909 AC 253 where it was pointed out that insertion of a proviso by the draftsman is not always strictly adhered to its legitimate use and at times a section worded as a proviso may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of or qualifying what goes before. To the same effect is a later decision of the same Court in Jennings Vs. Kelly 1940 AC 206, where it was observed thus:

"We must now come to the proviso, for there is. I think, no doubt that in the construction of the section the whole of it must be read and a consistent meaning if possible given to every part of it. The words are "provided that such lincence shall be granted only for premises situate in the ward or district electoral division in which such increase in population has taken place." There seems to be no doubt that the words "such increase in population" refer to the increase of not less than 25 per cent of the population mentioned in the opening words of the section."

35. While interpreting a proviso care must be taken that it is used to remove special cases from the general enactment and provide for them separately.

36. In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself.

37. Apart from the authorities referred to above, the Hon'ble Apex Court has in a long course of decisions explained and adumbrated the various shades, aspects and elements of a proviso. In State of Rajasthan Vs. Leela Jain (1965) 1 SCR 276: (AIR 1965 SC 1296), the following observations were made:

"So far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which

but for the proviso would have been within the operative part."

38. In the case of Sales Tax Officer, Circle I, Jabalpur Vs. Hanuman Prasad (1967) 1 SCR 831 : (AIR 1967 SC 565), Bhargava, J. observed thus:

"It is well-recognised that a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the legislature desires should be excluded."

39. In Commr. of Commercial Taxes Vs. R.S. Jhaver (1968) 1 SCR 148 : (AIR 1968 SC 59), the Hon'ble Apex Court made the following observations:

"Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognized that in exceptional cases a proviso may be a substantive provision itself."

40. In Dwarka Prasad Vs. Dwarka Das Saraf (1976) 1 SCC 128 : (AIR 1975 SC 1758), Krishna Iyer,J. speaking for the Court observed thus:

"There is some validity in this submission but if, on a fair construction, the principal provision is clear, a proviso cannot expand or limit it. Sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges. Here, such is the case.

If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso.

A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction."

41. In Hiralal Rattanlal Vs. State of U.P. (1973) 1 SCC 216 : (AIR 1973 SC 1``````034) this Court made the following observations:

"Ordinarily, a proviso to a section is intended to take out a part of the main section for special treatment. It is not expected to enlarge the scope of the main section. But cases have arisen in which this Court has held that despite the fact that a provision is called proviso, it is really a separate provision and the so-called proviso has substantially altered the main section."

42. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:

(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

43. These seem to be by and large the main purport and parameters of a proviso."

(29) At this juncture it would also be useful to refer a passage of **Chapter 10.1. of fourth Edition "Legislation and Interpretation" a Book by Late Sri Jagadish Swarup**, who had been Solicitor General of India and eminent Jurist of India. At page 357 of the Book, while taking note of **Jennings Vs. Kelly, 1940 A.C. 206**, he has very aptly observed as under:

*"In **Jennings Vs. Kelly** it was said that, where there was a proviso, the former part, which was described as enacting part must be construed, without reference to the proviso and Lord Wright said: "No doubt there may be cases in which the first part is so clear and unambiguous not to admit, in regard to the matters which are there clear, any reference to any other part of the section. The proviso may simply be an exception out of what is clearly defined in the first part or it may be some qualification not inconsistent with what is expressed in the first part. In the present case, however, not only is the first part of the section deficient in express definition, but also the second part is complementary and necessary in order to ascertain the full intention of the legislature. The proper course is to apply, the broad general rule of construction which is that a section or enactment must be construed as a whole, each part throwing light, if need, be, on the rest. I do not think that there is any other rule, even in the case of a proviso in the strictest or narrowest sense, and still less, where, as here, the introduction of the second part by the word "provided" is in a strict sense inapt."*

(30) Thus from a close analysis of law enunciated by the Hon'ble Apex Court and juristic opinions it is clear that the "proviso" appended to the statute may serve various different purpose as indicated herein before. Now a question would arise to be considered that what role has been assigned to the aforesaid "proviso" appended to new rule 4(1) of 1999 Rules? In this regard in order to arrive at a correct conclusion it is necessary to examine content and import of substantive/enacting part of rule 4(1) of Rule 1999 first without any reference to the "proviso" appended thereto, thereafter a clear picture would come to determine the role which the "proviso" has to play in the rule in question.

(31) Now from a bare reading of the enacting of part of the Rule 4 (1) of Rules, 1999 it is clear that a discretionary power to place a Government servant under suspension has been vested in the appointing authority pending conclusion of enquiry against whose conduct an inquiry is either "contemplated" or "is proceeding", but nothing further has been mentioned in the enacting part of the substantive provisions of the aforesaid rule to indicate how the exercise of the aforesaid discretionary power can be regulated and controlled. Although from the close scrutiny of entire scheme underlying in the new rules make the situation clear independently of the "proviso" appended to the rule but apparently it gives a look of unguided discretionary powers vested in appointing authority, though it is not real legal position.

(32) At this juncture it is necessary to point out that the provisions contained in Rule 4(1) of 1999 Rules are exactly same and similar to that of Rule 49-A (1) of C.C.A. Rules, as such both the rules are pari-materia to each other. Therefore,

there would be no difficulty in adopting the interpretation given by Five Judges Full Bench of this Court while considering the content and scope of Rule 4(1) of new Rules, 1999. In New Rule 4(1) also the expression "inquiry" has been used as used under old Rule 49-A(1) of C.C.A. Rules and the same expression "inquiry" has also been used in Rules 7, 8 and 9 of the new Rules, 1999. Major and Minor penalties have been described under Rule-3 of the Rules. Rule 7,8 and 9 of Rules 1999 cumulatively deals with the procedure for holding formal disciplinary inquiry for imposing major penalties against government servants. Rule-10 of 1999 Rules deals with the procedure for imposing minor penalties which does not use the expression "inquiry" any where in the rules instead there of in clause (2) of the aforesaid rule only this much is provided that the government servant shall be informed of the substance of imputations against him and called upon to submit his explanation within reasonable time. The Disciplinary Authority, shall after considering the said explanation, if any and relevant records, pass such orders as he considers proper and where a penalty is imposed, reason thereof shall be given.

(33) These intrinsic materials underlying in the scheme of aforesaid provisions of Rule 1999 itself clearly demarcates line between procedure for holding inquiry for imposing major penalties and minor penalties, and also leads towards irresistible conclusion that the expression "inquiry" used under Rule 7,8 and 9 of Rules, 1999 with a view to hold formal disciplinary inquiry for imposing major penalties only. Since the same expression "inquiry" has been used under Rules 4(1) with a view to place government servant under suspension against whose conduct an inquiry is either "contemplated" or "is proceeding". Therefore, it leaves no room for doubt to hold that a government servant can be suspended only when an inquiry is either under contemplation or is proceeding for imposition of major penalties. It is also because of another valid and justified reason that the expression "inquiry", has been deliberately omitted by same rule making authority where some sort of inquiry has to be held under Rule 10 of the new Rules of 1999 for imposing minor penalties.

(34) Thus, in our opinion this inquiry under Rule 4(1) of rules can be no other inquiry except the inquiry envisaged under rule 7,8 and 9 of the new Rules, 1999 which contemplates nothing but for holding formal disciplinary inquiry for imposing major penalties against Government servant. The aforesaid view taken by us have also been taken by both the Full Benches of this Court, while interpreting the pari-materia clauses of Rule 49-A(1) vis-Ã-vis Rule-55 and 55-B of C.C.A. Rules, both the Full Benches have arrived at the same conclusion. Therefore, from the aforesaid discussions the necessary corollary which follow is that where the allegations are not so serious so as to warrant major penalties on their being established in ordinary course rather attracts only minor penalties as described under Rule 3, it is not open for the appointing authority to place a Government servant under suspension, as the suspension can only be resorted to under Rule 4 (1) of Rules 1999, where a formal disciplinary proceeding has to be held within the meaning of rule 7, 8 and 9 of the aforesaid rules for imposing major penalties.

(35) At this juncture it would also be necessary to point out that the inquiry contemplated under rule 4(1) cannot have any reference to an informal preliminary inquiry or fact finding inquiry preceding the actual or formal disciplinary inquiry, otherwise it shall be permissible to suspension of a government servant pending such informal inquiry but not after charges have been framed and regular formal departmental proceeding is pending. This would lead to an anomalous situation whereas plain reading of Rule 4(1) of the new rules clearly indicates that suspension contemplated thereunder can continue till conclusion of pending inquiry. However, this power of Appointing Authority to continue suspension should not be confused with its exercise in situation not warranted under law in given facts and circumstances of a particular case. We are, therefore, of the opinion that inquiry contemplated by rule 4(1) of Rules 1999 has reference only to the formal departmental inquiry and not to any informal preliminary inquiry or fact-finding inquiry preceding the initiation of formal disciplinary inquiry for imposition of major penalty against the government servant. The view taken by us also finds support from the law laid down in subsequent Full Bench of this Court referred earlier, wherein a pari-materia clause contained in Rule 49-A(1) of C.C.A. Rules has been dealt with.

(36) Now coming to the true import and purpose of the proviso appended to Rule 4 (1) of new Rule 1999, it is necessary to point out as indicated earlier that the provisions contained in the proviso of Rule 4(1) of the aforesaid Rules are pari-materia clause to the provisions contained in first part of the note appended to Rule 49-A(1) of the erstwhile C.C.A. Rules prior to its deletion. Both the Full Benches referred earlier had dealt with the aforesaid provisions and held that the first part of the note which says, as a rule suspension should not be resorted to unless the allegations against the government servant are so serious that in the event of their being established, they may ordinarily be expected to warrant his dismissal, removal or reduction, shows that only in those cases where major punishment i.e. dismissal, removal or reduction can be imposed on the basis of nature of allegations against government servant that he may be suspended. Whether the seriousness of allegations warrant in the ordinarily course of his dismissal, removal or reduction will certainly depend on the contents of those allegations. The expression "as a rule" occurring in the beginning of first part of the note implies that it is always the rule to be observed. So far as with regard to the expression "allegations" contained in the first part of the note in para 46 of the decision referred earlier, the subsequent Full Bench has held that the earlier Full Bench interpreted the word "allegations" used in the first part of the note as allegations having substance revealed by an investigation of informal nature and not allegations contained in the complaint received against the government servant but while disagreeing with earlier Full Bench further observed that when "allegations" are substantiated and charges are framed, the "allegations" take a shape of charges and they are invariably called "charges" and not mere "allegations". There is, therefore, no reason why a restricted meaning be given to the word "allegations" used in the note. To suspend the government servant on

receipt of complaint containing allegations of dis-honesty, negligence or mis-conduct without the appointing authority being satisfied that the allegations made have substance which would later justify taking of disciplinary proceeding if shall be on subjective consideration, the same can be dis-approved by Court of law, but where there exists circumstances to satisfy the appointing authority that the allegations made have substance, suspension pending inquiry shall be on objective consideration and not subjective. It is different thing that appointing authority may later to have the matter investigated or further investigated so that total material may come on record and a proper departmental inquiry can be held.

(37) Thus, we are of considered opinion that there can be no scope for doubt to hold that on receipt of such complaint containing allegations against government servant, the appointing authority has to be satisfied about the allegations contained therein and further such allegations have any substance enabling to hold formal disciplinary inquiry against the government servant for imposition of major penalty against him. Before such satisfaction is arrived at with regard to such allegations, it is not open for the appointing authority to place a government servant under suspension. In this connection it is necessary to make it clear that such satisfaction need not be in shape of a final and firm decision, otherwise the "inquiry" instead of being "expected" or "as contingency", it would be sure and certain, which could not be said to be intention of rule making authority while employing the phrase "an inquiry is contemplated."

(38) Now putting it differently and viewing from different and another angle it is again necessary to point out that proviso appended to Rule 4(1) contained pari-materia clause as contained in first part of note appended to erstwhile Rule 49-A(1) of CCA Rules which was regarded as mandatory in nature, therefore the provisions contained in the first proviso to rule 4 (1) of the rule must also be treated to be mandatory in nature and no exception can be drawn in this regard. The phrase " unless allegations against the Government servant are so serious that in the event of their being established may ordinarily warrant major penalty" also assumes significance. As indicated earlier that seriousness of allegations depends on the content of those allegations upon which the appointing authority has to be satisfied about the actions to be taken thereon. Such satisfaction is to be arrived at on the basis of materials before it on objective considerations, which implies weighing of materials in the mind of appointing authority as a consequence of which it would arrive at a conclusion, which should also satisfy the test of proportionality of punishment to delinquency or gravity of allegation constituting misconduct against such employee. In our considered opinion, such duty has been cast upon the appointing authority by employing mandatory provisions under the proviso to Rule 4(1) of Rules 1999 which in clearest term stipulates that unless allegations are so serious, which on being established may ordinarily warrant major penalty suspension cannot be resorted to. The provisions contained in the aforesaid proviso thus imposes restriction upon the appointing authority to exercise its powers vested under enacting part of the rule as condition precedent for exercise of

such power therefore unless condition precedent for exercise of power exist, or satisfied, the exercise of power would be without jurisdiction and action would not be bonafide rather it would be termed as malafide. However, it is made clear that satisfaction so arrived need not be final concluded opinion in the shape of firm and final decision of the appointing authority instead thereof it may be only a prima facie satisfaction based on objective considerations of materials, but where such satisfaction is challenged before the court of law the Appointing Authority is bound to satisfy the court regarding his satisfaction based on materials by producing the materials before the court because of the simple reason that language used in the proviso to the rule in question appears to be objective in nature, which can be examined by the court or tribunal not as appellate authority but within the purview of well settled parameters of judicial review.

(39) Thus from the aforesaid discussion, the necessary corollary which follows that where the allegations are not serious enough to warrant either of the major penalties described under rule 3 of the new Rules, 1999, it goes without saying that suspension should not be resorted to serve other ulterior purpose as measure of administrative routine or as personal or political vendetta against Government servant as it would be prejudicial to the public interest causing loss to the public administration.

(40) Thus from the aforesaid discussion, we are of the considered opinion that the first proviso appended to Rule 4(1) is first to be treated as employed under the rule as abundant caution to give correct and accurate meaning to the expression "inquiry" used in the enacting part of the rule which was implicit in the enacting part has been made explicit by the proviso, second as substantive provision of the statute like enacting part contained in clause (1) of Rule 4 to be interpreted like supplementary provisions of enacting part of the rule as complementary provision to remove deficiency in enacting part of the rule and to ascertain full intention of rule making authority thus it would serve as integral part of the enacting provision. Third the proviso appended to the rule appears to have controlling effect upon the provisions of enacting part of the rule because of the simple reason that the discretionary power vested in appointing authority has to be exercised only in contingency provided under the proviso contained in the rule, as a condition precedent for exercise of such power. Lastly the provisions contained in proviso elucidated the provisions of enacting part of the rules by illuminating it. Thus in our considered opinion the proviso appended to the Rule 4(1) of the Rules has very significant and pivotal role to play under the rule in question as indicated herein above.

(41) Thus in view of foregoing discussions we are of considered opinion that law laid down by five judges Full Bench of this Court in case of Jai Singh Dixit (supra) is still good law and holds the field. The changes brought about in the rules regarding the suspension of Government servant by new rules of 1999 do not affect the legal position settled in the aforesaid decision, so far as interpretation of provisions of Rule -4(1) along with its first proviso is concerned. Thus, so far as the content and import of

expression "inquiry", "contemplated" and "allegations" used in the new rule of 1999 is concerned the same may be understood with necessary modifications in context of interpretation given to the erstwhile rule 49-A (1) of the CCA Rules. Accordingly the legal position as it stands now is that suspension pending inquiry under Rule 4 (1) of Rules 1999 can be resorted to at any stage prior and after framing of charge when on objective consideration the authority concerned is of the view that a formal departmental inquiry, under Rule 7 of the said rule is expected or such an inquiry is proceeding. It immaterial that prior to it any other inquiry of informal nature has been held or not or such informal inquiry if initiated, is concluded or not? Suspension can be resorted to even before a final decision is taken to initiate the disciplinary proceeding. At what stage the power under rule can be exercised, shall always depend upon the facts and circumstances of each individual case and no strait-jacked formula having universal application in all the cases can be evolved in this regard.

(42) Now at this juncture, it is necessary to refer some case laws wherein the scope of judicial review relating suspension vis-Ã-vis circumstances under which it can be resorted to have been dealt with by Hon'ble Apex Court. In **U.P. Rajya Krishi Utpadan Mandi Parishad and others Vs. Sanjiv Rajan (1993) 3 UPLBEC 1569** in para 5 and 10 of the decision Hon'ble Apex Court has held as under :

"5……Ordinarily, when there is an accusation of defalcation of the monies, the delinquent employees have to be kept away from the establishment till the charges are finally disposed of. Whether the charges are baseless, malicious or vindictive and are framed only to keep the individual concerned out of the employment is a different matter. But even in such a case no conclusion can be arrived at without examining the entire record in question and hence it is always advisable to allow the disciplinary proceedings to continue unhindered. It is possible that in some cases, the authorities do not proceed with the matter as expeditiously as they ought to, which results in prolongation of the sufferings of the delinquent employee. But the remedy in such cases is either to call for an explanation from the authorities in the matter, and if it is found unsatisfactory to direct them to complete the inquiry within a stipulated period and to increase the suspension allowance adequately……."

"10. We find from the charge-sheet that the allegations against the Ist respondent are grave in as much as they indicate that the amounts mentioned there in are not deposited in the bank and forged entries have been made in the pass book of the relevant accounts and the amounts are shown as having been deposited. In the circumstances, the High Court should not have interfered with the order of suspension passed by the authorities. The Division Bench has given no reason for upholding the learned Single Judge's order revoking the suspension order. In matters of this kind, it is advisable that the concerned employees are kept out of the mischief's range. It they are exonerated, they should be entitled to all their benefits from the date of the order of suspension. Whether the employees should or should not continue in their office during the period of inquiry is a matter to be assessed by

the concerned authority and ordinarily, the Court should not interfere with the orders of suspension unless they are passed mala fide and without there being even a prima facie evidence on record connecting the employees with the misconduct in question……."

(43) In **State of Orissa Vs. Bimal Kumar Mohanty A.I.R. 1994 S.C. 2296**, while dealing with the issue at length in para 12 of the decision Hon'ble Apex Court has held as under:

"12. It is thus settled law that normally when an appointed authority or the disciplinary authority seeks to suspend an employee, pending inquiry or contemplated inquiry or pending investigation into grave charges of misconduct or defalcation of funds or serious acts of omission and commission, the order of suspension would be passed after taking into consideration the gravity of the misconduct sought to be inquired into or investigated and the nature of the evidence placed before the appointing authority and on application of the mind by disciplinary authority. Appointing authority or disciplinary authority should consider the above aspects and decide whether it is expedient to keep an employee under suspension pending aforesaid action. It would not be as an administrative routine or an automatic order to suspend an employee. It should be on consideration of the gravity of the alleged misconduct or the nature of the allegation imputed to the delinquent employee. The Court or the Tribunal must consider each case on its own facts and no general law could be laid down in that behalf. Suspension is not a punishment but is only one of forbidding or disabling an employee to discharge the duties of office or post held by him. In other words it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending enquiry without any impediment or to prevent an opportunity to the delinquent officer to scuttle the enquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in office to impede the progress of the investigation or enquiry etc. But as stated earlier, each case must be considered depending on the nature of the allegations, gravity of the situation and the indelible impact it creates on the service for the continuance of the delinquent employee in service pending enquiry or contemplated enquiry or investigation. It would be another thing if the action is actuated by mala fide, arbitrary or for ulterior purpose. The suspension must be a step in aid to the ultimate result of the investigation or enquiry. The authority also should keep in mind public interest of the impact of the delinquent's continuance in office while facing departmental enquiry or trial of a criminal charge."

(44) In ***Secretary to Govt. Prpohibition and Excise Department Vs. L. Srinivasan (1996) 3 SCC 157*** in para 3 of the decision the Hon'ble Apex Court has held as under :-

"3. The respondent while working as Assistant Section Officer, Home, Prohibition and Excise Department has been placed under suspension. Departmental inquiry is in process. We are informed that charge-sheet was laid for prosecution for the offences of

embezzlement and fabrication of false records etc. and that the offences and the trial of the case is pending. The Tribunal had set aside the departmental enquiry and quashed the charge on the ground of delay in initiation of disciplinary proceedings. In the nature of the charges, it would take a long time to detect embezzlement and fabrication of false records, which should be done in secrecy. It is not necessary to go into the merits and record any finding on the charge levelled against the charged officer since any finding recorded by this Court would gravely prejudice the case of the parties at the enquiry and also at the trial. Therefore, we desist from expressing any opinion on merit or recording any of the contentions raised by the counsel on either side. Suffice it to state that the Administrative Tribunal has committed grossest error in its exercise of the judicial review. The member of the Administrative Tribunal appears to have knowledge of the jurisprudence of the service law and exercised power as if he is an appellate forum dehors the limitation of judicial review in quashing the suspension order and charges even at the threshold. We are coming across such orders frequently putting heavy pressure on this Court to examine each case in detail. It is high time that it is remedied.

(45) In **Ram Dular Tripathi Vs. State of U.P. and others All C.J. (2) 1997, 1416**, a Division Bench of this court has held that if the allegations are not serious enough, in ordinary course to warrant major penalty, the suspension can not be resorted to and in para 14th of the Decision observed as under :-

"14. Before parting with this case it may also be observed that if the Government servants are suspended on such flimsy ground it will have adverse effect on the service which may ultimately affect the working of the government."

(46) Before parting with the issue it is also necessary to make it clear that a suspension in contemplated inquiry or pending inquiry cannot be regarded as punishment, that is why it is not subject to any department appeal or revision but where it is unduly prolonged for longer time without holding any disciplinary inquiry or without any other justification available under law such as pendency of criminal investigation, inquiry or trial as contemplated by sub-rule 2 or not justified in situation envisaged by other sub-rules of rule 4 of 1999 Rules such suspension would be based on arbitrary exercise of power and without application of mind and offending act can also be termed as malafide for ulterior or collateral purpose i.e. purpose alien to statute or unauthorised purpose, therefore, liable to be struck down by this Court.

(47) To appreciate the expression "good faith", "bad faith", "bonafide" and "malafide" more conveniently it would be useful to refer few passage of observations made by Professor **H.W.R. WADE** from **5th Edition** of his monumental work **"Administrative Law"** at page 391-392 as under :

"GOOD FAITH

Bad faith not dishonesty

*The Judgments discussed in the last few pages are freely embellished with references to **good and bad faith**. These add very little to the true sense, and are hardly ever used to mean more than that some action is found to have a **lawful** or **unlawful** purpose. It is extremely rare for*

*public authorities to be found guilty of intentional dishonesty; normally they are found to have erred, if at all, by ignorance or misunderstanding. Yet the courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds. Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context "**in good faith**' means merely "**for legitimate reasons**'. Contrary to the natural sense of the words, they impute **no moral obliquity**.*

A pithy statement of **Lord Macnaghten** to this effect has already been quoted. He made another in **Roberts V. Hopwood**, dealing with the power of a local board to pay "such wages as they think fit':

*Firstly, the final words of the section are not absolute, but are subject to an implied qualification of **good faith**-"as the board may **bonafide think fit**'...**Bonafide** here cannot simply mean that they are not making a profit out of their office or acting in it from private spite, nor is bonafide a short way of saying that the council has acted within the ambit of its powers and therefore not contrary to law. It must mean that they are giving their minds to the comprehension and their wills to the discharge of their duty towards the public, whose money and local business they administer.*

Still more pithily, Vaughan Williams L.J. had said in an earlier case:

You are acting malafide if you are seeking to acquire land for a purpose not authorised by the Act.

*And **Lord Greene M.R.,** in the passage already quoted, treated **bad faith** as interchangeable with **unreasonableness and extraneous considerations. Bad faith** therefore scarcely has an independent existence as a distinct ground of invalidity. Any attempt to discuss it as such would merely lead back over the ground already surveyed. But a few examples will illustrate it in its customary conjunction with unreasonableness and improper purposes.*

*If a local authority were to use its power to erect urinals in order to place one "in front of any gentleman's house', then "it would be impossible to hold that to be a **bonafide** exercise of the powers given by the statute." If they wish to acquire land, their powers are "**to be used bonafide for the statutory purpose and for none other**.' If they refer numerous cases en masse to a rent tribunal without proper consideration, this is not "a valid and bonafide exercise of the powers'. If a liquor licence is cancelled for political reasons, the minister who brought this about is guilty of "a departure from good faith'. Such instances could be multiplied indefinitely.*

Motives and malice

*……..But the Court of Appeal decided that it was not necessary to go so far as to hold the council "guilty of bad faith'. Elsewhere in this case "**malafide'** was used merely to mean **"for an unauthorised purpose'…..……..**"*

(48) In this connection a reference can also be made to observations made by Hon'ble Apex Court in para 22 of the decision rendered by constitution Bench in **Union of India Vs. H.C. Goel, A.I.R. 1964 S.C. 364** as under:

"(22) We are not prepared to accept this contention. Malafide exercise of power can be attacked independently on the ground that it is malafide. Such an exercise of power is always liable to be

quashed on the main ground that it is not a bonafide exercise of power. But we are not prepared to hold that if malafides are not alleged and bonafides are assumed in favour of the appellant, its conclusion on a question of fact cannot be successfully challenged even if it is manifest that there is no evidence to support it. The two infirmities are separate and distinct though, conceivably, in some cases both may be present. There may be cases of no evidence even where the Government is acting bonafide; the said infirmity may also exist where the Government is acting malafide and in that case, the conclusion of the Government not supported by any evidence may be the result of malafides but that does not mean that if it is proved that there is no evidence to support the conclusion of the Government, a writ of certiorari will not issue without further proof of malafides……."

(49) The similar view has been reiterated again by Hon'ble Apex Court in **Express Newspapers Pvt. Ltd. and others Vs. Union of India and others, A.I.R. 1986 S.C. 872**. In para 118 of the decision Hon'ble Apex Court observed as under:

"118. Fraud on power voids the order if it is not exercised bonafide for the end design. There is a distinction between exercise of power in good faith and misuse in bad faith. The former arises when an authority misuses its power in breach of law, say, by taking into account bonafide, and with best of intentions, some extraneous matters or by ignoring relevant matters. That would render the impugned act or order ultra vires. It would be a case of fraud on powers. The misuse in bad faith arises when the power is exercised for an improper motive, say, to satisfy a private or personal grudge or for wreaking vengeance of a Minister as in S. Pratap Singh Vs. State of Punjab, (1964) 4 SCR 733 : (AIR 1964 SC 72). A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. Use of a power for an "alien' purpose other than the one for which the power is conferred is malafide use of that power. Same is the position when an order is made for a purpose other than that which finds place in the order. The ulterior or alien purpose clearly speaks of the misuse of the power and it was observed as early as in 1904 by Lord Lindley in General Assembly of Free Church of Scotland Vs. Overtown, 1904 AC 515, "that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bonafide for the purpose for which they are conferred'. It was said by Warrington, C.J. in Short V. Poole Corporation, (1926) 1 Ch 66 that :

"No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative."

(50) From the aforesaid discussion it is clear that Professor **H.W.R. Wade** has used the expression "malafide" by reference of case law in the sense that offending act was done for a purpose not authorised under law. The expression "bad faith" has been used as contrary to the expression "good faith" and "bad faith" when offending act is either unreasonable or based on improper

grounds. The expression "bonafide exercise of power" means exercise of power only for the purpose of which it was conferred and for none other. If power is exercised for other purpose or unauthorised purpose or purpose alien to the statute, the exercise of power would be malafide. The expression "malafide" can be used merely to mean for an unauthorised purpose. The aforesaid view has also approved by Hon'ble Apex Court in the cases referred herein before.

(51) Thus on the basis of aforesaid discussion the legal position as emerges in given facts and circumstances of the case (without intended to be exhaustive) may be summarized as under:-

(1) The expression "inquiry" used under Rule 4(1) of new Rules, 1999, would mean, that a formal departmental inquiry for imposing either of the major penalties described under Rule 3 of the aforesaid rule. It has no reference to an informal preliminary or fact finding inquiry.

(2) The expression "an inquiry is contemplated" would mean that when on objective consideration of materials the appointing authority considers the case as one which would lead to a departmental inquiry, irrespective of whether any preliminary inquiry summary or detailed has or has not been made, if made is not complete. There can, therefore, be suspension pending inquiry even before a final decision is taken to initiate a disciplinary proceeding, i.e. before framing of the charge and communication thereof to the Government servant.

(3) To remove any doubt the expression "an inquiry is contemplated" means "an inquiry is expected". Once a firm and final decision is taken to hold a formal departmental inquiry, such an inquiry is certain and cannot be said to be merely "expected". Thus it may be a stage prior to such firm and final decision is taken to initiate a formal disciplinary inquiry.

(4) The expression "an inquiry is proceeding" means, when the charges are framed and communicated to the Government servant. A departmental enquiry proceeds from the stage a final decision is taken to initiate such inquiry.

(5) The expression "allegations" used in the proviso to rule 4(1) of the Rule should not be given restricted meaning which requires to be substantiated. Once it is substantiated they may take the shape of charges and would not remain as mere allegations. Thus the expression "allegations" should not be confused with the expression "charges" which are reduced in writing in the charge sheet.

(6) As a necessary corollary of aforesaid discussion, it follows that the power of suspension under rule 4(1) of new Rules cannot be resorted to where the allegations are not of serious in nature which may in ordinary course on being established warrant major penalty rather only minor penalties can be imposed against a government servant.

(7) Normally when there is an accusation of fabrication of false records and serious allegations of embezzlement of money are involved the delinquent employees have to be kept away from the establishment till the charges are finally disposed of.

(8) Whether the charges are baseless, malicious or vindictive and are framed only to keep the individual concerned out of employment even in such a case no conclusion can be arrived at without examining the entire record in question, hence it is always advisable to allow the disciplinary proceedings to continue unhindered. The remedy in such cases is either to call for an explanation from the authorities in the matter, and if it is found unsatisfactory to direct them to complete the inquiry within a stipulated period and to increase the suspension allowances adequately. *(As held by Hon'ble Apex Court in* ***U.P. Rajya Krishi Utpadan Mandi Parishad and others Vs. Sanjiv Rajan's case(supra).***

(9) The suspension is not punishment pending inquiry rather it is to refrain the delinquent employee to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending inquiry without any impediment or to prevent an opportunity to delinquent employee to scuttle the inquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in the office to impede the progress of the investigation or inquiry.

(10) While placing an employee under suspension the authority should also keep in mind public interest and impact of delinquent's continuance in the office while facing departmental inquiry or trial of a criminal charge.

(11) The suspension should not be resorted to for indefinite period without holding any departmental inquiry or without any other justification available under law.

(52) Now coming to the facts of the case it is not in dispute that while working as Veterinary Officer in the Animal Husbandry department of State the petitioner was placed under suspension vide impugned order dated 21.7.2003 passed by the State Government in contemplation of disciplinary inquiry to be held against him on the allegation of arbitrary functioning in defiance of the orders of superiors, failure to achieve the targets of prescribed policies, use of vulgar language against the subordinate officials and not functioning befitting to the post. Applying the aforesaid law as enunciated hereinbefore it cannot be said that the substance of allegations mentioned in the impugned order of suspension do not constitute misconduct of such a serious nature which on being established in ordinary course does not warrant either of major penalties described in rule3 of Rule 1999 and can be said to be vague and flimsy in nature on its face value.

(53) At this juncture it is necessary to make it clear that under the relevant rules regarding the suspension it is not necessary that order must recites the allegations in the detail in the form of charges which are required to be framed and incorporated in the charge-sheet, while initiating formal disciplinary inquiry for imposing major penalties. Besides this, since suspension pending inquiry is not punishment and charge could be framed and communicated at the stage of initiation of inquiry and principle of natural justice is also not attracted at very threshold of suspension as held by Hon'ble Apex Court in **S. Pratap Singh**

Vs. State of Punjab, A.I.R. 1964 SC 72, wherein a constitution Bench of Hon'ble Apex Court in para 55 of the decision has held," the order suspending the Government servant pending enquiry, is partly an administrative order. What has been held to be quasi-judicial is the enquiry instituted against the Government servant on the charges of misconduct, an enquiry during which under the rules it is necessary to have an explanation of the Government servant to the charges and to have oral evidence, if any, recorded in his presence and then to come to a finding. None of these steps is necessary before suspending a Government servant pending enquiry. Such orders of suspension can be passed if the authority concerned, on getting a complaint of misconduct, considers that the alleged charge does not appear to be groundless, that it requires enquiry and that it is necessary to suspend the Government servant pending enquiry." Thus, in view of aforesaid discussion it is clear that unless charges are framed or charge-sheet is issued and served upon the petitioner or produced before the court or the records containing complaint bearing allegations are produced before the Court, it is very difficult for us to hold that the allegations are vague or flimsy in nature at its face value and do not constitute misconduct of serious nature without having perused the record, which has not been placed before us. Therefore, the submission of learned counsel for petitioner in this regard is wholly misplaced and decision cited by him is also distinguishable on facts.

(54) However, it is necessary to point out that from the date of order of suspension a period of more than 2 years have been passed and neither any charge sheet has yet been issued nor served upon the petitioner. In such circumstances, only this much can be said that complaints received against the petitioner have hardly any substance on the basis of which appointing/Disciplinary Authority could have framed a charge sheet and initiate a disciplinary proceeding for imposing major penalty against the petitioner as envisaged under rule 7 of the aforesaid rules. As indicated earlier that on 31.7.2003 a Division Bench of this Court while directing the standing counsel to file reply of the writ petition within 2 weeks has also directed the standing counsel to file a proposed charge sheet along with the counter affidavit. A counter affidavit has been filed as noticed earlier but neither any charge-sheet or proposed charge-sheet as mentioned in the order of this Court dated 31.7.2003 has been filed along with the counter affidavit which was sworn on 21.10.2003 after expiry of about three months from the date of suspension nor there appears any indication in the counter affidavit that such charge-sheet has been framed/issued or served upon the petitioner nor any justification has been furnished through the aforesaid counter affidavit for failure to issue charge-sheet and failure to initiate formal disciplinary inquiry. It is also not the case in the counter affidavit that the allegations are of such a nature, like fabrication of false records or embezzlement of money, which requires investigation or scrutiny of record which may take some considerable time in ascertaining the facts for framing the charges. It is also not the case of respondents that suspension has been resorted to during investigation, inquiry or pendency of criminal trial, or in any other situation envisaged by other sub-rules of Rule 4 of 1999 Rules. Contrary to it impugned order recites suspension under

contemplation of departmental inquiry as envisaged by Rule 4(1) of Rules 1999. Besides this, it is also necessary to mention that no interim order has been granted by this Court at any point of time either staying suspension order or staying the disciplinary inquiry contemplated against the petitioner. In such circumstances we have no hesitation to hold that inspite of lapse of a period of more than 2 years the respondent could not be able to frame the charge and issued any charge-sheet and initiate any disciplinary proceeding as contemplated in rule 7 for imposition of major penalty against the petitioner.

(55) Thus there was no scope for the respondent to sit idle without holding disciplinary inquiry to be initiated against the petitioner. Thus we have no hesitation to hold that keeping the petitioner under suspension for such a long period without holding any disciplinary inquiry against him as indicated in the order of suspension, the respondents have no justification under law. Suspension of the petitioner in such a circumstances cannot be said to be bonafide action of the respondent and accordingly the same can be termed as arbitrary, malafide and resorted to as administrative routine, which would not be justified under law. Thus in given facts and circumstances of the case impugned order of suspension vitiates from its very inception and liable to be quashed. Accordingly impugned order of suspension dated 21.7.2003 (Annexure-5 of the writ petition) is hereby quashed. With the result the petitioner shall be reinstated in service and paid balance salary for the period of suspension, within two months from the date of production of certified copy of the order passed by this Court, before the respondent no.1.

(56) In the result the writ petition succeeds and is allowed.

There shall be no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2006

BEFORE
THE HON'BLE A.K. YOG, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 1056 of 2002

Faujdar ...Petitioner
Versus
Deputy Director of Consolidation and others ...Respondents

Counsel for the Petitioner:
Sri Ram Niwas Singh
Sri V.K.S. Chandel

Counsel for the Respondents:
Sri G.C. Upadhyaya
Sri M.R. Jaiswal
Sri O.P. Rai
Sri R.P. Gupta (Amicus Curiae)
S.C.

(A) U.P. Consolidation of Holding Act, 1953-Section 48-Revisional Power-whether the D.D.C. can exercise its revisional power against the order passed by subordinate consolidation authorities-where the order appealable but no appeal filed? Held-"yes"

Held: Para 36

In view of the above discussion we are of the opinion that the aforesaid decisions laying down that an order of an authority subordinate to Deputy Director

of Consolidation can be challenged directly by filing revision under section 48 of the Act without resorting to the remedy of filing appeal under section 11 of the Act and thus revision is maintainable lay down law correctly. There is no bar to compel a litigant to invoke the appellate jurisdiction first, before filling a revision under section 48 of the Act. The decisions holding otherwise, in our considered opinion does not lay down the law correctly and all such decisions are hereby overruled.

(B) Constitution of India, Art-226-judgement-binding effect-not holding correct law-cannot be relied on-after consideration on-after consideration-court held-the law laid down by Single Judge-in case reported in 1995 RD-534, 1998 (89) RD-578, 1999(90) RD-363, 2000 R.D.-608, judgment date 28.9.99 passed in w.p. no.26527 of 99 are not correct law.

Held: Para 42, 43

We decide Question - A. "Whether the Deputy Director of Consolidation can exercise revisional jurisdiction under section 48 against the appealable order passed by the Consolidation Officer where no appeal has been filed?" -- Answer in affirmative.

C. Deputy Director of Consolidation can exercise revisional jurisdiction under section 48 in respect to an appealable order passed by the Consolidation officer where no appeal has been filed. We decide the question - B. Whether the decisions of learned Single Judges in:-

1. 1995 R.D. Page 534 Damodar Prasad vs. Deputy Director of Consolidation, Allahabad and others.
2. 1998 (89) R.D. page 578 Santosh Kumar and others vs. U.P. Sanchalak Chakbandi, Faizabad & others.
3. 1999 (90) R.D. page 363 Ranjeet and others vs. Deputy Director of Consolidation Balia and others.
4. 2000 R.D. page 608 Hari Har Ram vs. Deputy Director of Consolidation Ballia and others.
5. Judgment dated 28.9.1999 passed in writ petition No.26527 of 1999 Rama Shanker Singh and others vs. Deputy Director of Consolidation, Varanasi and another.
lays down correct law or the view taken by the learned Single Judge in following cases lay down the correct law?" --- Answer no.

Decisions of Learned Single Judges in the cases of Damodar Prasad (supra), Santosh Kumar and others (supra), Ranjeet and others (supra), Hari Har Ram (supra) and Rama Shanker Singh and others (supra) do not lay down correct law and hereby overruled. The correct law is as expounded by Learned Single Judges in the case of Ram Das (supra) and Ram Saran (supra).

Case law discussed:

1995 RD-534 not correct law
1979 RD-308
1982 RD-78
1985 AL-J-1343
1990 RD-?
1998 (80) RD-578
1999(90) RD-363
2000 RD-608
W.P. 26527 of 99 decided on 28.9.99
AIR 1970 Alld.-376
2003 (2) SCC-577
AIR 2003 SC-1405
2003 (4) J.T. 435
J.T. 2004 (2) SC-510
1979 AWC-513
1988 (2) SCC-602
1991 (4) SCC-139
2000 (4) SCC-462
2003 (5) SCC-448

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

1. Faced with conflicting opinion expressed by different "benches' of co-ordinate strength (All Single Judges) & Learned Single Judge referred the matter for consideration by a larger bench and

the Hon'ble Chief Justice as contemplated under Rules of Court 1952 (as amended upto date) has nominated this Bench to resolve the conflict and set at rest the legal position. Consequently the matter has come up for before this Bench for adjudication.

2. Can a party to the Proceedings under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act) directly invoke " Revisional' jurisdiction of DDC U/S 48 of the Act by passing statutory remedy of Appeal under section 12 of the Act.

3. The pith and substance of the issue in "controversy' can be summarized, for ready reference, as follows:-

4. Following two questions have been framed and referred by Learned Single Judge for decision:-

"A. Whether the Deputy Director of Consolidation can exercise revisional jurisdiction under section 48 against the appealable order passed by the Consolidation Officer where no appeal has been filed?

B. Whether the decisions of learned Single Judges in :-

1. 1995 R.D. Page 534 Damodar Prasad vs. Deputy Director of Consolidation, Allahabad and others.

2. 1998 (89) R.D. page 578 Santosh Kumar and others vs. U.P. Sanchalak Chakbandi, Faizabad & others.

3. 1999 (90) R.D. page 363 Ranjeet and others vs. Deputy Director of Consolidation Balia and others.

4. 2000 R.D. page 608 Hari Har Ram vs. Deputy Director of Consolidation Ballia and others.

5. Judgment dated 28.9.1999 passed in writ petition No.26527 of 1999 Rama Shanker Singh and others vs. Deputy Director of Consolidation, Varanasi and another.

lays down correct law or the view taken by the learned Single Judge in following cases lay down the correct law?"

1. 1979 R.D. page 308 ***Ram Das and another vs. Deputy Director of Consolidation and others.***

2. 1982 R.D. page 78 ***Hori Lal vs. Deputy Director of Consolidation, Allahabad and others.***

3. 1985 All. L.J. 1343 **Ram Saran Vs. Assistant Ddirector of (Consolidation) and others.**

4. 1990 R.D. page ***Ram Surat and others vs. Gram Sabha, Nagar, Haraiya Mirzapur and others.***

Facts of the Case :-

5. A dispute arose in between one Faurjdar (the petitioner) and Smt. Prabhawati (the respondent) during consolidation operations. Matter was placed before the Consolidation Officer for decision of the dispute under section 9-A (2) of the Act. An alleged compromise purporting to be on behalf of the respective parties was presented before the Consolidation Officer, who decided the dispute vide the order dated October, 8, 1996 in terms of the said compromise. Subsequently an application dated September, 4, 1997 was filed by Smt. Prabhawati for the recall of the order dated 8.10.1996 on the ground that the order dated 8.10.1996 was obtained by

playing fraud; no notice or summon of the case was served on her nor she filed any such compromise; there is no order sheet on the record which may show that any proceedings were taken out before the Consolidation Officer. She pleaded that compromise has been got verified by impersonation as she did not appear before the Court nor engaged any counsel. The allegations made in recall application were duly supported by statement on oath. The said recall application was dismissed in default by the order dated 13th of December, 1999.

6. Smt. Prabhawati filed two revisions being revision no.812 of 2000, (annexure 9 to the writ petition) against the order dated October, 8, 1996 passed in original case No.3173 and revision No.707 of 1998 against the order dated 18.10.1996, on similar pleas. In the memo of revision she has set up plea of fraud against the present petitioner and others and pleaded that no notice or summon was served on her by the Consolidation Officer before recording the compromise nor she ever entered into any such compromise. It has been also stated that Faujdar, the petitioner has filed a belated objection before the Consolidation Officer, notice of which was not given to her. An objection was raised by the present petitioner before the respondent no.1 about maintainability of the revision on the ground that it is barred by time.

7. The Deputy Director of Consolidation by the impugned order dated 27th December, 2001 held that the question "whether the revision is barred by time, and, therefore not maintainable, shall be heard and decided at the time of hearing of the revision being heard on merits itself. Aggrieved against the aforesaid order the present writ petition has been filed.

Contention of the Petitioner:

8. It appears that in the present writ petition the petitioner has endeavoured to raise and press a new plea with regard to the non maintainability of the revision before the respondent no.1 which was, though mentioned in the objection but appears to have been not pressed as it does not find mention in the impugned order; there is also no objection that said plea, though pressed but not dealt with by the court below.

9. It is submitted that the order passed by the Consolidation Officer dated October, 8, 1996 is an appealable order under section 11 of the Act and as such the revision filed by the contesting respondent no.2 Smt. Prabhawati under section 48 of the Act is not maintainable and is liable to be rejected as such.

Before Learned Single Judge reliance is sought to be placed by the learned counsel for the petitioner upon the following cases:-

1. ***1995 R.D. Page 534 Damodar Prasad vs. Deputy Director of Consolidation, Allahabad and others.***
2. ***1998 (89) R.D. page 578 Santosh Kumar and others vs. U.P. Sanchalak Chakbandi, Faizabad & others.***
3. ***1999 (90) R.D. page 363 Ranjeet and others vs. Deputy Director of Consolidation Ballia and others.***
4. ***2000 R.D. page 608 Hari Har Ram vs. Deputy Director of Consolidation Ballia and others.***

5. Judgment dated 28.9.1999 passed in writ petition no. 26527 of 1999 Rama Shanker Singh and others Vs. Deputy Director of Consolidation, Varanasi and another.

10. Shri Ram Niwas Singh, the learned counsel for the petitioner contends that legislative intent is clear; viz, orders, which are otherwise appealable under section 11 of the Act, cannot be challenged directly by filing revision under section 48 of the Act before Dy. Director of Consolidation. He seeks to support his contention with the help of Rule 111 of the Rules framed under the Act. It is pointed out, that in the said Rule, limitation for filing a revision against an order is "thirty days' but there is no such period of limitation is prescribed for a revision (if filed) against a proceeding. On that basis he contends that one can infer from the above circumstance that legislature did contemplate revisions of two kinds before the Respondent No.1, - (a) against an "order' and (ii) against a "proceeding'. Further elaborating the argument, it is argued that a conjoint reading of section 11 and section 48 of the Act makes it clear that a revision against an order which is appealable under section 11 of the Act, is not conceived by the legislature and, hence it should be held as "not maintainable' in law. He also submits that regular forum of "Appeal' if provided in the Statute, should not be allowed to be rendered redundant

Contention of the Respondents:-

11. In reply, the learned standing counsel Shri M.R. Jaiswal and Shri O.P. Rai, representing Respondent No.2 submit that legislature is competent to provide more than one remedy in a statute against an order in a given situation, it is the choice of "aggrieved person' to avail oneself of either of these remedies and there is no bar to provide two forums. According to the Respondent, a plain reading of Section 48 of the Act, does not show any "inhabitation' or "hitch' or restriction upon the right of "aggrieved person' against an order of Consolidation Officer etc., or during Proceeding to first challenge order "wrong' or Proceeding by way of appeal under section 11 before Settlement Officer Consolidation or, in the alternative invoke "revisional-jurisdiction' before Higher Authority i.e. DDC. It was further submitted that, if any, restriction is imposed, as suggested by the petitioner it will amount to rewrite "Statute' which is neither permissible in law nor warranted in the facts of the present case.

12. Section 48 as originally enacted of U.P. Act No.5 of 1954 is reproduced below:-

"48. Revision- *The Director of Consolidation may call for the record of any case if the officer, (other than the Arbitrator) by whom the case was decided appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it may think fit."*

It was amended and was substituted by U.P. (Amendment Act No.24 of 1956). The provision, thus, amended is reproduced below:-

"48. Powers of Director of Consolidation to call for records and to revise orders - The Director of Consolidation may call for the record of any case or proceeding if the Officer (other than the Arbitrator) by whom the case was decided or proceeding taken appears to have failed to exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and pass such orders in the case as it think fit."

13. Above section was further amended by U.P. (Amendment Act No.38 of 1958) as well as by Section 38 of U.P. (Amendment Act No.38 of 1963). Amended Section 48, as it stands today, is quoted below:-

"Section 48. Revision and reference –

(1) The Director of Consolidation may call for and examine the record of any case decided or proceeding taken by any subordinate authority for the purpose of satisfying himself as to regularity of the proceedings; or as to the correctness, legality or propriety of any order [other than interlocutory order] passed by such authority in the case of proceedings and may, after allowing the parties concerned a opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub section (1) may be exercised by the Deputy Director of Consolidation also on a reference under sub section 3.

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub section (1).

Explanation - (1) For the purpose of this section Settlement Officer, Consolidation, Consolidation Officer, Assistant Consolidation Officer, Consolidator and Consolidation Lekhpal shall be subordinate to the Director Consolidation.

Explanation - (II) For the purpose of this section the expression "interlocutory order' in relation to a case or proceeding or collateral thereto as does not have the effect of finally disposing of such case or proceeding.

Explanation - (III) The power under this section to examine the correctness, legality or propriety of any order includes the power to examine any findings, whether of fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence."

It may be pointed that Explanation - III was inserted by U.P. Act No.3 of 2002 w.e.f. 21st of June, 2002.

14. It may be pointed out that this Court in a Full Bench decision ***Zila Parishad Vs. Bramha Rishi Sharma AIR 1970 Allahabad 376*** has held that if two remedies have been provided by an enactment it is open to the aggrieved person to choose either of them, unless there is any prohibition. In this case an exparte injunction order was passed. The said order was appealable. The defendant had also a right to apply for the vacation of the injunction order before the Court

who passed the injunction order. In this fact situation, the Full Bench has made the following observation:-

"The language and the object of Rule 1(r) of Order 43 and the scheme of Rules 1 to 4 of Order 39 show that an appeal also lies against the exparte order of injunction. As soon as an interim injunction is issued and the party affected thereby is apprised of it, he has two remedies: (1) he can either get the ex parte injunction order discharged or varied or set aside under Rule 4 of O. 39 and if unsuccessful avail the right of appeal as provided for under Order 43, Rule 1 (r), or (2) straightway file an appeal under Order 43, Rule 1 (r) against the injunction order passed under Rules 1 and 2 of Order 39, C.P.C. It is not unusual to provide for alternative remedies. For instance, when an ex parte decree is passed against a person, he has two remedies: either he may go up in appeal against the ex parte decree or he may seek to get the ex parte decree or he may seek to get the ex parte decree set aside by the same court."

15. Under the Civil Procedure Code against an ex parte decree two remedies to the defendant have been provided. He can file an application for setting aside the exparte decree under Order IX Rule 13 of C.P.C. or to file appeal against the exparte judgment. By an amendment through which an Explanation has been added being C.P.C Amendment Act 1976 w.e.f. 1st of February, 1977 now it has been provided that if a party has availed remedy of filing appeal against the exparte judgment he is debarred to file an application under Order IX Rule 13 C.P.C.

16. Under the Income Tax Act against the assessment order it is upon an assessee to file an appeal before the First Appellate Authority or to file "revision' directly before the Commissioner of Income Tax under section 263 of the Income Tax Act. U.P. Minor Mineral Rules, Rules 77, 78 and 79 are also to the same effect.

17. The argument of the learned counsel for the petitioner is that this Court should interpret section 48 in such a manner so as to exclude the direct filing of revision against such orders or proceedings which are appealable first under section 11 of the Act. Under section 11 of the Act any aggrieved party to the proceedings under section 9-A by an order passed by the Assistant Consolidation Officer or the Consolidation Officer may file appeal within 21 days before the Settlement Officer Consolidation. On comparing the section 11 with section 48 of the Act it is clear that only limited orders which are passed under section 9 - A by Assistant Consolidation Officer or the Consolidation Officer are made appealable. On the other hand under section 48 the Deputy Director of Consolidation is empowered to examine the proceedings and the order of not only Assistant Consolidation Officer or the Consolidation Officer but also of Settlement Officer Consolidation, Consolidator and Consolidation Lekhpals also, thus we find no justification to accept the aforesaid argument of the petitioner.

18. Language of section 48 is plain and simple and admits of no doubt. It was not disputed, and could not be disputed by the petitioner, that on the plain

interpretation of section 48 of the Act, the section does not provide any bar to entertain a revision by the Deputy Director of Consolidation even if the order under revision is appealable and the appeal has not been filed. Shri R.P. Gupta, advocate, who appeared as amicus curie on the request of the Court has referred to a Constitution Bench Judgment of Supreme Court in the case of ***Nathi Devi Vs. Radha Devi Gupta AIR 2005 SC 648***, wherein it was held that the interpretative function of the Court is to discover the true legislative intents. It has been said that in interpreting a Statute, the court must, if the words are clear, plain, unambiguous and reasonably susceptive to only one meaning, irrespective of the consequence. They must be expounded in their natural and ordinary sense. When language is plain and unambiguous and admits of only one meaning no question of construction of Statute arises and the Act speaks for itself. Courts are not concerned with policy involved or that the results are injurious or otherwise, which may fall from giving effect to the language used. If the words used are capable of one construction only, then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity the Court must look at the Statute as a whole and consider the appropriateness of the meaning in a particular context, to avoid absurdity and inconsistencies, unreasonableness which may render Statute unconstitutional. In para 5 of the judgment it has been stated in the following words:-

"It is well settled that literal interpretation should be given to the Statute if the same does not lead to an absurdity."

19. In para 16 of the judgment, it has quoted an excerpt from its earlier judgment in the case of ***Nasiruddin and others Vs. Sita Ram Agrawal (2003) 2 SCC 577***, which is reproduced below:-

"37. The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used. It may be true that use of expression "shall or may' is not decisive for arriving at a finding as to whether statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions should be mandatory in character."

"Interpretation postulates the search for the true meaning of the words used in the statute as a medium of expression to communicate a particular thought. The task is not easy as the "language' is often misunderstood even in ordinary conversation or correspondence. The tragedy is that although in the matter of correspondence or conversation the

person who has spoken the words or used the language can be approached for clarification, the legislature cannot be approached as the legislature, after enacting a law or Act, becomes functus officio so far as that particular Act is concerned and it cannot itself interpret it. No doubt, the legislature retains the power to amend or repeal the law so made and can also declare its meaning, but it can be done only by making another law or statute after undertaking the whole process of law making. ***J.P. Bansal Vs. State of Raj. (A.I.R. 2003 S.C. 1405, para 12)."***

G.P. Singh in **Statutory Interpretation (8th Vol.) 2001** has observed as follows, which has been reproduced by the Apex Court in ***D. Saibaba Vs. Bar Council of India 2003 (4) J.T. 435 (P.16):-***

"It may look some what paradoxical that plain meaning rule is not plain and require some explanation. The rule, that plain words, require no construction, starts with the premise that the words are plain, which itself is a conclusion reached after construing the words. It is not possible to decide whether certain words are plain or ambiguous unless they are studied in their context and construed."

In ***J.T. 2004 (2) S.C. 510 Prakash Nath Khanna Vs. C.I.T.***, the Apex Court has observed as follows: -

"It is well settled principle in law that the court can not read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the lelgislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said....."

20. In view of the above, we are of the opinion that on the plain language of section 48 the argument of the petitioner cannot be accepted. If we accept the argument of the petitioner's counsel it would virtually amount to re-writing section 48, which is, normally, and as of course, permissible under law.

21. Now we take up the cases referred in the referring order by the Learned Single Judge and relied upon by the petitioner.

22. In the case of ***Damodar Prasad Vs. Deputy Director of Consolidation (Supra)*** only this much has been said that an order under section 9-B being appealable, if it is challenged in revision without availing remedy of appeal it would be destructive of a remedy under the Act. The jurisdiction under section 48 of the Act ought not to be exercised in a manner which may be destructive of a statutory remedy. On a close reading of the said judgment we find the aforesaid observations were only tentative observations made by the Learned Single Judge and were not conclusive in as much as in the very next sentence it has been observed "that this aspect of the matter also needs to be examined at the end of Deputy Director of Consolidation." It is difficult to deduce a ratio that in the aforesaid case as a matter of law filing of such revision was held to be not maintainable. Be that as it may, with great respect to the Learned Judge we fail to

understand how the filing of revision is "destructive of a remedy under the Act'. Rather, in our opinion it advances the aims and objects of the Act as it facilitates the early disposal and settlements of dispute. Choice has been given to litigants to reach to the higher authority directly instead of approaching the said authority through the route of first filing appeal before the Settlement Officer Consolidation and then revision before the Deputy Director of Consolidation. We, therefore, are unable to subscribe with the view of the judgment of the Learned Single Judge in the aforesaid case.

23. The next case relied upon is ***Santosh Kumar Vs. U.P. Sanchalak Chakbandi 1998 (89) RD 578***. In the aforesaid case the Learned Single Judge after noticing the argument of the counsel for the petitioner passed the order at the admission stage of the revision, while issuing notice to the opp. parties directing the Deputy Director of Consolidation not to dispose of the revision and with further direction that the opp. party be directed to prefer an appeal. No reasoning or ratio has been laid down in the said case. The aspect that it is open to legislature to provide more than one remedy was neither argued nor was considered by the Learned Single Judge and therefore, we are of the opinion, that the said judgment is not a binding precedent and was not correctly decided. The case of ***Ranjeet Vs. DDC 1999 (90) RD 363*** is distinguishable on facts in as much as an appeal was filed against the order of the Consolidation Officer and thereafter a revision was also filed against the said order. In this fact situation it was held as follows:-

"Where the appeal is pending, it is not appropriate for the Deputy Director of Consolidation to interfere in revision, specially, when the scope of interference in appeal is much wider than the scope of interference in revision."

24. In this case also in the penultimate paragraph the Learned Single Judge has said that the jurisdiction exercised by the Deputy Director of Consolidation is destructive of the statutory remedy of appeal. We, with great respect, disapprove the said observation made by the Learned Single Judge as it does not borne out from the scheme of the Act or on the plain language of sections 11 and 48 thereof.

25. The next case relied upon is ***Smt. Madhuri Vs. DDC 2004 (96) RD 46***. In this case without filing objection revision was preferred by the petitioner which was dismissed on the ground of alternative remedy. The High Court observed that it is still open to the petitioner to file objection under section 12 of the Act before the Consolidation Officer. We do not find any applicability of the said judgment on the issue in hands.

26. On the other hand we find that this Court in the case of ***Ram Das Vs. DDC 1979 AWC 513*** has dealt with the present issue directly. The relevant portion of the judgment is reproduced below:-

"The order was also challenged as being without jurisdiction as the opposite party did not prefer any appeal against the order of the Consolidation Officer. It is true that normally revision should not be filed directly against an order, if appeal lies, but there is no bar express or

implied either u/Sec. 21 or Section 48 prohibiting a direct revision. Even rule 111 which provides limitation for filing revision lays down that an application under Section 48 shall be presented by the applicant or his duly authorized agent to the District Deputy Director Consolidation within 30 days of the order against which the application is directed. It removes any doubt if there be any, and permits filing of revision against any order."

27. This judgment was not noted by the Learned Judges in the case of ***Damodar Prasad (supra), Santosh Kumar and others (supra), Ranjeet and others (supra) and Rama Shanker and others (supra).*** Therefore on the principle of per incurium the judgments delivered in the case of Damodar Das and other judgments are liable to be ignored.

28. We note that doctrine of per incuriam is applicable where by inadvertence a binding precedent or relevant provisions of the Statute have not been noticed by the Court.

In Halsbury's Laws of Ingland (4th Edn.) Vo.l. 26 on pages 297-98, para 578 per incuriam has been stated as follows:

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and, as a general rule, the only cases in which decision should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal most follow its previous decision and leave the House of Lords to rectify the mistake".

In the case of Mamleshwar Prasad vs. Kanhaiya Lal [(1975) 2 SCC 232] the Apex Court has held as follows:

"Certainty of law, consistency of rulings and comity of courts- all flowering from the same principle--converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reaching, it may not have the sway of binding precedent. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment per incuriam.

Finally it remains to be noticed that a prior de/.cision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law indistinguishably identical and that ruling must bind."

29. In the case of ***A.R.Antulay vs. R.S.Nayak [(1988) 2 SCC 602]*** the Apex

Court has quoted the observations of Lord Goddard in Moore v. Hewitt [(1947) 2 All ER 270(KBD) and Penny vs. Nicholas [(1950) 2 All ER 89 (KBD) to the following effect:

"Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

30. In the case of ***State of U.P. vs. Synthetics & Chemicals Ltd. [(1991)4 SCC 139]*** the Apex Court has observed as follows:

"'Incuria' literally means "carelessness'. In practice per incuriam appears to mean per ignorantium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law' is avoided and ignored if it is rendered, "in ignorantium of a statute or other binding authority' Young v. Bristol Aeroplane Co. Ltd. [(1944) 2 All ER 293].

In the case of Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd. [(2001) 6 SCC 356] the Apex Court has held that a prior decision of this Court on identical facts and law binds the Court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgment or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment "per incuriam'.

31. In the case of ***Government of A.P. vs. B. Satyanarayana Rao [(2000) 4 SCC 462]*** the Apex Court held that the rule of per incuriam can be applied where a Court omits to consider a binding precedent of the same Court or the superior Court rendered on the same issue or where a Court omits to consider any statute while deciding that issue.

32. In the case of ***State of Bihar vs. Kalika Kuer alias Kalika Singh and others [(2003) 5 SCC 448]*** the Apex Court has held that per incuriam would mean such element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature and earlier decision cannot be said to have been rendered per incuriam and liable to be ignored on the ground that a possible aspect of the matter was not considered or not raised before the Court or more aspect should have been gone into by the Court deciding the matter earlier.

33. The Supreme Court in the case of ***N. Bhargawan Pillai v. State of Kerala AIR 2004 S.C. 2317*** in para 14 has held that if a view has been expressed without analyzing the statutory provision, cannot be treated as a binding precedent and at the most is to be considered as having been rendered per incurium.

34. We may also notice here the observation made in the judgment of Division Bench of this Court in Mst. Kailashi Vs. DDC 1972 RD 80.

"The Consolidation Officer condoned the delay in filing an objection under Section 9, U.P. Consolidation of Holdings Act, the other side feeling aggrieved filed a revision. The Deputy

Director went into the merits and held that there was no sufficient explanation for the delay. On this ground he allowed the revision and set aside the order condoning the delay. Learned counsel for the applicant has urged that the Deputy Director had no jurisdiction to go into the merits of the application for the Condonation of delay. Section 48 of the U.P. Consolidation of Holdings Act confers powers upon the Deputy Director to reach on facts and law every kind of order passed by a subordinate consolidation authority. The order condoning the delay was subject to the revisional powers under Section 48 of the Act."

35. The Learned Single Judge referring the case in the reference order has rightly pointed out that the above observations of the Division bench supports the view that Deputy Director of Consolidation can revise every order passed by any subordinate consolidation authority. Another Learned Single Judge in ***Ram Sharan Vs. Assistant Director (Consolidation) 1985 Allahabad Law Journal 1343*** has held as follows:-

"In sub-cl.(1) of S.11 it is provided that any party to the proceedings under S.9-A, aggrieved by an order of the Assistant Consolidation officer or the Consolidation Officer, under that section may, within 21 days of the date of the order, file an appeal before the Settlement Officer Consolidation, who shall, after affording opportunity of hearing to the parties concerned, give his decision thereon. It is, therefore, clear that a person who is not a party to the proceedings under S. 9-A cannot file an appeal as of a right, although he may, if aggrieved by the order prefer an appeal with leave of the Court, as held in Basalat's case (1983 All LJ NOC 37) (supra). However, when a thing which cannot be done as of a right its non-compliance would not operate as a bar to taking recourse to other available legal remedy. Thus, when an appeal cannot be filed as of a right under S. 11 of the Act by an aggrieved person who is not a party to the proceedings, I find it difficult to accept that the non-filing of an appeal would operate as a bar to invoking the revisional jurisdiction by the person aggrieved by the order-passed by the Assistant Consolidation Officer or the Consolidation officer under S. 9-A of the Act. In my opinion the revision filed by the aggrieved person straightway without filing an appeal against the impugned order would be maintainable and it cannot be rejected as being non-maintainable. The revisional jurisdiction of the Director of Consolidation under S.48 of the Act is apparently very wide and it can be invoked without any let or hindrance by any person aggrieved by the order although he may not be party to the case. S. 48 contains no such clause nor it can be so construed as to be applicable only against the orders passed by the appellate authority under the Act. In my opinion the revisional jurisdiction under S.48 of the Act can be exercised by the Director of Consolidation against any order passed by any subordinate consolidation authority in any case or proceedings under the Act, except an interlocutory order."

36. In view of the above discussion we are of the opinion that the aforesaid decisions laying down that an order of an authority subordinate to Deputy Director of Consolidation can be challenged directly by filing revision under section

48 of the Act without resorting to the remedy of filing appeal under section 11 of the Act and thus revision is maintainable lay down law correctly. There is no bar to compel a litigant to invoke the appellate jurisdiction first, before filling a revision under section 48 of the Act. The decisions holding otherwise, in our considered opinion does not lay down the law correctly and all such decisions are hereby overruled.

37. Scope of section 48 has been subject matter of interpretation by this Court as well as by the Apex Court on a number of times.

Necessity to insert Explanation III arose on view of decision of Supreme Court given in the case of ***Gayadin Vs. Hanuman Prasad 2001 (92) RD 79***, wherein it was held that notwithstanding the fact that section 48 though couched in wide terms, permits interference only when the findings of the subordinate authority are perverse i.e. they are not supported by the evidence on record or against law or where they are vitiated due to procedural irregularity. The issue involved in the case in hand was, however, not the subject matter of the consideration of Apex Court in the aforesaid case.

38. ***Sheo Nath vs. D.D.C. AIR 2000 S.C. 1141*** is an authority for the proposition that Section 48 gives very wide powers to the Deputy Director of Consolidation so that claims of the parties under the Act may be effectively adjudicated upon and determined so as to confer finality of the rights of the parties and revenue records may be prepared accordingly.

39. Plain reading of Section 48 of the Act shows, and it is also not disputed by the petitioner's counsel, that very wide power has been conferred on the authority concerned who is empowered to call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purposes of satisfying himself as to the regularity of the proceedings etc. It does not provide, like section 115 of the Civil Procedure of Code that an order would be revisable where no appeal lies. Section 115 of the C.P.C., 1908 in no uncertain terms provides that revision lies only when there is no provision of appeal. Similarly, under section 333 of U.P. Zamindari Abolition and Land Reforms Act a revision will lie if an appeal lies or where an appeal lies but has not been preferred.

The argument of the learned counsel of the petitioner is that Section 48 should be read in such a manner so as to exclude filing of the revision directly under that section when the order is appealable. The said argument in view of the language of the Section 48 of the Act is misconceived and cannot be accepted.

40. No other point is involved in the writ petition.

While granting the interim order this Court passed the following order:-

"Issue notice.

In the meantime the Deputy Director of Consolidation, Azamgarh respondent no.1 is directed to consider the question of delay in Revisions No. 707 and 812 pending before him and he may proceed to hear the parties on merits of the revisions only if the delay in preferring the revision is condoned. It will be open

to the Deputy Director of Consolidation to proceed to hear the parties on merits in the event of Condonation of delay on the same day or thereafter."

41. None of the counsel are in a position to inform whether, the Revision no.707 and 812 are still pending or not before the Deputy Director of Consolidation. Since the matter is old one and contesting party respondent no.2 is a widowed lady, we direct the respondent no.1 to hear and decide the revisions, if not already decided, within a period of two months from the date of production of certified copy of this order.

42. We decide Question-A. *"Whether the Deputy Director of Consolidation can exercise revisional jurisdiction under section 48 against the appealable order passed by the Consolidation Officer where no appeal has been filed?*" -- Answer in affirmative.

C. Deputy Director of Consolidation can exercise revisional jurisdiction under section 48 in respect to an appealable order passed by the Consolidation officer where no appeal has been filed. We decide the question - B. Whether the decisions of learned Single Judges in:-

1. ***1995 R.D. Page 534 Damodar Prasad vs. Deputy Director of Consolidation, Allahabad and others.***
2. ***1998 (89) R.D. page 578 Santosh Kumar and others vs. U.P. Sanchalak Chakbandi, Faizabad & others.***
3. ***1999 (90) R.D. page 363 Ranjeet and others vs. Deputy Director of Consolidation Balia and others.***
4. ***2000 R.D. page 608 Hari Har Ram vs. Deputy Director of Consolidation Ballia and others.***
5. ***Judgment dated 28.9.1999 passed in writ petition No.26527 of 1999 Rama Shanker Singh and others vs. Deputy Director of Consolidation, Varanasi and another.***

lays down correct law or the view taken by the learned Single Judge in following cases lay down the correct law?" --- Answer no.

43. Decisions of Learned Single Judges in the cases of ***Damodar Prasad (supra), Santosh Kumar and others (supra), Ranjeet and others (supra), Hari Har Ram (supra) and Rama Shanker Singh and others (supra)*** do not lay down correct law and hereby overruled. The correct law is as expounded by Learned Single Judges in the case of ***Ram Das (supra) and Ram Saran (supra).***

The writ petition is hereby dismissed. No order as to costs. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2006

BEFORE
THE HON'BLE S. RAFAT ALAM, J.
THE HON'BLE POONAM SRIVASTAVA, J.

Civil Misc. Writ Petition No. 14451 Of 2002

Hari Om Yadav ...Petitioner
Versus
State of U.P. through its Chief Secretary, Sachivalaya Lucknow ...Respondent

Counsel for the Petitioner:
Sri S.P. Gupta
Sri Yashwant Varma

Counsel for the Respondent:
Sri Yogesh Kumar Saxena
Sri B.D. Mandhyan
Sri P.K. Mishra
Sri Aditya Narain
Sri Anil Kumar
Sri Satish Mandhyan
Sri Chandra Shekhar Singh
S.C.

U.P. Kshetriya Punchayat and Zila Panchayat Adhiniyam 1961, U.P. Act no. 13g 1961–Section 27-A(1) (4) as Amended by G.A. Amendment Act No. 9 of 1994 where the provision of section 27-A (1) (6) are ultra vires of the constitution ? Held –'No'–neither it is violation of fundamental right of part 9 of the constitution- the provisions of section 27-A (1) being enacted in exercise of power given state–by nature of act 245 and 246 of the constitution– hence the petitioner who was adhyaksha of zila Parishad–subsequently being elected as M.L.A. has no power to held the office of Adhyakasha of Zila Parishad.

Held Para 40 and 41

It is well settled that when vires of an enactment is challenged the every attempt should be made to interpret various provisions by putting a liberal construction upon a relevant legislative entry and effort should be made to extend the meaning of the relevant words to their reasonable connotation to preserve the power of legislature. In the circumstances, we come to a conclusion that the legislature has the power to legislate and provisions of section 27-A (1) (b) of the U.P. Kshetriya Panchayat and Zila Panchayats Adhinium is not in any way violative of any fundamental rights. The member are governed by various provision of stature. The maxim 'expressio unisest exclusio alterius' is not applicable to the facts of the present case. The language of the statute is plain, simple and meaning is very clear. The enactment of section 27- A (1) (b) of the Act is not ultra vires of the Constitution. We are of the view that the provisions of the Act are consistent with policy and object of the Constitution. Any other interpretation will only amount to shifting the State legislature from its power to legislate.

For the reasons already discussed, we hold that Section 27- A (1)(b) is not ultra viures of the Constitution. It is enactment and cannot be struck down .The enactment is neither violative of the fundamental rights or part IX of the Constitution, we hold that the provisions of Section 27–A (1)(b) is enacted in exercise of power given to the State by virtue of Articles 245 and 246 read with Entry 5 List II as well as Article 243-C (3) of the Constitution of India. The petitioner has no rights to hold the office of the Adhyaksh of Zila Panchayat after his election to the office, as a M.L.A. after the result was declared and published in the official gazette.

Case law discussed:
AIR 1990 SC –1747
2001 (G) SCC – 558
2001 (3) SCC 359
2004 (0) SCC 391
2003 (A) SCC 695
1999 (4) SCC 197
2003 (8) SCC 369
PIR 2001 SC 1098
PIR 1983 SC 299
AIR 1954 SC 686
PIR 1982 SC 983
1997 (2) UPLBEC 918
JJ 2003 (A) SC-35
PIR 1975 SC 2299
AIR 1954 SC 314
AIR 1961 SC 21
AIR 1960 PANJ 341
AIR 1942 FC 72
AIR 1950 SC 27
AIR 1951 SC 318
1992 (Supp.)(2) SCC 651
1995 (Supp.) (2) SCC 197
AIR 1999 SC 826
AIR 1954 SC 210

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

1. In the instant petition sole petitioner has challenged the constitutional validity of Section 27-A of the U.P. Kshetriya Panchayats and Zila Panchayats Adhiniyam, 1961 U.P. Act No. 53 of 1961 (hereinafter referred to as '1961 Act'), which imposes bar on legislatures and holders of certain offices becoming and continuing as Pramukh, Up Pramukh, Adhyaksh and Upadhyaksh.

2. Heard Shri S.P. Gupta, Senior Advocate, assisted by Mr. Yashwant Verma, learned counsel for the petitioner, Shri Chandra Shekhar Singh, learned Standing Counsel appearing for the State, Shri P.K. Mishra, learned counsel appearing for the State Election Commission, Shri B.D. Madhyan, learned Senior Advocate assisted by Shri Satish Madhyan, learned Senior Counsel appearing for Shri Brijendra Singh son of Ram Bharosey Lal, newly impleaded respondent, who has filed Impleadment application as he is elected member from ward No. 22 of Zila Panchayat, Firozabad. He has staked his claim to the office of Adhyaksh, which has become vacant on account of previous Adhyaksh namely, Hari Om Yadav, petitioner having been elected as Member of Legislative Assembly, (hereinafter referred to as 'M.L.A.').

3. Counter and rejoinder affidavits have been exchanged. As the parties have agreed that the writ petition may be decided finally, we have proceeded to hear counsel for the respective parties to decide the case finally.

4. The facts, giving rise to the instant dispute, are that on 19.5.2000 the petitioner was elected as a member of Zila Panchayat, Firozabad. Thereafter on 6th August, 2000 he was elected as Adhyaksh, Zila Panchayat, Firozabad. The petitioner while still in office of Adhyaksh contested the election for the membership of 14th Legislative Assembly of U.P. from the constituency of Shikohabad. The elections were held in February,2002 and he was elected on 24.2.2002. The result was published in the Gazette of Uttar Pradesh. As a result of election of the petitioner as a member of 14th legislative Assembly of Uttar Pradesh by operation of law under Section 27-A (1) (b) of 1961 Act a casual vacancy occurred in the office of Pramukh of Zila Panchayat at Firozabad. This has given rise to the present writ petition assailing the constitutional validity of Section 27-A by the petitioner on the ground that it is unconstitutional, being in conflict with the scheme of Part IX of the Constitution of India. The petitioner besides seeking declaration of Section 27-A of 1961 Act as unconstitutional and inoperative after enforcement of Part IX of the Constitution of India has further prayed for mandamus restraining the respondents from enforcing the provision of Section 27-A of 1961 Act in respect of the petitioner.

5. A Division Bench of this Court had passed an interim order on 30th April, 2000 directing that the casual vacancy in the office of Adhyaksh that may have occurred due to election of the petitioner to the legislative Assembly shall not be filled up.

6. The argument on behalf of the petitioner is that the institutions like Zila Panchayats are local Self Government at the village level. There are other similar institutions at the intermediate and district

level such as municipalities including municipal corporations. The main emphasis of the arguments of the petitioner is that after the insertion and enforcement of Part IX of the Constitution of India by virtue of the Seventy Third Amendment Act of 1992, these institutions became Self Government.

7. The argument advanced by Shri S.P. Gupta, learned Senior Counsel for the petitioner is that the institutions such as Panchayats at village level, intermediate level, district level and municipalities including municipal corporation became permanent features of governance by insertion of Par IX and IX-A of the Constition, Severnty Third Amendment, 1992. These institutions were previously creatures of State Legislation. On number of occasions, their existence depended on the discretion of the State Government to supersede or dissolve them but later by making provisions regarding Constitution, composition, powers and functions of these bodies; after the insertion of Part IX and IX-A of the Constitution, the position stands altered. After Seventy Third Amendment their existence and continuance are now matters of governance under the Constitution. These local self-bodies are now constitutional bodies in fulfillment of directive principles of Article 40 of the Constitution of India. These constituents at the local level now constitute third tier of a government. It has been submitted that the Chairperson of Panchayat is constitutional and is an essential component of the Panchayat. He has tried to draw a parlance between Adhyaksh of Panchayat to that of the Speaker or Deputy Speaker of the Parliament of the State Legislature.

8. Shri S.P. Gupta, learned Senior Counsel has argued that Article 243 (C) (iv) provides that the Chairperson and members of Panchayat, whether or not chosen by direct election, shall have a right to vote in the meeting of the Panchayat. Similarly, under the constitutional scheme the membership of M.L.A., whether has a right to vote, is not inconsistent with the composition of the Panchayat. Thus, the necessary conclusion is that the Constitutionalone prescribes qualification for eligibility of Chairperson of Panchayat at intermediate level and district level, as laid down by the Constitution, and the requirement is that he or she should be a member of Panchayat. The disqualification is laid down in Article 243 (F), but this is in regard to a member of a Panchayat but no such disqualification is prescribed by the Constitution for the Chairperson. It is, therefore, submitted that Adhayaksh, being a constitutional component of the Pancayat, the State enactment cannot take away the right of the petitioner from continuing as such. It has further been argued that whenever the intention of the Constitution is that a person, who happens to hold more than one office should discontinue in one, then there is a specific provision creating a clear bar in the Constitution.

9. Shri S.P. Gupta, learned Senior Advocate after referring to Article 59 of the Constitution of India further urged if the intention of the Constitution was that a person elected as Adhyaksh of Panchayat shall not continue to hold two offices simultaneously then the Constitution should have specifically mentioned as it is provided in Article 59, which restricts the president to continue as a member of two houses, which is not

provided in Chapter IX. Argument proceeds that there is no such bar in the Constitution to hold the office of M.L.A. and a member of Zila Panchayat and, therefore, by enactment, debarring an Adhyaksh to continue in his office, a M.L.A., is contrary to the scheme provided in Par IX and IX-A of the Constitution. The enactment requiring the Chairperson not to continue in the office of Adhyaksh should be held to be unconstitutional and the restriction imposed by the State Legislature on the basis of Section 27-A(1)(b) of the 1961 Act, being inconsistent with the scheme of the Constitution, is invalid and ultra vires to the provisions of the Constitution.

10. Lastly, it has been argued by the learned counsel that it is necessary to examine the provisions of Section 27-A (1) (b) from another angle. The principle of interpretation of statute is that if a provision is not made in the statute, which may have been otherwise made, it should be construed that the intention is that the said provision is not contemplated in that statute. To highlight his arguments reliance has been placed on the following decisions of the Hon'ble Apex Court in the cases of: -

1. *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. vs. Custodian of Vested Forests, Palghat and another, AIR 1990 SC 1747; and*
2. *Vijayalakshmamma and another vs. B.T. Shanker, (2001) 4 SCC 558*

11. The petitioner further urged that consequent upon the enforcement of the provisions of Part IX of the Constitution further changes were made. The Zila Parishad was substituted by Zila Panchayat and the new Act was called U.P. Kshetriaya Panchayats and Zila Parishad Adhiniyam, 1961. On the advent of Part IX of the Constitution many other changes in the old Zila Parishad were made by the U.P. Panchayat Laws (Amendment Act, 1994). On the basis of the aforesaid arguments learned counsel for the petitioner has concluded that no law can be made by legislature laying down disqualification of a chairperson by the State enactment, as has been done in the instant case, since Part IX is silent regarding disqualification of a person to continue as adhyaksh Zila Panchayat subsequent to his being elected as an M.L.A. OR M.P.

12. In support of the aforesaid submission learned Senior Counsel appearing for the petitioner relied upon the following judgments of the Hon'ble Apex Court in the cases of:-

1. *Oxford University Press vs. C.I.T., (2001) 3 SCC 359 (paragraphs 46 and 49);*
2. *Krishi Utpadan Mandi Samiti and others vs. Pilibhit Pant nagar Berj Limited and another, (2004) 1 SCC 391 (paragraph 24) ;*
3. *Union of India vs. Shiv Dayal Soin and Sons (P) Limited and others, (2003) 4 SCC 695; and*
4. *Orissa State Ware Housing Corporation vs. C.I.T., (1999) 4 SCC 197 (para 17).*

13. He further, referring to the judgments of the Hon'ble Apex Court in above cases, urged that since the Constitution is silent in respect of any restriction for holding the dual office of Adhyaksh Zila Panchayat and Member of Legislative Assembly, it should be construed that as a member of Zila

Panchayat the petitioner does not cease to continue as a member after he is elected as an M.L.A. or M.P. Similarly since Constitution is silent regarding Adhyaksh as well, the State legislature cannot impose a restriction not contemplated by the Constitution. Therefore, the provisions of Section 27-A (b) of the Act is in direct conflict and is inconsistent with the Constitution of India and is liable to be struck down. It is also submitted that besides the impugned provisions of the Act being unconstitutional, the same is arbitrary, undemocratic and leaves the elected Adhyaksh of Zila Panchayat without any choice after he is elected as Member of legislative Assembly.

14. Shri Chandra Shekhar Singh, learned Standing Counsel has filed a detailed counter affidavit and refuted each and every argument of Shri S.P. Gupta. The submission of the learned Standing Counsel is that Article 245 of the Constitution specifically clothes the legislature of the State to legislate subject to the provisions of the Constitution and similarly Article 246 deals with the distribution of the legislative powers between the Union and the State Legislature with the reference to the different list in Seventh Schedule. Learned Standing Counsel in support of his submission also refers and relies to the following judgments of the Hon'ble Apex Court as well as this Court:-

1. *Javed and others vs. State of Haryana and others, (2003) 8 SCC 369 ;*
2. *Anukjul Chandra Pradhan vs. Union of India, AIR 1999 SC 2814*
3. *State of Punjab vs. Bhajan Singh, AIR 2001 SC 1098 ;*
4. *Mahendra Kumar Shastri vs. Union of India, AIR 1983 SC 299;*
5. *J. Prasad vs. Mukhaiya, AIR 1954 SC 686;*
6. *N.P. Ponnuswami vs. Returning officer namkhal Constituency, AIR 1952 SC 64 ;*
7. *Jyoti Basu vs. Debi Ghosal, AIR 1982 SC 983; and*
8. *State of U.P. vs. C.O.D., Cheoki, (1997) 2 UPLBEC 793 (SC);*
9. *Buddhan Chowdhary vs. State of Bihar, 1955 SC 191;*
10. *Bar Council of U.P. vs. State of U.P.,1973 SC 231;*
11. *Abdul Quayyum vs. State of U.P., (1998) 2 UPLBEC 918;*
12. *State of U.P. and others vs. Pradhan Kshettra Samiti and others, 1995 (2) UPLBEC 874; and*
13. *Bipin Chandra Purshottam Das Patel vs. State of Gujrat and others; JT 2003(4) SC 35.*

15. Contention of the State-respondent is that subject to the provisions of this Constitution the object of Articles 245 and 246 is only to distribute the legislative powers and not to exempt them from any of the limitations, which are imposed by the other provisions of the Constitution upon legislative powers, though each legislature in India has plenary powers, both Union and State Legislature have their powers but the same is limited by (a) the fundamental rights guaranteed by the Constitution(b). The limitation imposed by the entries in the legislative list in the 7th Schedule as to the subject matter on which state legislature may legislate;(c) other mandatory provision of the Constitution, which expressly imposes limitation upon the powers of legislature such as Article 286, 301 303 of the Constitution. Learned standing Counsel emphasized that the powers to legislate cannot be fettered by

anything outside the purview of the Constitution. Articles 243-c do not provide any restriction on the legislative powers of the State legislature. On plain reading of two provisions of Article 243-C and 245, it is clear that it cannot be read that the intention of the Constitution was to impose any limitation on the legislative powers of the State. The phrase 'subject to the provisions of this Constitution …..; cannot be read while interpreting Article 243-C as if it imposes a limitation on the legislative powers of the state, which is otherwise available by virtue of Article 245, 246 read with entry 5 list II. It is correct that entry 5 list II empowers the State legislature to legislate with respect to any subject relating to local government including the Constitution of such local authority. The constitution of Panchayat, as provided in Article 243-B, and composition of Panchayat in Article 243-C does not limit the powers of State legislature. In fact, it includes the ancillary powers for the election, nomination and other matters including disqualification for holding the post of Chairperson of a local authority as well as the settlement of dispute arising therefrom. The legislative powers of the State has not been curtailed by Chapter IX of the Constitution. In fact by introducing 73rd Amendment it was to give effect to the idea, as intended in Article 40 of the Constitution. Learned Standing Counsel has placed reliance on a number of decisions decided by the Hon'ble Apex Court including ***Javed and others vs. State of Haryana,*** (supra) on the basis of the aforesaid decision it has been argued by the learned Standing Counsel that the purpose of Section 27-A (b) is that a person should hold only one office so that he can effectively discharge his duties and may not be treated as mere status symbol. Section 56 (2) & 58 of the Act prescribes duty of Adhyaksh of Panchayat, which is of such a nature, that it requires the Adhyaksh to be constantly present and a complete involvement in the affairs of the Panchayat. Admittedly, if the Adhyaksh is elected as a Member of Legislative Assembly or Member of Parliament, he will be burdened by double responsibility. It is the bounded duty to look after the welfare of his constituency and in the circumstances, it would be next to impossible to hold the dual charge.

16. Learned standing Counsel has also emphasized that the Court should draw the presumption that the legislature was well within its competence in putting an embargo on an elected Member of Legislative Assembly to continue as Adhyaksh Zila Parchayat. The court should not give a restrictive meaning to the provision of the Act under challenge.

17. Counter affidavit has also been filed by Shri Satish Madhyan, Advocate on behalf of newly impleaded respondent, who is also a member of Panchayat and is claimant for the post of Adhyaksh. As the petitioner is liable to vacate the seat of Adhyaksh after being elected M.L.A. He has supported the arguments of the learned Standing Counsel.

18. We have given careful consideration to the arguments advanced on both sides and gone through various decisions cited on behalf of the petitioner as well as on behalf of the State. Before proceeding to discuss the rival submissions made on behalf of the parties it would be useful to have a close look to the various provisions cited by the learned counsel for the parties and which are

necessary for the consideration of the issues raised by them.

19. In order to impart certainly, continuity and strength to certain basic and essential features of the Panchayat Raj institution under 73rd Amendment of the Constitution, Article 243 to 243-O was enacted, which came into force on 24.4.1993, inserting Part IX of the Constitution relating to Panchayat. Some of the Articles relevant for the purposes of present dispute, referred to by the learned counsel for the parties, are reproduced below : -

"**243-B. constitution of Panchayats –**

(1) There shall be constituted in every State, Pnachayats at the village, intermediate and district levels in accordance with the provisions of this par

(2) Notwithstanding anything in clause (1), Panchayats at the intermediate level may not be constituted in accordance with law State having population not exceeding twenty lakhs.

243-C. Composition of Panchayats –

(1) Subject to the provisions of this Part, the Legislature of a State may, by law, make provisions with respect to the composition of Panchayats;

Provided that the ration between the population of the territorial area of a Panchayat at any level and the number of seats in such Panchayat to be filled by election shall, so far as practicable, be the same throughout the State.

(2) All the seats in a Panchayat shall be filled by persons chosen by direct election from territorial constituencies in the Panchayat area and for this purpose, each Panchayat area shall be divided into territorial constituencies in such manner that the ration between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the Panchayat area.

(3) The Legislature of a State may, by law, provide for the representation –

(a) of the Chairpersons of the Panchayats at the village level, in the Panchayats at the intermediate level, or in the case of a State not having Panchayats at the intermediate level, in the Panchayats at the district level;

(b) of the Chairpersons of the Panchayats at the intermediate level, in the Panchayats at the district level;

(c) of the members of the House of the People and the Members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly a Panchayat area at a level other that the village level, in such Panchayat;

(d) of the members of the Council of States and the Members of the Legislative Council of the State, where they are registered as electors within : -

(i) a Panchayat area at the intermediate level, in Panchayat at the intermediate level;

(ii) a Panchayat area at the district level, in Panchayat at the district level.

(4) The Chairperson of a Panchayat and other members of a Panchayat whether or not chosen by district election from territorial constituencies in the Panchayat area shall have the right to vote in the meetings of the Panchayats.

(5) The Chairperson of -

(a) A Panchayat at the village level shall be elected in such manner as the

Legislative of a State may, by law, provide, and

(b) A Panchayat at the intermediate level or district level shall be elected by, and from amongst, the elected members thereof."

*"**243-D. Reservation of seats. –***

(1) Seats shall be reserved for –

(a) the Scheduled castes; and

(b) the Scheduled tribes,

in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and seats may be allotted by rotation to different constituencies in a Panchayat.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

(4) The offices of the Chairpersons in the Panchayat at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

Provided that the number of offices of Chairpersons reserved for the Scheduled Caste and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State :

Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women :

Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level.

(5) That reservation of seats under clauses (1) and (2) and the reservation of office of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens."

***"243-F. Disqualifications for membership** (1) A person shall be disqualified for being chosen as, and for being, a member of a Panchayat –*

(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections of the Legislature of the State concerned

Provided that no persons shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

(b) if he is so disqualified by or under any law made by the Legislature of the State.

(2) Subject to the provisions of any law made by the Legislature of a State, the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine;

(3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1) ;
(4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats."

"245. *(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.*

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

246. *(1) Notwithstanding anything in clauses (2) and (3) parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union of India").*

(2) Notwithstanding any thing in clause (3), Parliament, and subject to clause (1), the Legislature of any State …… also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Union List").

(3) Subject to clauses (1) and (2), the legislature of any State …….. has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in list II in the Seventh Schedule (in the Constitution, referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

20. As per provisions, contained in Part IX, and in order to bring the State Legislature consistent with 73rd Amendment of the Constitution the U.P. Legislature vide U.P. Amendment Act No.9 of 1994 made major amendments in 1961 Act, which shall be dealt with by the Court later on as the context would require. Presently, Section 27-A of the 1961 Act, which was inserted vide U.P. Act no. 6 of 1969 i.e. almost more than 30 years earlier when the present writ petition was filed and constitutional validity whereof has been assailed by the petitioner in the present writ petition, would be necessary to be reproduced as under: -

"Section 27-A. Bar to legislators and holders of certain offices becoming

or continuing as Pramukh, up Pramukh, Adhayksh or Upadhyaksh–*(1) Notwithstanding anything contained in Sections 7,19 and 27 –*

(a) a person shall be disqualified for being elected at, and for being, a Pramukh, Up Pramukh, Adhyaksh or Upadhyaksh if he is -

(i) a member of Parliament or of the State legislature; or

(ii) Nagar Pramukh or Up-Nagar Pramukh of a Nagar Mahapalika, or

(iii) President or Vice Precident of a Municipal Board, or

(iv) Chairman of a Town Area Committee or President as a Notified Area Committee;

(b) If a person after his election as Pramukh, Up Pramukh, Adhyaksh or Upadhyaksh is subsequently elected or nominated to any of the offices mentioned in sub-clause (i) to (iv) of clause (a), he shall, on the date of first publication in the Gazette of India or of Uttar Pradesh of the declaration of his election or his nomination cease to hold the office of Pramukh, Up Pramukh, Adhyaksh or Upadhyaksh and a casual vacancy shall thereupon occur in the office of Pramukh, as the case may be;

(c) No question or dispute as to whether a person has ceased to hold the office of Adhyaksh or Upadhyaksh under clause (b) shall be referred to or be raised before the Judge under Section 27;

(d) No suit in respect of any question or dispute as to whether a person has ceased to hold the office of Pramukh, Up Pramukh, Adhyaksh or Upadhyasksh under clause (b); shall lie in any civil court.

(2) Notwithstanding any judgment, decree or order of any Court or tribunal to the contrary, where any person after his election as Pramukh, Up Pramukh, Adhyaksh or Upadhyasksh is subsequently, at any time before the thirtieth day of April, 1969, elected or nominated to any of the offices mentioned in sub-clause (i) to (iv) of clause (a) of sub Section (1) and continues immediately before the said date to hold such office he shall on the said date, cease to hold the office of Pramukh, Up Pramukh, Adhyaksh or Upadhyasksh and a casual vacancy shall thereupon occur in the office of Pramukh, Up Pramukh, Adhyaksh or Upadhyasksh, as the case may be, and the provisions of clauses (c) and (d) of the said sub section shall apply in relation to such cessation as they apply in relation to cessation under clause (d) of that sub Section, and any reference pending before the Judge, under Section 27 or any suit pending in any civil court immediately before the said date in respect of any such question or dispute shall abate."

21. In the constitutional scheme of the Indian democracy, governed by the rule of law stands in a hierarchy. The hierarchal structure of the legal order of the State is that the constitution is at the highest level within national law. Thereafter comes the statute enacted by the parliament and State legislature. Then comes the delegated legislature or subordinate legislation namely, rules and regulations framed thereunder thereunder and at the lowest pedestal, is the ececutive orders issued by the executive wing of the State.

Some fundamental principles governing interpretation of the Constitution and testing constitutionality of the statute are as under: -

"1. By way of precedence the Courts have been cautioned and are guided by following rules in discharging solemn duty while considering constitutionality of legislative enactment:

"The constitutional validity of a statute depends entirely on the existence of the legislative power of the expressed provision in Article 13, apart from the limitation of the legislature, is not subject to any other prohitition**." (Smt. Indira Nehru Vs. Raj Narain, AIR 1975 SC 2299).**

2. There is a presumption in favour of constitutionality **(V.M. Syed Mohd. & Co. vs. State of Andhra Pradesh, AIR 1954 SC 314; and Madhubhai Amathalal Gandhi vs. Union of India, AIR 1961 SC 21.**

3. All circumstances, which might lead to the statute, being upheld, must be presumed by the Court and must be shown not to exceed by the person challenging the validity of the Act. **[AIR 1960 Punjab 341 (Full Bench)**

4. Where the validity of the statute is questioned and there are two interpretations, one of which would make the law valid and the other void, the former must be referred and the validity of the law must be upheld. **(AIR 1942 Federal Court 72** In re. **The Hindu Women Rightes to Property Act).**

5. The statute cannot be declared unconstitutional merely because in the opinion of the Court it violates one or more of the principles of liberty or the spirit the constitution unless such principles and that spirits are found in terms of the constitution. **(A.K. Gopalan vs. State of Madras- Opposite Party, Union of India-Intervener AIR 1950 SC 27)**.

6. In pronouncing the constitutional validity of the statute the Court is in concern with the wisdom or unwisdom, justice or injustice or the law. If that which is based into law is within the scope of the power conferred upon the legislature and violate no restriction upon that power, the law must be upheld whatever a Court may think of it. **(The State of Bombay and another vs. F.N. Balsara, AIR 1951 SC 318).**

7. The Constitution is the conclusive instrument by which powers are affirmatively created or negatively restricted. The only relevant test for the validity of a statute made under Article 245 is whether the legislation is within the scope of the affirmative grant of power or is forbidden by some provision of the Constitution. (para 133)

…….It is only where a piece of legislation clearly infringes a constitutional provision or in dubitably overrides a constitutional purpose or mandate or prohibition that Courts can interfere. (para 462)

……Ordinarily laws have to answer two tests for their validity: (1) The law must be within the legislature competence of the legislature as defined and specified in offend against the provisions of Article 13 (1) and (2) of the Constitution. (para 692) ***Smt. Indira Nehru Gandhi vs. Raj Narain*** (supra).

8. "While examining the constitutional validity of laws the principle that is applied is that if it is possible to construe

a statute so that its validity can be sustained against a constitutional attack it should be so construed and that when part of a statute is valid and part is void, the valid part must be separated from the invalid part……(para 66) ***Kihoto Hollohan vs. Zachilluhu and others, 1992 Supp. (2) SCC 651"***

22. Without burdening this judgment with catena of decisions of the Hon'ble Apex Court on the aforesaid line, we now proceed to deal with the contention of the learned counsel for the petitioner that Section 27-A of the 1961 Act is unconstitutional and invalid, being violative of Part IX of the Constitution of India.

23. As noted above, the precise contention of the learned counsel for the petitioner may be summarized as under:-

"1. Part IX of the Constitution is a complete code in respect to Panchayat Raj institution and whatever should be possessed by the Panchayat Raj institution, it has been specifically mentioned in the various provisions of Part IX of the Constitution and something, which is not provided, should be deemed to be prohibited. Since Article 243 (F) does not provide any disqualification with respect to the Chairperson of the Constitution, the said enactment cannot take away the right of the petitioner to function as Chairperson of Zila Panchayat. In other right of the petitioner to function as Chairperson of Zila Panchayat. In other words, what is submitted is that since there is no such disqualification, as provided in Section 27-A of the 1961 Act provided in Part IX of the Constitution in regard to the Chairperson of the Zila Panchayat and Kshetra Panchayat, the said legislature, by necessary implication, be deemed to be lacking legislative competence to provide a disqualification on its own.

2. Taking clue from Article 59, the learned counsel for the petitioner urged that wherever the Constitution intends that an elected person should not continue to hold two offices simultaneously, it has provided specifically, as is apparent from Article 59 of the Constitution, therefore since the Constitution itself provide a disqualification to a elected representative, holding office of the Chairperson of Zila Panchayat, from continuing to hold another elected office, such disqualification has to be deemed to be prohibited to state Legislature by necessary implication although not specifically prohibited in the Constitution.

3. The aforesaid submissions are apparently misconceived. Part IX of the Constitution of India is not, for the first time, conferring the legislative competence upon the State legislature to legislate with respect to Panchayat Raj institutions. The power is already possessed by the State Legislature in reference to Article 245 and 246 read with Entry 5 list II of the Constitution."

24. In the case of ***P.N. Krishna Pal vs. Union of India, 1995 Supp. (2) SCC 197*** the Hon'ble Apex Court while dealing with the power of legislature observed as under:-

"8. The first question is whether the State legislature was competent to enact the Amendment Act. Entry 8 of List II State List of the Seventh Schejule to the Constitution read with Article 246 (3) of the Constitution, empowers the State

legislature to enact law relating to intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase or sale of intoxicating liquor. Entry 64 deals with offences against law with respect to any of the matters in List II. Entry 65 deals with jurisdiction and powers of all court except the Supreme Court with respect to any of the matters in List II. It is true that Sections 272 to 276 of the Indian Penal Code deal with punishment for adulteration of articles of food, while the prevention of Food Adulteration Act, 1954 also deals with the same topic. As a procedural facet Chapter 18 of the Code of Criminal Procedure, 1973 (for short 'the code') and the relevant provisions in the Evidence Act, 1872 deal with adduction of evidence and consideration thereof by the Court, in proof of the quilt or its non-proof. It is not necessary to burden the judgment with copious citations of diverse decisions on the scope of the consideration of an entry in the seventh schedule. In Jilubhai Nambhai Khachar vs. State of Gujrat, this Court extensively considered the scope of an entry in the Seventh Schedule and held that such entry is not a power given to the legislature but is a field of its legislation. The legislature derives its power under Article 246 and other related articles in the constitution. The language of an entry should be given the widest meaning fairly capable to meet the need of the Government envisaged by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably comprehended within it. When the vires of an enactment is impugned, there is an initial presumption of its constitutionality. If there exists any difficulty in ascertaining the limits of the legislative power, it must be resolved, as far as possible, in favour of legislature, putting the most liberal construction on the legislative entry so that it is intra vires. Narrow interpretation should be avoided and the construction to be adopted must be beneficial and cover the amplitude of the power. The board liberal spirit should inspire those whose duty it is to interpret the Constitution to find out whether the impugned Act is relatable to one or the other entry in the relevant list. The allocation of the subjects of the entries in the respective lists is not done by way of a scientific or logical definitions but it is mere enumeration of board and comprehensive categories. The power to legislate on a particular topic includes the power to legislate on subjects which are ancillary to or incidental thereto or for purposes necessary to give full effect of the power conferred by the entry."

25. Entry 5 list II basically prescribes fields of legislation by the State legislature including matters relating to the local government i.e. constitution and its powers etc. This authority to legislate is granted to the State by virtue of Article 73rd Amendment and subsequent to it, the power to legislate with regard to local government has not been curtailed. On joint reading to Article 246 with newly added Article 243-C (1)(3) we agree with the learned Standing Counsel that the power, which was earlier exercised by virtue of Article 246, is intact and complete and cannot be circumscribed in any manner by Article 243-C. In the circumstances, we do not agree with the agree ment of Mr. Gupta that since the word 'disqualification' in Article 243-C do not specify impugned disqualification to hold dual post as it is in Section 27-A (1)(b) of the Act and the State enactment

should be held to be unconstitutional. On the contrary the State enactment is well intentioned and in the interest of the local body, has, well been taken care of. Besides, it is within competence of the state legislature to make enactments prescribing disqualification of a Chairperson, Article 243-C (5) states that a Panchayat of the village level shall be elected in such manner as the legislature of state made by law provided and Pancayat at the intermediate level or district level shall be elected by, and from amongst the elected members thereof. It is thus clear that the disqualification has envisaged in Section 27-A (b), which is under challenged in this writ petition, and by no stretch of imagination can be said to be inconsistent with Article 243-C or 243-N.

26. There is no concept of implied restriction on the legislative powers conferred by Article 243-C read with Article 246. The entries or the legislative heads are of an enabling character. They are designed to define and delimit the respective area of the legislative competence of the state. Neither entry 5 nor Article 243-C imposes any implied restriction on the legislative power conferred by the Article. It nowhere prescribed specifically any restriction or duty to exercise that legislative power in any particular manner only. It is well settled that once it is established that legislative power exists then each general word of the Constitution should accordingly, be held, to extend to all ancillary or subsidiary matter, we therefore, conclude that the comparison drawn by the counsel for the petitioner vis-à-vis Article 59, 101 (1)(2), 158 and 190 (1) and (2), which imposes a restriction on the President of India, Governor of a State or a Member of Parliament and legislative assembly from holding dual office, is specifically provided in the Constitution whereas in the case of Adhyaksh, Zila Panchayat, the constitution is silent, therefore, the restriction imposed in Section 27-A (b) of the Act is against the intention of the Constitution, cannot be accepted. We fail to agree with the argument that on the contrary. The legislature, while enacting Section 27-A (b) proceeded to impose bar on the basis of same theory and analysis. It is thus reasonable and proper for the State legislature to ensure for an efficient functioning of the local body such as Zila Panchayat. In the instant case, the enactment confirms the intention of the Constitution.

27. Similar contention was raised in ***Smt. Indira Nehru Gandhi vs. Raj Narain*** (supra) and the Constitution Bench of the Hon'ble Apex Court in various paragraphs of the judgment repelled the said contention as under:-

".....Election laws a part of the normal legislative process and what is permitted in the matter of ordinary legislation would also be permissible in the matter of legislation relating to elections unless there be some provision in the Constitution which forbids such a course. We have not been referred to any provision in the Constitution which has the effect of creating a bar in the way of the legislative making a law relating to elections with retrospective operation." (para 227)

"The doctrine of the 'spirit' of the Constitution is a slippery slope. The courts are not at liberty to declare an act void, because in their opinion, it is opposed to the spirit of democracy or

republicanism supposed to pervade the Constitution but not expressed in words. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered some ideal norms of free and fair election." (para 352)
"This Court, exercising the powers vested in it under the Constitution to declare the law of the land, cannot go behind the clear words of the Constitution on such a matter……(para 556)

28. In the case of ***Saij Gram Panchayat vs. State of Gujrat and others, AIR 1999 SC 826*** some what similar argument was raised that if an area forms part of the Panchayat under part IX of the Constitution, it cannot be treated as an industrial township under part IX-A of the Constitution. The Hon'ble Apex Court while rejecting the submission observed as under:-

"*The contention is based on a misconception about the relationship of the provisions of Parts IX and IX-A of the Constitution with any legislation pertaining to industrial dvelopment. The Gujarat Industrial Development Act operates in a totally different sphere from Parts IX and IX-A of the Constitution as well as the Gujarat Panchayats Act, 1961 and the Gujarat Municipalities Act, 1962- the latter being provisions dealing with local self-Government and organization of industries in a State." (para 16)*

29. It is also worthy to notice that the right to elect is neither a fundamental right nor a common law right, it is pure and simple a statutory right, being creation of statute is also subject to statutory limitation.

30. In the case of ***Javed and others vs. State of Haryana and others*** *(supra)* citing ***N.P. Ponnuswami vs. Returning Officer, Namakkal Constituency*** *(supra),* ***Jagan Nath vs. Jaswant Singh and others, AIR 1954 SC 210*** and ***Jyoti Basu and others vs. Debi Ghoshal and others*** (supra) the following observations of the Hon'ble Apex Court virtually negates the contention of the petitioner raised in the present case:-

"Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a Statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right-a right originating in Constitution and given shape by statute. But even so it cannot be equated with a fundamental right. There is noting wrong in the same Statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature of an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office" (para 22)

31. In the case of ***Abdul Qayyum vs. State of U.P. and others*** (supra), relied upon by the learned counsel, this Court rejected a some what similar contention while upholding the provisions of Section 54 (2) of the U.P. Municipalities Act, 1960, which was on the anvil of Articles 243-U, 243-P, 243-R (2) and 243-Zf, a

Division Bench of this Court rejecting the challenged observed as under:-

"*The election of Vice Chairman having not been provided in Part IX, by no stretch of imagination it can be said that the restriction of the tenure of office of Vice Chairman to one year offends any provision contained in Part IX-A and particularly Article 243-U, which does not at all include the tenure of the office of the office bearers. Therefore, we are unable to agree with the first submission of Mr. Singh." (para 7)*

32. The case relied upon by the learned counsel for the petitioner does not advance his case at all. In the case of ***Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. vs Custodian of Vested Forest, Palghat and another*** (supra) the interpretation of the statute was regarding the word 'Private Forest' and its meaning in the two enactments namely (Vesting and Assignment Act), 1971 and Kerala Land Reforms Act. It was laid down that judicial interpretation given to a word in one statute does not afford a guide to construction of the same word in another statute unless the statutes are pari material legislations. In the said case the Apex Court had interpreted and had come to the conclusion that the definition of 'private forest' in the Kerala Private Forest (Vesting and Assignment) Act, 1971 is not just the same as the definition of private forest in the Vesting Act. The Apex Court rejected the arguments on the ground that the object of the two Acts were not the same and since two separate definitions have been provided, it cannot be interpreted to have the same meaning.

33. Again, the case ***Vijayalakshmamma and another vs. B.T. Shanker*** (supra) relates to the Hindu Adoption and Maintenance Act, 1956. The challenge was regarding Sections 7, 8, 12 and 14 of the Hindu Adoption and Maintenance Act, 1956. The dispute in the said case was regarding adoption of a child by one of the two widows and question arose that after the death of the husband whether permission from the other widow was necessary or not and the Supreme Court as engaged in deciding the issue as to whether it is obligatory to obtain consent of the junior widow before adopting a son. The challenge was regarding effect of adoption after the death of the adoptive father and their respective share in the property.

34. We are not able to relate the present dispute with the decisions cited by the learned counsel for the petitioner. In the case of ***Oxford University Press vs. C.I.T.*** (supra) the question that came up before the Apex Court was that Section 10 (22) of the University Grants Commission Act, 1956 was applicable to Indian University alone or also to the other educational institutions meant solely for educational purpose and not for the purpose to make profit. The definition of the word University as defined in Section 2 (F) of the aforesaid Act was examined and the Court came to the conclusion that the University claiming benefit of exemption under Section 10 (22) has not to be necessarily of India origin, setting up of University or other institution in India was held also to be entitled to the exemption and benefit provided under Section 10 (22) of the said Act. It is thus argued that since the Apex Court extended the benefit of exemption to the educational institution, which was a branch of a foreign University, in the said case.

35. In ***Krishi Utpadan Mandi Samiti and others vs. Pilibhit Pant Nagar Berj Limited and another*** (supra) the question, which arose before the Apex Court in the said decision, was that the terms and conditions stipulated in Appendix XIII of Rule 40 (3) of the Rules framed under the Act. It was held that a cannot of statutory interpretation 'expressio unius est exclusio alterius', what is specially mentioned in one place but not in another must be taken to have been deliberately omitted. On the aforesaid analysis, the argument was dispelled by the Apex Court and held that it is not correct interpretation. The lease was cancelled for violating the lease conditions. A condition was imposed that leased land should be used only for construction of residential purpose.

36. In ***Union of India vs. Shiv Dayal Soin and Sons (P) Limited and others*** (supra) a three storied house was constructed but subsequently let out to the L.I.C. for a non-residential purpose. The Hon'ble Apex Court held that basically a residential house was constructed and only because it was let out for commercial purpose, does not entitle the lesser to cancel the lease however it was kept open for the lesser to take such action as may be permissible under other provisions.

37. In ***Orissa State Ware Housing Corporation vs. C.I.T.*** (supra) learned counsel for the petitioner relied upon the following paragraph of the judgment:-

"*The above excerpts go to show that the Tribunal has proceeded on the basis, as if the deposits are totally exempt in terms of Sections 10 (29) of the Act but unfortunately there is neither any factual support nor any sanction in law. Section 10 (29) is categorical in its language and this exemption is applicable only in the circumstances as envisaged wnder the section as noticed hereinbefore. Needless to say that the words: "any income " as appearing in the body of the statue are restrictive in their application by reason of the user of the wxpression "derived from " . In the event the intent of the leqislature was other wise, there was no embargo or restraint to use and express in clear and unequivocal language as has been so expressed in Section 10 (20-A) or 10 (21) or 10 (22-B) or 10 (23-BB) or Section 27. These statutory provisions go to show that wherever as a matter of fact the legislature wanted an unrestrictive exemption the same has used "any income "without any restriction so as to make it explicit that the entire income of the assessee would be exempted. The factum of the Corporation (sic Corporation' moneys) being put into fund by itself cannot be termed to be fund to facilitate the marketing of the commodities, as such question of interest income accruing therefrom being exempt from tax as has been held by the Tribunal does not and cannot arise."*

38. However, we do not find that the same helps him in any manner in advancing his submissions, as the controversy involved in the present case is totally different.

39. In ***Budhan Chaudhary vs. State of Bihar*** (supra), ***Bar Council of U.P. vs. State of U.P.*** (supra), ***Abdul Quayyam vs. State of U.P. State of U.P.*** (supra) and ***State of U.P. and others vs. Pradhan Sangh Kshettra Samiti and others*** (supra) provisions of U.P. Municipalities Act and various provisions of U.P. Panchayat Raj Act, 1947 was challenged

on the ground of being inconsistent with the provisions of Chapter IX of the Constitution . The contentions of the petitioner were not accepted and it was held that the provisions of Municipalities Act as well as U.P. Panchayat Raj Act were not violative of Chapter IX of the constitution. The Hon'ble Apex Court upheld the validity of Gujrat Municipalities act while interpreting Section 40 in the case of ***Bipin Chandra Purshottam Das Patel vs. State of Gujrat and others*** (supra**).**

40. It is well settled that when vires of an enactment is challenged the every attempt should be made to interpret various provisions by putting a liberal construction upon a relevant legislative entry and effort should be made to extend the meaning of the relevant words to their reasonable connotation to preserve the power of legislature. In the circumstances, we come to a conclusion that the legislature has the power to legislate and provisions of section 27-A (1) (b) of the U.P. Kshetriya Panchayat and Zila Panchayats Adhinium is not in any way violative of any fundamental rights. The member are governed by various provision of stature. The maxim 'expressio unisest exclusio alterius' is not applicable to the facts of the present case. The language of the statute is plain, simple and meaning is very clear. The enactment of section 27- A (1) (b) of the Act is not ultra vires of the Constitution. We are of the view that the provisions of the Act are consistent with policy and object of the Constitution. Any other interpretation will only amount to shifting the State legislature from its power to legislate.

41. For the reasons already discussed, we hold that Section 27- A (1)(b) is not ultra viures of the Constitution. It is enactment and cannot be struck down .The enactment is neither violative of the fundamental rights or part IX of the Constitution, we hold that the provisions of Section 27–A (1)(b) is enacted in exercise of power given to the State by virtue of Articles 245 and 246 read with Entry 5 List II as well as Article 243-C (3) of the Constitution of India. The petitioner has no rights to hold the office of the Adhyaksh of Zila Panchayat after his election to the office, as a M.L.A. after the result was declared and published in the official gazette.

42. In the result, the write petition fails and is , accordingly , dismissed . There shall, however, be no order as to costs Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2006.

BEFORE
THE HON'BLE A.K. YOG, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 1163 of 2001

Holy Cross School Allahabad ...Petitioner
Versus
State of Uttar Pradesh and others
...Respondents

Counsel for the Petitioner:
Sri G.K. Malviya

Counsel for the Respondent:
S.C.

<u>Motor vehicle Act–S-66 (3) h</u>–Holy cross school–an educational institution–vehicle in question owned by the

security–used exclusively for carrying the students from their residence to the school-held-petitioner held entitled for exemption.

Held Para 8

The objection raised by the petitioner regarding maintainability of the writ petition has no substance at this stage inasmuch as there are no disputed facts. Secondly, in view of the specific provisions contained in Section 66 (3)(h) (as quoted above) and the undisputed fact that petitioner is a registered Society which runs Educational Institution and the vehicle in question is being used exclusively for carrying children to and fro from their residence to the school, we find no good reason to dismiss the writ petition as not maintainable at this stage particularly when respondents have already filed counter affidavit and have filed to disprove the facts stated in the writ petition. In view of the aforesaid statutory provision contained in Section 66 (3) (h) (quoted above) we find that the contention of the petitioner deserves to be accepted as laid down by this Court in the case of Catholic Diocese of Gorakhpur Education Society and others (supra), a copy of which has been filed as Annexure-3 to the writ petition. The writ petition deserves to be allowed.

Case law discussed:

W.P. No. 3688 of 2001
Decided on 7.2.2001

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

1. Petition before us, Holy Cross School has approached this Court by filing present writ petition under Article 226 of the Constitution of India praying for following reliefs :

"(i) issue of writ, order or direction in the nature of CERTIORARI quashing the impugned order/notice dated 3.9.2001 passed by respondent no. 3 (Ann. 2 to the writ petition);

(ii) issue a writ, order or direction in the nature of MANDAMUS, commanding the respondents not to detain the bus of the petitioner till the disposal of the writ petition;

(iii) issue a writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case;

(ii) and to award the cost of the petition in favour of the petitioner."

2. The aforementioned reliefs have been claimed on the basis of the pleadings in the petition to the effect that the petitioner is an Educational School which is known as Holy Cross School which is being owned by a Society registered under the Societies Registration Act (as amended by U.P. Act). The said Society is known by the name of Holy Cross Society, Khusroobagh Raod, Allahabad. A copy of the Registration Certificate issued by the Registrar of Society, U.P. Allahabad is annexed as Annexure-1. As per the said certificate, Society was duly registered up to May 15, 2003. The Society, which runs Educational School, owns a vehicle bearing registration No. UP70/E-9846. The said vehicle is being used for carrying children to and fro to their respective places to the school. The respondents authorities, in their purported jurisdiction to statutory provisions including Motor Vehicles Act issued the impugned notice dated 3.9.2001 (copy of which is annexed as Annexure-2 to the writ petition). By means of the said impugned notice a demand was made against the petitioner to deposit a sum of

Rs. 3,338/- as road tax for the period 1.11.1998 to 31.12.2001/Annexure 2 to the writ petition.

3. According to the petitioner, there is no liability to pay road tax with respect to the aforementioned vehicle which is being used exclusively for carrying children to and fro their residence of the school and also complying with other terms and conditions of the permit. The petitioner contends that School Bus was never run on a particular defined road as it is used for carrying children as enrolled in the School from their respective residences which are invariably changed and are situate in different localities. The petitioner has claimed exemption and has placed reliance on Section 66(3)(h) of the Motor Vehicles Act, which is relevant section, reads as follows:

"*The provisions of Sub-section (1) shall not apply (a) to (g) ....*
(h) To any transport vehicle owned by, and used solely for the purpose of any educational institution which is rexognized by the Central or State Government or whose Managing Committee is a s Society registered under the Societies Registration Act, 1960 (21 of 1980) or under any law corresponding to that Act in force in any part of India.

4. In support of the stand taken by the petitioner. reference is being made to the decision of this Court in the case of **Catholic Diocese of Gorakhpur Education Society and others Vs. State of U.P. and others** decided by the Division Bench of this Court vide order dated 7.2.2001 in Civil Misc. Writ Petition no. 3686 of 2001. A copy of the said judgment is annexed as Annexure-3 to the writ petition. The relevant extract of the said judgment is being reproduced :

"In the instant writ petition the petitioner claims that it is a recognized educational institution and as such the provision for permit under section 66(1) of the Motor Vehicles Act, 1988 (for short the 'Act') is not applicable in the case of the petitioners. Section 66 (3) (h) of the Act specifically mentions the category of the transport vehicle for which permit shall not be required. Section 66(1) and 66 (3) (h) of the Act provides as under :

"66. Necessity for permit (1) No owner of a Motor Vehicle shall use or permit the use or permit the use of the vehicle as a Transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or counter-signed by a Regional or State Transport Authority authorizing him the use of the vehicle in that place in the manner in which the vehicle is being used :

Provided that a stage carriage permit shall, subject to any conditions that may be specified in the permit, authorize the use of the vehicle as a contract carriage.

Provided further that a stage carriage permit may subject to any condition that may be specified in the permit authorize the use of the vehicle as a goods carriage. Either when carrying passengers or not :

Provided also that a goods carriage permit shall, subject to any conditions that may be specified in the permit authorize the holder of use of vehicle for the carriage of goods for or in connection with a trade or business carried on by him.

(3) The provisions of sum-section (1) shall not apply –

(h) to any transport vehicle owned by, and used solely for the purpose of, any educational institution which is recognized by the Central or State Government or whose Managing committee is a society registered Under the Societies Registration Act,1960 (21 of 1860) or under any law corresponding to that Act in force in any part of India."

5. Admittedly, the petitioner is the owner of the vehicle and the petitioner is a recognized educational institution and it has produced the relevant documents showing the affiliation under the I.C.S.E. Board. Under such circumstances, we are of the view that the respondent no. 2 was not justified in insisting on permit under Section 66 (1) of the Act from the writ petitioner.

6. The writ petition succeeds and is, accordingly, allowed. The impugned order dated 9.1.2001 passed by respondent no. 2 accordingly stands quashed."

7. The respondents have filed a counter affidavit sworn by one Shri R.K. Trivedi, the Then Regional Transport Officer (Administration), Allahabad. The relevant pleadings, containing aforementioned facts have not been disputed or denied in the said counter affidavit. The only abjection appears to have been taken in the counter affidavit is contained in para 7 of the counter affidavit wherein it is mentioned that " ……. *since the petitioner has rushed to this Hon'ble Court against the show cause notice dated 3.9.2001 in which tax of Rs.3388/- was demanded from the period of 1.11.1998 to 31.12.2001 and the petitioner has not approached the respondent authorities by filing the show cause in response to the notice dated 3.9.2001 and, therefore, the instant writ petition as framed and filed by the petitioner is totally misconceived and the same is liable to be dismissed with costs and the interim stay order dated 28.1.2002 passed by this Hon'ble Court may kindly be vacated."*

8. The objection raised by the petitioner regarding maintainability of the writ petition has no substance at this stage inasmuch as there are no disputed facts. Secondly, in view of the specific provisions contained in Section 66 (3)(h) (as quoted above) and the undisputed fact that petitioner is a registered Society which runs Educational Institution and the vehicle in question is being used exclusively for carrying children to and fro from their residence to the school, we find no good reason to dismiss the writ petition as not maintainable at this stage particularly when respondents have already filed counter affidavit and have filed to disprove the facts stated in the writ petition. In view of the aforesaid statutory provision contained in Section 66 (3) (h) (quoted above) we find that the contention of the petitioner deserves to be accepted as laid down by this Court in the case of **Catholic Diocese of Gorakhpur Education Society and others** (supra), a copy of which has been filed as Annexure-3 to the writ petition. The writ petition deserves to be allowed.

9. In the result, the writ petition is allowed. The impugned notice dated September 3,2001 (Annexure-2 to the writ petition) is hereby quashed.

There shall, however, be no order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2006

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

Civil Misc. Writ Petition No. 4045 of 2006

Jafar ...Petitioner
Versus
State of U.P. and others ...Respondents

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

Counsel for the Respondents:
Sri Ayub Khan
S.C.

U.P. Consolidation of Holdings Act-1960-section 48-Check allotment-private respondent were allotted check on their original holding D.D.C. without recording any reason-without application of mind-reversed the order passed by the subordinate consolidation authorities-order can not sustain-direction issued to decide the matter after giving opportunity to both the parties.

Held : Para 7

As the order passed by the Deputy Director of Consolidation does not contain any reason for reversal of the orders of the subordinate consolidation authorities and grievance of the parties was not considered, this Court is of the view that the order dated 17th December, 2005 is unsustainable in law.
Case law discussed:
2005 (2) SCC-235

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

1. Learned counsel for Caveator-Opp. Parties states that the writ petition be heard and decided at the admission stage and he does not propose to file any counter affidavit.

Heard learned counsel for the petitioner and learned counsel for Caveator-Opp. Parties.

2. Learned counsel for the petitioner urged that the impugned order dated 17th December, 2005, passed by the Deputy Director of Consolidation, Moradabad suffers from error of law apparent on the face of record in view of the fact that the grievance of petitioner was not considered at all by the Deputy Director of Consolidation. He further urged that contesting Opp. Parties were allotted Chaks on Plot nos. 135, 136, 169 and 170 which are their original holdings. By the impugned order, no reasons have been assigned by the Deputy Director of Consolidation while reversing the order of subordinate consolidation Authorities. He prayed that the impugned order may be quashed.

3. In reply to the same, Sri Ayub Khan, learned counsel for contesting Opp. Parties, urged that the order of Settlement Officer, Consolidation was also passed without assigning any reasons by which Chaks allotted to contesting Opp. Parties at the stage of Consolidation Officer were altered. He does not dispute the fact that in the order of the Deputy Director of Consolidation, there is no application so far as grievance of the petitioner is concerned.

4. Considered arguments of learned counsel for the parties and materials on record.

5. Without going into the merits of the case as the Deputy Director of

Consolidation did not consider the case of both the parties and did not record any reason for accepting or refusing to accept grievance of the parties, this Court is of the view that the order of Deputy Director of Consolidation is liable to be set aside on the ground for non-application of mind by the Deputy Director of Consolidation and for not assigning any reason on the rival claims of the parties. No doubt it is also clear from the record that the Appellate authority has also not assigned any reason while reversing the allotment made at the stage of Consolidation Officer, but as the Deputy Director of Consolidation is the final court under the U.P. Consolidation of Holdings Act, which is competent to consider all aspects and record a finding on fact also, this Court is of the opinion that remand of the matter to the Deputy Director of Consolidation for deciding the revision afresh will serve ends of justice.

6. In a recent decision in MMRDA Officers Association Kedarnath Rao Ghorpade v. Mumbai Metropolitan Regional Development Authority, the Apex Court held as under:-

"Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the inscrutable face of the sphinx, it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirement of natural justice is spelling out reasons for the order made, in other words, a speaking out. The inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi judicial performance."

7. As the order passed by the Deputy Director of Consolidation does not contain any reason for reversal of the orders of the subordinate consolidation authorities and grievance of the parties was not considered, this Court is of the view that the order dated 17th December, 2005 is unsustainable in law.

8. In view of the discussions made above, the writ petition succeeds and is allowed. The order dated 17th December, 2005, passed by the Deputy Director of Consolidation, Moradabad, is quashed. The matter is remanded back to the Deputy Director of Consolidation, Moradabad to decide the matter in accordance with law after giving opportunity of hearing to the parties and after considering the grievance of all the parties in accordance with law by passing a reasoned order within four months' from the date of presentation of a certified copy of this order. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 16267 of 2003

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

Connected with

Civil Misc. Writ Petition No. 35962 of 2003

Gautam Prasad Patel ...Petitioner
Versus
State of U.P. and others ...Respondents

And

Civil Misc. Writ Petition No. 56521 of 2003

Satya Narain Maurya ...Petitioner

Versus

State of U.P. and others ...Respondents

Counsel for the Petitioners

Sri Ashok Khare

Sri Vijay Kant Dwivedi

Counsel for the Respondents:

Sri J.K. Tiwari

S.C.

Uttar Pradesh Procedure for direct Recruitment of group C Post (outside the preview of U.P. Public Service Commission) (First Amendment Rules) 1998 Rule 5 (5)-Waiting list-91 posts of can supervisor advertised-selection made-out of 91 83 appointed-9 post remained vacant-the claim of petitioner rejected on the ground the life of selection list expired after one year-filling up same posts and keeping vacant the other posts-held arbitrary-amounts to discrimination for those who could have selected from the waiting list-direction issued for utilization of waiting list within 3 month.

Held: Para 11

The action of the respondents in filling up some posts and keeping some post vacant is arbitrary and also amounts to discrimination against those persons who could be selected on the remaining posts. No doubt the petitioners' does not have an indefeasible right even against an existing vacancy and the State is under no obligation to fill up the vacancies. On the other hand, the State has the obligation to act fairly and cannot act arbitrary and adopt a pick and choose policy. If the respondents have chosen to fill up the seats pursuant to the directions of the Court, in that event, all the vacancies should be filled up by the State. The State cannot adopt an arbitrary policy, namely, to fill up some of the posts and keep the remaining posts vacant. In my view, the action of the State was not fair

Case law discussed:

1987 (Suppl.) SCC-401
1993 (2) SCC-573
2000 (3) SCC-1999
1989 (15) ALR-13
1991 (3) SCC-47

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

1. On 8.8.1998 an advertisement was issued for filling 91 posts of Cane Supervisor in the Cane Development Department of the Government of Uttar Pradesh. These 91 posts were to be filled up from the Scheduled Caste, Scheduled Tribes and Other Backward class categories and candidates from the General Class category. The result pursuant to the aforesaid advertisement was declared on 5.3.1999. Before the appointment letters could be issued, the results were cancelled. The cancellation of the results were challenged in Writ Petition No.565 of 2000 which was eventually allowed by a judgement dated 1.5.2001 wherein the Court directed the respondents to appoint the selected candidates. It transpires that the State filed a Special Appeal which was dismissed by a judgment dated 18.7.2002.

2. Inspite of the aforesaid, the State did not make any appointments. It transpires that several candidates filed contempt petitions and subsequently the first batch of appointments were made on 29.6.2002. It further transpires that the State Government, after verifying and scrutinising the certificates submitted by the candidates, cancelled the selection of 9 candidates vide orders dated 2.10.2002 and 26.10.2002. Eventually, out of 91

posts the respondents appointed 83 persons and 9 posts remained vacant.

3. The petitioners are those persons who were in the waiting list declared by the respondents and have filed the present writ petition praying for a writ of mandamus commanding the respondents to appoint the petitioners on the post of Cane Supervisors on the basis of the waiting list prepared by them. The petitioners submitted that admittedly 9 posts have not been filled up and the same could be filled up from the candidates whose names were found in the waiting list and that the action of the respondents in not utilising the waiting list was arbitrary.

4. Heard Sri Ashok Khare, the learned Senior Counsel assisted by Sri Vijay Kant Dwivedi for the petitioner and Sri J.K. Tiwari, the learned Standing Counsel for the respondents.

5. Sri Ashok Khare, the learned Senior Counsel submitted that admittedly 9 posts were vacant which had not been filled up by the respondents inspite of preparing a waiting list. It was further submitted that the waiting list was prepared under Sub Rule (5) of Rule 5 of the **Uttar Pradesh Procedure for Direct Recruitment of Group 'C' Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) (First Amendment)Rules, 1998** which provided that the number of names in the list would not be larger than 25% of the number of vacancies. The learned counsel for the petitioner submitted that if the waiting list was utilised to fill up the vacancies, the petitioners would have a chance for being appointment on the post of a Cane Supervisor. In support of his contention, the learned counsel for the petitioner has relied upon the decision in **State of U.P. vs. Rafiquddin and others,** 1987 (Suppl.) SCC 401 in which it was held that in the absence of any Rules, the life of the waiting list could be utilised till the declaration of the results in the subsequent examination. The learned counsel for the petitioner further placed reliance on a decision of **Asha Kaul (Mrs) and another vs. State of Jammu and Kashmir and others**, 1993 (2) SCC 573, in which it was held that once a select list was sent in accordance with the regulations of the Government, it must accord its sanction and appoint the person as per the select list and that the Government cannot pick and choose or approve a portion of the select list and reject the other part of the list.

6. In **State of U.P. vs. Ram Swarup Saroj**, (2000) 3 SCC 1999, the Supreme Court held that the mere fact that the period of the life of the select list expired during the pendency of the writ petition, the Court could not decline to grant the relief if the incumbent was found to be eligible by the High Court. In **Shilesh Chandra Saxena vs. State of U.P. and others,** 1989 (15) ALR 13, a Division Bench of this Court held that where no limitation was prescribed for the life of the list, in that event, the life of the list ennures till it was exhausted and, in any case, the period of three years was held to be reasonable to limit the life of the list.

7. On the other hand, the learned Standing Counsel submitted that merely because the petitioners' name were found in the waiting list, the same does not confer an indefeasible right for being appointed on the post inasmuch as, the State was under no obligation to fill up all

or any of the vacancies. The leaned counsel submitted that the mere inclusion of the petitioner's name in the waiting list did not confer any right to be selected even if the vacancies remained unfilled and, even in such a situation, the petitioners cannot claim that they were being discriminated. In support of his submission, the learned Standing Counsel has relied upon the decision in **Shankarsan Dash vs. Union of India**, (1991) 3 SCC 47, **Asha Kaul vs. State of Jammu & Kashmir** (1993)2 SCC 573; **Union of India vs. S.S.Uppal,** AIR 1996 SC 2346.

8. Learned Standing Counsel also placed reliance upon the two decisions of this Court in the case of **Deputy General Manager, U.P. Power Corporation Ltd. and others vs. Bharat Singh**, 2004 (4) ESC 1985 and in the case of **Hum Veer Singh vs. State of U.P. and others**, 2004 (1) ESC 37, on the aforesaid proposition.

9. From the aforesaid, it is clear that number of candidates in the list prepared should not be more than 25% of the vacancies advertised. The reason for including more candidates than the number of vacancies is, that in the event a candidate fails to join, the said post could be filled up by the next incumbent in the waiting list. It is common knowledge that the selection process is a time consuming process and involves huge expenditure and that the selections are made infrequently. Therefore, the list is prepared in such a manner to enable the authorities to fill up the requisite number of vacancies so advertised.

10. In the present case, the Rules permit the respondents to prepare a waiting list. The petitioners in paragraph Nos.10 and 11 of the writ petition have categorically submitted that a waiting list of candidates which was 25% of the total vacancies was prepared by the respondents under the Rules of 1998 in which the petitioners name were found. These paragraphs has not been denied by the respondents in paragraph nos.12 and 13 of the counter affidavit.

11. Further this Court by judgment dated 1.5.2001 in Writ Petition No.565 of 2000 directed the respondents to fill up the posts on the basis of the results declared by the respondents. Subsequently, the said judgment was affirmed by a Division Bench and consequently it was incumbent upon the respondents to fill the entire posts so advertised. The respondents have appointed a number of persons but have not filled the entire vacancies that were advertised. The action of the respondents in filling up some posts and keeping some post vacant is arbitrary and also amounts to discrimination against those persons who could be selected on the remaining posts. No doubt the petitioners' does not have an indefeasible right even against an existing vacancy and the State is under no obligation to fill up the vacancies. On the other hand, the State has the obligation to act fairly and cannot act arbitrary and adopt a pick and choose policy. If the respondents have chosen to fill up the seats pursuant to the directions of the Court, in that event, all the vacancies should be filled up by the State. The State cannot adopt an arbitrary policy, namely, to fill up some of the posts and keep the remaining posts vacant. In my view, the action of the State was not fair. This aspect has been dealt with by a Constitution Bench of the Supreme Court

in **Shankarsan Dash vs. Union of India** (supra) wherein the Supreme Court held-

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidate 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. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons. 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 vs. Subhash Chander Marwaha, Neelima Shangla vs. State of Haryana, or Jatendra Kumar v. State of Punjab."*

12. In **Asha Kaul** (supra) the Supreme Court held that where the select list was not being utilised, the Government must record its reasons of disapproval.

In the present case the reason given by the respondents in not utilising the waiting list was that the State Government had declared the post of a Cane Supervisor as a dying cadre. This plea is no longer tenable, in view of the fact, that inspite of this declaration the Court directed the respondents to fill up the vacancies and that the State Government, in compliance with the judgment of the Court, issued appointment letters to various candidates on the post of Cane Supervisor. Therefore, the reason for not invoking the waiting list does not exist any longer. The decision of the State Government not to fill up the remaining vacancies was not bonafide nor contained valid reasons.

In view of the aforesaid, the judgments cited by the Standing Counsel is distinguishable. Once a select list is prepared, the same has to be utilised in order to complete the vacancies so advertised.

The learned counsel for the respondents submitted that the waiting list cannot be utilised today inasmuch as the life of the waiting list has now been exhausted and as such, no mandamus could be issued to the respondents to utilise the said waiting list. In my opinion, the submission of the learned counsel for the respondent is misconceived. From a bare perusal of Rule 5 of the Rules of 1998, it is clear, that there is no limitation of the life of the waiting list. In **State of U.P. vs. Ram Swarup Saroj** (supra), the Supreme Court held that the High Court could not decline to grant the relief to a candidate where the life of the select list expired during the pendency of the writ petition.

In the present case, the appointments were made by the respondents on 29.6.2002. Some of the appointments were cancelled by the State Government by orders dated 2.10.2002 and

26.10.2002. The petitioners approached this Court on 10.4.2003 i.e. within one year from the date of issuance of the appointment letters. Even though there is no period of the limitation for the life of the waiting list and, assuming that the life should be of one year, even then, the petitioner approached this Court within the validity of the life of the waiting list. The mere fact that the life of the waiting list expired during the pendency of the writ petition does not mean that this Court is powerless to grant the relief. The Supreme court in **State of U.P. Vs. Ram Swarup Saroj** (supra) has clearly held that where the validity of the period of the select list expires during the pendency of the litigation, the Court could still grant the relief, if the incumbent was entitled to the relief. In **Sheo Shyam and others vs. State of U.P. and others** 2004(2) ESC 256, the Supreme Court held that the period of one year of the life of the select list should be computed from the last date when the recommendations were made.

In view of the aforesaid, I find that the petitioners are entitled to the relief claimed. The respondents were not justified in leaving the vacancy vacant and the respondents should have utilised the waiting list prepared for filling up the remaining number of vacancies. Consequently, the writ petitions are allowed. A mandamus is issued to the respondents commanding them to utilise the waiting list so prepared and fill the remaining vacancies out of the total number of 91 that was advertised in the year 1998, within three months from the date of the production of a certified copy of this order. In the circumstances of the case, parties shall bear their own cost.
Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2005

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. writ Petition No. 74397 of 2005

K. Prasad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.C. Srivastava
Sri Sudhakar Upadhyay

Counsel for the Respondents:
SC

Constitution of India Art. 226-Service Law–Regularisation-Petitioner engaged by Nagar Punchayat–on the post of peon on consolidated salary of Rs.1200–per month–without any advertisement without any selections against the statutory rules–not confer any right to claim regularisation–observation made regarding mode of appointment in Public office by affording right of consideration to all suitable candidates.

Held: Para 3

It is disputed by the petitioner that before his appointment there was no advertisement or invitation of application from eligible incumbents against the vacancy which is said to be existing in the officer of the Nagar Panchayat Khanpur. The petitioner was appointed on contract basis and no on regular basis. The appointment was not in accordance with statutory rules. In other words, the appointment of the petitioner was nothing but a back door entry Since, on his application submitted before the Nagar Panchayat, he was given appointment on contract basis on consolidated salary of Rs.1200/-, such appointment does not confer any legal

right either to consider or to claim regular appointment against substantive or permanent vacancy. Whenever there is a vacancy in the public officer, it is obligatory to the state to fill up the same by affording right of consideration to all eligible and suitable persons, who are aspiring for a job in the State and awaiting the opportunity of consideration. Thus, the vacancy should be notified to all, and thereafter the recruitment should be made as per rules which would be in conformity with Article 16 of the Constitution of India also.

Case Law discussed.

AIR 1992 SC-2130
AIR 1996 SC-976
1996 (4) SCC–319
AIR 1998 SC–1021
AIR 1995 SC -962
2005 Sec. 209
2003 (1) SCC-12
2004 (7) SCC–112

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri S.C. Srivastava learned counsel for the petitioner and the learned Standing Counsel for respondent nos. 1 and 2.

2. The learned counsel for the petitioner submits that the petitioner was appointed on a consolidated pay of Rs.1200/- per month on contract basis on an application submitted by him before the Adhyaksh, Nager panchayat, Khanpur, District Bulandshahar on 8.7.2002 whereupon an order was passed appointing the petitioner as peon. A copy of the petitioner's application as well as endorsement thereon showing his appointment on contract basis on fixed salary of Rs.1200/- is Annexure-1 to the writ petition. The petitioner, however, submits that since then he is continuing to discharge his duties. On 3.7.2003, a meeting of the Nagar Panchayat took place wherein it was resolved that since there is a vacancy of Chaprasi in the office of the Nagar Panchayat, Khanpur and the petitioner is a scheduled caste candidate working on contract basis, he may be regularized on the said post. A copy of this resolution has been filed as Annexure 4 to the writ petition. However, it is stated by the petitioner that no action has been taken in pursuance of the said resolution. Since he has been working for more then three years, therefore, in law he is entitled to be considered for regularization. Reliance has been placed on the Government Order daed 3.2.1992 (Annexure8) and the law laid down by the Hon. Supreme Court in the case of State of Haryana and Ors. Vs. Piara Singh and Ors. AIR 1992 SC 2130.

3. It is disputed by the petitioner that before his appointment there was no advertisement or invitation of application from eligible incumbents against the vacancy which is said to be existing in the officer of the Nagar Panchayat Khanpur. The petitioner was appointed on contract basis and no on regular basis. The appointment was not in accordance with statutory rules. In other words, the appointment of the petitioner was nothing but a back door entry Since, on his application submitted before the Nagar Panchayat, he was given appointment on contract basis on consolidated salary of Rs.1200/-, such appointment does not confer any legal right either to consider or to claim regular appointment against substantive or permanent vacancy. Whenever there is a vacancy in the public officer, it is obligatory to the state to fill up the same by affording right of consideration to all eligible and suitable persons, who are aspiring for a job in the

State and awaiting the opportunity of consideration. Thus, the vacancy should be notified to all, and thereafter the recruitment should be made as per rules which would be in conformity with Article 16 of the Constitution of India also.

4. The Apex Court in the case of Piara Singh (Supra) considered the validity of the Government Orders Providing scheme for regularization and observed as follows:

"The court cannot obviously help those who cannot get regularized under these orders for their failure to satisfy the conditions prescribed therein. Issuing general declaration of indulgence is no part of our jurisdiction. In case of such persons we can only observe that it is for the respective Governments to consider the feasibility of giving them appropriate relief, particularly in cases where persons have been continuing over a long number of years, and where eligible and qualified on the date of their adhoc appointment and further whose record of service is satisfactory."

5. The question as to whether the appointment on a post in State can be made without advertising the vacancies and inviting application from public at large came up for consideration before the Apex Court in a catena of cases.

In Ashok kumar & Ors. Vs. Chairman, Banking Service recruitment Board and Ors., AIR 1996 SC 976, the Supreme Court held as under :

"The recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16 (1) of the Constitution."

6. Again in the case of Prem Singh & Ors. Vs. Haryana State Electricity Board and Ors. (1996) 4 SCC 319, the Supreme Court held as under:

"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."

7. Subsequently In Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta & Ors. AIR 1998 SC 1021, the Apex Court held as under:

"As per the scheme of the Act and the aforesaid provisions, for each academic year in question, the management has to intimate the existing vacancies and vacancies likely to be caused by the end of the ensuing academic year in question. Thereafter, the Director shall notify the same to the Commission and the Commission, in turn, will invite applications by giving wide publicity in the State of such vacancies. The vacancies cannot be filled except by following the procedure as contained therein, sub-section (1) of Section 12 has incorporated in strong words that any appointment made in contravention of the provisions of the Act shall be void. This was to ensure to back door entry but section only as provided under the said sections,"

8. Deprecating the practice of claim for regular appointment on post merely on the ground of long continuous service the Apex Court in the case of Dr. Arundhati A. Pargaonkar Vs. State of Maharashtra, AIR 1995 SC 962, held as under:

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

9. In Binod Kumar Gupta Vs. Ram Ashray Mahoto & Ors. (2005) SCC 209, the Apex Court refusing to permit continuance in service after 15 years observed as under:

"if we allow the appellants to continue in service merely because they have been working in the posts for the last 15 years we would be guilty of condoning a gross irregularity in their initial appointment."

10. In the case of Surendra Kumar Sharma Vs. Vikas Adhikari, 2003 (1) SCC 12, the Apex Court noticed its earlier judgment in Delhi Development Horticulture Employees' Union held as under:

"A good deal of illegal employment market has development resulting in a new source of corruption and frustration of those who are waiting at the employment exchanges for years. Not all those who gain such back door entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in government departments, public undertakings or agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularization has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days they have to be absorbed as regular employees although the works are time bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardized on both counts."

11. Lastly a three judges Bench of the Apex Court in a Umarani Vs. Registrar Cooperative Society & Ors. (2004) 7 SCC 112 after a review of the entire earlier case law, in para 39, 40 and 41 observed as under:

"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 hereunder. 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 would 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.

41. Regularization furthermore cannot give permanence to an employee whose services are ad hoc in nature."

12. A Division Bench of this Court also, following large number of the Apex Court Judgments, in the case of District Judge, Baghpat Vs. Anurag Kumar and Ors. Special Appeal No. 702 of 2005 decided on 31.05.2005, held as under:

"Appointments made in contravention of the statutory provisions remain in executable."

13. In the present case the petitioner has not claimed regularization under any statutory provision. The Government Order dated 3.2.1992 filed by the petitioner as Annexure 8 to the writ petition is of no help to the petitioner. A bare perusal of the aforesaid Government Order shows that it was a one time measure undertaken by the Government Order shows that it was a one time measure undertaken by the Government to regular persons who were appointed prior to 11.10.1989 and have worked for 240 days in each year and also completed three years service. It is inapplicable to the case of petitioner.

14. In the above circumstances. I do not find any merit in the writ petition, accordingly it is dismissed summarily.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2006

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 5285 Of 2006

Kamal Singh and others
...Petitioners/Defendants
Versus
Smt. Faiyazan ...Respondent/Plaintiff

Counsel for the Petitioners:
Sri Govind Krishna

Counsel for the Respondent:
Smt. Kamla Mishra
S.C.

Code of civil Procedure–Order XVIII rule 2(4) as amended after 1999, Section 151–Permission to examine witness–even after the closure of evidences–rejection-held not proper–on the ground of delay as the provision of order 18 rule 2 has been deleted- under inherent power–the court has every jurisdiction–to pass any order–which in the opening of court is just and proper.

Held: Para 4

Naturally, this fact is a very relevant fact in the matter and if the evidence of Ompal throws due light on such issue, it will definitely facilitate just and proper adjudication of the dispute between the parties, which has to be decided by the court. Obviously, the evidence of Ompal was relevant and permission of his examination as a witness could not have been refused simply because there was some delay in the proposal made by the defendants petitioners for such tendering of the evidence. It should have also not been refused simply because sub-rule (4) of Rule 2 of Order XVIII C.P.C. had been deleted in 1999 amendment from the Code. The principle of law laid down by the apex court and otherwise also under the inherent power of the Court, as enshrined under Section 151 C.P.C., the court has every jurisdiction to pass any such order, which in its opinion appears to be just and proper for proper dispensation of justice to the parties. Accordingly, the prayer of the petitioners to the extent it was made for examining the witnesses Ompal was quite justifiable. The other witness Jitendra, who is the scribe of sale deed and is also relevant witness, must be examined and permission for his

examination should be granted along with Ompal.

Case law discussed:

2005(3) PWC (S.C.) 2996 relied on

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

1. Heard learned counsel for the parties.

2. It has been contended that the application moved on behalf of the defendants petitioners for granting permission to examine three witnesses in the trial court was refused vide order dated 20.10.2005 and the revision filed against the said order by the petitioners before the District Judge was also dismissed vide order dated 22.11.2005. In the application for permission to examine the witnesses, it was specifically stated that the witness namely Ompal is a person, who had lent some amount to the plaintiff respondent, which she (plaintiff) paid back to Ompal on 10.10.2000 after receiving the consideration sum from the defendants for executing the impugned sale deed dated 30.9.2000. It is a suit for cancellation of sale deed dated 30.9.2000 in which several grounds were taken. It has also been pleaded that no consideration was received in respect of this transaction of sale by the plaintiff from the defendants petitioners. In order to prove the fact that there has been actual payment of consideration to the plaintiff by the defendants, the petitioners proposed to examine the aforesaid witness Ompal and for that purpose the prayer was made in the application. It is further stated in the said application that since the knowledge of this fact of repayment of the lean amount made by the plaintiff to Ompal, could be obtained by the petitioners only on 5.10.2005, he moved an application for permission to examine the witness. The trial court has rejected his application on the ground that the evidence of the parties was closed long back and that there was absolutely no justification for permitting the examination of the witnesses. The revisional court has held that since after 1999 amendment of the Code of Civil Procedure in Order XVIII, Rule 2 (4) the permission could not be granted.

3. Learned counsel relying upon a case law of **Salem Advocate Bar Association, Tamil Nadu Vs. Union of India, 2005 (3) AWC 2996 (S.C.)** has argued that even though by virtue of 1999 amendment the provisions of Sub-rule (4) of order XVIII, Rule 2 C.P.C. has been omitted yet the discretionary power of the court to permit examination of the witness, if found relevant has not been taken away, Para-33 of the judgment is important in this regard, which is reproduced as below: -

"Order XVIII, Rule 2 (4) which was inserted by Act 103 of 1976 has been omitted by Act 46 of 1999. Under the said Rule, the Court could direct or permit any party, to examine any party or any witness at any stage. The effect of deletion is the restoration of the status quo ante. This means that law that was prevalent prior to 1976 amendment, would govern. The principles, as noticed hereinbefore in regard to deletion of Order XVIII, Rule 17 (a), would apply to the deletion of this provision as well. Even prior to insertion of Order XVIII, Rule 2(4), by the Court in its discretion. The provision was inserted in 1976 by way of caution. The omission of Order XVIII, Rule 2 (4) by 1999 amendment does not take away Court's inherent power to call for any witness at any stage either suo motu or on the prayer

of a party invoking the inherent powers of the Court/"

4. This Ompal is a witness, who is said to have received some money from the respondent plaintiff soon after he had executed the impugned sale deed in favour of the petitioners. The evidence of this witness. If found positive and is believable, will present before the court a circumstance, which may facilitate just and proper adjudication of the matter on this issue, whether any consideration in the impugned transaction had actually passed from the vendee to the vendor. Naturally, this fact is a very relevant fact in the matter and if the evidence of Ompal throws due light on such issue, it will definitely facilitate just and proper adjudication of the dispute between the parties, which has to be decided by the court. Obviously, the evidence of Ompal was relevant and permission of his examination as a witness could not have been refused simply because there was some delay in the proposal made by the defendants petitioners for such tendering of the evidence. It should have also not been refused simply because sub-rule (4) of Rule 2 of Order XVIII C.P.C. had been deleted in 1999 amendment from the Code. The principle of law laid down by the apex court and otherwise also under the inherent power of the Court, as enshrined under Section 151 C.P.C., the court has every jurisdiction to pass any such order, which in its opinion appears to be just and proper for proper dispensation of justice to the parties. Accordingly, the prayer of the petitioners to the extent it was made for examining the witnesses Ompal was quite justifiable. The other witness Jitendra, who is the scribe of sale deed and is also relevant witness, must be examined and permission for his examination should be granted along with Ompal.

5. In view of the aforesaid, the petition is allowed and the orders of the court below dated 20.10.2005 and 22.11.2005 are hereby quashed. It is directed that the witnesses Ompal and Jitendra, as mentioned in the application of the defendants petitioners, shall be permitted to be examined in the trial court latest between 01.02.2006 to 15.02.2006 and not beyond it. Meanwhile, a certified copy of this order shall be obtained by the petitioners and submitted to the trial court for proceeding with the matter as directed above. In case, till 15.02.2006 the witnesses are not examined, no permission would be given thereafter for such examination.

6. The certified copy of this order be given on due payment to the parties by 30.01.2006. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2005

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 13406 of 1997

Kailash Nath Shukla ...Petitioner
Versus
The Regional Assistant Director (Basic) VII Region, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri S.S. Tripathi
Sri A.P. Tewari

Counsel for the Respondents:
Sri S.G. Hasnain
Sri B.P. Singh

Sri Jitendra Ojha
S.C.

U.P. Basic Education Teachers Service Rules 1981-Rule-5-Compassionate Appointment-Petitioner's father working as permanent Asstt. Teacher-in Junior High School (Senior Basic School)-died in harness on 5.5.82-7.3.87 appointed on compassionate ground on Asstt. Teacher in Primary School-13.1.96 appointment of petitioner as Asstt. Teacher in junior High School (Sanskrit) subsequent in order dated 16.03.96 diversion of petitioner from junior High School to primary school-held proper-as the post of Astt. Teacher in junior High School is a promotional post-hence illegality has been rectified.

Held: Para 20, 21

The petitioner was entitled to be appointed on the post of Assistant Teacher in Junior High School as untrained teacher appears to be misconceived for simple reason that the post of Assistant Teacher in Junior High School (Senior Basic School) is a promotional post, as such the petitioner could not claim his compassionate appointment on the said post. Besides this, once he has accepted the post of Assistant Master in Primary School (Junior Basic School) of the Board in the year 1987 on compassionate grounds he can not claim again any higher post on the same ground unless promoted on the said post on his turn according to rules of recruitment. So far as his appointment on the post of Assistant Teacher in Senior Basic School vide order dated 13.1.1996 made by the District Basic Education Officer, is concerned, it was illegally secured by the petitioner by manipulation which too was for short period and by subsequent order dated 16.3.1996 the petitioner has been again posted at Primary School (Junior Basic School) as Assistant Teacher. Thus aforesaid illegality appears to have been rectified.

That apart, it is also necessary to point out that the petitioner has secured his illegal appointment on compassionate ground on the post of Assistant Master in Senior Basic School on 13.1.1996 contrary to the rules of recruitment, which was rectified subsequently on 16.3.1996 by District Basic Education Officer, the same view was reiterated again by District Basic Education Officer vide impugned order dated 27.1.1997, thus in my considered opinion in such situation writ jurisdiction of this court under Article 226 of the Constitution of India cannot be invoked by the petitioner to restore an illegal order of District Basic Education Officer dated 13.1.1996 passed in his favour. The aforesaid view also finds support from the decision of Hon'ble Apex Court rendered in Gadde Venkateswara Rao Vs. Govt. of Andhra Pradesh, A.I.R. 1966 S.C. 828. The aforesaid decision is being consistently followed by Hon'ble Apex Court in M.C. Mehta Vs. Union of India, A.I.R. 1999 S.C. 2583 (Pr. 18) and in Canara Bank Vs. V.K. Awasthi J.T. 2005 (4) S.C. 40 (Pr. 18). Therefore in view of aforesaid settled legal position and further since the petitioner has already been enjoying the benefit of compassionate employment on the post of Assistant Master in Primary School of the Board by virtue of his such appointment w.e.f. 7.3.1987, therefore, no interference is called for in the impugned order dated 27.1.1997.

Case law discussed:

AIR 1966 SC-828
J.T. 2005 (4) 40
AIR 1998 SC2230
1996 (3) UPLBEC-1974
J.T. 1997 (7) SC-324
AIR 1958 SC-282

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

The brief facts of the case are that the father of petitioner namely Sant Bhawan Shukla was a permanent Assistant Teacher in Junior High School in District

Padrauna run and controlled by Basic Shiksha Parishad U.P., Allahabad, died in harness i.e. during the course of employment on 5.5.1982. At the time of his death no other member of family of petitioner was in the employment to relieve the family from financial hardship and distress arose on account of death of sole bread earner of the family. The petitioner was also unemployed and has possessed only Intermediate qualification. According to him, he was eligible for being appointed as an untrained teacher in junior high school. The petitioner has applied for his compassionate appointment under dying in harness rules on the post of Asstt. Teacher in Junior High School run by U.P. Basic Shiksha Parishad but on 7.3.1987 he was appointed as Asstt. Teacher in Primary School instead of Junior High School. In pursuance thereof the petitioner joined the post on 9.3.1987. It is alleged that State Government has issued several orders from time to time with regard to its policy for compassionate appointment under Dying-in-Harness Rules. In para 3 of such Government Order dated 2.2.1996 it was provided that the appointment of a dependent of a deceased employee would as possible as be made in the institution on the post of Assistant Teacher where the deceased had been working, and if no post of Assistant Teacher is vacant in that institution then in any other institution of that district and in case there is absolutely no vacancy in the district, then a supernumerary post be created in the school where the deceased employee had been working and one dependent may be provided employment on the post of Assistant Teacher provided he is eligible for being appointed on the said post. It is stated that in view of clear-cut policy of the Government, the petitioner was fully eligible to be appointed as Assistant Teacher in Junior High School, but instead thereof he was appointed as Assistant Teacher in Primary School contrary to the policy of Government and against the wishes of the petitioner. It is further stated that on 13.1.1996 the Head Master of a Junior High School of District Padrauna made a request from District Education Officer for appointing a teacher in Junior High School on account of transfer of four teachers from that school elsewhere, there upon the District Basic Education Officer, Padrauna vide order dated 13.1.1996 made temporary arrangement appointing the petitioner in Junior High School on the post of Assistant Teacher (Sanskrit) Dandopur. Subsequently thereafter another District Basic Education Officer took over the charge of office and passed an order on 16.3.1996 directing the petitioner's posting in Primary School. Feeling aggrieved against this order of posting dated 16.3.1996 the petitioner made an application before Basic Shiksha Adhikari on 8.4.1996 requesting therein that he may be given permanent appointment as Assistant Teacher in Junior High Schools instead of Primary School, in pursuance of Govt.Order dated 2.2.1996. Thereafter petitioner made several reminders to same effect and ultimately he filed writ petition No. 35512 of 1996, Kailash Nath Shukla Vs. Regional Assistant Director, Basic Education and others, which was disposed of finally by this Court vide order dated 6.11.1996 with the direction that representation of petitioner may be decided expeditiously. In pursuance of the aforesaid order respondent no.2 has decided the representation of petitioner vide order dated 27.1.1997 whereby the representation of petitioner has been rejected, hence this petition.

2. On behalf of respondents a detail counter affidavit has been filed while justifying the impugned order dated 27.1.1997, contained in Annexure-7 of the writ petition. In this counter affidavit, the stand taken by respondents before making parawise reply of the writ petition, in para 4,5 and 6 of the counter affidavit are as under:

"4. That it will further not be out of place to submit before this Hon'ble Court that there are 2 sets of institutions are being running by the Board of Basic Education. One is Junior Basic School and other is Senior Basic School in which only the post of Assistant Teacher/Master in Junior Basic School is post of Direct Recruitment (In respect of Gents) in accordance with the procedure given in rule 14 and 15 of the Basic Education Teachers Services Rules 1981 whereas the post of Assistant Teacher in Senior Basic School or the post of Head Master in Junior/Senior Basic School are the promotional post in accordance with the provisions given in rule 18 of the said rules. The post of Assistant master in Senior Basic School or the post of Head Master in Junior/Senior Basic School cannot be filled by way of direct recruitment, which is clear in rule 5 of the said rules.

For the kind perusal of this Hon'ble Court a copy of the extract of Rule 5 of the said rules is being filed herewith and marked as Annexure C.A. II to this affidavit.

Here many of the suitable candidates for promotion from the post of Assistant Teacher in Junior Basic School to the post of Head Master in Junior Basic School or, to the post of Assistant Teacher in Senior Basic School are already available and waiting even in District Kushinagar itself and also in other district of Province and therefore in view of rule 5 of the said rules the petitioner has got no merit at all and his writ petition is liable to be dismissed with cost on this ground alone.

5. That it will also be pertinent to mention before this Hon'ble Court that the petitioner is illegally claiming for his Direct Recruitment as Assistant Teacher in Senior Basic School on account of misleading/misinterpreting the Government order dated 2.2.1996 (Annexure no.3 to the writ petition) whereas in paragraph no.1 of the said Government order itself it is clearly mentioned that the said Government order has been issued in respect of Director Recruitment of Assistant Teacher in Junior Basic School on compassionate ground not in respect of any appointment in Senior Basic School/Junior High School. The word "USI VIDYALAYA" (The same Institution) in paragraph no. 3 of the said Government order has been given in respect of the location of the Junior Basic School not in respect of Senior Basic School.

A copy of the said Government order dated 2.2.1996 is being filed herewith and marked as Annexure no. C.A. III to this affidavit.

6. That prior to issuance of said Government order dated 2.2.1996 the Government has already issued a Government order dated 23.3.1990 directing to make the compassionate appointment on the post of Assistant Teacher in Primary Institution not in Junior High School.

A copy of the said Government order is also being filed herewith and marked as Annexure no. C.A. IV to this affidavit.

From the perusal of the both said orders also it is clear that the petitioner

has got no merit at all and his so called claim is void abinitio and therefore the writ petition is liable to be dismissed."

3. Having heard the rival contentions of learned counsel of the parties and from perusal of records, the first question arises for consideration as to whether the petitioner was entitled for compassionate appointment on the post of Assistant Master in Primary School (Junior Basic School) or on the post of Assistant Master in Junior High School (Senior Basic School) which is a promotional post under relevant service rules in schools run and controlled by U.P. Basic Shiksha Parishad under Dying-in-Harness rules?

4. To find out complete and correct answer to this question it is necessary to examine the relevant provisions of Dying-in-Harness Rules and/or Govt. Orders having material bearing on the issue under which compassionate appointment under aforesaid rules are made vis-Ã-vis provisions of relevant service rules. In this connection it is necessary to mention here that U.P. Basic Education Teachers Service Rules, 1981 is relevant service Rules dealing with such appointments. Rule-2 contains definition clause, which defines and describes various expressions employed and used under the rules. Rule-2 (b) defines the expression "Appointing Authority", in relation to teachers referred to in Rule-3, means the District Basic Education Officer. Rule-2 (c) defines the expression "Basic School" which means a school where instructions from class I to class VIII are imparted. Rule-2(h) defines expression "Junior Basic School" means a Basic School where instructions from class I to class V are imparted. Rule-2 (m) defines the expression "Senior Basic Schools", means where instructions from class VI to class VIII are imparted. Rule-3 provides extent of applicability of rules which is made applicable to all teachers of Local Bodies transferred to the Basic Education Board under Section 9 of the U.P. Basic Education Act, 1972 and all teachers employed for the Basic and Nursery schools established by the Board. Rule-5 provides sources of recruitment, which reads as under:

"5. Sources of recruitment.- The mode of recruitment to the various categories of posts mentioned below shall be as follows:

(a) (i) Mistresses of Nursery Schools	*By direct recruitment as provided in Rules 14 and 15;*
(ii) Assistant Masters and Assistant Mistresses of Junior Basic Schools	*Ditto*
(b) (i) Head Mistresses of Nursery Schools	*By promotion as provided in Rule 18;*
(ii) Head Masters and Head Mistresses of Junior Basic Schools	*Ditto*
(iii) Assistant Masters of Senior Basic Schools	*Ditto*
(iv) Assistant Mistresses of Senior Basic Schools	*Ditto*
(v) Head Masters of Senior Basic Schools	*Ditto*
(vi) Head Mistresses of	*Ditto*

Senior Basic Schools

Provided that if suitable candidates are not available for promotion to the posts mentioned at (iii) and (iv) above, appointment may be made by direct recruitment in the manner laid down in Rule 15."

5. Rule-8 of Rules 1981 deals with academic qualifications, sub-rule-3 of which provides for minimum experience of candidates for promotion to a post referred to in clause (b) of rule-5, reads as under:

"(3) The minimum experience of candidates for promotion to a post referred to in clause (b) of Rule 5 shall be as shown below against each:

Post	***Experience***
(i) Head Mistress of Nursery School	*At least five years' teaching experience as permanent Mistress of Nursery School.*
(ii) Head Master or Head Mistress of Junior Basic School and Assistant Master or Assistant Mistress of Senior Basic School.	*At least five years' teaching experience as permanent Assistant Master or Assistant Mistress of Junior Basic School.*
(iii) Head Master or Head Mistress of Senior Basic School.	*At least three years' experience as permanent Head Master or Head Mistress of Junior Basic School or permanent Assistant Master or Assistant Mistress of Senior Basic School, as the case may be:*

Provided that if sufficient number of suitable eligible candidates are not available for promotion to the posts mentioned at serial number (ii) or (iii) the field of eligibility may be extended by the Board by giving relaxation in the period of experience."

6. Rule-10 of Rules 1981 deals with relaxation of rules which reads as under:

"10. Relaxation for ex-servicemen and certain other categories:- *Relaxation, if any, from the maximum age-limit, educational qualifications or/and any procedural requirements of recruitment in favour of the ex-servicemen, disabled military personnel, dependents of military personnel dying in action, dependents of Board's servants dying in harness and sportsmen shall be in accordance with the general rules or orders of the Government in this behalf in force at the time of recruitment."*

7. Thus on plan reading of Rule-5 (a) of the rules, it is clear that the post of Assistant Mistresses of Nursery Schools, Assistant Master and Assistant Mistresses of Junior Basic Schools are filled up by direct recruitment as provided in Rule 14 and 15, rests of the posts including the post of Assistant Master or Assistant Mistresses of Senior Basic Schools included in Clause (iii) and (iv) of rule 5(b) of the rules are filled by promotion as provided under Rule-18. A proviso has also been appended to the Rule-5(b) of the rules which provides that if suitable candidates are not available for promotion

to the posts mentioned at (iii) and (iv) above, the appointment may be made by direct recruitment in the manner laid down in the Rule-15. Under Rule-8(3) of the rules only those candidates would be eligible for promotion on the post of Assistant Master or Mistresses in Senior Basic School who have atleast five years teaching experience as permanent Assistant Master or Assistant Mistresses of Junior Basic School. Rules-14 to 17 deals with procedure for preparation of select list through direct recruitment. Rule-18 provides procedure for recruitment by promotion. The provisions of the Rule-10 of the aforesaid rules, deals some sort of relaxation of rules in favour of certain category of persons including dependents of Board's servants dying in harness, only in respect of maximum age limit, educational qualification and/or other procedural requirement of rules of recruitment in accordance of the general rules or Government Orders issued in this behalf at the time of recruitment.

8. Now coming to the relevant Government orders referred by the parties, it is to be seen that Govt. Order No. 480/15-5-90-30/82 dated 23rd March, 1990 whereby compassionate appointment under dying in harness rules are made applicable in respect of dependents of teaching and non-teaching employees of the Board, has been issued under Section 13(1) of U.P. Basic Education Act, 1972. It has statutory sanction and backing. In para (1) of said Govt. Order it is provided that one unemployed member of family of deceased employee died during the course of employment may be appointed on the post of Assistant Teacher in Primary Schools of Board or non-teaching class III and class IV post, on application made provided such dependent is eligible and possesses minimum qualification prescribed for the post. The appointment shall be made by relaxing the procedural requirement of the rules of recruitment. In para-2 of the said Govt. Order it is also provided that untrained dependent of deceased employee otherwise eligible and qualified under U.P. Basic Education Teachers Service Rules, 1981 would be appointed on the post of Assistant Teacher or Assistant Mistresses in Primary School with the condition that they shall obtain necessary training within five years from the date of such appointment and on acquisition of such training his appointment shall be made on regular basis. Although subsequent Govt. Order dated 2.2.1996 has been issued by superseding earlier Govt. Order dated 23.3.1990 but in the same manner under the same provisions of the Act, 1972. The provisions contained in para 1 and 2 of the earlier superseded Govt. Order have been reiterated in this Govt. Order also by incorporating the same again with slight variance in para 2 of the Govt. Order whereby the untrained teacher is required to obtain training within three years of appointment. Other provisions of this Govt. Order need no detail discussion at this stage.

9. Thus from a close scrutiny of the aforesaid provisions of rules and Govt.Order it is clear that an eligible and qualified dependent of deceased employee can be appointed only on the post of Assistant Master or Assistant Mistresses in Primary School i.e. Junior Basic Schools of the Board or on class III and IV post of the Board, which is liable to be filled up by direct recruitment. No such appointment can be made against a post, which is liable to be filled up by

promotion. The post upon which the petitioner stakes his claim for appointment i.e. post of Assistant Master in Senior Basic Schools is promotional post and is liable to be filled up by promotion of Assistant Teacher of Junior Basic School under Rule-18 of the Rules, 1981. The recourse to fill up said post through direct recruitment under the rule-15 of the Rules 1981 can only be made in a situation envisaged under the proviso to rule-5 (b) of said Rules and only when the candidates for promotion are not available and in no other situation.

10. At this juncture an incidental question arises for consideration is that what are functions, object or purpose of the proviso appended to rule 5(b) of the said rules? In this regard it is necessary to point out that it is well settled that a proviso plays various role in different situation depending upon the scheme under lying the statute in question. In this connection it would be useful to refer a decision of Hon'ble Apex Court rendered in S. **Sundaram Pillai Vs. V.R. Pattabhiraman, AIR 1985 SC 582**, wherein Hon'ble Apex Court has dealt with in detail the nature, object and purpose of the proviso appended to a statute by making references of several juristic opinions and law laid down earlier by the Apex Court in para 26 to 43 of the decision. The observations made by Supreme Court in para 26, 42 and 43 of the decision are as under:

"26. The next question that arises for consideration is as to what is the scope of a proviso and what is the ambit of an Explanation either to a proviso or to any other statutory provision. We shall first take up the question of the nature, scope and extent of a proviso. The well-established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein, which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment.

42. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:

(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

43. These seem to be by and large the main purport and parameters of a proviso."

11. Thus from the aforesaid settled legal position, it is clear that proviso appended to statute plays different role in different situation depending upon the scheme under lying the statute. Applying the aforesaid principles enunciated by the Apex Court, it is clear that proviso

appended to rule 5 (b) of the rules 1981 carves out an exception to the enacting provisions of statute and operates only in situations envisaged under the proviso itself, meaning thereby the post of Assistant Master and Assistant Mistress in Senior Basic School can be filled up through direct recruitment in the manner laid down in rule 15 of the rules, only if suitable candidates are not available for promotion to the said posts and in no other situation. At this juncture it is also necessary to point out that since the said proviso has been employed as an exception to the enacting part of the main statute, therefore, the same cannot be construed to nullify the main provisions to which it is an exception or set at naught the real object of main enactment. Thus, there can be no scope for doubt to hold that the said proviso has to play a role within the limited field assigned to it by rule making authority. It cannot be utilized to achieve an object different and alien to the purpose contained in the proviso itself. In my considered opinion such situation can arise and be satisfied only when the claim of all the eligible and qualified persons entitled for promotion under rule 5 (b) read with rule 8(3) of the Rules are considered for promotion according to procedure provided under rule 18 by selection committee constituted under rule-16 for promotion as required under the aforesaid rules and thereafter if it is found as fact that suitable persons are not available even by taking recourse of the proviso of Rule 8 (3) whereby relaxing the period of experience also only, in that situation alone the proviso appended to rule 5 (b) of the rules can be pressed into service. Taking different and contrary view in the matter and permitting the authority concerned to take recourse of proviso appended to rule 5 (b) of the Rules without undertaking aforesaid exercise would render main provision of rule 5 (b) together with rule 8(3) redundant and it would also unduly interfere with the rights of persons eligible, qualified and entitled for promotion inasmuch as open the gate of favourtism and corruption rampant in the public life. Therefore, before coming to such conclusion that suitable candidates for promotion are not available to the post mentioned at (III) and (IV) under rule 5 (b) of the Rules, the authority entrusted with the function must strictly comply and adhere to the aforesaid rules.

12. Now coming to the provisions contained in rules-10 of Rules 1981 it is clear that said rule has also limited scope of relaxation of the rules only to the extent indicated thereunder which in clearest term stipulates, in respect of maximum age limit, educational qualification and other procedural requirement of the rules of recruitment. Thus from the perusal of rule 10 of the aforesaid Rules there appears no difficulty in understanding the true import of rules of relaxation regarding the maximum age limit, educational qualification in common and legal parlance both but so far as the expression "other procedural requirement of rules of recruitment" is concerned it requires some more clarification by way of interpretation to find out true intent and import of the expression. In this connection it is necessary to point out that procedure for recruitment consists of several steps, normally it starts from advertisement of vacancy in daily newspapers having wide circulation and asking names of candidates from employment exchange. Sometime selection also consists of preliminary examination and thereafter-

main examination and in the main examination too written test and interview. Having regard to the scheme of statute for providing compassionate appointment, such long drawn process of selection would naturally cause undue delay in providing compassionate employment under Dying in Harness Rules, therefore, in order to avoid undue delay and shorten the process in holding selection for compassionate appointment the aforesaid procedural requirement of recruitment can be relaxed by general rules or government orders issued in this behalf. Thus the relaxation of "procedural requirement of rules of recruitment" should be understood in the parameters stated herein above.

13. Now another incidental question arises as to whether the provisions regarding the source of recruitment contained in rule 5 of the rules are procedural or substantive in nature and would be covered under rule-10 or not? In this connection it is necessary to be pointed out that the provisions regarding the source of recruitment confer certain rights and benefit in favour of certain persons entitled to be considered for appointment on the post in question either by way of direct recruitment or through promotion, therefore, being basic and fundamental rules of recruitment it cannot be said to be procedural in nature rather it would be of substantive in nature. Since the provisions of rule-5 are substantive in nature, hence it cannot be covered under rule-10 for the purposes of the relaxation of rules of recruitment. Thus the scope of rule-10 has to be limited only to the extent of situations envisaged under the aforesaid rules indicated herein before and in no other situation.

14 In this connection it would be useful to refer some decisions of Hon'ble Apex Court, wherein the question of appointment under Dying-in-Harness Rules vis-Ã-vis rules regarding relaxation of rules of recruitment was under consideration. In **Hira Man Vs. State of Uttar Pradesh, J.T. 1997 (7) S.C. 324** Hon'ble Apex Court while considering the scope of rules 4 and 5 of U.P. Recruitment of Dependents of Government servant Dying-in-Harness Rules, 1974 has held that overriding effect which is given to the rules in respect of procedure for selection for appointment on the post for which the dependent makes an application should not be read in isolations but it should be read in context of rule 8 of the aforesaid Rules, which deals with the situations under which Rules of Recruitment is relaxed. The Apex Court has rejected the claim of compassionate appointment of respondent no. 4 even on class III posts falling in the quota of promotion of appellant therein. For ready reference para 9 of the decision of Hon'ble Apex Court is reproduced as under:

"9. Rule 5 imposes an obligation on the State Government to give suitable employment to the dependent of the deceased Government servant in the State Government service or on a post which is not within the purview of the State Public Service Commission provided that he is not already employed under the Central Government or a State Government or a Corporation owned by the Central Government or a State Government. It further provides that such employment is to be given in relaxation of the normal recruitment rules, provided such member fulfills the educational qualifications prescribed for the post and is also

otherwise qualified for Government service. Such employment has to be given without delay. Obviously this provision has been made with a view to achieve the object of the rules, viz., to provide immediate secure to family of the deceased Government servant when it is put in a difficult financial situation as a result of his death. If the dependent of the deceased Government servant is made to wait till the vacancy is to be filled up by following the prescribed procedure under the normal recruitment rules and to compete with others, the object of the rules would get frustrated. Therefore, such appointment has to be made in relaxation of the normal procedure prescribed by the relevant recruitment rules. For that reason Rule 5 contemplates giving of a suitable employment to such dependent in relaxation of the normal procedure prescribed by the relevant recruitment rules and that becomes clear when we read this rule along with Rule 8. The rule making authority after providing generally in Rule 4 that Dying in Harness Rules and any orders issued thereunder shall have effect notwithstanding anything to the contrary contained in any rules, regulations or orders in force at the commencement of the rules has thereafter in rules 5 and 8 specifically provided what is to be relaxed and to what extent it is to be relaxed. If the intention of the rule making authority was to give the Dying in Harness Rules an overriding effect over all other recruitment rules or regulations in all respects, then it would have been unnecessary for it to provide for relaxation of the normal recruitment rules in rules 5 and relaxation of age and the procedural requirements for selection in rule 8. Sub-rule (1) of rule 8 makes relaxation in the matter of age of the candidate seeking appointment under the said rules. Sub-rule (2) dispenses with the requirements of selection such as written test or interview by selection committee or any other authority. Rule 5 speaks of relaxation and Rule 8 indicates the extent of relaxation contemplated by the said rules. Thus it we read rules 4, 5 and 8 together, it becomes clear that overriding effect which is given to the said rules is with respect to the age and the procedure for selection for appointment on a post for which the dependent makes an application. The rule making authority has taken care to emphasise, even while making such relaxation, that employment is to be given only if other eligibility conditions are satisfied by providing that such dependent member must fulfill the educational qualifications prescribed for the post and must also otherwise be qualified for Government service. While dispensing with the procedural requirements for selection it is provided that it shall be open to the appointing authority to interview the candidate in order to satisfy itself that the candidate will be able to maintain the minimum standard of work and efficiency expected on the post. If the rules are construed in this manner, and so we do the contention raised on behalf of the respondents that notwithstanding the fact that the post of clerk which had fallen vacant, belonged to the promotional quota, the respondent no.4 should have been appointed on that post, and not the appellant, has to be rejected."

15. In **State of Bihar and others Vs. Samsuzzoba, (1996) 3 UPLBEC 1974**, Hon'ble Apex Court has held that candidates under Dying in Harness Rules have no vested right to be appointed on higher post according to the

qualifications. In para 4 of the decision Hon'ble Apex Court has held as under:

"4. The question that arises for consideration is whether the High Court is right in giving directions to appoint them afresh or give them promotion? It is not in dispute that there is no right vested in the candidates for particular appointment on compassionate grounds. The State had taken policy decision to appoint all the candidates irrespective of the qualifications as Class IV post and, therefore, the committee consisting of the Secretary, Addl. Secretary and the Registrar met and decided the principle that all the available posts in Class IV should be made available to the candidates in the awaiting list for appointment on compassionate grounds. 12 posts available in Class III were reserved for appointment by promotion to the Class IV candidates who were entitled thereto as per the rules. The Principle adopted by the Government cannot be said to be unjustified or illegal. Undoubtedly, some candidates had gone to the Court and obtained orders and in compliance thereof, at pain of contempt petition, the Government, instead of appointing them to Class IV posts since by then the Class III posts were not available, upgraded Class IV post as Class III post and confirmed them as Class III employees. That order which was wrongly made by the High Court cannot be a base in issue directions. In other words, if the directions are complied with all the Class IV posts would be converted into Class III posts which is against the discipline of the service. The High Court, therefore, was not justified in issuing directions in all the cases for appointment to Class III."

16. In **Director of Education (Secondary) Vs. Pushpendra Kumar, reported in AIR 1998 Supreme Court, 2230: (1998 All LJ 1525 at p. 1529),** while taking note of the earlier decision of the Apex Court rendered in the case of Umesh Kumar Nagpal v. State of Haryana, reported in 1994(4) SCC 138: (1994 AIR SCW 2305) in paragraph 8 of the judgment it was observed that –

"The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependents of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception can not subsume the main provision to which it is an exception and thereby nullifies the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment

to seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependent of a deceased employee. In Umesh Kumar Nagpal v. State of Haryana, 1994(4) SCC 138: {(1994) 1 AIR SCW 2305} this Court has taken note of the object underlying the rules providing for appointment on compassionate grounds and has held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. In that case the court was considering the question whether appointment on compassionate grounds could be made against posts higher than posts in classes III and IV. It was held that such appointment could only be made against the lowest posts in non manual and manual categories. It was observed at page 2308 of AIR SCW :---

"The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations and the change in status and affairs of the family engendered by the erstwhile employment which are suddenly upturned."

17. Thus from a close analysis of law laid down by Hon'ble Apex Court it is clear that if the intention of rule making authority is to give the Dying in Harness Rues an overriding effect over all other recruitment rules or regulation in all respect then it would have been unnecessary for it to provide for relaxation of the recruitment rules only in respect of maximum age limit, educational qualification and/or any procedural requirement of recruitment in favour of certain category of persons including dependents of Board's servants Dying in Harness in accordance with general rules or Government orders in this behalf in force at the time of recruitment. Thus in my opinion the relaxation of rules of recruitment is permissible only to the extent indicated in rule-10 of the said rules. As held earlier since rule 5 of rules provides source of recruitment and is substantive and fundamental in nature, therefore, does not cover under rule 10 of the rules, Thus, I have no hesitation to hold that rule-5 (b) (iii) and (iv) which provides that the post of Assistant Master or Assistant Mistress are liable to be filled up by promotion according to rule-18 of rules, cannot be relaxed under rule-10 of the rules, making it available for direct recruitment. The proviso appended to rule-5(b) of the rules no doubt carves out exception to the main provisions contained in the enacting part of the rule but it would apply only in situation envisaged therein and in no other situation. Therefore, the same cannot be utilized for different purpose that is for relaxation of rules regarding the source of

recruitment, which is fundamental and substantive in nature for the purpose of making it available for Dying in Harness Rules. Such interpretation would lead anomalous result and rights of persons entitled for promotion would be unduly impaired and prejudiced.

18. Now coming to another incidental question arises for consideration as to whether the petitioner could be appointed as Assistant Master in Senior Basic Schools, which is a promotional post under the rules of recruitment? In this connection it is necessary to point out as seen earlier neither the Govt. Order referred by the petitioner, permits such appointment nor the rules of recruitment could be relaxed to take it within its fold. Contrary to it having regard to the nature of appointment as held by Hon'ble Apex Court in the decisions referred herein before, the object underlying the provisions for grant of compassionate appointment is to enable the family of deceased employee to tide over the sudden crisis resulting due to the death of the bread earner which left the family without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be relieved from financial hardship and distress. Since such provisions makes a departure from general provisions providing for appointment on the post by following particular procedure and such provision enables appointment being made without following said procedure. It is in the nature of an exception to the general provisions. An exception cannot nullify the main provisions to which it is an exception thereby taking away completely the right conferred by the main provision. Thus a care should be taken that a provision for grant of compassionate employment which is in the nature of an exception to the general provision does not unduly interfere with the right of other persons who are eligible for appointment to such employment against the post which would have been available to them but for provisions enabling appointment being made on compassionate grounds of dependents of a deceased employee. Almost in all the aforesaid cases the Hon'ble Apex Court has held that the compassionate appointment should be made at lowest post in service, as only in that situation it would have some rational nexus with the object sought to be achieved vis-Ã-vis competing dominant public interest. Thus there can be no scope for doubt to hold that the petitioner could not be appointed on the post of Assistant Master in Senior Basic Schools or Junior High Schools under Dying in Harness Rules, which is promotional post. His such appointment is neither permissible under the proviso of rule 5(b) of rules unless situation envisaged thereunder is existing meaning thereby unless it is found as fact that suitable candidates are not available for promotion on the said post nor rule 10 of Rules 1981 permits his such appointment by taking recourse to relax the rule 5(b) of the aforesaid rules, which is beyond the scope of relaxation of rules regarding procedural requirement of rules of recruitment envisaged under Rule 10 of the aforesaid Rules.

19. Now coming to the facts and circumstances of the case again, it is not in dispute that petitioner's father who was a permanent Assistant Teacher in Junior High School (Senior Basic School), in

district Padrauna died in harness on 5.5.1982. The petitioner had applied for his compassionate appointment under Dying in Harness Rules on the post of Assistant Teacher in Junior High School (Senior Basic School) run by Board but on 7.3.1987 he was appointed as Assistant Teacher in Primary School (Junior Basic School) instead of Junior High School (Senior Basic School). In pursuance thereof he joined the post on 9.3.1987. Thereafter it appears that on request of Head Master of a Junior High School of district Padrauna, District Basic Education Officer vide order dated 13.1.1996 as a measure of temporary arrangement appointed the petitioner as Teacher in Junior High School (Senior Basic School). But when another District Basic Education Officer took over charge of the office he passed an order on 16.3.1996 directing the petitioner's posting as Assistant Teacher in Primary School (Junior Basic School). Feeling aggrieved against which he made an application before District Basic Education Officer on 8.4.1996 requesting therein that he may be given permanent appointment as Assistant Teacher in Junior High Schools instead of Primary School, in pursuance of Government Order dated 2.2.1996. Ultimately finding no favour from the office of District Basic Education Officer the petitioner filed a writ petition no. 35512 of 1996 which was disposed of finally by this Court vide order dated 6.11.1996 with the direction that representation of petitioner may be decided in pursuance thereof vide order dated 27.1.1997 District Basic Education Officer has decided the representation by reasoned and speaking order whereby the claim of petitioner's compassionate appointment on the post of Assistant Master in Junior High School has been rejected. It is against this order the petitioner has filed above noted petition before this Court.

20. The submission of learned counsel for the petitioner, that in view of para 3 of the Government Order dated 2.2.1996, which provides that appointment of dependent of deceased employee would as far as possible be made in the institution on the post of Assistant Teacher where the deceased have been working and if no post of Assistant Teacher is vacant in that institution then in any other institution of that district and in case there is absolutely no vacancy in the district then supernumerary post may be created in school where the deceased employee had been working, the petitioner was entitled to be appointed on the post of Assistant Teacher in Junior High School as untrained teacher appears to be misconceived for simple reason that the post of Assistant Teacher in Junior High School (Senior Basic School) is a promotional post, as such the petitioner could not claim his compassionate appointment on the said post. Besides this, once he has accepted the post of Assistant Master in Primary School (Junior Basic School) of the Board in the year 1987 on compassionate grounds he can not claim again any higher post on the same ground unless promoted on the said post on his turn according to rules of recruitment. So far as his appointment on the post of Assistant Teacher in Senior Basic School vide order dated 13.1.1996 made by the District Basic Education Officer, is concerned, it was illegally secured by the petitioner by manipulation which too was for short period and by subsequent order dated 16.3.1996 the petitioner has been again posted at

Primary School (Junior Basic School) as Assistant Teacher. Thus aforesaid illegality appears to have been rectified. The appointment of petitioner on the post of Assistant Teacher on 13.1.1996 in Senior Basic School was neither made by way of promotion nor made on regular and permanent basis under the proviso to rule 5 (b) by way of direct recruitment. The proviso appended to the rule 5 (b) of Rules 1981 no doubt permits the recruitment on the post of Assistant Teacher in Junior High School through direct recruitment method under rule-15 of the rules but it is only in the circumstances envisaged under the aforesaid proviso where the suitable candidates entitled for promotion are not available. The averments made in the counter affidavit filed in the writ petition clearly indicates that several eligible, qualified and suitable candidates in the quota of promotion are available and are waiting their turn for promotion on the post in question. In such a situation the proviso cannot come into play in absence of situation envisaged thereunder as discussed herein before. Besides this, since rule 5 cannot be taken into fold of rule 10 permitting relaxation of rule for the reasons indicated herein before, therefore, on this count also the submission of learned counsel for the petitioner appears to be misplaced and has to be rejected.

21. That apart, it is also necessary to point out that the petitioner has secured his illegal appointment on compassionate ground on the post of Assistant Master in Senior Basic School on 13.1.1996 contrary to the rules of recruitment, which was rectified subsequently on 16.3.1996 by District Basic Education Officer, the same view was reiterated again by District Basic Education Officer vide impugned order dated 27.1.1997, thus in my considered opinion in such situation writ jurisdiction of this court under Article 226 of the Constitution of India cannot be invoked by the petitioner to restore an illegal order of District Basic Education Officer dated 13.1.1996 passed in his favour. The aforesaid view also finds support from the decision of Hon'ble Apex Court rendered in **Gadde Venkateswara Rao Vs. Govt. of Andhra Pradesh, A.I.R. 1966 S.C. 828.** The aforesaid decision is being consistently followed by Hon'ble Apex Court in **M.C. Mehta Vs. Union of India, A.I.R. 1999 S.C. 2583 (Pr. 18)** and in **Canara Bank Vs. V.K. Awasthi J.T. 2005 (4) S.C. 40 (Pr. 18).** Therefore in view of aforesaid settled legal position and further since the petitioner has already been enjoying the benefit of compassionate employment on the post of Assistant Master in Primary School of the Board by virtue of his such appointment w.e.f. 7.3.1987, therefore, no interference is called for in the impugned order dated 27.1.1997.

22. Thus in view of aforesaid discussions and observations, I do not find any justification to interfere in the impugned order dated 27.1.1997 passed by District Basic Education Officer, Padrauna on the representation of petitioner. Thus the writ petition is devoid of merits hence liable to be dismissed.

23. Accordingly the writ petition fails and is dismissed.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2006

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SHIV SHANKER, J.

Present:
(Hon'ble Mr. Justice Amitava Lala and Hon'ble Mr. Justice Shiv Shanker)

Criminal Misc. Writ Petition No. 10500 of 2005

Kishan Pal @ K.P. ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioners: S/sri U.C. Mishra, Sushil Kumar Dubey, Dhirendra Singh Rajpoot, B.N. Singh, Rajesh Pathik, S.N. Verma, Smt. Pushpa Verma, Satyendra Narayan Singh, P.N. Tripathi, Ashwini Kumar Awasthi, Manish Tiwary, L.M. Singh, Kamal Krishna, Nisaruddin, Abhijit Mishra, Kapil Tyagi, Shri Prakash Dwivedi, Sameer Jain, Sunil Kumar and Ajay Kumar Malviya.

Counsel for the Respondents: S/sri Surendra Singh, Rajeev Sharma, Hemendra Kumar, N.K. Verma, A.N. Mulla, A. Bhanot, Inderjeet Yadav, S.N. Murtaza and Mrs. M. Bajpai (All learned Additional Government Advocates)

Constitution of India Art.-226-Writ jurisdiction-quashing of FIR-offence under Section 2/3 U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986-in view of Full Bench discussion in Ashok Kumar Dixit case the-ratio of Full Bench having binding effect-No further discussion required-the Division Bench view in Shamshul Islam case being contrary to Full Bench-scrutinizing the individual case under writ jurisdiction-held-no binding effect.

Held: Para 6

Therefore, the Division Bench under writ jurisdiction scrutinized the individual cases of investigation to grant relief in direct conflict with Full Bench decision. It is a departure from the ratio of the Full Bench judgement and as such has no binding effect. That apart, the aforesaid judgement was also distinguished by another Division Bench of this Court in 1999 (1) JIC 804 (All.) (Shamsul Islam Vs. State of U.P.). There the Court held that original relief is quashing of the first information report. Additional relief is in the nature of stay of arrest. If the original relief can not be granted, the order of stay can not be granted. The Act creates a new and distinct offence. The protection of Article 20 (2) of the Constitution of India would not be available at all at any stage and there can be no bar in arresting the person, who has committed an offence, which is punishable under the Act. Therefore, as we understood question of double jeopardy or double conviction or double protection or double arrest may not hit the cause since the source of investigation is the separate law introduced by the State. In a further judgement reported in 2000 All. L.J. 1035 (Rinku alias Hukku Vs. State of U.P. and another) a Division Bench of this High Court held that singular includes plural and vice versa, thereby single act of anti-social activities is sufficient to trap a person as a gangster. Hence, the basis of the judgement reported in Subhash (supra) is no more available in view of the successive judgements and these being later judgements have binding effect upon this Court. There is no occasion to forward the matter to the Larger Bench in view of the discussion made herein.

Case law discussed:
1987 (24) ACC-164 (F.B.) relied on
1988 JIC 405 (DB) distinguished
1999 (1) JIC 804 (D.B.) relied on
2000 ALJ 1035

(B) Constitution of India-Art. 20 (2)- Double jeopardy-applicable where one has been prosecuted and punished for same offence-more than once even if the act similar in nature arises out of two different Acts-can not be held to be same offence-stage of investigation-being pre-cognizance stage-can not be equated with punishment-court issued the guide lines.

Held: Para 9 & 12

Coming back to the question of double jeopardy we say that the same will be applicable when one has been prosecuted and punished for the same offence more than once following the Article 20 (2) of the Constitution of India, meaning thereby more than one same offence under the same Act. If the Acts are different, source of action should have to be different. Hence, even if actions are similar in nature but when arises out of two different Acts, can not be held to be a same offence to attract the question of double jeopardy. In further the stage of investigation is a pre cognizance stage which can not be equated with prosecution and punishment being post cognizance stage which exists where a criminal charge is made before a Court. Pre cognizance stage will be ended by filing charge-sheet or final report.

Case law discussed:
1994 (31) ACC-431
2003 (156) Excise law times 193 (Cal)
AIR 1992 SC-1795
2004 (5) ACC-742
AIR 1992 SC-604
2002 SCC (Crl.) 110

(Delivered by Hon'ble Amitava Lala, J.)

Amitava Lala, J.—1. The aforesaid cases are taken up for analogous disposal. In all the cases more or less similar prayers have been made for quashing first information reports under Sections 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 and stay of arrest of the accused in connection thereto. By and large four categories of cases are involved herein. First category cases are those where several previous cases are initiated/ pending prior to initiation of investigation under this Act. Second category cases are those where single case was initiated/pending prior to initiation of investigation under the Act. Third category cases are those where in spite of acquittal under the Criminal Procedure Code investigation has been initiated or kept pending under this Act. Last category cases are those where no previous case was pending under any other law prior to initiation of investigation under this Act.

2. Therefore, in all the cases investigations by the police authorities under the Act are challenged under writ jurisdiction. A Full Bench judgement of this High Court reported in **1987 (24) ACC 164 (Ashok Kumar Dixit Vs. State of U.P. and another)** can not be avoided whenever any discussion is necessary in this respect. Let us see the ultimate ratio of such judgement hereunder:

"137. These petitions had been filed mainly on the ground that U.P. Act 7 of 1986 was ultra vires the Constitution. We have not been able to find substance in any one of the grounds to attack of the Act. So far as our power to quash the investigations and the proceedings pending before the Special Judges challenged in some of the writ petitions before us, are concerned, we are of opinion that this is not possible to be done in these cases. Judicial opinion seems to be settled and we have several authorities of the Supreme Court where interference

by the Court into police investigation has been disapproved. This question arose in connection with an application under Section 561 A of the Code of Criminal Procedure in an appeal in **State of Bengal v. S.N. Basak (AIR 1963 SC 447).** Kapoor, J. quoted with approval the observations of the Judicial Committee in the case of **Emperor v. Khwaja Nazir Ahmad (AIR 1945 PC page 18);** where the Privy Council observed:

"The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to interfere in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus."

138. This view was followed by the Supreme Court in **State of West Bengal v. Sampat Lal (AIR 1985 SC 195)** and **Eastern Spinning Mills Shri Virendra Kumar Sharda v. Rajiv Poddar (AIR 1985 SC 1668).** In this case, the Supreme Court observed:-

"We consider it absolutely unnecessary to make a reference to the decision of this Court and they are legion which have laid down that save in exceptional cases where non-interference would result in miscarriage of justice, the court and the judicial process should not interfere at the stage of investigation of offences."

139. Of course, the decisions cited above were in connection with Section 482 Cr.P.C., but the scope of interference under Article 226 of the Constitution is narrower. The power of superintendence of the High Court under Article 226 being extra-ordinary is to be exercised sparingly and only in appropriate cases. The power to issue certiorari cannot be invoked to correct an error of fact which a superior Court can do in exercise of its statutory power as a Court of appeal. The High court cannot in exercising its jurisdiction under Article 226 convert itself into a Court of appeal when the legislature has not chosen to confer such a right. The High Court's function is limited to see that the subordinate court of Tribunal or authority functions within the limits of its power. It cannot correct errors of fact by examining the evidence."

(Emphasis supplied)

3. In the aforesaid judgement the Full Bench also held that the Act is punitive in nature unlike the U.P. Control of Goondas Act, 1970, which is otherwise preventive in nature. In view of the ratio of the aforesaid judgement and having its binding effect no further discussion is necessary, but because of following Division Bench judgement it appears to us that discussion is yet open. However, there is no room for further discussion about the vires of the Act admittedly.

4. In **1998 JIC 405 (All.) (Subhash Vs. State of U.P. and another)** a Division Bench of this Court considered the matter basically on the four following questions:-

(1) There could not be a prosecution under the Act for a single incident as the Act spoke of "anti-social activities" (in plural).
(2) Prosecution under the Act for past offences was not thought of.

(3) If at all the Act created a new concept of an offence, there must be some allegation that any act or omission towards the commission of the offence was there.
(4) The words "indulges in" as used under Section 2 of the Act would only mean that there should be habituality of the acts covered by Section 2.

5. In considering such questions the Division Bench held all the anti-social activities enumerated under the definition of "gang" are not covered as offence, but were certainly unlawful activities having serious reflection on the society, though not termed as offences. The law, thus, never required that offence must have been committed in the past for a proper prosecution under this Act. Ultimately, from the bunch of the cases the Court selected six cases to prescribe that the first information reports do not indicate any act or omission on the part of the accused persons named in the first information report and are based on solely reading of records. So far as the others are concerned, the Court was pleased to held that investigations will proceed but till collection of credible evidence beyond the mere allegations of their involvement in the past cases no arrest could be made.

6. Therefore, the Division Bench under writ jurisdiction scrutinized the individual cases of investigation to grant relief in direct conflict with Full Bench decision. It is a departure from the ratio of the Full Bench judgement and as such has no binding effect. That apart, the aforesaid judgement was also distinguished by another Division Bench of this Court in **1999 (1) JIC 804 (All.) (Shamsul Islam Vs. State of U.P.).** There the Court held that original relief is quashing of the first information report. Additional relief is in the nature of stay of arrest. If the original relief can not be granted, the order of stay can not be granted. The Act creates a new and distinct offence. The protection of Article 20 (2) of the Constitution of India would not be available at all at any stage and there can be no bar in arresting the person, who has committed an offence, which is punishable under the Act. Therefore, as we understood question of double jeopardy or double conviction or double protection or double arrest may not hit the cause since the source of investigation is the separate law introduced by the State. In a further judgement reported in 2000 All. L.J. 1035 **(Rinku alias Hukku Vs. State of U.P. and another)** a Division Bench of this High Court held that singular includes plural and vice versa, thereby single act of anti-social activities is sufficient to trap a person as a gangster. Hence, the basis of the judgement reported in **Subhash** (supra) is no more available in view of the successive judgements and these being later judgements have binding effect upon this Court. There is no occasion to forward the matter to the Larger Bench in view of the discussion made herein.

7. So far as the Act is concerned, we quote some of the important parts of it hereunder:

"2 (b) "*Gang*" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other

person, indulge in anti-social activities, namely—

(i) offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code (Act No. 45 of 1860), or
(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or disturbing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act No. 4 of 1910), or the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act No. 61 of 1985), or any other law for the time being in force, or
(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or possession of immovable property whether in himself or any other person, or
(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or
(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No. 104 of 1956), or
(vi) offences punishable under Section 3 of the Public Gambling Act, 1867 (Act No. 3 of 1867), or
(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or
(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or
(ix) offences punishable under Section 171-E of the Indian Penal Code (Act No. 45 of 1860), or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or
(x) inciting others to resort to violence to disturb communal harmony, or
(xi) creating panic, alarm or terror in public, or
(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or
(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or
(xiv) kidnapping or abducting any person with intent to extort ransom, or
(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;"

Section 2 (c) of the Act is giving definition of "gangster", which is as follows:-

"(c) " "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities."

Apart from others, Section 3 of the Act prescribes for various penalties, which are as follows:-

"3. Penalty.-- (1) A gangster, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:

Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees.

(2) Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or after the commission of any offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any Court or of his superior officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine."

Under such Act special courts were formed. It has jurisdiction, power and procedure. Jurisdiction, power and procedure of the special courts are provided under Sections 7, 8 and 10 of the Act, which are quoted hereunder:-

"7. Jurisdiction of Special Courts.- - (1) Notwithstanding anything contained in the Code, where a Special Court has been constituted for any local area, every offence punishable under any provision of this Act or any rule made thereunder shall be triable only by the Special Court within whose local jurisdiction it was committed whether before or after the constitution of such Special Court.

(2) All cases triable by a Special Court, which immediately before the constitution of such Special Court were pending before any Court, shall on creation of such Special Court having jurisdiction over such cases, stand transferred to it.

(3) Where it appears to any Court in the course of any inquiry or trial in respect of any offence that the case is one which should be tried by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by the Special Court in accordance with the provisions of this Act:

Provided that it shall be lawful for the Special Court to act on the evidence, if any, recorded by the Court in the case in the presence of the accused before the transfer of the case under this section:

Provided further that if the Special Court is of opinion that further examination of any of the witnesses whose evidence is already recorded in the case is necessary in the interest of justice, it may re-summon any such witness and after such further examination, cross-examination and re-examination, if any, as it may permit, the witness shall be discharged.

(4) The State Government may, if satisfied that it is necessary or expedient in the public interest so to do, transfer any

case pending before a Special Court to another Special Court.

8. Power of Special Courts with respect to other offences.-- (1) When trying any offence punishable under this Act a Special Court may also try any other offence with which the accused may, under any other law for the time being in force, be charged at the same trial.

(2) If in the course of any trial under this Act of any offence, it is found that the accused has committed any other offence under this Act or any rule thereunder or under any other law, the Special Court may convict such person of such other offence and pass any sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof.

10. Procedure and powers of Special Courts.-- (1) A Special Court may take cognizance of any offence triable by it, without the accused being committed to it for trial upon receiving a complaint of facts which constitute such offence or upon a police report of such facts.

(2) Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special Court may, notwithstanding anything contained in sub-section (1) of Section 260 or Section 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of Section 263 to 265 of the Code, shall, so far as may be, apply to such trial:

Provided that when in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try in a summary way, the Special Court shall recall any witnesses who may have been examined and proceed to rehear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to and in relation to a Special Court as they apply to and in relation to a Magistrate:

Provided further that in the case of any conviction in a summary trial under this sub-section, it shall be lawful for a Special Court to pass sentence of imprisonment for a term not exceeding two years.

(3) A Special Court may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to an offence, tender a pardon to such person, on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned whether as principal or abettor in the commission, thereof, and any pardon so tendered shall, for the purposes of Section 308 of the Code, be deemed to have been tendered under Section 307 thereof.

(4) Subject to the other provisions of this Act a Special Court for the purpose of trial of any offence, have all the powers of a Court of Session and shall follow the procedure prescribed in the Code for the trial of warrant cases by the Magistrate.

(5) Subject to the other provisions of this Act every case transferred to a Special Court under sub-section (3) of Section 7 shall be dealt with as if such case had been transferred under Section 406 of the Code to such Special Court."

8. Therefore, when the Special Courts are empowered to summary disposal, there is hardly anything to be interfered with by the writ Court. The Act is, by and large, a complete code for effective and expeditious disposal. If there is any lacuna, that can be filled up by the general procedural law i.e. Code of Criminal Procedure.

9. Coming back to the question of double jeopardy we say that the same will be applicable when one has been prosecuted and punished for the same offence more than once following the Article 20 (2) of the Constitution of India, meaning thereby more than one same offence under the same Act. If the Acts are different, source of action should have to be different. Hence, even if actions are similar in nature but when arises out of two different Acts, can not be held to be a same offence to attract the question of double jeopardy. In further the stage of investigation is a pre cognizance stage which can not be equated with prosecution and punishment being post cognizance stage which exists where a criminal charge is made before a Court. Pre cognizance stage will be ended by filing charge-sheet or final report. According to us, in delivering the judgement in **Subhash (supra)** the Court was definitely influenced by the principle of personal liberties as discussed in the case of **Joginder Kumar Vs. State of U.P. and others** reported in **1994 (31) ACC 431**. A three Judges Bench of the Supreme Court held as follows:-

"A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the Officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police Officer issues notice to person to attend the Station House and not to leave Station without permission would do."

10. The ratio of the judgement in connection with **Joginder Kumar (supra)** is based on altogether a different situation. A person was detained for few days in the police custody without formal arrest. For few days whereabouts of the person was unknown. When Supreme Court intervened, it was contended by the Police that he was not detained at all. Some informations were being collected from him during such period in connection with a case of abduction and the person was helpful in co-operating with the police. Under such circumstances, the Court had not granted any relief in the nature of habeas corpus but instead of putting the end of the writ petition made certain observations as regards question of personal liberties. The Court held that the horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, the Court has been receiving complaints about violation of human rights because of indiscriminate arrests. A realistic approach should be made in this direction. Factual basis of the judgement is apprehension of custodial violence. The Supreme Court expanded the scope of personal liberties in connection with

custodial violence even if one is not formally detained. We have no quarrel with such judgement nor we can do so. On the contrary, we say that one of us (Hon'ble Amitava Lala, J.) already held in a case similar situation as reported in **2003 (156) Excise Law Times 193 (Cal.) (Mahendra Jain (Patni) Vs. U.O.I.)** that even if a person is detained in the name of investigation without taking into custody formally, he is entitled to get protection under the Protection of Human Rights Act, 1993 and, therefore, the Human Rights Commission was directed to enquire into the matter and furnish a report before the appropriate Government. Factually the petitioners were taken in the custody in the name of interrogation and detained for one or two days and physically tortured. It is to be remembered that at the time of hearing of such matter a judgement reported in **AIR 1992 SC 1795 (Poolpandi etc. etc. Vs. Superintendent, Central Excise and others etc. etc.)** was cited to establish that there is a sharp distinction between an accused in a criminal case and a person called for interrogation. Therefore, protection of an accused can not be available to others. However, the Court at the time of delivering such judgement observed that the persons not being accused have better position in the society, therefore, if any protection is available to the accused, can also be made available to such persons who are in the name of interrogation restrained by the appropriate investigating authorities in such manner. Fortunately, protection of such persons is the ratio of the judgement of **Joginder Kumar (supra).** In the instant cases no body has been taken into custody formally or informally. Nothing more than apprehension of arrest is available. At the stage of investigation the Court should not interfere with it. We are well aware that the people are apprehensive about long-lasting investigation of the police and Court proceedings. They are also apprehensive about unnecessary police rigour. This is the real agony but not the quashing of F.I.R. (First Information Report). Therefore, the real purpose is to get stay of arrest. That can not be granted by the Court since in the appropriate cases one can get expeditious disposal of bail application following the ratio of **2004 (5) ACC 742 (Smt. Amarawti and another Vs. State of U.P.).** Apart from the question of bail, in these days protection of personal liberties are far more secured. The horizon of human rights is not expanding but expanded. The police authorities are very much aware about the human rights activities. Section 2 (d) of the Protection of Human Rights Act, 1993 provides as follows:

"(d) "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India."

11. Therefore, if an innocent person is victimised, he can get benefit of the same. Similarly, habeas corpus writ proceedings are available where now-a-days Courts are not showing any latitude in considering the appropriate issues. Even in the appropriate cases the Court is interfering under public interest litigation. But scrutinization of individual facts of investigation under writ of certiorari is not permissible. Both Full Bench of this High Court in **Ashok Kumar Dixit (supra)** and the Supreme Court in **AIR 1992 SC 604 (State of Haryana and others Vs.**

Ch. Bhajan Lal and others) observed that the power of the writ court will be sparingly exercised in the rarest of the rare cases. Here, the object of the Act is that gangsterism and anti-social activities influenced the State legislature in making introduction of such Act. The statement of objects and reasons of the Act is that gangsterism and anti-social activities were on the increase in the State posing threat to lives and properties of the citizens. The existing measures were not found effective enough to cope with new menance. With a view to break the gangs by punishing the gangsters and to nip their conspiratorial designs it was considered necessary to make special provisions for the prevention of, and for coping with gangsters and anti-social activities in the State. Therefore, desire of the legislature in introducing the Act was pious. Hence, the only question is about misuse of power. Therefore, if the Court streamlines the process by giving guidelines following the ratio of the Supreme Court judgement reported in **2002 SCC (Cri) 110 (Mahendra Lal Das Vs. State of Bihar and others)** persons concerned will be benefited at the appropriate stages. The ratio of the Supreme Court judgement is as follows:

"It is true that interference by the court at the investigation stage is not called for. However, it is equally true that the investigating agency cannot be given the latitude of protracting the conclusion of the investigation without any limit of time."

12. Following the ratio of such judgement we can formulate certain guidelines for the future, as under:

a) It is expected that the investigation will be completed by the police within the prescribed limit under the general law i.e. Section 167 of Code of Criminal Procedure, 1973 by filing the charge-sheet or final report, if the accused is in custody within that period;

b) It is expected that the Special Court will conclude the hearing of the cases, where rate of crime is not so higher by applying a summary procedure preferably within a period of 3-6 months from the date of filing the charge-sheet before the Court depending upon the facts and circumstances of each case;

c) In case of pendency of Appeal/Revision/Review by an accused, Special Court will be empowered to split up the file in respect of other co-accused to avoid delay in hearing the case;

d) If any person applied or surrendered or produced before the Court in connection with the matters where rate of crime is not higher, the Special Court expeditiously dispose it of following the principles as laid down in **Smt. Amarawati (supra);**

e) In case the Special Court found that the crime case is not so negligible nor the rate of crime is lower in nature, it will proceed strictly in accordance with law;

f) It will be solemn duty of the Special Courts and the police authorities to follow the guidelines for the sake of investigation viz-a-viz personal liberties.

All earlier order/s passed by this Court is reviewed hereunder and will be bound by this latest view. However, no relief can be granted directly to the

petitioners individually by this Court. Therefore, the writ petitions stand dismissed. Interim order, if any, stands vacated.

However, no order is passed as to costs.

Office is directed to keep a copy of this judgement in the file of all the writ petitions decided with this writ petition.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2005

BEFORE
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 15991 of 1999

Manvendra Pratap Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.B. Paul
Sri Pankaj Srivastava

Counsel for the Respondents:
Sri Praveen Kumar
Sri Anil Kumar
S.C.

Uttar Pradesh Secondary Education Service Selection Boards (Amendment) Act-1995-(U.P. Act No. 16 and 18-Short term vacancy-caused in L.T. Grade teacher-intimation send by the management to the D.I.O.S. as well as to board-on failure to make appointment-management by advertising the short term vacancy on 3.8.98-by letter dated 10.8.98 appointed the petitioner and sought approval from D.I.O.S.-on inaction-petitioner approached under writ jurisdiction-held-procedure provided under section 18 not followed by the management-adhoc appointment being contrary to Rule-confer no right-financial approval rightly refused.

Held: Para 10

Thus, once Section 16 of the Act was made subject to the provisions Section 18 of the Act by U.P. Act No. 15 of 1995 and Section 18 of the Act also provided for a detailed procedure to be followed while making appointments on ad hoc basis it became imperative that the ad hoc appointment in the present case should have been made in accordance with the provisions of Section 18 of the Act. Admittedly the procedure provided for in Section 18 of the Act was not followed by the Committee of Management. The Committee of Management itself had advertised the post and the Selection Committee constituted by it had made the recommendation. The appointment of the petitioner as an ad hoc teacher was, therefore, contrary to the provisions of Section 18 of the Act. It is, therefore, void and cannot confer any right upon him. The relief claimed for in this petition to grant financial approval to the appointment of the petitioner on the post of Assistant Teacher (L.T. Grade), therefore, cannot be granted.

Case law discussed:
1994 (3) UPLBEC-1551
1996 (10) SCC-62

(Delivered by Hon'ble Dilip Gupta, J.)

1. This petition has been filed for a direction upon the District Inspector of Schools, Aligarh to accord financial approval to the appointment of the petitioner on the post of Assistant Teacher (L.T. grade) in Hira Lal Barasaini Inter College, Aligarh (hereinafter referred to as the "College') and to pay him salary regularly including arrears w.e.f. 10th August, 1998.

2. The petitioner claims that in the aforesaid College, which is a recognised Government aided College, a number of vacancies on the post of Assistant Teacher (L.T. grade) were lying vacant but despite intimation having been sent by the Committee of Management of the College, the District Inspector of Schools, Aligarh and the U.P. Secondary Education Services Commission and Selection Board (hereinafter referred to as the "Secondary Education Board") did not make any appointment. In such circumstances the Committee of Management decided to fill-up the existing short term vacancies of Assistant Teacher (L.T. grade) on ad hoc basis by issuing an advertisement in the Newspaper "Parabada Dainik" dated 3rd August, 1998. In response to the aforesaid advertisement the petitioner and other candidates submitted applications and on the basis of the recommendations made by the Selection Committee the petitioner was appointed as Temporary Assistant Teacher (L.T. Grade) on ad hoc basis by means of the letter dated 10th August, 1998. The petitioner thereafter joined the services on 10th August 1998 and by means of the communication dated 24th October, 1998 the Committee of Management of the College sought approval of the appointment of the petitioner from the District Inspector of Schools, Aligarh. However, when no communication was received from the office of the District Inspector of Schools, the petitioner filed this petition on 17th April, 1999 when the matter was adjourned on the request made by the learned counsel for the petitioner that he desired to file a supplementary affidavit disclosing the Newspapers wherein the advertisements were published. A supplementary affidavit was filed on behalf of the petitioner mentioning therein that the advertisement was also published in the Newspaper "Dainik Prakash" dated 3rd August, 1998.

3. A counter affidavit has been filed by the Assistant District Inspector of Schools, Aligarh on behalf respondent nos. 1, 2 & 3. It has been pointed out that the appointment had not been made in accordance with the provisions of the Act and the Removal of Difficulties Order and was also contrary to the decision of this Court given in the case of ***Radha Raizada and others vs. Committee of Management, Vidyawati Darbari Girls Inter College & Ors,. (1994) 3 UPLBEC 1551*** as the vacancy was not advertised in two Newspapers having vast circulation in the State but was advertised only in local Newspapers. It was further pointed out that it was imperative for the College to have intimated the Board about the appointments to be made on the vacancies but that had not been done. In such circumstances, it was pointed out that the petitioner was not entitled to any relief from this Court.

4. I have heard learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents and have perused the material available on record.

5. Section 18 of The Uttar Pradesh Secondary Education Services Commission and Selection Boards Act, 1982 (hereinafter referred to as the "Act') has been amended time and again and in order to appreciate the contention of the learned counsel for the petitioner it may be pertinent to refer to the provisions of Section 18 of the Act and to the provisions of the Uttar Pradesh Secondary

Education Services Commission (Removal of Difficulties) Order, 1981 which is more popularly known as the First Removal of Difficulties Order, 1981. Section 18 of the Act as amended by U.P. Act No.24 of 1992 provided that where the management notified a vacancy to the Commission in accordance with the Provisions of the Act, and the post of such teacher actually remained vacant for more than two months, the management could appoint by direct recruitment or promotion a teacher, on purely ad hoc basis, in the manner provided for in the section. Subsequently amendments were made in the Act by U.P. Act No. 1 of 1993 but it was provided that the Amendment Act shall come into force on such date as the State Government may by notification appoint and different dates could be appointed for different provisions. Under section 11 of the U.P. Act No. 1 of 1993 a new Section 16 was substituted for Section 16 of the Act and it was stated that notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the Regulations made there under but subject to the provisions of Sections 21-B, 21-C, 21-D, 33, 33-A, 33-B, every appointment of a teacher shall, on or after the date of commencement of the Amendment Act, be made by the management only on the recommendation of the Board. What is important to be noted under the amended Section 16 is that reference to Section 18 was omitted with the result that Section 16 was no longer subject to Section 18 of the Act. It may also be pertinent to state that under Section 13 of U.P. Act No. 1 of 1993, Section 18 of the Act was omitted. Under the notification dated 7.8.1993 it was provided that 7th of August, 1993 would be the date on which the U.P. Act No. 1 of 1993 shall come into force except Section 13. Thus Section 16 of the Act came into force w.e.f. 7.8.1993 but Section 18 still continued since Section 13 of U.P. Act No.1 of 1993 did not come into force. Thus a situation had arisen where Section 16 of the Act was no longer subject to Section 18 of the Act meaning thereby that no appointment on ad hoc basis could be made under Section 18 of the Act. This matter came up for decision before a Full Bench of this Court in the case of ***Radha Raizada and Others vs. Committee of Management, Vidyawati Darbari Girls Inter College & Ors. (1994) 3 UPLBEC 1551*** and the Court clearly held as follows:-

"Thus after omission of Section 18 from Section 16 no ad hoc appointment is permissible under Section 18 and if made, would be void under sub-section (2) of Section 16 of the Act."

6. The Full Bench, however, examined the problem that if no ad hoc appointment of a teacher could be made under Section 18 of the Act, then whether it was permissible to appoint a teacher on ad hoc basis under the First Removal of Difficulties Order, since the Removal of Difficulties Order still continued. The Court noticed that a perusal of Section 16 would show that it was still subject to Section 33 of the Act, which empowers the Government to issue Removal of Difficulties Order. The Court, therefore, held that since the Removal of Difficulties Order had been issued under Section 33 of the Act, an ad hoc appointment, either by direct or by promotion under the Removal of Difficulties Order would be a valid appointment. It was also observed that if the management had made an ad hoc appointment without following the procedure laid down in paragraph 5, the

District Inspector of Schools can stop payment of salary to such a teacher.

The Court held as follows:-

"Omission of Section 18 has not yet been enforced with a result the conditions precedent namely notification of substantive vacancy to the Commission and further the post has remained vacant for more than two months are still there and if these two conditions are fulfilled, it is only then the management can appoint ad hoc teacher either by promotion or by direct recruitment in accordance with the procedure laid down in the First Removal of Difficulties Order."

7. The Supreme Court also had an occasion to examine the validity of the ad hoc appointments which were not made in accordance with the procedure provided for under paragraph 5 of the First Removal of Difficulties Order in the case of ***Prabhat Kumar Sharma and others Vs. State of U. P. and others reported in (1996) 10, SCC 62*** and it was clearly held that any ad hoc appointment not made in accordance with paragraph 5 of the First Removal of Difficulties Order is an illegal appointment and is void and confers no right on the appointee. It may be useful to reproduce a passage from the judgment made in the context of paragraph 5 of the First Removal of Difficulties Order and it is as follows:-

"It is an inbuilt procedure to avoid manipulation and nepotism in selection and appointment of the teachers by the management to any post in an aided institution. It is obvious that when the salary is paid by the State to the Government aided private educational institutions, public interest demands that the teachers' selection must be in accordance with the procedure prescribed under the Act read with the First 1981, Order".

8. The Act was further amended by the Uttar Pradesh Secondary Education Services Selection Boards (Amendment) Act, 1995 (U. P. Act No. 15 of 1995). The Amendment Act came into force w.e.f. 28.12.1994. The relevant amendments caused by U.P. Act No. 15 of 1995 which are relevant for the purposes of the controversy involved in the present petition are the amendments made in Sections 16 and 18 of the Act. Section 16 of the Act was again made subject to Section 18 of the Act. The relevant portions of Section 18 of the Act are reproduced below:-

"*18. Ad hoc teachers.*- (1) Where the Management has notified a vacancy to the Commission in accordance with sub-section (1) of Section 10 and the post of a teacher actually remained vacant for more than two months, the Management may appoint by direct recruitment or promotion a teacher on purely ad hoc basis, in the manner hereinafter provided in this section.

(2) A teacher other than a Principal or Headmaster, who is to be appointed by direct recruitment may be appointed on the recommendation of the Selection Committee referred to in sub-section (8).

(3) A teacher other than a Principal or Headmaster, who is to be appointed by promotion, may in the prescribed manner be appointed by promoting the senior most teacher, possessing prescribed qualifications-

(a) in the trained graduate's grade, as a lecturer, in the case of a vacancy in the lecturer's grade;
(b) in the Certificate of Teaching grade, as teacher in the trained graduate's Grade, in the case of a vacancy in the Trained graduate's grade.

.....

(6) For the purposes of making appointments under sub-sections (2) and (3), the Management shall determine the number of vacancies, as also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, the Scheduled Tribes and Other Backward Classes of citizen in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and, as soon as may be thereafter, intimate the vacancies to be filled by direct recruitment to the District Inspector of Schools and if the Management fails to intimate the vacancies and the post of a teacher has actually remained vacant for more than three months, the District Inspector of Schools may, subject to such directions as may be issued by the Director and after verification from such institution or from his own record, determine such vacancies himself.

(7) The District Inspector of Schools shall, on receipt of intimation of vacancies or as the case may be, after determining the vacancies under sub-section (6), forward the same to the Deputy Director of Education in charge of the Region, who shall invite applications from the persons possessing qualifications prescribed under the Intermediate Education Act, 1921 or the regulations made thereunder, for ad hoc appointment to the post of teachers other than Principal or Headmaster in such manner as may be prescribed.

(8) (a) For each region there shall be a Selection Committee for selection of candidates for ad hoc appointment by direct recruitment comprising-

(i) Regional Deputy Director of Education;
(ii) Regional Deputy Director of Education (Secondary);
(iii) Regional Assistant Director of Education (Basic).

The Regional Deputy Director of Education who is senior shall be the Chairman.

(b) The Selection Committee constituted under clause (a) shall make selection of the candidates, prepare a list of the selected candidates, allocate them to the Institutions and recommended their names to the Management for appointment under sub-section (2).

(c) The criteria and procedure for selection of candidates and the manner of preparation of list of selected candidates and their allocation to the Institution shall be such as may be prescribed.

(9) Every appointment of an ad hoc teacher under sub-section (1) shall cease to have effect from the date when the candidate recommended by the Commission joins the post."

9. It may also be pointed out that minor amendments were again made in Section 18 of the Act by U.P. Act No.25 of 1998 but they are not relevant to the controversy involved in this petition. In sub-section (1), for the word "Commission", the word "Board" was substituted and in sub-section (a), for the Clause "A" the following Clause was substituted namely:-

"(a) For each region there shall be a Selection Committee for selection of candidates for ad hoc appointment by direct recruitment comprising –
(i) Regional Joint Director of Education (Secondary);
(ii) Regional Deputy Director of Education (Basic);
(iii) Regional Assistant Director of Education (Basic);

The Regional Joint Director of Education shall be the Chairman."

Further in sub-section (9), for the word "Commission", the word "Board" was substituted.

10. Thus, once Section 16 of the Act was made subject to the provisions Section 18 of the Act by U.P. Act No. 15 of 1995 and Section 18 of the Act also provided for a detailed procedure to be followed while making appointments on ad hoc basis it became imperative that the ad hoc appointment in the present case should have been made in accordance with the provisions of Section 18 of the Act. Admittedly the procedure provided for in Section 18 of the Act was not followed by the Committee of Management. The Committee of Management itself had advertised the post and the Selection Committee constituted by it had made the recommendation. The appointment of the petitioner as an ad hoc teacher was, therefore, contrary to the provisions of Section 18 of the Act. It is, therefore, void and cannot confer any right upon him. The relief claimed for in this petition to grant financial approval to the appointment of the petitioner on the post of Assistant Teacher (L.T. Grade), therefore, cannot be granted.

11. The Writ Petition is accordingly dismissed.

There shall be no order as to costs.
Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2006

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

Civil Misc. Writ Petition No. 68245 Of 2005

Mehndi Hasan ...Petitioner
Versus
Deputy Director of Consolidation, Siddharth Nagar & others...Respondents

Counsel for the Petitioner:
Sri Tripathi B.G. Bhai

Counsel for the Respondent:
Sri B.K. Srivastava
Sri R.K. Chitragupt
Sri P.P. Chaudhary
S.C.

U.P. Consolidation of Holding Art 1953–Section 48–Revisional Power–Chak allotment–Petition's chak not disturbed upto S.O.C. stage-while considering the revision the DDE excluded Plot no. 259, 430 from chak and given totally, 'Udan' chak over plot no. 51 without application of mind based non spiking order–held Liable to be quashed.

Held: Para 3

On consideration of the entire materials on record and impugned orders of Deputy Director of Consolidation and Settlement Officer Consolidation, it is clearly borne out that the orders are without any reason and without application of mind to the grievance of the parties. Appellate order is also

without application of mind and is a non-speaking order. As both the appellate as well as revisional authorities have not considered the grievance of the parties and orders are not speaking order same are liable to be quashed on this ground alone.

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

1. This writ petition is directed against the order dated 23.9.2005 passed by Deputy Director of Consolidation, Siddharth Nagar, allowing revision and making certain amendment in chak of the petitioner and contesting Opposite Party Nos. 2,3 and 4 in the proceeding of allotment of Chak.

Heard learned counsel for the parties.

2. From perusal of the record, it transpires that Opposite Party no. 4 filed a time barred appeal against an order dated 25.8.2003 passed by Consolidation Officer, which was allowed and chak of Opposite Party No. 2 and Opposite Party No. 4 was altered, against which Opposite Party No. 2 preferred a revision which was allowed and petitioner's Chak was disturbed. It is important to note from the record that petitioner's Chak was not disturbed upto Settlement Officer of Consolidation stage. Opposite Party No. 2 preferred revision against an order dated 5.2.2004 passed by Settlement Officer of Consolidation. Though, petitioner's Chak was not disturbed up to that stage, but while allowing revision, petitioner's Chak was disturbed by the order of Deputy Director of Consolidation and his original plot no. 259 430 air was excluded from his Chak and a totally Udan Chak on plot no. 51 ltc was given to him. Learned counsel for parties raised several argument as to illegality of the order and also that the order is non-speaking order.

3. On consideration of the entire materials on record and impugned orders of Deputy Director of Consolidation and Settlement Officer Consolidation, it is clearly borne out that the orders are without any reason and without application of mind to the grievance of the parties. Appellate order is also without application of mind and is a non-speaking order. As both the appellate as well as revisional authorities have not considered the grievance of the parties and orders are not speaking order same are liable to be quashed on this ground alone.

4. In view of the discussions made above, writ petition succeeds and is allowed. Impugned order dated 23 March, 2005 passed by Deputy Director of Consolidation, Siddharth Nagar and order dated 5.2.2005 passed by Settlement Officer of Consolidation are quashed. The matter is remanded to Settlement Officer of Consolidation who shall pass appropriated orders in accordance with law after giving opportunity of hearing to parties within 3 months from the date of production of certified copy. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2006

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE PRAKASH KRISHNA, J.
THE HON'BLE K.N. OJHA, J.

Civil Misc. Writ Petition No.252 of 1994

M/s Bhadauria Gram Sewa Sansthan, Fatehpur ...Petitioner
Versus
Assistant Commissioner, Sales Tax, Allahabad Division, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri R.K.S. Chauhan
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U.P. Sales Tax (Now Trade Tax Act) 1948-Section 7-D-composite scheme-launched by the State Govt.-investing option from all brick kiln owners-either to pay Tax on actual sale or purchase or to option for giving tax in lump sum amount-once option given-can not be permitted to turn around or resile from liability on the ground no any manufacturing activity done during the relevant year-held-law laid down by Division Bench in M/s Jaya Bhatta udyog followed by other Division Bench in M/s Durga Brick field and Jai Sharma Int Udyog-are correct law.

Held: Para 39 & 42

The amount payable under the composition scheme is not relatable to any actual turnover but depends upon the agreement under the scheme at the option of the dealer. The dealer having once exercised its option, cannot, therefore, be permitted to turn around and resile from its liability merely on the ground that had had no turnover or had not done any manufacturing activity during the relevant year.

In view of the foregoing discussions, we are of the considered opinion that the Division Bench in the case of M/s Jaya Bhatta Udyog (supra) subsequently followed by other Division Benches in the case of M/s Sri Durga Brick Field and Jai Sharma Int Udyog (supra) lay down the correct law.

Case law discussed:
1965 (2) SCR-45
AIR 1958 SC-560
AIR 1975 SC-1121
1996 (5) SCC-740
1996 (4) SCC-704
1997 (2) SCC-183
J.T. 2000 (4) SC-77
2001 (10) ELT 513 (SC)
2000 (119) ELT 531
1980 UPTC 64-FB
W.P. No.858/90 decided on 17.7.90
1991 UPTC-510
1999 (116) 585
AIR 1983 SC-2414
2002 (3) SCC-175
2004 (9) SC-19

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

1. Disagreeing and also doubting the correctness of the law laid down by a co-ordinate Bench of this Court in the case of **M/s Jaya Bhatta Udyog v. State of U.P.** (Civil Misc. Writ Petition No.858 of 1990, decided on 17.7.1990), followed subsequently by two Division Benches in the case of **M/s Sri Durga Brick Field v. State of U.P.,** 1991 UPTC 510, and **Jai Sharma Int Udyog v. Deputy Collector (Collection), Sales Tax**, (1999) 116 STC 357, wherein this Court has held that once a person elects to pay the sales tax in lump sum under the scheme announced

under Section 7-D of the U.P. Sales Tax Act, 1948 (hereinafter referred to as "the Act"), he could not be permitted to turn around and contend that he was not liable to pay the amount, agreed to be paid by him, because his turnover turned out to be either nil or that it was not adequate on account of various factors, a Division Bench had referred the matter to be considered by a larger Bench of this Court. The Full Bench has, therefore, been constituted to reconsider the correctness of the aforesaid judgments rendered by the Division Bench.

2. While referring the matter for reconsideration by the larger Bench, the Division Bench has expressed its disagreement in the following words :-

"We have carefully perused the above decisions and we are in respectful disagreement with the same. In the aforesaid decisions it has been held that once the petitioner has opted for composition scheme he has to pay Trade Tax even if he has not made any sales. In our opinion sales tax (now known as Trade Tax) is payable when there is a sale. When there is no sale we cannot understand how sales tax (Trade Tax) can be charged.

3. It may be mentioned that Section 7-D mentions that "assessing authority may agree to accept the composition money either in lump sum or at an agreed rate on the dealers turnover **in lieu of tax** that may be payable by a dealer in respect of such goods or class of goods...."

4. Thus Section 7-D is only a convenient mode of realization of Trade Tax and it has been made so that the dealer may not be harassed to go to the Trade Tax office again and again. Thus Section 7-D provides for convenient alternative mode of realization of Trade Tax.

5. The word turnover has been defined in Section 2(i) of the U.P.Trade Tax Act as follows:-

"turnover" means the aggregate amount for which goods are supplied or distributed by way of sale or are sold, by a dealer, either directly or through another, on his account or on account of others, whether for cash or deferred payment or other valuabe consideration."

6. Thus the turnover is only payable when there are sales and when there are no sales there is no question of any turnover. Hence also in our opinion no Trade Tax can be demanded or realised from a dealer when he has not made any manufacture or sale.

It may be mentioned that as far back in State of Madras v. Gannon Dunkerley, AIR 1958 SC 560, it was held that to levy sales tax there must be a sale as defined in the Sales of Goods Act. No doubt this definition of sale both in the Constitution and Sales Tax Acts has been changed and now it includes works contract, agreement to use, etc. but still there must be some transaction, and if there is no transaction obviously no sales tax can be levied.

7. Learned Standing Counsel relied on the decision of the Supreme Court in Commissioner, Central Excise vs. M/s Venus Castings (P) Ltd. JT 2000 (4) SC 77 which has affirmed the Division Bench decision of this Court in M/s Jalan Castings (P) Ltd. vs. Commissioner, Central Excise 2000 (119) ELT 531. The

decision in Jalan Castings' case (supra) involved the controversy as to whether once having opted for the composition scheme a dealer can turn around and ask for a regular assessment, and it was held that he cannot. This controversy is totally different from that which is involved in the present case. In the present case the question is whether there can be demand of Trade Tax when there is no production or sale at all."

Facts of the case:

8. In the year 1993, the petitioner, M/s Bhadauria Gram Sewa Sansthan, Fatehpur, it is alleged, took over a brick kiln which was functioning in the name and style of Bhadauria Brick Field, for manufacturing bricks in the name and style of the petitioner. It applied for grant of registration with the sales tax department on 21.2.1993. The Sales Tax Officer, Fatehpur, vide order dated 21.3.1993, registered the petitioner society as a dealer under the Act with effect from 1.4.1993. The registration was effective for a period of three assessment years, i.e., 1993-94, 1994-95 and 1995-96. The Government of Uttar Pradesh announced a scheme, commonly known as Composition Scheme, under the provisions of Section 7-D of the Act under which an option was given to all brick kiln owners to either pay the tax assessed on their actual sales or purchase or to give an option to pay the tax in one lump sum. Under the said scheme, the brick season was from 1.10.1992 to 30.9.1993. The amount payable by the brick kiln owners who have opted under the said Scheme, was known as **SAMADHAN DHANRASHI** or the composition amount. It was fixed according to the capacity determined in terms of **PAYA** or columns. The petitioner's brick kiln had 19 **PAYA.** It opted for payment of tax under the composition scheme and deposited a sum of Rs.8,600/- on 19.3.1993, being 20% of the total composition money. According to the petitioner, it could not run the brick kiln during the brick season 1992-93, i.e., from 1.10.1992 to 30.9.1993 and, therefore, informed the sales tax authorities to make survey and physical verification so that the petitioner may not be saddled with the liability for payment of the composition money. This information is alleged to have been given on 16.4.1993 to the Sales Tax Officer, Fatehpur, who surveyed the petitioner's brick kiln on 8.9.1993 and found that the chimney is broken and on the basis of the statements given by the local persons, came to the conclusion that in the first season of the Assessment Year 1993-94, no burning has been done in the brick kiln by the petitioner. The matter was referred to the Deputy Commissioner (Administration), Sales Tax, Allahabad who, vide order dated 23.12.1993, did not accept the plea of the petitioner that it is not liable to pay any amount towards the composition money on the ground that the brick kiln did not function as, according to the Deputy Commissioner, once an application has been submitted under Section 7-D of the Act exercising the option to pay the amount in lump sum, it cannot be withdrawn for any reason whatsoever. As the petitioner had failed to deposit the balance amount due under the composition scheme, the Sales Tax Officer, Fatehpur, vide notice dated 22.9.1993, directed the petitioner to deposit the balance amount of Rs.34,400/- alongwith interest due thereon as also penalty of Rs.2,000/.

Relief sought :

9. The demand of the balance amount of composition fee alongwith interest and penalty as also the order dated 23.12.1993 passed by the Deputy Commissioner (Administration), Sales Tax, Allahabad have been challenged by the petitioner in the present writ petition.

Provision of law :

Section 7-D of the Act runs as under:-

"7-D. Composition of tax liability - Notwithstanding anything contained in this Act, but subject to directions of the State Government, the Assessing Authority may agree to accept a composition money either in lump sum or at any agreed rate on his turnover in lieu of tax that may be payable by a dealer in respect of such goods or class of goods and for such period as may be agreed upon:

Provided that any change in the rate of tax which may come into force after the date of such agreement shall have effect of making a proportionate change in the lump sum on the rate agreed upon in relation to that part of the period of assessment during which the changed rate remains in force.

Explanation. - For the purposes of this section the Assessing Authority includes an officer not below the rank of Trade Tax Officer, Grade II, posted at a check post."

Law laid down in the cases referred for reconsideration :

M/s Jaya Bhatta Udyog's case:

10. In the case of M/s Jaya Bhatta Udyog, a Division Bench of this Court has held that Section 7-D of the Act is very clear. It enables the dealer to pay the sales tax in lump sum in lieu of the tax. For that purpose, the dealer executes an agreement undertaking to pay the sales tax in lump sum and the liability arising under such agreement is not related to actual turnover of the petitioner. The petitioner having elected to pay the sales tax in lump sum, could not be permitted to turn around and contend that he was not liable to pay the amount agreed to be paid by him because his turnover turned out to be either nil or that it was not adequate on account of various factors. This Court has further held that there is another reason why it is not persuaded to interfere. Clause 16 of the agreement specifically provided that it would not be open to the dealer to pay a reduced amount or to resile therefrom as that clause clearly contemplated that once a dealer agreed to pay the tax in lump sum, they cannot insist on payment of the tax on the basis of actual turnover and the dealer's rights are, in the opinion of the Court, regulated entirely by the terms of the agreement.

M/s Sri Durga Brick Field's case :

11. In the case of M/s Sri Durga Brick Field, another Division Bench of this Court has relied upon the opinion expressed in the case of M/s Jaya Bhatta Udyog.

Jai Sharma Int Udyog's case :

12. In the aforesaid case, a Division Bench of this Court was considering the

question as to whether where a dealer has opted to pay the tax in terms of the Scheme under Section 7-D of the Act, can he be permitted to resile from the same subsequently for one reason or the other including that he had no turnover that could have been brought to tax. This Court has referred in extenso the law laid down in the case of **M/s Jaya Bhatta Udyog (supra)** and has held that the petitioner therein is not entitled to any relief from this Court.

13. As already mentioned hereinbefore, the Division Bench had disagreed with the aforesaid three Division Benches on the ground that the sales tax, now known as Trade Tax, is payable when there is a sale and when there is no sale, the court wondered as to how the sales tax (trade tax) could be charged. According to the Division Bench, Section 7-D is only a convenient mode of realisation of the sales tax and it has been made so that the dealer may not be harassed to go to the Trade Tax office again and again and the tax is only payable when there are sales and when there are no sales, there is no question of any turnover and, therefore, in its opinion, no Trade Tax can be demanded or realised from a dealer when he has not made any manufacture or sale. The Division Bench had distinguished the decision of the Apex Court in the case of **M/s Venus Castings** (supra) on the ground that the controversy involved therein as to whether once having opted for the composition scheme, a dealer can turn around and ask for a regular assessment, and it was held that he could not whereas, in the present case, the question is whether there can be demand of Trade Tax when there is no production or sale at all.

14. We have heard Sri Navin Sinha, learned Senior counsel, assisted by Sri R.K.S.Chauhan, on behalf of the petitioner, Sri S.M.A.Qazmi, learned Chief Standing Counsel, assisted by Sri K.M.Sahai and Sri S.P. Kesarwani, learned Standing Counsels, appearing for the respondents.

Rival Submissions :

15. Sri Navin Sinha, learned Senior Counsel, has submitted that, under Section 7-D of the Act, the amount to be paid is in lieu of the amount of tax that may be payable by a dealer in respect of such goods or class of goods and for such period, as may be agreed upon. Laying emphasis on the words "in lieu of', he submitted that if there was no liability for payment of tax, as there was no production or sale during the relevant period, the petitioner cannot be saddled with the liability for payment of the amount agreed by it as the liability to pay the said amount was in place of the amount of tax payable on actual sales.

16. He further submitted that to levy the sales tax, there must be a sale as defined in the Sale of Goods Act and unless there are some transaction, and if there is no transaction, obviously no sales tax can be levied. He, thus, submitted that the decisions rendered in the case of **M/s Jaya Bhatta Udyog, M/s Sri Durga Brick Field and Jai Sharma Int Udyog** (supra) do not lay down the correct law and require to be overruled. According to him, as the petitioner had not done any production and sale of bricks during the brick season 1992-93 (1.10.1992 to 30.9.1993), the petitioner was not liable to pay any tax and consequently, the composition money. In fact, it was

entitled for the refund of Rs.8,600/- deposited by it at the time of making the application. In support of his aforesaid submissions, he has relied upon the following decisions and dictionary:-

(i) Black's Law Dictionary, V Edition, page 708;
(ii) **Hindustan Construction Co. Ltd. v. Income Tax Officer (Companies Circle) Bombay and another,** (1965) 2 SCR 41;
(iii) **State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., AIR** 1958 SC 560.

17. Sri S.M.A.Qazmi, learned Chief Standing Counsel, submitted that under the terms of the Scheme, which was announced for the brick season 1992-93 (1.10.1992 to 30.9.1993), the petitioner had made the application. It had also deposited a sum of Rs.8,600/- towards the first instalment while making the application. Referring to clauses 7 and 19 of the said Scheme, he submitted that the petitioner cannot withdraw or resile once it had made the application exercising the option under Section 7-D of the Act and further, clause 19 of the Scheme specifically provided that there would be no reduction in the composition money even if the brick kiln owner starts the firing late, does not start the firing or does not do any business for any reason whatsoever. He further submitted that a writ petition is not an appropriate remedy for impeaching contractual obligation and it is not open to the petitioner to get over a contract by challenging some of the clauses of the contract as the petitioner had made the application with open eyes.

18. He further submitted that the method of taxation provided by Section 7-D of the Act is optional and the person who has opted the said alternate method of taxation, cannot be permitted to complain against the said provision. According to him, where two alternate procedures have been made available and an assessee has opted for one, it cannot claim the benefit for other.

19. According to Sri Qazmi, once the petitioner had voluntarily made the application for payment of a lump sum amount in lieu of tax payable by it, it cannot resile or seek remission either in full or in particular or deny its liability for payment of the amount on any ground whatsoever, including the plea of non-production or no sale during the brick season. He, therefore, submitted that this Court in the case of M/s Jaya Bhatta Udyog which has been reiterated subsequently in the case of M/s Sri Durga Brick Field and Jai Shamra Int Udyog, has correctly laid down the law and it does not require any reconsideration. In support of his various pleas, he has relied upon the following decisions:-

(i) **Har Shanker and others v. The Deputy Excise and Taxation Commissioner and others,** AIR 1975 SC 1121;
(ii) **State of Orissa and others v. Narain Prasad and others**, (1996) 5 SCC 740;
(iii) **Bharathi Knitting Co. v. DHL Worldwide Express Courier**, (1996) 4 SCC 704;
(iv) **State of Kerala and another v. Builders Association of India and others**, (1997) 2 SCC 183;
(v) **Commissioner, Central Excise vs. M/s Venus Castings (P) Ltd.**, JT 2000 (4) SC 77;

(vi) **Union of India v. Supreme Steels and General Mills**, 2001 (133) ELT 513 (SC);
(vii) **Jalan Castings (P) Ltd. v. Commissioner, Central Excise,** 2000 (119) ELT 531 (Alld.);
(viii) **Satish Prakash Ajay Kumar v. Assistant Sugar Commissioner, Saharanpur and others,** 1980 UPTC 64 (FB);
(ix) **M/s Jaya Bhatta Udyog v. State of U.P.** (Civil Misc. Writ Petition No.858 of 1990, decided on 17.7.1990);
(x) **M/s Sri Durga Brick Field v. State of U.P.,** 1991 UPTC 510;
(xi) **Jai Sharma Int Udyog v. Deputy Collector (Collection), Sales Tax,** (1999) 116 STC 357; and
(xii) **M/s Mycon Construction Ltd. v. State of Karnataka and another,** 2002 UPTC 585 (SC).

20. Sri Navin Sinha, learned Senior counsel, in reply, submitted that the agreement cannot go beyond the provisions of the Act. According to him, there cannot be any estoppel against a statute. In support of his submission, he has relied upon the following decisions :-

(i) **Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla and others**, AIR 1992 SC 2038;
(ii) **Bengal Iron Corporation and another v. Commercial Tax Officer and others**, AIR 1993 SC 2414;
(iii) **Inder Sain Mittal v. Housing Board, Haryana and others**, (2002) 3 SCC 175; and
(iv) **M.D.Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.,** (2004) 9 SCC 619.

Cases cited at the bar :

21. In the Black's Law Dictionary, V Edition, page 708, the following meaning has been given to the words "in lieu of' :-

"in lieu of /in lyuw ev/, Instead of; in place of; in substitution of."

22. In the case of **Hindustan Construction Co. Ltd.**, the Apex Court has referred to the meaning ascribed to the expression "in lieu of' in the case of **Stubbs v. Director of Public Prosecutions, 24 QBD** 577, wherein it was held that where a liability has to be discharged by A in lieu of B, there must be a binding obligation on B to do it, before A can be charged with it. Considering the provision of Section 49E of the Indian Income Tax Act, 1922, which provided for set off of the amount to be refunded in lieu of the payment of refund, the Apex Court has held that the expression "in lieu of' connotes that the payment is outstanding, i.e., there is a subsisting obligation on the Income Tax Officer to pay and if a claim of refund is barred by a final order, it cannot be said that there is a subsisting obligation to make the payment.

23. In the case of **Gannon Dunkerley & Co. (Madras) Ltd.** (supra), the Apex Court has held that the expression "sale of goods" in Entry 48 is a nomen juris, the essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is entire and indivisible there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in

such contract treating it as a sale. Hence the provisions of the Madras General Sales Tax Act which impose a tax on such materials as if there is a sale of them are ultra vires.

24. In the cases of **Har Shanker and others and Narain Prasad and others** (supra), the Apex Court has held that the writ petition is not an appropriate remedy for impeaching contractual obligations voluntarily incurred.

25. In the case of **Bharathi Knitting Co.** (supra), the Apex Court has held that when a person signs a document which contains certain contractual terms, normally parties are bound by such contract and it is for the party to establish exception in a suit. When a party to the contract disputes the binding nature of the signed documents, it is for him to prove the terms in the contract or circumstances in which he came to sign the document, need to be established and in appropriate case where there is an acute dispute of facts, necessarily the Tribunal has to refer the parties to original Civil Court established under the Code of Civil Procedure or the State law, to have the claim decided between the parties but when there is a specific term in the contract, the parties are bound by the term in the contract.

26. In the case of **Builders Association of India** (supra), the Apex Court while considering the constitutional validity of Sections 7 (7) and 7 (7-A) and 5(1)(iv) of the Kerala General Sales Tax Act, 1963, which provided for payment of tax in lump sum in place of actual amount of tax, has held that the alternate method of taxation provided by sub-section (7) or (7-A) of Section 7 is optional. It is wholly at the choice or pleasure of the contractor and the contractor who has opted to the said alternate method of taxation, cannot complain. It has further held that having voluntarily and within the full knowledge of the features of the alternate method of taxation, opted to be governed by it, a contractor cannot be heard to question the validity of the relevant sub-sections or the Rules. The impugned sub-sections have been evolved for convenient, hassle free method of assessment of tax, just as the system of levy of entertainment tax on the gross collection capacity of the cinema theatre and by opting to this alternate method, the contractor saves himself the botheration of book keeping, assessment, appeals and all that it means. It has also held that it is not necessary to enquire and determine the extent or value of goods which have been transferred in the course of execution of a works contract, the rate applicable to them and so on. It is only an alternative method of ascertaining the tax payable which may be availed of by a contractor if he thinks it advantageous to him. The Constitution does not preclude the Legislature from evolving such alternate, simplified and hassle free method of assessment of tax payable making it optional for the assessee.

27. Similar view has been taken by the Apex Court in the case of **M/s Mycon Construction Ltd.** (supra). The Apex Court has repelled the submission that while evolving a simplified method of payment of tax such is the case in the instant case, the law cannot give an option to the assessee which is in the teeth of constitutional provision. It has held that this argument does not survive in view of the principles laid down by the Apex Court in the case of Builders Association of India (supra).

28. In the case of **M/s Venus Castings (P) Ltd.** (supra), the Apex Court while considering the provision of Section 3A(4) of the Central excise Act, 1944 and Rule 96ZO(3) of the Central Excise Rules, which envisaged the composition method of payment of duty, has held that they provided two alternative procedure to be adopted at the option of the assessee and they do not clash with each other. The manufacture if they have availed of the procedure under Rule 96ZO(3) at their option, cannot claim the benefit of determination of production capacity under Section 3A(4) of the Act, which is specifically excluded.

29. In the case of **Jalan Castings (P) Ltd.** (supra), this Court has held that where an assessee has himself asked for a lump sum method of assessment and this was agreed to by the Department, then the assessee cannot go back and claim that he should be assessed by the normal mode as the assessee cannot blow hot and cold at the same time. The decision of this Court has been approved by the Apex Court in the case of Venus Castings (P) Ltd. (supra).

30. The same view was taken by the Apex Court in the case of **Supreme Steels and General Mills** (supra). In the aforesaid case, it has been held by the Apex Court that it was absolutely optional for the manufacturer to opt for payment of excise duty in accordance with sub-rule (3) of Rule 96ZO on the basis of total finished capacity installed as provided thereunder and the manufacturer cannot opt twice during one financial year first choosing to pay in accordance with sub-rule (3) of Rule 96ZO and thereafter to switch over to actual production basis under Section 3A(4) of the Central Excise Act, 1944 in case it is less than the duty payable under sub-rule (3) of Rule 96ZO. The said sub-rule is quite clear that the option under it is available subject to the condition that once having opted it, the benefit, if any, under sub-section (4) of Section 3A of the Central Excise Act, 1944 shall not be available.

31. In the case of **Satish Prakash Ajay Kumar** (supra), a Full Bench of this Court while interpreting the provisions of Section 3(1)(b) of the U.P. Sugarcane Purchase Tax Act, 1961 and Rule 13 of the Rules framed thereunder, has held that the said Act and the Rules do not contemplate exemption from the liability for payment of tax by the owner of a unit who has opted for the assumed basis merely because he has, either by choice or on account of some mechanical defect, been unable to work some of the crushers composing his unit for any length of time during a particular assessment year.

32. The decisions of this Court in the cases of **M/s Jaya Bhatta Udyog, M/s Sri Durga Brick Field and Jai Sharma Int Udyog** (supra), relied upon by the State respondent, have already been dealt with under the heading **Law laid down in the cases referred for reconsideration** and are not being discussed again.

33. In the case of **Ahmedabad Urban Development Authority** (supra), the Apex Court has held that in the absence of an express provision, a delegated authority cannot impose tax or fee and the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental

or ancillary power in the matter of exercise of fiscal powers.

34. In the cases of **Bengal Iron Corporation, Inder Sain Mittal and M.D.Army Welfare Housing Organisation** (supra), the **Apex Court** has held that there can be no estoppel against the statute.

Discussion :

35. Having given our anxious considerations to the various submissions made by the learned counsel for the parties, we find that Section 7-D which provides for composition of tax liability, starts with a non-obstante clause. A plain reading of Section 7-D of the Act shows that an option has been given to a dealer who is covered by a scheme issued by the State Government from time to time to opt for payment of lump sum amount in lieu of the amount of tax. It excludes the applicability of other provisions of the Act which deals with the assessment and payment of tax. A non-obstante clause, as observed by the Apex Court in the case of **State of Bihar v. Bihar M.S.K.K. Mahasangh and others**, AIR 2005 SC 1605, is generally appended to a section with a view to give the enacting part of the section, in case of a conflict, an overriding effect over the provision in the same or other Act mentioned in the non-obstante clause. It is equivalent to saying that in spite of the provisions or Act mentioned in the non-obstante clause, the provision following it will have its full operation or the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs. The payment of compounded tax is a convenient, hassle free and a simple method of assessment. A dealer who has opted for payment of lump sum amount in lieu of tax, is not required to file monthly or quarterly return of its turnover. It has to pay a fixed sum of money as tax as agreed upon by the department. It is the choice of a dealer to opt for compounded payment of tax and if the said choice is in accordance with the scheme and is ultimately accepted by the authority concerned, it becomes an agreed amount of tax. The department as also the dealer are bound by the said agreement. A dealer who has opted to pay the tax in lump sum under Section 7-D of the Act after it has been accepted by the department, any demand for that period is not relatable to the actual turnover but the sum agreed upon. In other words, the department as well as the dealer both know the amount payable and receivable by each other. The determination of lump sum amount in lieu of tax displaces the requirement of regular assessment proceeding and the quantification of tax liability is by agreement as per the term of the scheme which would bind both the parties. The object of introducing such a scheme under a taxing statute is well established as so many advantages are attached to such scheme besides being hassle free to the dealer. It also avoids unnecessary litigation. The department in its turn receives a fixed amount of tax without undertaking the assessment work and, thus, saves a lot of time. It also facilitates the speedy recovery of tax.

36. In the case of **Venkateshwara Theatre v. State of Andhra Pradesh**, AIR 1993 SC 1947, the Apex Court while considering the scheme announced by the Government of Andhra Pradesh, providing that instead of payment of

entertainment tax on the basis of actual number of cinema goers, the proprietor of a cinema hall may opt to pay a consolidated levy on the basis of gross collection capacity per show, has held that the compound payment of entertainment tax is a more convenient mode of levy of the tax inasmuch as it dispenses with the need of verification or to enquire into the number of person admitted to each show and to verify the correctness or otherwise of the returns submitted by the proprietor containing the number of persons admitted to each show and the amount of tax collected. The aforesaid decision has been followed by the Apex Court in the case of **Builders Association of India** (supra) wherein the Apex Court has held that the object of levy of compound payment of tax is not to increase the revenue. The legislature provides the alternate method of taxation with a view to realise the tax with least discomfort to the assessee. It is only a convenient mode of realisation of tax. It also ensures the fixed amount of payment of tax to the Government irrespective of the fact that the business of the assessee earned profit or not. Similar view has been taken by the Apex Court in the case of **M/s Mycon Construction Ltd., M/s Venus Castngs (P) Ltd. and Supreme Steels and General Mills** (supra).

37. A Full Bench of this Court in the case of **Satish Prakash Ajai Kumar** (supra) while considering the provision of Section 3 (1)(b) of the U.P.Sugarcane Purchase Tax Act, 1961 and Rule 13 of the Rules framed thereunder, has held that they do not contemplate any exemption from the liability for payment of tax by the owner of a unit who has opted for payment of tax on assumed basis merely because he has, by chance or on account of some mechanical defect, been unable to work some of the crushers in his unit.

38. Clause 19 of the scheme under which the petitioner had applied for composition, specifically provided that if the firing is started late or is not commenced or, for any other reason, the amount of composition money would neither be reduced nor changed. Thus, from the provision of Section 7-D of the Act as also the scheme announced thereunder, we are of the considered opinion that the liability for payment of tax is dependent upon the agreement entered into by the parties and the amount so agreed would continue to be payable by the dealer notwithstanding the fact that the dealer has neither manufactured nor sold any bricks during the period for which it had opted for the composition under Section 7-D of the Act.

39. The amount payable under the composition scheme is not relatable to any actual turnover but depends upon the agreement under the scheme at the option of the dealer. The dealer having once exercised its option, cannot, therefore, be permitted to turn around and resile from its liability merely on the ground that had had no turnover or had not done any manufacturing activity during the relevant year.

40. So far as the decisions and the dictionary meaning of the words "in lieu of" relied upon by Sri Navin Sinha, learned Senior Counsel, are concerned, we may mention that it is of no help to the petitioner inasmuch as here the amount of tax is being demanded in terms of the composition scheme which the petitioner had opted.

41. There cannot be any dispute that there cannot be any estoppel against a statute. However, where the demand is being made under the terms of the contract which specifically provides that there would be no reduction or change in the composition money even if the firing has not been done in brick kiln or it has been started late or for any other reason, the petitioner is bound by the said clause and he cannot be permitted to challenge the same in view of the law laid down by the Apex Court in the case of **Har Shanker and others, Narain Prasad and others and Bharathi Knitting Co.** (supra). As we have already come to the conclusion that the liability to pay the composition money is not relatable to actual sales at all, the principle laid down by the Apex Court in the case of Gannon Dunkerley & Co. (Madras) Ltd. (supra) will not be attracted.

Conclusion :

42. In view of the foregoing discussions, we are of the considered opinion that the Division Bench in the case of **M/s Jaya Bhatta Udyog** (supra) subsequently followed by other Division Benches in the case of **M/s Sri Durga Brick Field and Jai Sharma Int Udyog** (supra) lay down the correct law.

Let the matter be placed before the appropriate Bench for further orders. Opinion given accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2006

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

Civil Misc. Writ Petition No.75895 of 2005

M/s. Kesar Enterprises Limited ...Petitioner
Versus
Deputy Director of Consolidation, Bareilly and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh
Sri M.N. Singh
Sri Mahesh Narain Singh

Counsel for the Respondents:
Sri G.S.D. Mishra
S.C.

Practice of Procedure-Defective vakalatnama-appeal before-S.O.C. filed jointly by 47 persons-but the vakalatnama signed by only one person-whether the Appellate Authority ought to have give some reasonable time to remove the defect? Held 'yes' in view of law laid down by the Apex court repeated in S.L.P. No.22578 of 2002, Udai Shakar Trivar vs. Ram Kalunwar Prasad Singh.

Held: Para 5 and 6

In view of he law laid down by the Apex court, this Court is of the view that that some reasonable time may be granted to the appellants in the appeal pending before the Appellate authority to remove the defect.

Accordingly, appellants in the Appeal pending before the Appellate authority are directed to remove the defect in the Appeal within three weeks' from the date of production of a certified copy of this order. In case defect in the appeal is

removed within three weeks, the appeal shall be heard and decided in accordance with law within three months thereafter.

Case law discussed:

Civil Appeal No. 22578 of 02 decided on 10.11.2005 fallowed

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

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

2. Learned counsel for the petitioner urged that against an order passed by the Consolidation Officer, an appeal was preferred by 15 persons, but Vakalatnama was signed by only one person as such the appeal on behalf of other persons was not maintainable. The Appellate authority has not taken into consideration this aspect while entertaining the Appeal.

Considered arguments of learned counsel for the party.

3. In view of the law laid down by the Apex Court in the judgment rendered in Civil Appeal No. 6701 of 2005 (Arising out of SLP(C) No. 22578 of 2002), Udav Shanker Trivar vs. Ram Kalewar Prasad Singh and another decided on 10.11.2005, the appellants before the Appellate Authority (Assistant Settlement Officer, Consolidation, Bareilly) are entitled to have an opportunity to get the defect removed. Paragraph-15 of the judgment of the Apex Court is being reproduced below:-

"15. It is, thus, now well-settled that any defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal, or the omission to file the Vakalatnama executed by the appellant, along with the appeal, will not invalidate the memorandum of the appeal, if such omission or defect is not deliberate and the signing of the Appeal memorandum or the presentation thereof before the appellate court was with the knowledge and authority of the appellant. Such omission or defect being one relatable to procedure, it can subsequently be corrected. It is the duty of the Office to verify whether the memorandum of appeal was signed by the appellant or his authorised agent or pleader holding appropriate Vakalatnama. If the Office does not point out such defect and the appeal is accepted and proceeded with, it cannot be rejected at the hearing of the appeal merely by reason of such defect, without giving an opportunity to the appellant to rectify it. The requirement that the appeal should be signed by the appellant or his pleader (duly authorised by a Vakalatnama executed by the appellant) is, no doubt, mandatory. But it does not mean that non-compliance should result in automatic rejection of the appeal without an opportunity to the appellant to rectify the defect. If and when the defect is noticed or pointed out, the court should, either on an application by the appellant or suo motu, permit the appellant to rectify the defect by either signing the memorandum of appeal or by furnishing the Vakalatnama. It should also be kept in view that if the pleader signing the memorandum of appeal has appeared for the party in the trial court, then he need not present a fresh Vakalatnama along with the memorandum of appeal, as the Vakalatnama in his favour filed in the trial court will be sufficient authority to sign and present the memorandum of appeal having regard to Rule 4 (2) of Order 3 CPC, read with Explanation [c] thereto. In such an event, a mere memo

referring to the authority given to him in trial court may be sufficient. However, filing a fresh Vakalatnama with the memo of appeal will always be convenient to facilitate the processing of the appeal by the office."

4. Sri G.S.D. Misra, learned counsel for Caveator, undertakes to remove the defect in the appeal and prays for time for the purpose.

5. In view of he law laid down by the Apex court, this Court is of the view that that some reasonable time may be granted to the appellants in the appeal pending before the Appellate authority to remove the defect.

6. Accordingly, appellants in the Appeal pending before the Appellate authority are directed to remove the defect in the Appeal within three weeks' from the date of production of a certified copy of this order. In case defect in the appeal is removed within three weeks, the appeal shall be heard and decided in accordance with law within three months thereafter.

7. In case defect is not removed within the stipulated time, the appellate authority shall decide maintainability of the appeal in accordance with law first.

8. With above directions, writ petition is disposed of.

Certified copy of this order be issued to learned counsel for the parties within 48 hours on payment of usual charges.
Petition disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 30541 of 2002

Om Prakash ...Petitioner
Versus
District Inspector of School-II,Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Srivastava
Sri C.K. Parekh

Counsel for the Respondents:
Smt. Sunita Agarwal
S.C.

U.P. Intermediate Education Act-1921-Section-16-EE-absorbtion of retrenched employee-petitioner appointed on the post of Watchman-under leave gape arrangement-purely on temporary basis-after joining of permanent incumbent-the services of petition come to an end-held-petitioner being temporary employee without holding permanent post-not entitled to be absorbed as retrenched employee.

Held: Para 8 & 12

In my opinion, the petitioner was only a temporary employee and had not become a permanent employee nor was he holding a permanent post. Consequently, the petitioner was not entitled to be absorbed as a retrenched employee on a vacant post under Section 16-EE of the Act.

In view of the aforesaid, the petitioner being appointed on a temporary post had no right to claim an appointment as a retrenched employee under Section 16-EE of the Act.

Case law discussed:
1992 (Suppl.) (1) SCC-524

1995 (1) SCC-638
J.T. 1996 (8) SC-46

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

1. The petitioner was issued an appointment letter dated 10.9.1986 on the post of a Watchman on a temporary basis subject to the condition, that in the event Sri Shambhu Nath Misra joins, the petitioner's term would come to an end. It transpires that Shambhu Nath Misra returned and joined his services on 6.5.1988. Consequently, the appointment of the petitioner on the post of Watchman came to an end. It further transpires that the Management issued another appointment letter dated 8.7.1988 appointing the petitioner to lookafter the cycle stand. It is alleged that the petitioner is continuing on this post till date. The petitioner alleged that from 1988 till the year 2001, several Class-IV posts fell vacant in which the petitioner could be adjusted but the Management, for reasons best known, did not adjust or regularise the services of the petitioner. The petitioner further alleged that even today, two Class-IV posts are still lying vacant in which the petitioner could be absorbed. The stand taken by the petitioner is, that he is a retrenched employee and is liable to be absorbed under Section 16-EE of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'the Act'). Consequently, the petitioner has prayed that a writ of mandamus be issued to the Principal and the Management of the respondent Institution to forward his name for being appointment as a Class-IV employee against a vacant post.

2. On the other hand, the learned counsel for the respondent nos.3 and 4 submitted, that the petitioner was appointed on a temporary basis subject to certain conditions and was not holding a permanent post, therefore, the provisions of Section 16-EE of the Act are not applicable. Even otherwise, the petitioner did not make any application for absorption within the stipulated period under the said provisions and, therefore, was not entitled for any relief.

3. Heard Sri C.K. Parekh, the learned counsel for the petitioner, Smt. Sunita Agarwal, the learned counsel for respondent nos.3 and 4 and the learned Standing Counsel for respondent nos.1 and 2.

4. The claim of the petitioner is, that he is a retrenched employee and that he can be absorbed in the Institution under Section 16-EE of the Act. For facility, Section 16-EE of the Act is quoted below:-

"16-EE. Absorption of retrenched employee.-(1) Where any employee of an institution has been retrenched on or after July 1, 1974 but before the commencement of the Intermediate Education (Amendment) Act, 1980, and such employee possesses minimum qualifications prescribed therefore on the date of initial appointment the Regional Deputy Director of Education shall, on the application made in this behalf, direct that subject to the provisions of this section, such employee be absorbed against any permanent vacancy occurring in the same or any other institution situate in any district within his jurisdiction.

Provided that in the case of an employee retrenched on or after the date of such commencement the Regional Deputy Director of Education may issue

directions under this section without any application from the employee concerned.

(2) Every application referred to in sub-section (1) shall be made within six months from the date of commencement of the Intermediate Education (Amendment)Act, 1980.

(3) Where any direction is issued by the Regional Deputy Director of Education under sub-section (1) the following consequences shall ensue, namely:

(i) The Committee of Management of the institution concerned shall be bound to comply with every such directions, and the employee in whose favour such direction is issued shall be deemed to be an employee of such institution from the date of the order of appointment issued by the Committee to him or from the expiry of a period of two months from the date of service of the direction on the Committee of Management under sub-section(1), whichever is earlier.

(ii) The period of substantive service rendered by such employees in any institution before the date of his retrenchment shall be counted for the purposes of his seniority and pension.

(iii) Where the employee concerned fails to join the post within the time allowed thereafter, the benefits of this section shall not be available to him.

(4) Any person aggrieved by the direction issued under sub-section(1) may make a representation to the Director within one month from the date of service on him of such direction, and the order of the Director thereon shall be final.

(5) The provisions of this section shall have effect notwithstanding anything contained in any other provisions of this Act or any other law for the time being in force.

(6) Nothing in this section shall apply to an institution established and administered by a minority referred to in clause (1) of Article 30 of the Constitution of India.

Explanation- For the purposes of this section-

(a) '*employee*' in relation to an institution means a teacher, head of institution or other employee thereof holding a permanent post on the date immediately preceding the date of retrenchment;

(b) *'institution*' includes a training institution recognised by the State Government or the Director.

(c) *'retrenchment*' in relation to an employee of an institution means the termination of his services for any reasons other than resignation, retirement or removal by way of punishment inflicted in disciplinary proceedings."

5. From the aforesaid the word 'retrenchment' has been defined under the explanation which states, that in relation to an employee of an institution, retrenchment means the termination of his services for any reason other than the resignation, retirement or removal by way of punishment inflicted in a disciplinary proceeding. In the present case, the petitioner was appointed on 10.9.1986 and continued to work till 6.5.1988 when his services came to an end upon the joining of Shambhu Nath Misra. Since, the petitioner does not come under the exception clause, the petitioner became a retrenched employee.

6. Sub-clauses (1) and (2) of Section 16-EE of the Act stipulates that every

application for absorption as a retrenched employee must be made within six months from the occurrence of a permanent vacancy.

7. The petitioner has alleged that he made applications on 3.8.1989, 4.9.1991, 7.9.1999 and 8.7.2002 for absorption as a retrenched employee. From a perusal of these applications which have been annexed as Annexures 10, 11, 12 and 13 to the writ petition, it is clear that these applications have not been made for the absorption of the petitioner as a retrenched employee under Section 16-EE of the Act. These applications only indicates that the petitioner made a request for being granted wages as payable to a Government servant. In my view, these applications, cannot be treated as an application made under Section 16-EE of the Act. Consequently, the petitioner is not entitled for any relief.

8. Assuming that these applications could be treated as applications under Section 16-EE of the Act, the petitioner will still not be entitled for any relief. Explanation (a) of Section 16-EE stipulates that the employee of an institution who had worked earlier and was retrenched must be holding a permanent post immediately proceeding the date of retrenchment in order to avail the benefit of these provisions. From a perusal of the appointment letter, it is clear, that the petitioner was appointed on a temporary basis subject to certain conditions. In my opinion, the petitioner was only a temporary employee and had not become a permanent employee nor was he holding a permanent post. Consequently, the petitioner was not entitled to be absorbed as a retrenched employee on a vacant post under Section 16-EE of the Act.

9. In **Triveni Shanker Saxena vs. State of U.P. And others**, 1992 Supp.(1)SCC 524, the Supreme Court held-

"....His appointment order unambiguously shows that it was only a temporary basis. The appellant has not shown that he had been confirmed in a permanent post and that he was holding that appointment substantively either immediately or on the termination of a period so as to make a claim of lien to the post of Lekhpal by availing the benefit of Rules 14-A and 14-B of the U.P. Fundamental Rules. Therefore, as rightly pointed out by Mr.Yogeshwar Prasad, it cannot be said that the appellant held the post in a substantive capacity on permanent basis on the date when he was appointed as a Consolidator. In the absence of any such proof on the side of the appellant, we are constrained to hold that he was employed as Lekhpal on a temporary basis and thereafter appeared before the Selection Board and was selected de novo as a Consolidator in the Consolidation Department."

10. In **Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd. vs. Devendra Kumar Jain and others**, (1995) 1 SCC 638, the Supreme Court held-

"....A temporary government servant does not become a permanent government servant unless he acquires that capacity by force of any rule or he is declared or appointed as a permanent servant...."

11. In **The Secretary, Ministry of Works & Housing Government of**

India & others, JT 1996 (8) SC 46, the Supreme Court held-

"...Until the temporary service matures into a permanent, he has no right to the post."

12. In view of the aforesaid, the petitioner being appointed on a temporary post had no right to claim an appointment as a retrenched employee under Section 16-EE of the Act. Consequently, I do not find any force in the writ petition and is dismissed accordingly. However, in the circumstances of the case, there shall be no order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2006

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

Special Appeal No. 834 of 1998

Om Prakash Pawar
...Petitioner/Appellant
Versus
State of U.P. and another...Respondents

Counsel for the Petitioner:
Sri R.G. Padia
Sri Prakash Padia

Counsel for the Respondents:
Sri M.S. Pipersenia

Constitution of India, Art. 311 (2)-Civil Services (classification Control and Appeals Rules-Rule-55-readwith Constitution of India, Article 311 (2) Service Law-Compulsory retirement-Opportunity to show cause-held-not required-Since neither attaches any stigma-nor implies any suggestion of mis behavior.

Held: Para 7

The contention of the learned counsel for the appellant that he was not afforded opportunity which vitiates the order of compulsory retirement, is entirely untenable and contrary to decades old settled law. Order of compulsory retirement is not a punishment, since it neither attaches any stigma nor it implies any suggestion of misbehaviour. A similar contention was advanced as long back as more than 50 years ago in the case of *Shyam Lal vs. State of U.P., AIR 1954 SC 369*. One of the grounds of challenge of the order of premature retirement was that no opportunity or show cause was afforded to the employee concerned against the proposed premature retirement. Rejecting the said contention the Hon'ble Apex Court held that the compulsory retirement does not amount to dismissal or removal and, therefore, it does not attract. Article 311 of the Constitution or Rule 55 of the Civil Services (Classification, Control and Appeal) Rules. It was thus, held that the order of compulsory retirement cannot be challenged on the ground that the employee was not afforded opportunity of show cause against the action sought to be taken i.e. compulsory retirement.

AIR 1954 SC-369
AIR 1971 SC-40
AIR 1992 SC-1020
1996 (5) SCC-331
2001 (3) SCC-314
AIR 2003 SC-4303

Constitution of India Art.-14 and 16-Compulsory retirement-Order based upon-various adverse entries in respect of various years-guilty of embezzlement-Considering all materials-Order can not be termed as arbitrary.

Held: Para 12 and 13

Considering the order of compulsory retirement passed under Fundamental Rules 56 the Hon'ble Apex Court in

Nawal Singh vs. State of U.P. & another, AIR 2003 SC 4303 **upheld the orders of compulsory retirement passed on the basis of scrutiny of entire past record of service, character roll and other material. Therefore, in the present case, besides the adverse entries awarded to the petitioner-appellant in respect of various years, he was also found guilty of the charges of embezzlement.**

Considering all the aforesaid aspects and the material available, it cannot be said that the decision taken by the respondent, retiring the petitioner-appellant compulsorily, is arbitrary or based on no material. In this view of the matter, we are of the view that the Hon'ble Single Judge has rightly upheld the order of compulsory retirement and the writ petition has rightly been dismissed.

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

1. Heard learned counsel for the appellant and Shri M.S. Pipersenia, learned Standing Counsel appearing for the respondents and also perused the order of the Hon'ble Single Judge.

2. The special appeal, under the Rules of the Court, arises from the judgment of the Hon'ble Single Judge dated 27.8.1998 dismissing the appellant's writ petition no.3539 of 1994.

3. The petitioner-appellant was initially appointed as Senior field Assistant, Sugar Cane Research Station, Shahjahanpur in the year 1960 and was confirmed on 28.11.1981. It appears that he was suspended on 11.7.73 to 19.8.1974. Thereafter he was again suspended during the period 1977 to 1981 and a departmental inquiry was initiated against him which was unltimately culminated in the order of punishment dated 2.9.1982 as charge of embezzlement were found proved against him and he was also required to deposit a sum of Rs.3281.30p. The order of punishment also provide that in future he would not be given charge of any seed store and agriculture farm. Besides the above adverse entries, he was awarded two adverse entries in the year 1988-89 and 1989-90. The screening committee considered the matter for premature retirement under Fundamental Rules, 56 and recommended the petitioner for compulsory retirement. Accepting the said recommendation the competent authority issued order dated 30.3.1993 compulsorily retiring the petitioner under Fundamental Rule 56. Challenging the order dated 31.3.1993 whereby the appellant was retired compulsorily, he filed writ petition no.3539 of 1994, which has been dismissed by the Hon'ble Single Judge by means of the order under appeal.

4. Learned counsel for the appellant submits that the order of compulsory retirement was passed without giving any opportunity to the appellant and hence the same is in violation of the principles of natural justice. He further submits that the decision is arbitrary, since on the basis of service record of the appellant, it cannot be said that he has outlived his utility or has become a dead not to be retained further in public service. He further submits that the entries, which are too old and stale, have been taken into consideration, as adverse material, in order to arrive at the decision of compulsory retirement, which is vitiated in law, since the entries, which are stale, could not have been considered at all. Lastly, learned counsel for the appellant submits that he was granted selection grade, which shows that he is efficient

and fit for retention in service but ignoring the said fact he has been retired compulsorily, which is arbitrary and discriminatory.

5. Learned counsel for the respondent, however, submits that the Hon'ble Single Judge after considering the pleadings of the parties and the material on record has also found that the petitioner-appellant has outlived its utility and, therefore, has rightly been recommended for compulsory retirement in public interest. He further submits that since compulsory retirement is not a punishment the question of affording opportunity to the appellant would not arise and, therefore, the Hon'ble Single Judge has rightly dismissed the writ petition.

6. We has given anxious thought to the submissions advanced by the learned counsel for the parties and perused the record.

7. The contention of the learned counsel for the appellant that he was not afforded opportunity which vitiates the order of compulsory retirement, is entirely untenable and contrary to decades old settled law. Order of compulsory retirement is not a punishment, since it neither attaches any stigma nor it implies any suggestion of misbehaviour. A similar contention was advanced as long back as more than 50 years ago in the case of ***Shyam Lal vs. State of U.P., AIR 1954 SC 369***. One of the grounds of challenge of the order of premature retirement was that no opportunity or show cause was afforded to the employee concerned against the proposed premature retirement. Rejecting the said contention the Hon'ble Apex Court held that the compulsory retirement does not amount to dismissal or removal and, therefore, it does not attract. Article 311 of the Constitution or Rule 55 of the Civil Services (Classification, Control and Appeal) Rules. It was thus, held that the order of compulsory retirement cannot be challenged on the ground that the employee was not afforded opportunity of show cause against the action sought to be taken i.e. compulsory retirement.

8. Similar argument was advanced in the case of ***Union of India vs. J.N. Sinha, AIR 1971 SC 40***. It was also urged in the said case that the provision empowers the competent authority to retire the government servant compulsorily before attaining the normal age of superannuation and has to be read in consonance with the principle of natural justice, else the provision itself may be arbitrary and violative of Article 14 & 16 of the Constitution of India. Rejecting this contention the Hon'ble Apex Court held that it is axiomatic that the provision in a statute of statutory rules ought to be read consistently with the principles of natural justice. It is so because the presumption is that the legislatures and statutory authority intend to act in conformity with the principles of natural justice. It is, however, open to the law making body to exclude the application of any or all the rules of principles of natural justice. This can be done by specific provision or by necessary implication. In either event the mandate of the legislature or statutory authority (in the case of statutory rules) cannot be ignored. In other words, the rules of principles of natural justice cannot be read into the provisions concerned. It was further held that whether the exercise of statutory power

should or should not be done in accordance with any of the principles of natural justice or not depends upon the express words of the statute, which confers power as well as nature and purpose of power and effect of its exercise. It was further held that since compulsory retirement is not a punishment and the appropriate authority has absolute right to retire a government servant, if it is of the opinion that it is in the public interest to do so, it cannot be said that the order of compulsory retirement can be challenged on the ground of non-affording of opportunity of hearing. Same view has been reiterated by the Hon'ble Apex Court in the case of ***Baikunth Nath Das vs. Chief Divisional Medical Officer, AIR 1992 SC 1020*** relevant observation, as contained in para 34, may be reproduced as under:-

"**34.** Following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate Court, the may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary-in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before decision in the matter of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a Government is promoted to higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference. Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

9. Coming to the second aspect of the matter, whether the order impugned, in the present case, can be said to be arbitrary on the basis of the facts and relevant material of the case in hand, we find that sub Rule 2 of Fundamental Rule 56 empowers the appointing authority to take into consideration any material relating to the Government servant and nothing is to be excluded from this

consideration. Same material, which is not to be excluded, has also been specified in the aforesaid provision. For brevity, sub Rule (2) of Fundamental Rule 56 is reproduced below:-

"(2) In order to be satisfied whether it will be in the public interest to require a Government servant to retire under clause (c) the appointing authority may take into consideration any material relating to the Government servant and nothing herein contained shall be construed to exclude from consideration-

(a) any entries relating to any period before such Government servant was allowed to cross any efficiency bar or before he was promoted to any post in an officiating or substantive capacity or on an ad hoc basis; or
(b) any entry against which a representation is pending, provided that the representation is also taken into consideration along with the entry; or
(c) any report of the Vigilance Establishment constituted under the Uttar Pradesh Vigilance Establishment Act, 1965."

10. In view of the aforesaid express provision of Fundamental Rule 56, as applicable in the State of U.P., it is not permissible to raise contention that certain material cannot be considered at all or should not be considered. Admittedly, the appellant has several adverse entries in the service book, as stated above. The competent authority after considering the entire service record of the appellant has arrived at the conclusion that the appellant should be retired compulsorily, as it is in public interest. It cannot be said that the decision has been taken by the authorities in the absence of any material at all. The scope of judicial review, in the matter of compulsory retirement, is now well settled. The judicial review is permissible only when the decision of compulsory retirement is taken in the absence of any adverse material or is vitiated on account of bias or mala fide or is otherwise inconsistent with the statutory provision. In **State of Orissa vs. Ram Chandra Das, (1996) 5 SCC 331** the Hon'ble Apex Court of the judgment held as under:-

"It is needless to reiterate that the settled legal position is that the Government is empowered and would be entitled to compulsorily retire a government servant in public interest with a view to improve efficiency of the administration or to weed out the people of doubtful integrity or who are corrupt but sufficient evidence was not available to take disciplinary action in accordance with the rules so as to inculcate a sense of discipline in the service. But the Government, before taking such decision to retire a government employee compulsorily from service, has to consider the entire record of the government servant including the latest reports." (emphasis supplied) (para 3)

11. In **State of Gujarat vs. Umedbhai M. Patel, (2001) 3 SCC 314** after review of earlier law on the subject the Hon'ble Apex Court observed that the law relating to compulsory retirement has now crystallized into definite principles and broadly has summarized the said principles as under:

"(i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead-wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure."

12. Considering the order of compulsory retirement passed under Fundamental Rules 56 the Hon'ble Apex Court in ***Nawal Singh vs. State of U.P. & another, AIR 2003 SC 4303*** upheld the orders of compulsory retirement passed on the basis of scrutiny of entire past record of service, character roll and other material. Therefore, in the present case, besides the adverse entries awarded to the petitioner-appellant in respect of various years, he was also found guilty of the charges of embezzlement.

13. Considering all the aforesaid aspects and the material available, it cannot be said that the decision taken by the respondent, retiring the petitioner-appellant compulsorily, is arbitrary or based on no material. In this view of the matter, we are of the view that the Hon'ble Single Judge has rightly upheld the order of compulsory retirement and the writ petition has rightly been dismissed.

Accordingly, the special appeal, being devoid of merit, is hereby dismissed. There shall, however, be no order as to costs. Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2005

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Misc. Writ Petition No. 45747 of 2000

Pan Kumari ...Petitioner
Versus
Board of Revenue, U.P. at Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri G.N. Verma
Sri R.C. Singh
Sri S.D. Pandey

Counsel for the Respondents:
Sri Anuj Kumar, A.S.C.
Sri Radhey Shyam
Sri H.R. Misra
Sri Trevini Shanker
Smt. Sarita Dubey
S.C.

U.P.Z.A. & L.R. Act-1956- 18,229-B,209 Section limitation for filing suit After date of vesting become bhumidhar-No limitation for institutions of Suit-except the land covered under section 189-if already dispossessed-suit shall be filed under section 209.

Held: Para 5

The rule is an exception to the general rule that limitation bars the remedy but does not extinguish the right. If however a person is in possession his right can not be extinguished unless the case is covered by Clauses (a) (aa) and (b) of Section 189. He can therefore seek a declaration of his right at any point of time. If a person has been dispossessed he would have to institute a suit under Section 209 U.P.Z.A. & L.R. Act. Appendix III provides the period for limitation for filing a suit under Section 209. It would follow therefore that a suit under Section 299-B would be barred by limitation the bhumidar is out of possession and his right to file a suit under Section 209 is barred by limitation.

Case law discussed:

1985 RD. 444 relied on

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

1. A suit under Section 229-B of the U.P. Zamindari Abolition and Land Reforms Act was filed by the plaintiffs/respondents Kailash Nath Tewari, Surya Mani Tewari and Chandra Mani Tewari against the Gaon Sabha. The petitioner Pan Kumari was also impleaded in the suit on an application filed by her. The case of the petitioner is that the ancestors of the petitioner were recorded in 1281-F and from 1320 fasali to 1359 fasali and the petitioners are in possession over the disputed land of which they were grove-holders on the date of vesting and consequently they became Bhumidhar under Section 18 of the U.P. Zamindari Abolition and Land Reforms Act. The suit was contested by the Gaon Sabha and by the petitioner. The trial court decreed the suit. Against the decree two appeals were filed one by the Gaon Sabha and the other by the petitioner. Both the appeals were dismissed by the Commissioner. Two second appeals were filed. The Board of Revenue dismissed both the appeals. Against the order of the Board of Revenue a writ petition was filed by the Gaon Sabha numbered as Civil Misc. Writ Petition No. 50461 of 2000, which was also dismissed as withdrawn. The present writ petition has been filed by Pan Kumari.

2. I have heard Sri R.C. Singh, learned counsel for the petitioner and Sri Radhey Shyam, learned counsel for the respondents.

3. It is submitted by Sri R.C. Singh that the suit filed by the plaintiffs/respondents was barred by Section 49 of the Consolidation of holding Act in as much as no objection was raised in consolidation proceedings by the plaintiffs/respondents. The other submission is that the suit is barred by limitation. On the question that the suit was barred by Section 49 of Consolidation of Holdings Act the finding recorded by the trial court is that on the date of the publication of the notice under Section 9 of the Consolidation of Holdings Act the plaintiffs/respondents were minors. The appellate court also affirmed the said finding. Sri R.C. Singh submitted that from the reading of the orders passed by the trial court and the appellate court it is clear that there is no specific finding upon the point of minority of the plaintiffs/respondents, which they were required to record in view of the directions in an earlier writ petition No.41280 of 1996. I have examined the judgement of the trial court. It appears that before the trial court the plaintiffs/respondents had filed evidence showing the age of the plaintiffs. In the passport the date of birth of Chandra

Mani Tewari is 25.9.1963 and in the High School Certificate of Kailash Nath Tewari his date of birth is 13.9.1958 and of Sruya Mani Tewari in his High School certificate is 25.8.1948. Oral evidence on behalf of the plaintiffs/respondents was also adduced. The Trial court found that the documentary evidence filed by the plaintiffs/respondents was unrebutted. In effect this is a finding of minority as the trial court found that the plaintiff's evidence of minority was unrebutted. The appellate court has affirmed the finding that the plaintiffs/respondents were minors and consequently they could not file the objections within the time permissible under Section 9 of the Consolidation of Holdings Act. Sri R.C. Singh was unable to refer to any document filed by the defendant/petitioner in the trial court or in the Ist Appellate Court regarding the age of the plaintiffs/respondents. He however submitted that in the Board of Revenue an application for additional evidence was filed by the petitioner in which certain documents including C.H. Form 11 showing Surya Mani as major and guardian of the other plaintiffs were sought to be filed but the Board of Revenue did not pass any order on that application. In reply it has been stated in para 19 of the counter affidavit that the appeal was heard by the Board on 6.9.2000 and no such application was passed or filed until the judgment on 21.9.2000. According to the respondents even the court fee stamps on the application have not been cancelled, which would indicate that the application was never filed. In rejoinder affidavit the averments made in the counter affidavit have been denied. In C.H. Form 11 copy of which has been filed in this petition there is an entry showing Kailash Nath Tewari the plaintiff as aged 6 years (minor) and Chandra Mani Tewari as aged 5 years (minor) whereas Surya Mani Tewari is shown as major and guardian of the minors.

4. Sri Radhey Shyam, learned counsel for the respondents submitted that the Board of Revenue had no occasion to pass any order on the application under Order 41 Rule 27 because the same was never pressed and it was filed subsequently after the arguments were over. There is a dispute upon this fact. The point does not find mention in the order of the Board of Revenue. Ordinarily it would be treated that all the points that were raised before the Board of Revenue were considered by it. There is no affidavit of the counsel who argued the case before the Board of Revenue that the application under Order 41 Rule 27 was pressed. That apart in the face of the direct evidence in the nature of the High School Certificate that was available on the record not much weight can be attached to the entry in C.H. Form 11. The finding on the question of minority recorded by the authorities below is a finding of fact. No ground for interference has been made out.

5. It is submitted by Sri Radhey Shyam, learned counsel for the respondents that the order of the Board of Revenue has become final. The Gaon Sabha had filed a writ petition against that order but had withdrawn the same. It is not disputed by Sri R.C. Singh that in this case the petitioner is not claiming title in herself but is setting up the title of the Gaon Sabha. The Gaon Sabha having already lost in the Board of Revenue and having withdrawn the writ petition the matter between the Gaon Sabha and the

plaintiffs/respondents has become final. The petitioner is litigating under the same title and consequently even otherwise the principles of res-judicata would be applicable. The view finds support from the decision of the Apex Court in 1996 Allahabad Civil Journal 824 (Singhal Lal Chand Jain Vs. Rashtriya Swayam Sewak Sangh, Pann and other). In that case a decree for eviction was passed against the Sangh. An objection under Section 47 C.P.C. in execution proceeding was filed by a member of the Sangh. The Apex Court held that the principles of res judicata were applicable as a member of the Sangh is litigating under the same title as the Sangh.

Sri R.C. Singh submits that the suit under Section 229-B was barred by limitation. In support of this contention he relies upon Section 341 of the U.P. Zamindari Abolition and Land Reforms Act, which provides that the Limitation Act would be applicable to proceedings under the U.P. Zamindari Abolition and Land Reforms Act and limitation in a suit for declaration would be governed by Article 137 of Schedule 1 of the Limitation Act as there is no period prescribed for such a suit under the U.P.Z.A. & L.R. Act. Section 341 itself provides that the provisions of certain Acts including the Limitation Act shall apply to the proceedings under the U.P.Z. & L.R. Act unless otherwise provided in the U.P.Z.A. & L.R. Act. Rule 338 of the U.P.Z.A. and L.R. Rules provides that the suits, applications and other proceedings specified in Appendix III shall be instituted within the time specified therein for them respectively. Recourse to the provisions of the Limitation Act would be available only if there is no provision under Rules in respect of the period of limitation for the different classes of suits or proceedings mentioned therein. In Appendix III the period of limitation provided for different classes of suits has been given. As regards suits under Section 229-B column 4, which prescribes the period of limitation for different classes of suit says “none”. It would therefore be treated that there is no limitation for filing a suit under Section 229-B. Section 9 of the Civil Procedure Code provides that all suits of civil nature shall be instituted in the civil court except those, which have been excepted. A suit under Section 229-B falls within the excepted category and such suits even though they involve declaration are suits of a special character. Article 137 of the Limitation Act relied upon by Sri Singh in any case is applicable only to applications and not to suits and therefore has no play. When the rule making authority has provided different periods of limitation for different classes of suits it would be treated that provisions prescribing period of limitation in the Limitation Act would not be applicable to suits under The U.P.Z.A. & L.R. Act. Section 189 U.P.Z.A. & L.R. Act sets out the circumstances in which the interest of a bhumidar is extinguished. Clauses (a) (aa) and (b) relate to cases where the bhumidar dies leaving no heir, or where he has let out his holding in contravention of the provisions of the Act or where the land is acquired. Sub Section (C) of Section 189 provides that where a bhumidar has lost possession the bhumidari right would extinguish when the right to recover possession is lost. In Ram Naresh Vs. Board of Revenue 1985 R.D. 444 relied upon by Sri R.C. Singh it was held that the provisions of Section 27 of the Limitation Act would be attracted to suits instituted under Section 229-B. Section 27

provides that on the determination of the period limited for instituting a suit for possession the right to such property shall be extinguished. The rule is an exception to the general rule that limitation bars the remedy but does not extinguish the right. If however a person is in possession his right can not be extinguished unless the case is covered by Clauses (a) (aa) and (b) of Section 189. He can therefore seek a declaration of his right at any point of time. If a person has been dispossessed he would have to institute a suit under Section 209 U.P.Z.A. & L.R. Act. Appendix III provides the period for limitation for filing a suit under Section 209. It would follow therefore that a suit under Section 299-B would be barred by limitation the bhumidar is out of possession and his right to file a suit under Section 209 is barred by limitation. The finding of fact recorded on the question of possession is that the plaintiffs have established their continuous possession over the disputed land. The finding is not shown to be vitiated by any error. As the rights of the plaintiff were never extinguished no question of limitation arises. For the reasons given above the writ petition lacks merit and is dismissed. Petition dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Section Appeal No. 894 of 1985

Radhey Shyam Mishra ...Plaintiff
Versus
Union of India through G.M., Northern Railway ...Defendant

Counsel for the Appellant:
Sri V.K. Pandey
Sri R.P. Mishra

Counsel for the Respondent:
Sri Govind Saran
Sri K.C. Sinha

Indian Railway Establishment Manual- Rule–Whether the Provision of Establishment Rules are the compilation of Rules held –yes:

Held: Para 8

I find that Appellate Court grossly erred in law in holding that the Indian Railway Establishment Manual, Part II is non statutory compilation of rules. In L. Robert D'Souza Vs. The Ex. Engineer Southern Railway AIR 1982 SC 854 it was held that Indian Railway Establishment Manual Vol. Ii is a compilation of Rules and is applicable as conditions of service to the Railway servants. The plaintiff having worked for more than six months continuously had attained the temporary status under para 2511 (1) and could only be terminated from service after following the procedure under para 2302 which conforms to para 2505 for termination of service and the provisions of Article 311 (2) of Constitution of India. There was no evidence o record and that the documents filed by the parties do not justify the findings of the lower appellate court that the plaintiff quit his job on his own accord. This was not even the case set up in the written statement. The letter dated 2.12.1997 in reply did not even suggest that plaintiff had quit the job.

Case law discussed:
AIR 1982 SC 854

(B) Indian Railway Establishment Rules– Para–2511 (c)–Termination Order– Appellant worked as skilled, Mechanic- on the basis of competitive examination worked about 6 month–acquired the statues of temporary employee can not

be terminated without following the procedure provided in para 2302–absent from duty without information amounts–misconduct before termination enquiry held must .

Held: Para 10 and 12

The plaintiff had attained the temporary status of employment. His services could not be terminated without following the procedure provided in para 2302 of the Indian Railway Establishment Manual.

I find that the pleadings and the documentary evidence led by parties, clearly raised the question of the status of employment and its consequences on termination of service. It is a substantial question of law which was not appreciated by the Lower Appellate Court and was wrongly decided against the plaintiff, who had not quit the job and was entitled to notice of termination. It was a case of misconduct and called for an enquiry before the notice of termination could be given.

Case law discussed:
AIR 1974 SC-1758
2005 (2) SCC-500

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

1. Heard learned counsel for the appellant and learned counsel for the respondent.

2. The substantial question of law that arises for consideration in Second Appeal and framed at the time of admission is whether a casual labourer who had acquired temporary status under Rule 2501 (b) of the Indian Railway Establishment Manual is debarred from the rights and privileges admissible to a temporary employee.

The facts giving rise to this second appeal are, that the plaintiff after having pased the written test for appointment as a 'Skilled Mechanic' was appointed, on 15.10.1975, on daily rated wages at Rs.8/- and was posted at Bindki Railway Station Fatehpur under the Telecommunication Inspector, Northern Railway, Kanpur. It was alleged in the plaint that he worked upto 27.4.1976 for 188 days and was thereafter reappointed on the same post w.e.f. 4.5.1976 of daily rated wages. On completing six months service, he was paid Rs. 13.30 per day w.e.f. 4.11.1976. He was not provided with any railway quarters. He was trade tested in May 1978 for the post of WM/TCM/Skilled Mechanic by oral, written and practical examinations on 27.8.1977. While performing the duties at Bindki Railway Station, he fell ill suffering from diarrhoea and became physically incapable of performance of duties. He had to leave at about 04.00 P.M. for easing himself and requested his colleagues Shri Maharaj Singh to perform his duties. He left at 08.00 PM after handing over the charge to Shri Maharaj Singh.

3. On the next day, he was ready to take charge of his duties. He met Sri B. Ram, Telecommunication Inspector, who refused to allow him to resume duties on 31.8.1977. He received a letter from Telecommunication Inspector, Microwave, Kanpur Centre alleging that he had absconded from duties and was found absent at 07.05 hours on 27.8.1977. On 2.9.1976 plaintiff submitted his explanation. Thereafter he was not allowed to join duties giving him cause of action to file the suit.

4. Both the parties filed documents in evidence. Plaintiff did not examine himself and did not produce any witness.

Both the parties dispensed with formal proof of documentary evidence and did not choose to examine any witnesses. The trial court found that the plaintiff had acquired temporary status in employment and that his services could not be terminated without following the procedure of giving 14 days notice as provided in para 2302 of the Indian Railway Establishment manual Vol. 2. The suit was consequently decreed with the declaration that the plaintiff is entitled to work as skilled mechanic. The statement of the defendant that his services came to an end on 27.8.1974 was declared to be void. The First Appeal No. 482 of 1983 against judgement and decree dated 19.4.1983 was, however, allowed by the XII Additional District Judge, Kanpur by the judgement and order dated 28.1.1985 on the ground that the plaintiff was not absorbed in service and did not attain temporary status. The Railway Establishment Manual does not have statutory force and that the plaintiff had abandoned his employment which was proved by the fact that he had pleaded guilty and had prayed for pardon.

5. Learned counsel for the appellant submits that having worked for more than six months as a skilled Mechanic, the plaintiff had attained temporary status. It was not necessary for the railways to issue a specific order of absorption. Para 2511 of Indian Railways Establishment Manual gives the employee the benefit of temporary employment. It is a protection given to the casual laboures against exploitation and the services of such an employee can be terminated only after following the procedure of giving notice under para 2302 of the Railways Establishment Manual Vol. II. The termination in such case can only be made, if it is on account of the expiry of the officiating vacancy, or removal and dismissal from service as a disciplinary measure after following with the provisions of Article 311 (2) of the Constitution of India, or when he is deemed to have resigned from his appointment. It gives a right to the employee to a notice and pay for the period of notice provided a notice of termination is given by the authority which is not lower than the appointing authority and where he is an apprentice, after following the provisions of Industrial Disputes Act 19473.

6. In the present case, it is denied in the written statement that the plaintiff had completed more than six months of daily rated service. In para 1 and 2 it is admitted that the petitioner was appointed as skilled Mechanic w.e.f. 4.5.1976. He took leave for attending the selections conducted by the headquarters for recruitment of mechanics from open marked. In para 15 it is stated that there was no question of removing the plaintiff from retrospective effect from 27.8.1976 as he was not at all in service at that time. In para 23 it is stated that he was found absent from duties and on an enquiry it was found that he had left the place of duty at 08.00 hours on 26.8.1977 and had not come back. Thereafter he did not turn up till 31.8.1977. When he came to Kanpur on 31.8.1977 he was required to give his explanation for his absence, on which he submitted a reply and accepted his guilt, left the place and thereafter did not turn up for duties.

7. The explanation submitted by the petitioner vide his letter dated 2.9.1977 clearly states that he had requested Sri Maharaj Singh to look after the duty on

27.8.1977, as he had very urgent work. He admitted that he did not take permission before leaving duties. On 2.12.1977 the plaintiff was informed as follows;

"Ref.: Your application dated 14/11/77

It is intimated that you were engaged as casual rated worker in the Artisan category against temporary labour application sanction only, and, therefore, your engagement on casual rated basis is governed by the extant rules on the subject. You were not permanent employee of the railway.

Sr. Signal & Telecom. Engineer/MW"

8. I find that Appellate Court grossly erred in law in holding that the Indian Railway Establishment Manual, Part II is non statutory compilation of rules. In **L. Robert D'Souza Vs. The Ex. Engneer Southern Railway AIR 1982 SC 854** it was held that Indian Railway Establishment Manual Vol. Ii is a compilation of Rules and is applicable as conditions of service to the Railway servants. The plaintiff having worked for more than six months continuously had attained the temporary status under para 2511 (1) and could only be terminated from service after following the procedure under para 2302 which conforms to para 2505 for termination of service and the provisions of Article 311 (2) of Constitution of India. There was no evidence o record and that the documents filed by the parties do not justify the findings of the lower appellate court that the plaintiff quit his job on his own accord. This was not even the case set up in the written statement. The letter dated 2.12.1997 in reply did not even suggest that plaintiff had quit the job.

9. It is admitted that the Railway administration did not given any notice of termination of service to the plaintiff-appellant. Even if he had left the place of his duty without informing his superior officers, he could have explained his absence. I find that sufficient explanation was given by the plaintiff for his absence. He urgently required leave and that when he came back on the next date he was not allowed to join duties. He was just informed that as a temporary labour his engagement on casual rated basis is governed by the rules implying that his engagement on casual rated basis is governed by the rules implying that his services could be disposed off at any time.

10. This matter was not transferred as Central Administrative Tribunal as the Second Appeals have been saved by Section 29 (2) of the Administrative Tribunals Act. The lower appellate court committed gross error of law in holding that the petitioner had quit the job. The plaintiff had attained the temporary status of employment. His services could not be terminated without following the procedure provided in para 2302 of the Indian Railway Establishment Manual.

11. Shri Govind Saran, learned counsel for the defendant respondent states that the findings that plaintiff-appellant had quit his job are findings of fact, and that the Railway Establishment Manual is not statutory in nature, vide **The General Manager South Central Railway Vs. V.R. Siddharh AIR 1974 SC 1755**. He further submits that no substantial question of law arises for consideration vide **Govind Raju Vs. Mariamman 2005 (2) SCC 500**.

12. I find that the pleadings and the documentary evidence led by parties, clearly raised the question of the status of employment and its consequences on termination of service. It is a substantial question of law which was not appreciated by the Lower Appellate Court and was wrongly decided against the plaintiff, who had not quit the job and was entitled to notice of termination. It was a case of misconduct and called for an enquiry before the notice of termination could be given.

13. The plaintiff as such is entitled to the reliefs claimed in the suit.

14. The Second Appeal is allowed. The judgement passed by XII the Additional District Judge, in Civil Appeal No. 482 dated 28.1.1981 and the decree dated 23.2.1985 is set aside. The Plaintiff suit shall stand decreed in terms of the directions issued by the trial court. The plaintiff shall be entitled to the costs of the suit throughout. Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 450 of 2003

Radhey Shyam Singh (IInd) ...Petitioner
Versus
Director of Education, U.P. Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri K.C. Vishwakarma

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

U.P. Public Service Commission (Reservation)-for Scheduled Castes, Scheduled Tribes and other Backward classes) Act 1994-Rule 3 (1)-Reservation on promotional post-prior to enforcement of Act-its was governed by the G.O. dated 11.12.93-petitioner belongs to OBC L.T. Grade Teacher-claimed promotion under 50% quota being senior most L.T. grade Teacher-management passed resolution on 9.3.02 send for approval- DIOS refused on the ground out of 6 posts of Lecturer-under promotion Quota one post is to be filled up by S.C./S.T. candidate-held-proper.

Held: Para 6

The reservations for SC/ST is as such applicable in promotions and all the Government Orders in this regard are saved by Section 3 (7) of the Reservation Act, 1994. The objections of the District Inspector of Schools to the promotion of petitioner belonging to Other Backward Class for promotion in 50%, quota is a such a valid objection. I do not find any illegality or error in the order of District Inspector of Schools, to interfere in the matter. The writ petition is dismissed.

Case law discussed:
1993 (1) ESC-644
2001 (1) U.P.L.B.E.C.-708
1992 (1) SCC-20
1981 UPLBEC-521
2004 (1) ESC-424
2004 (2) UPLBEC-1837

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

1. Heard Sri K.C. Vishwakarma, learned counsel for the petitioner and learned standing counsel.

2. Briefly stated the facts of this case are that Chhatrapati Shivaji Inter College, Khajuraul, District Mirzapur, is an aided and recognised intermediate college. The petitioner belongs to the reserved category (Other Backward Class). He was

appointed in the institution as a LT grade teacher on 1.10.1974. A vacancy was caused in the lecturer's grade in History on the superannuation of Shri Samsuddin. The petitioner being the senior most teacher was considered for promotion in the 50% quota reserved in the lecturer's grade. On 9.3.2002 a resolution in this regard was passed by the Committee of Management and was sent for approval. The District Inspector of Schools, Mirzapur returned the resolution on the ground that there are six sanctioned posts of lecturers in the institution out of which three posts are filled up by direct recruitment, and that only one post in promotion quota is vacant to be filled up from amongst the reserved category candidate and that according to policy of the reservation the unfilled vacancy has to be allotted only to the reserved category (SC/ST) candidate.

3. Learned counsel for the petitioner has challenged the order on the ground that rules of reservation are not applicable in promotion, to the post of lecturer in intermediate colleges. He has relied upon a judgement of this Court in **Asha Jaiswal (Smt.) vs. Joint Director of Education, Varanasi 2004 2 UPLBEC 1837** in which it was held that the State Government has not taken any decision to enforce reservation in promotions in recognised Intermediate Colleges.

4. The question with regard to reservations in promotion for Scheduled Caste/Scheduled Tribes candidates, on the posts in lecturer's grade in the intermediate Colleges regulated by U.P. Secondary Education Services Commission Rules 1995, came up for consideration in **Sunil Kumar Misra vs. Regional Selection Committee, Gorakhpur 2004 1 ESC 424**. This Court relying upon **Krishna Pal Singh vs. Government of U.P. 1981 UPLBEC 521; Comptroller and Auditor General of India and another vs. Mahendra Lal and others (1992) 1 SCC 20, and Sudhir Kumar Anand vs. U.P. State Electricity Board and others 2001 (1) UPLBEC 708** held that the Constitution (77th Amendment) Act 1995, inserted clause-(4-A) in Article 16 of the Constitution of India, enabling the State to make provisions for reservation in matters of promotion to any class or classes of posts in the services under the State, in favour of SC//ST, which in the opinion of the State are not adequately represented in the services under the State.

5. Section 3 (7) of the U.P. Public Services (Reservations for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994 (the Reservation Act 1994, for short), provides that if on the date of commencement of the Act, reservation was in force under any Government Order for appointment to the posts to be filled up by promotion, such Government Orders shall continue to be applicable till they are modified or revoked. Prior to the enforcement of the Act i.e. 11.12.1993, the State Government had issued orders providing for reservation for 21% for Scheduled Caste, 2% for Scheduled Tribe, in respect of posts to be filled up by way of promotion. The Government Orders issued on 12.7.1998, was thus saved by the Reservation Act 1994. In Sudhir Kumar Anand (supra) this Court upheld these orders and in **V.K. Banerjee vs. State of U.P. 1993 (1) ESC 644** this Court upheld the validity of the Government order dated 10.10.1994 increasing reservation quota for promotion in favour of

Scheduled Castes candidates from 18% to 21%.

6. The reservations for SC/ST is as such applicable in promotions and all the Government Orders in this regard are saved by Section 3 (7) of the Reservation Act, 1994. The objections of the District Inspector of Schools to the promotion of petitioner belonging to Other Backward Class for promotion in 50%, quota is a such a valid objection. I do not find any illegality or error in the order of District Inspector of Schools, to interfere in the matter. The writ petition is dismissed.
Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2005

BEFORE
THE HON'BLE V.K. SHUKLA, J.

Civil Misc. Writ Petition No. 8540 of 1996

Rama Kant Misra ...Petitioner
Versus
Committee of Management, Badri Nath Intermediate College, Meja Road, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Raj Kumar Jain
Sri Hari Shanker Misra
Sri R.K. Singh
Sri Anil Bhushan

Counsel for the Respondents:
Sri Sudhir Agarwal, Addl. A.G.
Sri Radhey Shyam Dwivedi
Sri S.S. Sharma
Sri Rajesh Dwivedi
S.C.

U.P. Act No. 4 of 1994-Section 2 (c), 3 (7)-readwith Constitution of India Art. 14, 16-Reservation in Promotional Post-Government order providing reservation to S.C./S.T.-continue to be applicable till revocation, or modification-Post of lecturer-if the vacancy fall under reserved Quota-suitable candidates for promotion not available-it shall carry forward to next year-but can not be filled up by general category.

Held: Para 20 & 22

The logical conclusion on the basis of reference made above is that though in the matter of promotion under U.P. Act No. 5 of 1982 and the Rules framed thereunder there is no mention for providing any reservation, but as promotion is to be made in "public service and post" as defined under Section 2(c) and 2(c) (iv) of U.P. Act No. 4 of 1994 then in terms of Section 3(7) of U.P. Act No. 4 of 1994, the Government Orders which covered the field of promotion qua SC/ST category candidates, continue to be applicable till they are modified or revoked. As till date said Government Orders have not been revoked or modified, net effect of the same would be that 21% of vacancies is to be filled by way of promotion from amongst SC category and 2% of vacancies from amongst ST category candidates.

Thus, this much is clear that when the point is fixed for reserved category candidates by way of roster then same has to be filled from amongst the members of reserve category and the candidates belonging to General category are not entitled to be considered on the reserved post and the Sate Government has discretion to carry forward the point in just and fair manner. Thus, reserved post cannot be offered to other category candidate and State Government is empowered to carry forward the said point in just and fair manner.

Case law discussed:
1981 UPLBEC 521,
1992 Supp. (3) SCC-217
2001 (1) UPLBEC 708

1999 (1) ESC-644
2004 (2) UPLBEC 1520
2004 (2) UPLBEC-1837
1995 (2) SCC-745
1999 (7) SCC-209
AIR 1963 SC-649
1992 Supp. (3) SCC-217
1998 (4) SCC-31
AIR 1963 SC 649
AIR 1964 SC-179
1992 Supp. (3) SCC-217
1972 (1) SCC-660
AIR 1968 SC-507

(Delivered by Hon'ble V.K. Shukla, J.)

1. Brief facts giving rise to instant writ petition in brief is that in the district of Allahabad there is a recognised institution known as Badri Nath Tiwari Inter College, Meja Road, Allahabad. Said institution is a duly recognised institution under the provisions as contained under U.P. Intermediate Education Act 1921 and Regulations framed therein. Said institution is engaged in imparting education up to Intermediate level. Institution in question is also in grant-in-aid list of the State Government and the provisions of U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1971 are also fully applicable to the said institution. After enforcement of U.P. Act No. 5 of 1982 selection and appointment on the post of Principal, Lecturer and L.T. Grade teachers is to be made strictly as per the provisions as contained in U.P. Act No. 5 of 1982and Rules framed. In the institution concerned Ramkant Misra was appointed as L.T. Grade teacher on 01.08.1974. Eight posts of Lecturer have been sanctioned in the aforementioned institution. One such post was being held by one Manideo Singh in the capacity of Lecturer in Civics. Said Manideo Singh retired on 30.06.1992 and thus, a substantive vacancy on the post of Lecturer in Civics fell vacant. Petitioner has contended that out of eight sanctioned post of Lecturer only two post of Lecturer had been filled up by way of promotion and as such said post of Lecturer in Civics fell within promotional quota and as such same ought have been filled up by way of promotion by promoting the petitioner on the post of Lecturer in Civics. As no action was being taken petitioner, Rama Kant Mishra in his turn represented the matter again and again for promoting him, but no action was taken on the same and in the meantime Managing Committee of the institution on the pretext that there is no S.C./S.T. Candidate available in the institution sent requisition to U.P. Secondary Education Services Selection Board on 24.05.1995 for filling up aforementioned vacancy by way of direct recruitment from amongst S.C./S.T. Candidate. When requisition was sent, at this juncture Civil Misc. Writ Petition No. 8540 of 1996 had been filed before this Court by Ramakant Mishra claiming therein promotion on the post of Lecturer in Civics with effect from 01.07.1992.

2. On presentation of aforementioned writ petition, this Court as an interim measure passed following order which is being quoted below:

"Meanwhile, I direct respondent no. 2 to decide the petitioner's representation filed on 20.10.1995 within a period of one month from the date a certified copy of this order is produced before him alongwith the copy of the said order."

3. Pursuant to directives issued by this Court, Deputy Director of Education proceeded to decide the representation

moved on behalf of the Ramakant Mishra petitioner and order was passed on 18.04.1996 by Deputy Director of Education 4th Region Allahabad accepting claim of Ramkant Misra for being promoted under promotional quota as post in question was not liable to be filled up by way of direct recruitment. Said order has been subject matter of challenge before this Court by means of Civil Misc. Writ Petition No. 20453 of 1996 by Managing Committee of the Institution. Thereafter Civil Misc. Writ Petition No. 39441 of 1996 has been filed by Ramkant Misra praying therein that order dated 18.04.1996 be implemented and be given effect to by according promotion to him.

4. Counter affidavit has been filed in Civil Misc. Writ Petition No. 8540 of 1996 and therein Management of the institution has tried to raise dispute in respect of educational qualification of Ramakant Mishra and further it has been asserted that there is no teacher in L.T. Grade belonging to S.C/S.T category and as such post in question in all eventuality is to be filled up from amongst reserved category candidate, by way of direct recruitment. Further it has been asserted that one Mahendra Nath Tripathi is senior to the petitioner and it is his claim which is to be accepted and not that of petitioner.

5. Rejoinder affidavit has been filed to this counter affidavit and therein it has been asserted that promotion cannot be permitted to be defeated in the way and manner as has been sought to be done in the present case as such action of the Management in not according promotion to the petitioner is wholly unjustifiable. In respect of post of Lecturer in Civics, alternatively it has been contended that even if said post is reserved for S.C./S.T. Category candidates and there being no one available in the next lower grade it has to be filled up by way of promotion from amongst General Category candidate.

6. After pleadings have been exchanged inter se parties with the consent of the parties all these three writ petitions are being taken up together and are being decided together, as issues raised are interconnected.

7. Issue which has been sought to be raised in this writ petition is; (1) whether there is any provision of reservation provided for in the matter of promotion under U.P. Act No. 5 of 1982 and Rules framed thereunder (2) In case it is accepted that there is provision of reservation in promotion and in the next lower grade no one eligible from reserved category is available then whether said post has to be filled up by way of promotion from amongst General Category candidate or by way of direct recruitment from amongst SC/ST category candidate.

8. As question mentioned above was of general importance, as such invitation was extended to Members of "Bar, to advance arguments and pursuant thereto arguments were advanced by various counsel at the Bar in support of the reservation and against the reservation.

9. Sri Raj Kumar Jain, Senior Advocate Sri R.K. Singh, Advocate, Sri Anil Bhushan, Advocate and Sri H.S. Misra, Advocate, counsel for the petitioner contended that under U.P. Act No. 5 of 1982, there is no provision of

reservation in promotion and now right of promotion has been accepted to be fundamental right, and said right cannot be permitted to be defeated, specially when in the feeder cadre, no one elligible from the reserve category is available, and in that event post has to be filled up from amongst General Category candidate, and promotion quota post cannot be permitted to be diverted under direct recruitment quota, as such action of Respondents cannot be subscribed.

10. Sri Radhey Shyam, Advocate as well as Sudhir Agarwal, Additional Advocate General U.P. submitted with vehemence that once post in question is reserved for S.C./S.T. Category candidate in the matter of promotion by way of roster, then by no stretch of imagination said post could be filled up from amongst General category candidate and the post will have to be filled up by way of direct recruitment in case in the next lower grade, no one from reserved category is available and same cannot be filled up by way of promotion from amongst General category candidate.

11. After respective arguments have been advanced in the present case. Relevant provisions, which cover the field are being looked into. At the point of time when petitioner's promotion was to be adverted to the provision as contained under Section 10 and 11 of U.P. Secondary Education Services Selection Board Act 1982 alongwith relevant Rules 4 to 9 of U.P. Secondary Services Commission Rules 1983 are being quoted below:

U.P. Act No. V of 1982

10. **Procedure of selection:**- (1) For the purpose of making appointment of a teacher, the management shall determine the number of vacancies existing or likely to fall vacant during the year of recruitment and in the case of post other than the post of Head of the Institution, also the number of vacancies to be reserved for the candidates belonging to the Schedule Castes, the Scheduled Tribes and other Backward Class of citizens in accordance with the Uttar Pradesh Public Services (Reservation for Schedule Castes, Schedule Tribes and Other Backward Classes) Act 1994 and notify the vacancies to the Commission in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for appointment to the post of teachers shall be such as may be prescribed:

Provided that the Commission shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under Sub-section (1).

11. **Panel of Candidates:**- (1) The Commission shall, as soon as may be after the vacancy is notified under Sub-section (1) of Section 10, hold interviews of the candidates and prepare a panel of those found most suitable for appointment.

(2) The panel referred tin Sub-section (1) shall be forwarded by the Commission to the officer or authority referred in Sub-section (1) of Section 10 in such manner as may be prescribed.

(3) After the receipt of the panel under Sub-section (2) the officer or authority concerned shall in the prescribed manner intimate the Management of the Institution the names of the selected candidates in respect of the vacancies notified under Sub-section (1) of Section 10.

(4) The management shall within a period of one month from the date of receipt of such intimation, issue appointment letter to such selected candidate.
(5) Where such selected candidate fails to join the post in such Institution within the time allowed in this behalf, or where such candidate is otherwise not available for appointment, the officer or authority concerned may, on the request of the Management intimate in the prescribed manner, fresh name from the panel forwarded by the Commission under Sub-section (2)]

U.P. Secondary Education Services Commission Rules 1983:-

"4. Determination and intimation of vacancies- (1) (i) The Management shall determine and intimate to the Commission, in the proforma given in Appendix "A" and in the manner hereinafter specified, the number of vacancies existing or likely to fall vacant during the year of recruitment and in the case of any post, other than the post of the head of an institution also the number of vacancies to be reserved for the candidates belonging to the scheduled caste, scheduled tribes and other category of persons in accordance with the rule or others issued by the Government in this behalf in regard to the educational institution.

(II) In regard to the post of head of an institution the Management shall also forward, mutatis mutaindis in the manner hereinafter specified the name of two senior most teacher copies of their service records (including character rolls) and such other record or particulars as the Commission may require from time to time.

Explanation - For the purpose of this sub-rule 'senior most teacher' mean the senior teachers in the post of the highest grade in the institution.

(III) Where an institution is raised from High School to an Intermediate College, the post of Principal of such a college shall with the approval of the Commission be filled by promotion of the Head master of such High School if he was duly appointed as Headmaster in substantive capacity in accordance with law for the time being in force and posses a good record of service and the minimum qualification prescribed in that behalf or has been granted exemption from such qualification by the Board. Proposal for such promotion shall be submitted by the Management to the Commission mutatis mutandis in the manner hereinafter specified alongwith the service book, character roll and the educational and other qualification of the Headmaster concerned.
(2) The statement of vacancies shall be sent by the Management to the Inspector in quadruplicate by 15th September of the year of recruitment and the Inspector shall after verification forward two copies of the same to the Deputy Director by October 15, with a copy of the Commission.
(3) The Deputy Director shall after keeping a copy, forward the statement received by him under sub-rule (2) alongwith a consolidated subject-wise statement of various categories of vacancies to the Commission by November 15.
(4) Notwithstanding anything contained in sub-rule (1), (2) and (3) the time schedule mentioned in the sub-rules shall not apply in respect of recruitment year 1982 and

unless any other date or schedule is notified by the Government the Director shall ensure that vacancies are notified to the Commission by February 28, 1983.
Provided that where Government is satisfied that there are sufficient reasons for doing so it may relax the time schedule in the respect of any year generally or in respect of any particular institution.

(5) Where a vacancy occurs at any time during the session or after the requisition has already been sent in accordance with sub-rules (2), (3), (4) or (5) of this rule the management shall notify the vacancy to the Inspector within 15 days of its occurrence and the Inspector and the Deputy Director shall deal with it in the manner mentioned in sub-rules (3) and (4) and within 10 days of its receipt by them.
(6) (i) Where the Management has for any recruitment year, failed to notify the vacancy or the vacancies by the date specified in sub-rules (2) (4) or (5) or has failed to notify the vacancy or the vacancies in the manner prescribed in rule 4 or Rule 9 the Commission may require the Inspector to notify the vacancy or the vacancies in the institution under his jurisdiction to the Commission by such date as the Commission may specify.
(ii) Where the Commission requires the Inspector to notify the vacancy or the vacancies under paragraph (1) of this sub-rule the Inspector shall notify the same in accordance with Rule 4 or as the case may be Rule 9 of these rules and the vacancy or the vacancies so notified shall be deemed to be notified by the Management.
5. Notification of vacancies - The Commission shall, in respect of vacancies to be filled by direct recruitment advertise the vacancies in at least two newspapers having wide circulation in the State and shall also notify the same to the Deputy Director. Such advertisement or notifications shall, inter alia mention the names of the institutions and places where they are situated and shall require the candidates to give, if he so desires the choice of not more than five institutions in order to preference. Where a candidate wishes to be considered for particular institution or institutions only and for no other institution, he shall mention the fact in his application.
6. Procedure for recruitment- The Commission shall scrutinize the applications and having regard to the need of securing due representation of candidate belonging to the Scheduled Castes and Scheduled Tribes and other categories referred to in Rule 4 call for interview such number of candidate as it may consider proper:
Provided that in respect of the post of the head of an institution the Commission shall also call for interview two senior most teachers of the institution whose name are forwarded by the management under sub-rule (1) Rule (4):
Provided further that if on account of excess number of applications or for any other reasons, the Commission considers it desirable to limit the number of candidates to be called for interview, if may-

(i) In the case of the post of a teacher, not being the post of the head of an institution, either hold preliminary screening on the basis of academic record or hold a competitive examination; and
(ii) in the case of the post of the head of an institution hold preliminary screening on the basis of academic record, teaching and administrative experience.

Provided also that the number of candidates to be called for interview for any category of post shall, as far as possible, be not less than five times the number of vacancies.

7. Preparation of panel- (1) The Commission shall prepare an institution-wise panel of those found most suitable for appointment and arrange them in order of merit, inter alia mentioning-

(i) the name of the institution and where it is situate;

(ii) the subject in which vacancy existed and selection made;

(iii) names of selected persons in order of merit and with due regard to their preference for appointment in a particular institution

(2) the Panel prepared under sub-rule (1) shall hold good for one year from the date of its notification by the Commission.

8. Notification of selected candidate-(1) The Commission shall forward the panel referred to in Rule 7 in quadruplicate to the Deputy Director and shall also notify the same on its notice board and publish it in such other manner as it may consider proper.

(2) Within 15 days of the receipt of the panel by him, the Deputy Director shall notify it on his notice board and publish it in such other manner as it may consider proper.

(2) Within 15 days of the receipt of the panel by him, the Deputy Director shall notify it on his notice board and send two copies thereof to the Inspector.

(3) Within 10 days of the receipt of the panel by him, the Inspector shall-

(i) notify it on the notice board:

(ii) Intimate the name of selected candidates, standing first in order of merit and where there are more than one vacancies as many names in order of merit as there are vacancies to the Manager of the concerned institution with directions that no authorisation under resolution of the Management an order of appointment in the proforma given in Appendix "B" be issued to the candidate by registered post within one month of the receipt of intimation requiring him to join duty within 10 days of the receipt of the order or within such extended time, as may be allowed to him by the Management and also intimating him that on his failure to join within the specified time his appointment will be liable to be cancelled.

(iii) Send an intimation to the candidate, referred to in clause (ii) with directions to report to the Management within 10 days of the receipt of the order of appointment by him from the Manager or within such extended time as may be allowed to him by the Management.

(4) The Manager shall comply with the directions given under sub-rule (3) and report compliance to the Commission through the Inspector.

(5) When the candidate referred to in sub-rule (3), fails to join the post within the time allowed in the letter of appointment or within such extended time as the management may allow in this behalf or where such candidate is not available for appointment the Inspector may on the request of the management send fresh name or names standing next in order or merit on the panel under intimation to the Deputy Director and the Commission and the provisions of sub-rules (3) and (4) shall mutatis mutandis apply.

9. Procedure for appointment by promotion- (1) Where any vacancy is to be filled by promotion all teachers working in L.T. Or C.T grade who possess the minimum qualifications and have put in at least 5 years continuous

service as teacher on the date of occurrence of vacancy shall be considered for promotion to the Lecturer or L.T. Grade as the case may be without their having applied for the same.

Note- For the purpose of this sub-rule service rendered in any other recognised institution shall count for eligibility, unless interrupted by removal dismissal or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in sub-rule (1) and forward it to the Commission through the Inspector with a copy of seniority list, service records (including the character rolls0 and a statement in the proforma given in Appendix 'A'

(4) Within three weeks of the receipt of the list from the Management under sub-rule (3) the Inspector shall verify the facts and forward the list to the Commission.

(5) The Commission shall after calling for such additional information as it may consider necessary, intimate the name of selected candidate or candidates to the Inspector with a copy to the Manager of the Institution.

(6) Within ten days of the receipt of the intimation from the Commission under sub-rule (5) the Inspector shall send the name of the selected candidate (s) to the Manager of the concerned institution and the provisions of sub-rules (3) and (4) of Rule 8 shall mutatis mutandis apply]

12. A bare perusal of Section 10 and 11 of U.P. Act No. 5 of 1982 and Rules would go to show that Management has been enjoined upon to determine and intimate vacancies to the Commission in the proforma given in Appendix 'A and number of vacancy existing or likely to fall vacant during the year of recruitment as well as number of vacancy to be reserved for candidate belongs to S.C./S.T. and other category of persons in accordance with the rules or orders issued by the Government in this behalf in regard to the educational institutions. Said statement of vacancies are to be sent within 15 September of the year of recruitment and District Inspector of Schools after verification of the same is enjoined upon to forward two copies of the same to the Deputy Director of Education. Deputy Director of Education thereafter is enjoined upon to forward the statement received by him under sub-rule (2) alongwith a consolidated subject-wise statement of various categories of vacancies to the Commission. Where Commission has failed to notify the vacancy in the manner prescribed the Commission may require the Inspector to notify the vacancy and vacancies in the institution under his jurisdiction to the to Commission by such date as the Commission may specify. Rule 5 deals with notification of vacancy. Rule 6 provides the procedure for recruitment and thereafter it has been provided that in respect of the post of the Head of an institution the Commission shall also call for interview two senior-most-teachers of the institution whose names are forwarded by the management under sub-rule (1) of Rule 4. Rule 7 deals with preparation of panel. Rule 8 deals with notification of selected candidate. Rule 9 deals with procedure for appointment by promotion. Said rule provides that where any vacancy is to be filled by promotion all teachers working in L.T. Or C.T. Grade, who possess the minimum qualifications and have put in at least five year continuous service as teacher on the date of occurrence of vacancy shall be considered for promotion for the same Lecturer or

L.T. Grade as the case may be without their having applied for the same. The criterion for promotion shall be seniority subject to the rejection of unfit. In that event management is obliged to prepare the list of teachers referred to in sub-rule (1) and forward it to the Commission through the Inspector with a copy of seniority list,service records including the character rolls and a statement in the proforma given in Appendix "A" thereafter Inspector has to verify the facts and forward the list to the Commission and Commission thereafter after calling for such additional information as it considers necessary, intimate the name of selected candidate or candidates and thereafter within ten days for the date of receipt of the intimation from the Commission to the Inspector shall send the name of the selected candidates to the Manager of the Institution.

13. Thereafter Chapter III of U.P. Act No. V of 1982 containing Section 12, 12A,12B, 12C,13 14,15 and 15-A have been omitted by U.P. Act No. 15 of 1995 w.e.f. 28.12.1994 new set of Rules known as U.P. Secondary Education Services Commission Rules 1995 were brought in force. Relevant extract of 1995 Rules are being quoted below:

U.P. Secondary Education Services Commission Rules 1995:-

10. Source of recruitment- Recruitment to various categories of teachers shall be made from the following sourses:

(a) Principal of an Intermediate College or Headmaster of a High School-	By Direct recruitment
(b)Teachers of lecturers grade	(i) 50 percent by direct recruitment (ii) 50 percent by promotion from amongst substantively appointed teachers of the trained graduates (L.T) grade
(c) Teachers of trained graduate (L.T.) grade	(i) 50 percent by direct recruitment (ii) 50 percent by promotion from amongst substantively appointed teachers of the trained graduates (C.T) grade

Provided that it in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the posts may be filled in by direct recruitment;

Provided further that if in calculating respective percentages of posts under this rule there comes a fraction then the fraction of the posts to be filled by direct recruitment shall be ignored and the fraction of the posts to be filled by promotion shall be increased to make it one post.

11. Determination and notification of vacancies--(1) The management shall determine the number of vacancies in accordance with sub-section (1) of Section 10 of the Act and notify them through the Inspector to the Commission in the manner hereinafter provided.

(2) The statement of vacancies for each category of posts to be filled in by direct recruitment or by promotion, including the vacancies that are likely to arise due to

retirement on the last day of the year of recruitment, shall be sent in separately in quadruplicate, in the pro forma given in Appendix "A" by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subjectwise in respect of the vacancies of lecturer grade and groupwise in respect of vacancies of trained graduates(L.T) grade. The consolidated statement so prepared shall, alongwith the copies of statement received from the Management, be sent by the Inspector to the Board by July 31 with a copy thereof to the Joint Director.

Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment:

Provided further that in respect of the vacancies existing on the date of the commencement of these rules as well as the vacancies that are likely to arise on June 30, 1995, the Management shall, unless some other dates are fixed under the preceding proviso, send the statement of vacancies by June 15,1995 to the Inspector and the Inspector shall send the consolidated statement in accordance with this sub-rule to the Board by June 30, 1995.

Explanation- For the purposes of this sub-rule the word "group-wise' in respect to the trained graduates (L.T) grade means in accordance with the
following groups, namely:

(a) Language	This group consist of the subjects of Hindi, Sanskrit, Urdu, Persian and Arabic
(b) Science	This group consists of the subjects of Science and Mathematics.
(c) Art and Craft	
(d) Music	
(e) Agriculture	
(f) Home Science	
(g) Physical Education	
(h) General	This group consists of the subjects not covered in any of the foregoing groups.

(3) If, after the vacancies have been notified under sub-rule (2), any vacancy in the post of teacher occurs, the Management shall, within fifteen days of its occurrence, notify to the Inspector in accordance with the said sub-rule and the Inspector shall within ten days of its receipt by him send if to the Commission

(4). Where, for any year of recruitment, the Management does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Inspector shall on the basis of the record of his office, determine the vacancies in such institution in accordance with sub-section (1) of Section 15 of the Act and notify them to the Commission in the manner and by the date referred on in the said sub-rule. The vacancies notified to the Board under this sub-rule shall be deemed to be notified by the Management of such institution.

12. **Procedure for direct recruitment-** (1) The Commission shall, in respect of the vacancies to be filled by direct recruitment, advertise the vacancies including those reserved for candidates belonging to Scheduled castes, Scheduled Tribes and Other Backward Classes of citizens in at lest two daily newspapers, having wide circulation in the State, and call for the applications for being considered for reservation in the proforma published in the advertisement. For the post of Principal of an Intermediate College or the Head Master of a High School, the name and place of the institution shall be mentioned in the advertisement and the candidates shall be required to give the choice of not more than three institutions in order of preference and if he wished to be considered for any particular institution or institutions and for no other institution, he may mention the fact in his application.

(2) The Commission shall scrutinize the applications and prepare list for each category of posts on the basis quality point specified in Appendix B C or D as the case may be and having regard to the need for securing due representation of the candidates belonging to the Scheduled Caste, Scheduled Tribes and Other Backward Classes of citizens in respect of the posts of teacher in lecturers and trained graduates (L.T.) grade, call for interview such candidate who have secured the maximum quality points in such manner that the number of candidates shall not exceed five times the number of vacancies.]

(3) The Commission shall hold interview of the candidates and for each category of post prepare panel of those found most suitable for appointment in order to merit as disclosed by the marks obtained by them in the interview. The panel for the post of Principal or Headmaster shall be prepared institutionwise after giving due regard to the preference given by a candidate, if any, for appointment in a particular institution whetheras for the posts in the lecturers and trained graduates (LT) grade, if shall be prepared subjectwise and groupwise respectively. If two or more candidates obtain equal marks in interview, the name of the candidate who has higher quality points shall be placed higher in the panel and if the marks obtained in the interview as well as the quality points of two or more candidates are equal the name of the candidate who is older in age shall be placed higher, In the panel for the post of Principal or Headmaster, the number of names shall be three times of the number of the vacancy and for the post of teachers in the lecturers in the lecturers and trained graduates (LT) grade, it shall be larged (but not larger than twenty-five percent) then the number of vacancies.

Explanation- For the purposes of this sub-rule the word groupwise means menas in accordance with the groups specified in the Explanation to sub-rule (2) of rule 11.

(4) At the time of interview of candidates, for the post of teachers in lecturers and trained graduates (LT) grade the Commission shall, after showing the list of the institution which have notified the vacancy to it, require the candidate to give, if he so desires, the choice of not more than five such institutions in order of preference, where, if selected, he may wish to be appointed.

(5) The Commission shall after preparing the panel in accordance with sub-rule (3), allocate the institutions to the selected candidates in respect of the posts of teachers in lecturers and trained graduates (LT) grade in such manner that the candidate whose name appears at the top of the panel shall be allocated the institution of his first preference given in accordance with sub-rule (4). Where a selected candidate cannot be allocated any of the institutions of his preference on the ground that the candidates placed higher in the panel have already been allocated such institutions and there remains no vacancy in them. The commission may allocate any institution to him as it may deem fit.]

(6) The commission shall forward the panel prepared under sub-rule (3) alongwith the name of the institutions allocated to selected candidates in accordance with sub-rule (5) to the Inspector with a copy thereof to the Deputy Director and also notify them on its notice board.

13. Intimation of names of selected candidates--(1) The Inspector shall, within ten days of the receipt of the panel and the allocation of institution under Rule 12,--

(i) notify it on the notice-board of his office.

(ii) Intimate the name of selected candidate to the Management of the institution, which has notified the vacancy, with the director, that, on authorization under resolution under resolution of the management, an order of appointment, in the pro forma given in Appendix "E' be issued to the candidate by registered post within fifteen days of the receipt of intimation requiring him to joint duty within fifteen days of the receipt of the order or within such extended time, as may be allowed to him by the Management, and also intimating him that on his failure to join within the specified time his appointment will be liable to be cancelled.

(iii) Send an intimation to the candidate, referred to in clause (ii) with the direction to report to the Manager within fifteen days of the receipt of the order of appointment by him from the Manager or within such extended time as may be allowed to him, by the Management.

(2) the Management shall comply with the directions, give under sub-rule (1) and report compliance thereof to the Board through the Inspector.

(3) Where the candidate, referred to in sub-rule (1), fails to join the post within the time allowed in the letter of appointment or within such extended time as the Management may allow in this behalf or where such candidate is otherwise not available for appointment, the Inspector may, on the request of the Management, intimate fresh name or names standing next in order of merit on the panel, under intimation to the Joint Director and the Board, and the provisions of such-rule (1) and (2) shall mutatis mutaindis apply.

(4) The Joint Director shall monitor and ensure that the candidates selected by the Board join the institution in the specified time and for this purpose, he may issue such directions to the Inspector as he thinks proper."

"14. Procedure for recruitment by promotion- (1) Where any vacancy is to be filled by promotion all teachers

working in trained graduates (L.T) grade or certificate of Training (C.T.) grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates (L.T) grade, as the case may be, without their having applied for the same.

14. Even as per 1995 Rules, Rule 10 dealt with source of recruitment by providing that post of Principal of Intermediate College/Headmaster of High School is to be filled up by way of direct recruitment. Lecturers are to be appointed 50% of the post by way of direct recruitment and fifty percent by promotion from amongst substantively appointed teachers of L.T. Grade. Similarly in respect of the L.T. Grade teacher, 50% of the post is to be filled up by way of direct recruitment and 50% by way of promotion from amongst substantively appointed teachers of C.T. Grade. It has also been provided for, that it in any year of recruitment suitable eligible candidates are not available for recruitment by way of promotion, the post may be filled up by way of direct recruitment. Rule 11 obligates the Management to determine the number of vacancies in accordance with sub-section 1 of Section 10 of Act and to notify the same to Commission. Rule 12 deals with procedure for direct recruitment. Rule 13 deals with intimation of name of selected candidate. Rule 14 deals with promotion, by mentioned that where any vacancy is to be filled up by promotion all teachers working in L.T. Grade or C.T. Grade if any who possess the qualification prescribed for the post and have completed five years continuous service as such on the first day of year of recruitment shall be considered for promotion to the Lecturers Grade or Trained Graduate (LT) grade, as the case may be without their having applied for the same.

Thereafter w.e.f 20.04.1998, by means of U.P. Act No. 25 of 1998 Section 10,11and, 12 has been substituted and further new set of Rules have been enforced namely U.P. Secondary Education Services Selection Board Rules 1998. Section 2(l) and Section 10,11 and 12 substituted by U.P. Act No. 25 of 1998 and Rules 10, 11,12 14 are being quoted below:-

U.P. Act No. V of 1982(Section 10,11 and 12 substituted by U.P. Act No. 25 of 1998)

Section 2(l):

"(1) " Year of recruitment' means a period of twelve months a period of twelve months commencing from July 1st of a calendar year.

Section 10: Procedure of selection by direct recruitment- (1) For the purpose of making appointment of a teacher by direct recruitment, the management shall determine the number of vacancies existing or likely to fall vacant during the year of recruitment and in the case of a post other than the post of Head of the Institution, also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, the Scheduled Tribes and other Backward Classes of citizen in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward

Classes) Act 1994, and notify the vacancies to the Board in such manner and through such officer or authority as may be prescribed.
(2) The procedure of selection of candidates for direct recruitment to the post of teachers shall be such as may be prescribed;

Provided that the Board shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under sub-section (1).]

Section 11:- Panel of candidates- (1) The Board shall, as soon as as may be after the vacancy is notified under sub-Section (1) of Section 10 hold examinations, where necessary and interviews of the candidates and prepare a panel of those found most suitable for appointment.

(2) The panel referred to in sub-section (1) shall be forwarded by the Board to the officer or authority referred to in sub-section (1) of Section 10 in such manner as may be prescribed.
(3) After the receipt of the panel under sub-section (2) the officer or authority concerned shall, in the prescribed manner, intimate the Management of the Institution the names of the selected candidates in respect of the vacancies notified under sub-section (1) of Section 10.
(4) The management shall, within a period of one month from the date of receipt of such intimation, issue appointment letter to such selected candidate.
(5) Where such selected candidate fails to join the post in such Institution within the time allowed in the appointment letter or within such extended time as the Management may allow in this behalf or where such candidate is otherwise not available for appointment, the officer or authority concerned may, on the request of the Management, intimate in the prescribed manner, fresh name or names from the panel forwarded by the Board under sub0-section (2).

Section 12:- Procedure of Selection by promotion- (1) For each region, there shall be a Selection Committee, for making selection of candidates for promotion to the post of a teacher comprising-

(i) Regional Joint Director of Education- Chairman
(ii) Senior-most Principal of Government Inter
College in the region -- Member
(iii) Concerned District Inspector of Schools -
Member Secretary

(2) The procedure of selection of candidates for promotion to the post of a teacher shall be such as may be prescribed.

U.P. Secondary Education Services Selection Board Rules 1998

10. Source of recruitment- Recruitment to various categories of teachers:

(a) Principal of an Intermediate College or Headmaster of a High School -	By Direct recruitment
(b)Teachers of lecturers grade	(i) 50 percent by direct recruitment (iii) 50 percent by promotion from

	amongst substantively appointed teachers of the trained graduates grade
(C) Teachers of trained graduate grade	Promotion from amongst the substantive appointed teachers of Certificate of Teaching grade;

Provided that it in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the posts may be filled in by direct recruitment;

Provided further that if in calculating respective percentages of posts under this rule there comes a fraction then the fraction of the posts to be filled by direct recruitment shall be ignored and the fraction of the posts to be filled by promotion shall be increased to make it one post.

11. Determination and notification of vacancies--(1) For the purposes of direct recruitment to the post of teacher, the Management shall determine the number of vacancies in accordance with sub-section (1) of Section 10 and notify the vacancies through the Inspector, to the Board in the manner hereinafter provided.

(2) (a) The statement of vacancies for each category of posts to be filled in by direct recruitment including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment, shall be sent in quadruplicate, in the pro forma given in Appendix "A" by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subject-wise in respect of the vacancies of lecturer grade and group-wise in respect of vacancies of trained graduates grade. The consolidated statement so prepared shall, alongwith the copies of statement received from the Management, be sent by the Inspector to the Board by July 31 with a copy thereof to the Joint Director.

Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment:

Provided further that in respect of the vacancies existing on the date of the commencement of these rules as well as the vacancies that are likely to arise on June 30, 1998, the Management shall, unless some other dates are fixed under the preceding proviso, send the statement of vacancies by July 20,1998 to the Inspector and the Inspector shall send the consolidated statement in accordance with this sub-rule to the Board by July 25, 1998.

Explanation- For the purposes of this sub-rule the word "group-wise' in respect to the trained graduates grade means in accordance with the following groups, namely:

(a) Language	This group consist of the subjects of Hindi, Sanskrit, Urdu, Persian and Arabic
(b) Science	This group consists of the subjects of Science and

	Mathematics.
(c) Art and Craft	
(d) Music	
(e) Agriculture	
(f) Home Science	
(g) Physical Education	
(h) General	This group consists of the subjects not covered in any of the foregoing groups.

(b) With regard to the post of Principal or Headmaster, the Management shall also forward the names of two senior-most teachers, alongwith copies of their service records (including character rolls) and such other records or particulars as the Board may require, from time to time.

Explanation- For the purpose of this sub-rule " senior most teacher" means the senior-most teacher in the post of the highest grade in the institution, irrespective of total service put in the institution.

(3) If, after the vacancies have been notified under sub-rule (2), any vacancy in the post of teacher occurs, the Management shall, within fifteen days of its occurrence, notify to the Inspector in accordance with the said sub-rule and the Inspector shall within ten days of its receipt by him send if to the Board.

(4). Where, for any year of recruitment, the Management does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Inspector shall on the basis of the record of his office, determine the vacancies in such institution in accordance with sub-section (1) of Section 10 and notify them to the Board in the manner and by the date referred on in the said sub-rule. The vacancies notified to the Board under this sub-rule shall be deemed to be notified by the Management of such institution.

12. **Procedure for direct recruitment**- (1) The Board shall , in respect of the vacancies to be filled by direct recruitment, advertise the vacancies including those reserved for candidates belonging to Scheduled castes, Scheduled Tribes and Other Backward Classes of citizens in at lest two daily newspapers, having wide circulation in the State, and call for the applications for being considered for reservation in the proforma published in the advertisement. For the post of Principal of an Intermediate College or the Head Master of a High Scholl, the name and place of the institution shall be mentioned in the advertisement and the candidates shall be required to give the choice of not more than three institutions in order of preference and if he wishes to be considered for any particular institution or institutions and for no other institution, he may mention the fact in his application.

(2) The Board shall scrutinize the applications and in respect of the post of teacher in lecturers and trained graduates grade, shall conduct written examination. The written examination shall consist of one paper of general aptitude test of two hours duration based ion the subject. The centres for conducting written examination shall be fixed in district head quarters only and the invigilators shall be paid honorarium at such rate as, the Board may like to fix.

(3) The Board shall evaluate the answer sheets through examiner to be appointed by the Board or through Computer and the examiner shall be paid honorarium at the rate to be fixed by the Board.

(4) The Board shall prepare lists for each category of posts on the basis of quality points specified in appendix "B' or Appendix "C', as the case may be, marks in written examination and marks for experience as follows:

2.30m per cent marks on the basis of quality points;

3.30m per cent marks on the basis of written examination; and

4.20 per cent marks for experience more than the required experience in such manner that 4 marks shall be given for each year of such experience with maximum of 16 marks.

Notes: - (1) The teaching experience for this purpose shall be counted only for the recognised High School/Intermediate College (s) or Junior High Scholl and such certificate shall actually mention the date of appointment, date of joining and the scale of pay and duly signed by the Principal/Head Master and counter signed by the District Inspector of Schools or Zila Basic Shiksha Adhikari, as the case may be, with full name of the countersigning authority;

(2) Any wrong information submitted in this regard shall make the applications of such candidates liable to be rejected and for this the candidate himself shall be solely responsible.

(5) The Board shall, in respect to the selection for the post of Head master and Principal, allot the marks in the following manner:

(i) 60 per cent marks on the basis of quality point specified in Appendix "D'
(ii) 20 per cent marks for having experience more than the required experience. 1 mark for each research paper published with a maximum of 4 marks and 2 marks for each year of such experience with a maximum of 16 marks; and
(iii) 10 per cent marks for having doctorate degree.

Note- For the purpose of calculating experience, the service rendered as Head Master of Junior High School or as Assistant teacher of a High School/Intermediate College shall be counted in the case of selection of head Master and for selection of Principal, the service rendered as Head Master of a High School or as a lecturer shall only be counted. The provision of sub rule (4) of Rue 12 regarding the certificate of experience shall *mutatis mutandis* apply.

(6) The Board, having regard to the need fort securing the representation of the candidates belonging to the Scheduled Castes/Scheduled Tribes and Other Backward Classes of citizen in respect of the post of teacher in lecturers grade and trained graduates grade, call for interview such candidates who have secured the maximum marks under sub-rule (4) above/and for the post of Principal/Head Master, call for interview such candidates who have secured maximum marks under sub clause (5) above in such manner that the number of candidates shall not be less

than three and not more than five times of the number of vacancies:

Provided that in respect of the post of principal or Head Master of an institution the Board shall also in addition call, for interview two senior most teachers of the institution whose names are forwarded by the Management through Inspector under clause (b) of sub rule (2) of Rule 11.

(7) The Board shall hold interview of the candidates and 10 per cent marks shall be allotted for interview. The marks obtained in the written test and the quality point by the eligible candidates shall not be disclosed to the members of the Interview Board:

Provided further that in the interview, ten per cent marks shall be divided in the following manner:
2.4 per cent marks on the basis of subject/general knowledge;
3.3 per cent marks on the basis of personality; and
4.3 per cent marks on the basis of ability and experience.

(8) The Board then, for each category of post, prepare panel of those found most suitable for appointment in order of merit as disclosed by the marks obtained by them after adding the marks obtained under sub-clause (4) or sub-clause (5) above, as the case may be with the marks obtained in the interview. The panel for the post of Principal or Head Master shall be prepared institution-wise after giving due regard to the preference given by a candidate, if any, for appointment in a particular institution whereas for posts in the lecturers and trained graduates grader, it shall be prepared subject-wise and group-wise respectively. If two or more candidates obtain equal marks, the name of candidate who has higher quality points shall be placed higher in the panel and if the marks obtained in the quality p0oints are also equal, then the name of candidate who is older in age shall be placed higher. In the panel for the post of Principal or Head Master, the number of names shall be three times of the number of vacancy and for the post of teachers in the lacquerers and trained graduates grade, it shall be larger (but nor larger than twenty five per cent) then the number of vacancies.

Explanation: For the purpose of this sub-rule the word "group-wise' means in accordance with the groups specified in the Explanation to sub-rule (2) of Rule 11.

(9) At the time of interview of candidates, for the post of teachers in lecturers and trained graduates grade the Board shall, after showing the list of the institutions which have notified the vacancy to it, require the candidate to give, if he so desires, the choice of not more than five such institutions in order of preference, where, if selected, he may wish to be appointed.

(10) The Board shall after preparing the panel in accordance with sub-rule (8), allocate the institutions to the selected candidates in respect of the posts of teachers in lecturers and trained graduates grade in such manner that the candidate whose name appears at the top of the panel shall be allocated the institution of his first preference given in accordance with sub-rule (9). Where a selected candidate cannot be allocated any of the institutions of his preference on the ground that the candidates placed higher

in the panel have already been allocated any institution to him as it may deem fit.

(11) The Board shall forward the panel prepared under sub-rule (8) alongwith the name of the institutions allocated to selected candidates in accordance with sub-rule (10) to the Inspector with a copy thereof to the joint Director and also notify them on its notice-board.

13. Intimation of names of selected candidates--(1) The Inspector shall, within ten days of the receipt of the panel and the allocation of institution under Rule 12,--

(iv) notify it on the notice-board of his office.
(v) Intimate the name of selected candidate to the Management of the institution, which has notified the vacancy, with the director, that, on authorization under resolution under resolution of the management, an order of appointment, in the pro forma given in Appendix "E' be issued to the candidate by registered post within fifteen days of the receipt of intimation requiring him to joint duty within fifteen days of the receipt of the order or within such extended time, as may be allowed to him by the Management, and also intimating him that on his failure to join within the specified time his appointment will be liable to be cancelled.
(vi) Send an intimation to the candidate, referred to in clause (ii) with the direction to report to the Manager within fifteen days of the receipt of the order of appointment by him from the Manager or within such extended time as may be allowed to him, by the Management.

(2) the Management shall comply with the directions, give under sub-rule (1) and report compliance thereof to the Board through the Inspector.

(3) Where the candidate, referred to in sub-rule (1), fails to join the post within the time allowed in the letter of appointment or within such extended time as the Management may allow in this behalf or where such candidate is otherwise not available for appointment, the Inspector may, on the request of the Management, intimate fresh name or names standing next in order of merit on the panel, under intimation to the Joint Director and the Board, and the provisions of such-rule (1) and (2) shall mutatis *mutaindis apply*.

(4) The Joint Director shall monitor and ensure that the candidates selected by the Board join the institution in the specified time and for this purpose, he may issue such directions to the Inspector as he thinks proper."

"14. Procedure for recruitment by promotion- (1) Where any vacancy is to be filled by promotion all teachers working in trained graduates grade or certificate of Training grade, if any, who possess the qualification prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates grade, as the case may be, without their having applied for the same.

15. Section 2(l) of the Act defines year of recruitment, as meaning a period of twelve months' commencing from July 1st of calendar year. Section 10 of the Act

obligates the Management to determine number of vacancies existing or likely to fall vacant, during the year of recruitment and notify the vacancies to the Board. Section 10 (2) provides that procedure of selection of candidates for direct recruitment, shall be such as may be prescribed. Proviso to the said section, talks of wide publicity to invite talented persons. Rule 4 provides that a candidate for direct recruitment must have attained age of 21 years on 1st day of July of calendar year when vacancy is advertised. Rule 5 deals with academic qualifications. Rule 10 deals with source of recruitment and as far as post of Lecturers and LT grade teachers are concerned 50% of the vacancies, in respective grade is to be filled up by way of promotion and 50% by way of direct recruitment. Said Section further provides that if in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the post may be filled up by direct recruitment. Rule 11 deals with determination of vacancies, in terms of Section 10(1) of the Act. Rule 11 (2) (a), talks of statement of vacancies, to be filled by direct recruitment, including vacancies that are likely to arise on account of retirement on the last day of year of recruitment to be sent by Inspector by July 15 of the year of recruitment and thereafter by the Inspector to the Board by 31st July. Rule 11 (4), in the event of failure on the part of Management, empowers the District Inspector of Schools, to determine and notify the vacancies, and this action of District Inspector of Schools is to be treated as action on behalf of Management. Rule 12 deals with procedure for direct recruitment. Rule 13 deals with intimation of name of selected candidates Rule 14 deals with procedure for promotion. Rule 16 deals with ad-hoc promotion.

16. At this place relevant provision of U.P. Act No. 4 of 1994 and the Government Orders which cover the field are also been looked into and quoted below:

U.P Act No. 4 of 1994: Section 2(c)- "public services and posts" means the services and posts in connection with the affairs of the State and includes services and posts in

(i) a local authority;

(ii) a co-operative society as defined in clause (f) of Section 2 of the Uttar pradesh Co-operative Societies Act 1965 in which not less than fifty-one percent of the share capital of the society is held by the State Government;

(iii) a Board or a Corporation or a statutory body established by or under a Central or Uttar Pradesh Act which is owned and controlled by the State Government or a Government company as defined in Section 617 of the Companies Act 1956 in which not less than fifty one percent of the paid -up share capital is held by the State Government;

(iv) an educational institution owned and controlled by the State Government or which receives grants in aid from the State Government including a university established by or under a Uttar Pradesh Act except an institution established and administered by minorities referred to in clause (1) of Article 30 of the Constitution.

(v) Respect of which reservation was applicable by Government orders on the date of the commencement of this Act and which are not covered under sub-clauses (i) to (iv).

Section 3 (1)- Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes- (1) In public services and posts, there shall be reserved at the stage of direct recruitment the following percentages of valencies to which recruitments are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens

(a) in the case of Scheduled Caste- Twenty one percent
(b) in the case of Scheduled Tribes- two percentage
(c) in the case of the other Backward

Classes of citizens Twenty seven percent

Provided that the reservation under Clause (c) shall not apply to the category of other backward classes of citizens specified in Scheduled II.
(2) If, even in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, special recruitment shall be made for such number of times, not exceeding three, as may be considered necessary to fill such vacancy from amongst the persons belonging to that category.
(3) if in the third such recruitment referred to in sub-section (2), suitable candidates belonging to the Scheduled Tribes are not available to fill the vacancy reserved for them such vacancy shall be filed by persons belonging to the Scheduled Caste.
(4) Where, due to non-availability of suitable candidates any of the vacancies served under sub-section (1) remains unfilled even after special recruitment referred to in sub-section (2) it may be carried over to the next year commencing from first of July, in which recruitment is to be made, subject to the condition that in that year total reservation of vacancies for all categories of persons mentioned in sub-section (1) shall not exceed fifty percent of the total vacancies.
(5) the State Government shall for applying the reservation under sub-section (1) by a notified order issue a roster which shall be continuously applied till it is exhausted.
(6) If a person belonging to any of the categories mentioned in sub-section (1) gets selected on the basis of merit in an open competition with general candidates he shall not be adjusted against the vacancies reserved for such category under sub-section (1).
(7) if one the date of commencement of this Act, reservation was in force under Governments Orders for appointment to posts to be filled by promotion such Government Orders shall continue to be applicable till they are modified.

Governments Orders:
Government Order dated 12th July 1978

प्रेषक,
श्री आत्म प्रकाश,
उप सचिव,
उत्तर प्रदेश शासन ।

सेवा में,
शिक्षा निदेशक,
उत्तर प्रदेश,
इलाहाबाद/लखनईद

शिक्षा ख(७ख) अनुभाग लखनईः दिनांक १२ जुलाई, १९७८

विषयः- मान्यता प्राप्त अशासकीय सहायकता प्राप्त उ.मा. विद्यालयों में नियुक्ति हेतु अनुसूचित जातियों, जनजातियों एवं पिछड़े वर्गो को आरक्षण ।

महोदय,

मुझे यह कहने का निदेश हुआ है कि प्रदेश में सरकारी उच्चतर माध्यमिक विद्यालयों में नियुक्ति हेतु अभी तक अनुसूचित जातियों, जनजातियों एवं पिछड़े वर्गो को कोई आरक्षण प्राप्त नहीं है । अशासकीय सहायता प्राप्त उ. मा. विद्यालयों में भी अनुसूचित जातियों, जनजातियों एवं पिछड़े वर्गो को आरक्षण प्रदान करने का प्रश्न काफी समय से शासन के विचाराधीन था । अतः शासन ने इस मामले में सम्यक विचारोपरान्त यह निर्णय लिया है कि प्रदेश के सभी अशासकीय उ.मा. विद्यालयों को, जो कि इस समय अनुदान सूची पर हैं या जो भविष्य में अनुदान सूची पर लाये जायें, राज्य सरकार द्वारा देय अनुदान के जारी रखे जाने अथवा उनके अनुदान सूची पर बने रहने की एक अनिवार्य शर्त यह रहेगी कि वे अपने यहॉ नियुक्तियों में अनुसूचित जातियों, अनुसूचित जनजातियों तथा पिछड़े वर्गो के सदस्यों की संलग्न नियमावली के अनुसार आरक्षण प्रदान करेंगे।

ख(२ख) अतः मुझे आपसे यह अनुरोध करना है कि आप संलग्न नियमावली की एक प्रति सभी सहायता प्राप्त उ. मा. विद्यालयों को भेजते हुये उन्हें शासन के उपर्युक्त निर्णय से अवगत करा दें और उन्हे यह स्पष्ट कर दें कि उन्हे इस नियमावली का पालन करना अनिवार्य होगा अन्यथा उनके विरूद्ध आवश्यक कार्यवाही की जायेगी ।

सहायता प्राप्त अशासकीय, सहायता प्राप्त उ. मा. विद्यालयों में नियुक्ति

हेतु अनुसूचित जातियों, जनजातियों एवं पिछड़े वर्गो को आरक्षण प्रदान करने हेतु नियमावली

ख(१ख) प्रत्येक अशासकीय सहायता प्राप्त उ. मा. विद्यालय ख(जिसे आगे विद्यालय कहा गया हैख) में अध्यापकों ख(जिसके अन्तर्गत संस्था का प्रधान सम्मिलित नहीं है ख) के प्रत्येक पदईध्म के पदों पर निम्नांकित वर्गो के ऐसे व्यक्तियों के लिये जो कि उस पद हेतु न्यूनतम निर्धारित योग्यता रखते हों, आरक्षित होगा जो कि प्रत्येक वर्ग के सम्मुख अंकित है :-

अनुसूचित जाति .....१८ प्रतिशत
अनुसूचित जनजाति ..... २ प्रतिशत
पिछड़े वर्ग .....१५ प्रतिशत
ख(जिनकी सूची परिशिष्ट ''क'' में दी हुई है ख) के लिये

प्रतिबन्ध यह है कि किसी भी पदईध्म के पदों में किसी भी वर्ग के आरक्षित पदों की गणना हेतु आधे से कम भाग छोड़ दिया जायेगा और आधा या आधा से अधिक भाग को एक गिना जायेगा ।

ख(२ख) यदि किसी विद्यालय में, किसी समय में, किसी पदईध्म के अध्यापको के पदों पर उपरोक्त वर्गो के अध्यापकों की संख्या उन वर्गो के लिये निर्धरित प्रतिशत से कम होगी तो जब तक उस वर्ग के लिये उक्त निर्धरित कोटा पूर्ण न हो जाय, पहली रिक्ति तथा प्रत्येक एकान्तर रिक्तियॉ ख(..... .....ख) ख(चाहे वह पदोन्नति से भरी जाय अथवा सीधी भर्ती सेख) आरक्षित समझी जायेगी ।
ख(३ख) किसी वर्ग विशेष के न्यूनतम योग्यताधारी अभ्यार्थियों की उपलब्धता के अधीन रहते हुये,-

ख(कख) जहॉ उपर्युक्त वर्गो में से किसी एक वर्ग का निर्धारित कोटा अपूर्ण हो, वहॉ आरक्षित पदों को उसी वर्ग विशेष के अभ्यार्थियों से भरा जायेगा, और

ख(खख) जहॉ उपर्युक्त वर्गो में से एक से अधिक वर्गो का निर्धारित कोटा अपूर्ण हो, वहॉ आरक्षित पदों का उस प्रत्येक वर्ग के अभ्यार्थियों से उसी ईध्म में भरा जायेगा । इस ईध्म में इन वर्गो का उल्लेख नियम ख(१ख) दिया हुआ है । यह प्रईध्या तब तक दोहराई जाती रहेगी जब तक कि सभी आरक्षित पद भर न जॉयें ।

ख(४ख) यदि उपर्युक्त वर्गो में से किसी वर्ग का कोटा पूर्ण न हुआ हो और उस वर्ग का सम्बन्धित पद हेतु न्यूनतम योग्यताधारी कोई अभ्यर्थी भी उपलब्ध न हो तो ऐसी दशा में आरक्षित पद की रिक्ति उस वर्ग के बाद वाले ऐसे वर्ग के अभ्यर्थी से, जिसका कोटा अपूर्ण हो, भरी जायेगी ।

ख(५ख) जहॉ उपर्युक्त वर्गो में से कोई भी ऐसा वर्ग न हो जिसका कोटा अपूर्ण हो, अथवा जहॉ कोई ऐसा वर्ग हो जिसका कोटा अपूर्ण हो किन्तु उस वर्ग का कोई निर्धरित योग्यताधारी अभ्यर्थी उपलब्ध न हो, तो उस दशा में वह रिक्ति सामान्य अभ्यर्थियों से भरी जायेगी ।

ख(६ख) जहॉ सीधी भर्ती से भरा जाने वाला कोई पद इनमें से किसी भी वर्ग के लिये आरक्षित हो, तो उस पद के विज्ञापन में इस बात का अवश्यमेव उल्लेख किया जायेगा कि वह पद उस वर्ग के लिये आरक्षित है ।

ख(७ख) उपरोक्त व्यवस्थ लिपिकीय तथा चतुर्थ श्रेणी कर्मचारियों के सम्बन्ध में भी लागू होगी ।

ख(८ख) ये नियम उन पदों के सम्बन्ध में लागू नहीं होंगे जिन पर उत्तर प्रदेश हाईस्कूल तथा इंटर कालेज ख(आरक्षित समूह अध्यापक ख) अध्यादेश, १९७८ के अन्तर्गत आरक्षित समूह अध्यापकों का आमेलन किया जायेगा ।

परिशिष्ठ ''क''

शासनादेश सं.-१३१४/छब्बीस-७८१-१६५८, दिनांक १७ सितम्बर, १६५८ के अनुसार उत्तर प्रदेश में पिछड़ी जातियों की सूची ।

हिन्दू

१-अहीर २०-कहार
२-अरख २१-कैवट या मल्लाह
३-बंजाा २२-किसान
४-बढ़ई २३-कोहरी
५-बारी २४-कोरीख(आगरा, मेरठ और
६-बैरागी
(रूहेलखण्ड डिवीजन में)
७-भर २५-कुम्हार

८-भोटिया २६-कुर्मी
९-भूर्जी या भड़भूजा २७-लोध
१०-बिन्द २८-लोहार
११-छीपी २९-लोनिया
१२-दर्जी ३०-माली
१३-धीवर ३१-मनिहार
१४-गड़रिया ३२-मुराव या मुराई
१५-गोसाई ३३-नाई
१६-गूजर ३४-नायक
१७-हलवाई ३५-सोनार
१९-काछी ३६-तमाली
३७-तेली

मुस्लिम

१-भठियारा १२-किसान

२-बढ़ई १३-मनिहार
३-चिकवाख(कस्साजख) १४-भिरासी
४-दर्जी १५-मौमिनख(अंसारख)
५-डुाली १६-मुस्लिम कायस्थ
६-फकीर १७-नद्दाफ ख(धुनियाख)
७-गद्दी १८-नक्काल
८-हज्जामख(नाईख) १९-नट
९-झीका २०-रंगरेज
१०-कुसगर २१-स्वीपर
११-कुंजड़ा

नोटः- कुमायू डिवीजन में मारछा, नायक, गिरी और पिछड़े मुसलमान भी पिछड़ी जातियों में ही माने जायेंगे ।

उत्तर प्रदेश सरकार

शिक्षा अनुभाग-७
संख्या : ४३८०/१५-७-१ख(१२२ख)/८१
लखनईघ, दिनांक अक्अूबर २५,१६८२
अधिसूचना

उत्तर प्रदेश माध्यमिक शिक्षा सेवा आयोग और चयन बोर्ड अधिनियम, १६८२ ख(उत्तर प्रदेश अधिनियम संख्या ५ सन् १६८२ख) की धारा ३ के अधीन शक्ति का प्रयोग करके राज्यपाल, दिनांक १ नवम्बर १६८२ से ''उत्तर प्रदेश माध्यमिक शिक्ष्या सेवा आयोग'' स्थापित करते है और निदेश देते हैं कि उक्त आयोग का मुख्यालय इलाहाबाद मं होगा ।
ख(२ख)- राज्यपाल, अग्रतर, उक्त अधिनियम की धारा ४ के अधीन शक्ति का प्रयोग करके निम्नलिखित व्यक्तियों को, कार्य भार ग्रहण करने के दिनांक से, उक्त आयोग का अध्यक्ष और सदस्य नियुक्त करते है :-

१-श्री नरोत्तम प्रसाद त्रिपाठी अध्यक्ष
२-श्री जमूना प्रदास सिंह सदस्य
ख(धारा ४ की उपधाराख(२ख) के खण्ड
ख(कख) के अधीनख)

Government Order dated 26th April 1983

आरक्षण में नियुक्ति सम्बन्धी नीति
सं० मा०/ १६८५/१५-७-१६८३-१२ ३२/८३
विशय-७ अनुभाग लखनउं, दिनांक २६ अप्रैल, १६८३

विषय :- अशासकीय सहायता प्राप्त उ० मा० विद्यालयों में नियुक्ति हेतु अनुसूचित जातियों/ जनजातियों एवं पिछडे वर्गो को आरक्षण !

महोदय,
मान्यता प्राप्त साहाय्रियक उच्चतम माध्यमिक विद्यालयों में विभिन्न पदों में की जाने वाली नियुक्तियों में अनुसूचित जातियों, अनुसूचित जनजातियों एवं पिछडे वर्गो के अभ्यर्थियों के लिये किये जाने वाले आरक्षण से सम्बन्धित शासनादेश संख्या मा०/२६४२/१५-७-१७ -७१- दिनांक १२-७-७८ के अनुक्रम में मुझे यह कहने का निर्देश हुआ है कि उक्त शासनादेशों से संलग्न निर्देशों में अन्य बातों के साथ यह इंगित किया गया था कि आरक्षित वर्ग के अभ्यर्थियों की नियुक्ति के प्रसंग में ऐसे अभ्यर्थियों के पद हेतु निर्धारण योग्यता का वर्तमान सेवा भाग पर्याप्त समझा जायेगा और यदि वह प्रतिबन्ध पूरा है तो सम्बन्धित अभ्यर्थी को प्रश्नगत पद में आरक्षित कोटा के पद पर नियुक्त किया जा सकता है ! मामले में पुनर्विचारोपरान्त शासन ने यह निर्णय लिया है कि आरक्षित कोटा के पदों में नियुक्ति हेतु अर्द्ध अभ्यर्थियों द्वारा चाहे ऐसी नियुक्ति सीधी भर्ती द्वारा की जा रही हो अथवा प्रोन्नति, द्वारा पद हेतु निर्धारण न्यूनतम योग्यता का अवधारण मांग पर्याप्त न

समझा जायेगा बल्कि साथ ही ऐसे अभ्यर्थी का चयन करने वाले प्राधिकारी/ निकाय के दृष्टिकोण से पद से नियुक्ति हेतु उपर्युक्त होना भी आवश्यक होगा !
२- जहॉ तक प्रोन्नतियों द्वारा की जाने वाली नियुक्तियों का सम्बन्ध है शासन ने यह निर्णय लिया है कि ऐसी नियुक्तियों में पिछडे वर्गो के अभ्यर्थियों के लिए कोई आरक्षण न होगा !
३- मुझे यह कहना है कि शासनादेश सं० २६४२/१५-७-१२ ७१/७४ दिनांक १२ जुलाई, १९८३ में संलग्न निर्देश पूर्व प्रस्तरों में उल्लिखित आवेशों की सीमा तक संशोधित समझे जायेगे !
४- कृपया समस्त संस्थाधारियों को शासन के उपर्युक्त आदेशों ने यथाशीध्र अवगत कराने का कष्ट करें और यह सुनिश्चित करें कि आरक्षण सम्बन्धी आदेशों का परिपालन उनके द्वारा तद्नुसार किया जाय ! कृपया जारी किये गये अपने निदेशों की ५० प्रतियां शासन को भी शीध्र भेजने का कष्ट करें !

भवदीय,

राम लाल शर्मा
उप सचिव

क्रम संख्या -१
संख्या २२/२५/८२-कार्मिक-२

Government Order dated 7th February 1990

प्रेषकः
श्री राज कुमार भार्गव
मुख्य सचिव,
उत्तर प्रदेश शासन !
सेवा में,
१- समस्त प्रमुख सचिव/ सचिव/ विशेश सचिव, उत्तर प्रदेश शासन !
२- समस्त विभागाध्यक्ष एवं प्रमुख कार्यालयाध्यक्ष, उत्तर प्रदेश !
३- समस्त मण्डलायुक्त/जिलाधिकारी, उत्तर प्रदेश !

लखनउ, दिनांक ७ फरवरी, १९९० !
विषय :- सेवाओं में अनुसूचित जाति के प्रतिनिधित्व/अनारक्षित डी-रिजर्वेशन नियिम का पुनर्विलोकन !

महोदय,
मुझे यह कहने का निदेश हुआ है कि उपर्युक्त विषयक समसंख्यक शासनादेश दिनांक ३१ जनवरी, १९८९ में यह आदेश प्रसारित किये गये थे कि अनुसूचित जाति/ जनजाति के उपयुक्त अभ्यर्थी की अनुपलब्धता की दशा में आरक्षित रिक्तियों को अन्य वर्ग के अभयर्थियों से न भरा जाये तथा केवल प्रशासनिक अपेक्षाओं की पूर्ति के लिये यदि अपरिहार्य हो तो माननीय मुख्य मंत्री जी का पूर्वानुमोदन प्राप्त करने के उपरान्त ही ऐसा किया जा सकता है !
२- इस सम्बन्ध में ऐसे प्रकरण सामने आये हैं जिनमें ऐसे प्रस्ताव माननीय मुख्य मन्त्री जी के अनुमोदनार्थ प्रस्ततुत किये गये जो अपरिहार्य नहीं थे अथवा आरक्षित रिक्ति के विरूद्ध सामान्य अभ्यर्थियों से व्यवस्था किये जाने का प्रस्ताव किया गया था! यह स्थिति शासन की मंशा के अनुकूल नहीं है ! इस सम्बन्ध में शासन ने समुचित विचारोपरान्त निम्नांकित निर्णय लिये हैं :-

१- अनुसूचित जाति/ जनजाति के उपयुक्त अभ्यर्थी उपलब्ध न होने की दशा में केवल नितान्त अपरिहार्य मामलों में ही काम चलाउ व्यवस्था के रूप में वित्तीय वर्ष के लिये केवल सीनापन्न/अस्थाई व्यवस्था के लिये माननीय मुख्य मंत्री जी के पूर्वानुमोदन हेतु प्रस्ताव प्रस्तुत किये जा सकते हैं !
२- सामान्य चयन से पूर्व ही आरक्षित कोटे की रिक्तियों के विरूद्ध पात्र अभयर्थियों की अनुपलब्धता के कारण उन्हें सामान्य अभयर्थियों से भरने की अपरिहार्यता स्पष्ट हो जाती है अतः उसे प्रस्ताव में अंकित किया जाय ! विशेष परिस्थितियों में चयनोपरान्त संज्ञान में आने वाले मामलों में माननीय मुख्य मंत्री जी का पूर्वानुमोदन विभागीय मंत्री के अनुमोदन के पश्चात तत्समय प्राप्त किया जाय, परन्तु दोनों ही अवसरों पर पद विशेष पर सामान्य चयन हेतु निर्धारित प्रक्रिया के अनुसार ही चयन किया जाय !

३- कृपया उक्त स्थिति से अपने अधीनस्थ समस्त सम्बन्धित अधिकारियों को अवगत कराने का कष्ट करें !

भवदीय
राज कुमार भार्गव
मुख्य सचिव

संख्या २२/२५/८२ /१/ कार्मिक-२ तद्दिनांक

प्रतिलिपि लिम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित :-
१- सचिवालय के समस्त अनुभाग !
२- राज्यपाल के सचिव !
३- सचिव, लोक सेवा आयोग, उत्तर प्रदेश, इलाहाबाद !
४- सचिव, उत्तर प्रदेश अधीनस्थ सेवा चयन बोर्ड, लखनउ !
५- मुख्य कार्यालय निरीक्षक, उत्तर प्रदेश, इलाहाबाद !
६- निबन्धक, उच्च न्यायालय, उत्तर प्रदेश, इलाहाबाद!
७- समस्त जिला हरिजन एवं समाज कल्याण अधिकारी, उत्तर प्रदेश !
८- सचिव, विधान सभा/ विधान परिषद, उत्तर प्रदेश !
आज्ञा से,
नीरा यादव,
सचिव !

Government Order dated 18-12.1990

कार्मिक अनुभाग-२, शासनादेश संख्या २२/५८/८२-कार्मिक-२/६०,

दिनांक १८ दिसंबर, १६६०
विषय : राज्याधीन आदि सेवाओं के पदोन्नति कोटे में अनुसूचित जाति/ जनजाति के अभ्यर्थियों की बिना भरी हुए आरक्षित रिक्तियों की पूर्ति ।

शासन के संज्ञान में यह आया है कि पोषक संवर्ग में अनुसूचित जाति/जनजाति के अर्ह उपयुक्त अभ्यर्थियों की अनुपलब्धता के कारण या तो ऐसे पदों को लम्बी अवधि तक खाली रखना पडता है अथवा उन्हें अस्थई/स्थनापन्न रूप से सामान्य वर्ग के अभ्यर्थियों से भरे जाने के प्रस्ताव प्राप्त होते हैं । फलतः आरक्षित पदोन्नति कोटे के पदों पर आरक्षण कोटे की पूर्ति नहीं हो पाती है तथा आरक्षित वर्ग के अभ्यर्थी उच्च पदों पर सेवा के अवसर पाने से वंचित रह जाते है। आरक्षित पदों को प्राथमिकता के आधार पर आरक्षित वर्ग के अभ्यर्थियों से भरने के उद्देश्य से शासन द्वारा सम्यक विचारोपरान्त निम्नांकित निर्णय लिये गये हैं :-

१- जिन सेवाओं में सीधी भर्ती तथा पदोन्नति दोनों कोटा निर्धारित है उनमें पोषक संदर्भ में अनुसूचित जाति/ जनजाति के अर्ह अभ्यर्थियों के पदोन्नति हेतु अनुपलब्धता पर उक्त रिक्तियॉ अस्थाई रूप से सीधी भर्ती के कोटे में परिवर्तित की जा सकेंगी।

२- पोषक संवर्ग में अनुसूचित जाति/जनजाति के अर्ह अभ्यर्थियों के उपलब्ध होने के बाद सीधी भर्ती कोटे में आरक्षित रिक्तियों को पुनः पदोन्नति कोटे में स्थानान्तरित किया जाये ताकि भर्ती के दोनों स्त्रोतों में संतुलन बना रहे ।

३- सीधी भर्ती के पदों पर आगामी चयन आयोजित करने हेतु तद्नुसार अधियायन भेजे जायें, और यदि पूर्व में अधियायन भेजे जा चुके हों तो उनमें वांछित संशोधन कर दिये जायें ।

४- उक्त आदेश तात्कालिक प्रभाव से लागू होंगे और इस संदर्भ में पूर्व प्रसारित समस्त आदेश इस सीमा तक संशोधित समझे जायें ।

२- कृपया उपरोक्तानुसार कार्यवाही सुनिश्चित करने हेतु अपने अधीन समस्त नियुक्ति प्राधिकारियों को निर्देशित करने का कष्ट करें !

३- यह आदेश तात्कालिक प्रभाव से लागू होंगे ।

17. After all these provisions have been noticed, the first question is to be seen is as to whether reservation policy is applicable in case where the post is to be filled up by way of promotion, when there is no mention of providing reservation either under the U.P. Act No. V of 1982 or Rules framed thereunder in respect of promotion. Both under the un-amended and amended U.P. Act No. V of 1982 specific mention has been made in respect of providing of reservation in the matter of direct recruitment but there is no mention of reservation in the matter of promotion and in this background relevant provisions are being looked into. State Government as far as back on 12.07.1978 had issued an order providing reservation of post for S.C/S.T. And Other Back ward Classes of citizens where the vacancies were to be filled up by way of promotion. Said Government Order contained condition No. 5 wherein it has been mentioned that in case in aforementioned relevant year of recruitment no one was available in the next lower grade then in that event said post could be filled by way of direct recruitment. Validity of aforementioned Government Order had been considered by a Division Bench of this Court in the case of **Krishna Pal Singh Vs. Government of U.P. and others** reported in 1981 UPLBEC 521 wherein this Court took the view that said Government Order has statutory force and same will have to be effective notwithstanding any regulation framed by the Board. Division Bench of this Court while considering the provision of the Chapter-II Regulation 6 of U.P. Intermediate Education Act 1921 alongwith the Government Order dated 12.07.1978 concluded that if the vacancy occurs in the L.T. Grade then that should be filled up by way of promotion from

member of Scheduled Castes, Scheduled Tribes or Backward Classes if he posses the minimum requisite qualifications. Subsequent to the said Government Order another Government Order dated 26.04.1983 has been issued and the same has modified the earlier Government Order dated 12.07.1978 and promotion benefit has been withdrawn qua "OBC" category candidates. State Government as policy decision took the view that in the matter of promotion there would be no reservation qua Other Backward Class category candidate. Thereafter Government Order dated 31.01.1989 had been issued mentioning therein, that in case no one from SC/ST category is available then the said post shall not be filled from candidate of other categories and only when there is administrative requirement and same cannot be awaited, then after taking concurrence from Hon'ble Chief Minister, candidate from other category could be appointed. This Government Order has been further clarified in Government Order dated 07.02.1990. In Government Order dated 07.02.1990 it has been mentioned that where candidate from Scheduled Caste/Scheduled Tribe category is not available then in that event said post shall not be filled up from other category candidate and only when there would be administrative exigency then in that event same may be filled up from other category of candidates after obtaining prior permission from the Chief Minister and it was also mentioned therein it would be treated as merely stop gap arrangement. It was also mentioned that after permission was accorded by the Chief Minister then same can be filled by following procedure provided for. Subsequent to this Government Order dated 18.12.1990 has been issued and therein it has been mentioned that State Government has acquired knowledge that in the feeder cadre, on account of non-availability of Scheduled Caste/Scheduled Tribes candidates posts are lying vacant for long period and further resolutions are being received to fill up the said post on temporary/stop gap basis from amongst General category candidates and net effect of the same is that posts reserved are not filled up from amongst reserve category candidate. In this background State Government took decision providing therein that where quota both by way of direct recruitment and promotion has been provided for and there is no candidate available in feeder Cadre from amongst Scheduled Caste/Scheduled Tribes category then in that event said vacancies can be converted on temporary basis to be filled by way of direct recruitment and the moment in the feeder Cadre Scheduled Caste/Scheduled Tribes category candidates are available then in that event the post reserved under direct recruitment quota would be transferred to promotional quota so that balance is there in between direct recruitment quota and promotion quota. It has been mentioned in the Government Order dated 18.12.1990 that earlier Government Order issued in this respect shall stand cancelled. Said Government Order dated 12.07.1978 in its modified form dated 18.12.1990 still holds the field and till date said Government Order has not been rescinded, modified or revoked. In the case of ***Indra Sawhney and others Vs. Union of India and other*** reported in 1992 Supp. (3) SCC 217, reservation, in the matter of promotion was disapproved, however it was mentioned that in case there are existing provision giving benefit of reservation in the matter of promotion then same be permitted to be continued

for a period of five years. State Government came out with U.P. Act No. 4 of 1994 with a view to provide reservation in public service and post in favour of persons belonging to SC/ST/ and OBC category and therein sub-section (7) of Section 3 had been inserted by mentioning that Government Orders which provided for reservation in promotion as on the date of commencement of the Act, would continue to be applicable till they are modified or revoked. Constitutional amendment was also made by inserting Clause (4-A) in Article 16 of Constitution w.e.f. 17.06.1995 which enjoined State Government to make provision for reservations in favour of SC/ST category candidate.

18. Validity of Section 3(7) of U.P. Act No. 4 of 1994 has been subject matter of challenge before Division Bench of this court, in the case of ***Sudhir Kumar Anand Vs. U.P. State Electricity Board*** reported in 2001 (1) UPLBEC 708 and this court has upheld validity of the same. Relevant extract of the said judgement is being quoted below:

"5. The validity of Sub-Section (7) of Section 3 of U.P. Act No. 4 of 1994 has been questioned by Sri Ravi Kiran Jain on the ground that the State Legislature was not competent to enact sub-section (7) of Section 3 of the U.P. Act No.4 of 1994 in view of the pronouncement by the Apex Court in ***Indra Swhney's*** *case. The arguments is mis-conceived. It is evident that sub-section (7) of Section 3 by itself does not provide for any reservation. Rather it simply visualises that the Government Orders providing for reservations in promotion, as on the date of commencement of the Act will continue to be applicable till they are modified or revoked. Accordingly, we are of the view that the Government Orders on the subject of reservation in favour of Scheduled Castes for appointment to posts to be filled by promotion in favour of Scheduled Castes for appointment to posts to be filled by promotion in force on the date of commencement of the Act were capable for being invoked indecently of sub-section (7) of Section 3 of U.P. Act No. 4 of 1994 by virtue the directions contained in* ***Indra Swhney's*** *case and after insertion of the clause (4-A) in Article 16 of the Constitution of w.e.f. 17.06.1995, no exception can be taken to the provisions contained in sub-section (7) of Section 3 of the Act which became valid and operative by strength of clause (4-A) of Article 16 of the Constitution. It is true that but for insertion of clause (4-A) in Article 16, sub-section (7) of Section 3 would not have been available for being invoked on expiration of period of five years from 15.11.1993 but now after insertion of clause (4-A) in Article 16 of the Constitution, Section 3(7) of U.P. Act No. 4 of 1994 has become a valid law and, therefore, it cannot be struck down a violative of Articles 14 and 16 of the constitution. It may be pertinently observed that now after insertion of clause (4-A) in Article 16 of the Constitution the appropriate Government can, in exercise of its executive powers under Articles 73 and 162 of the Constitution, as the case may be, can provide for reservation in favour of Scheduled Castes/ Scheduled Tribes in matters of promotion of any class or classes of posts in the services under the State Government Order dated 31.03.1996 (Annexure CA-7) and other Government Orders referred to therein were issued by the State Government in*

exercise of its executive power under the Constitution.

19. Earlier percentage of reservation for SC category candidate was 18% and same was extended to 21% the said extension of quota from 18% to 21% has been subject matter of challenge before this Court in Full Bench judgement of this Court in the case of **V.K. Bannerji Vs. State of U.P. and others** reported 1999 (1) ESC 644 wherein Full Bench of this Court has upheld the validity of the Government Order dated 10.10.1994 increasing reservation quota in promotion in favour of Scheduled Castes candidates from 18% to 21% under Section 3 of the Reservation Act 1994.This Court in the case of **Sunil Kumar Mishra Vs. Regional Selection Committee and others** reported in 2004 (2) UPLBEC 1520 has taken the same view after considering various Government Orders, that reservation is applicable with full force in the matter of promotion upto 21% of the cadre strength. In yet another judgement of this Court in the case of **Asha Jaiswal (Smt.) Vs Joint Director of Education, Varanasi and others** reported in 2004 (2) UPLBEC 1837 this Court has taken the view that under U.P. Secondary Eduction Services Selection Board Act 1982 and the Rules framed there under no reservation has been provided for as such there is no provision for reservation in promotion. Said judgement has not taken note of existing Government Orders which still covered the field and which had not been modified or revoked in respect of promotion of SC/ST category candidate in terms of Section 3 (7) of U.P. Act No. 4 of 1994. Said judgement has been passed ignoring the Government Order and the correct position is mentioned in the case of **Sunil Kumar Mishra Vs. Regional Selection Committee and others** reported in 2004 (2) UPLBEC 1520.

20. The logical conclusion on the basis of reference made above is that though in the matter of promotion under U.P. Act No. 5 of 1982 and the Rules framed thereunder there is no mention for providing any reservation, but as promotion is to be made in "public service and post" as defined under Section 2(c) and 2(c) (iv) of U.P. Act No. 4 of 1994 then in terms of Section 3 (7) of U.P. Act No. 4 of 1994, the Government Orders which covered the field of promotion qua SC/ST category candidates, continue to be applicable till they are modified or revoked. As till date said Government Orders have not been revoked or modified, net effect of the same would be that 21% of vacancies is to be filled by way of promotion from amongst SC category and 2% of vacancies from amongst ST category candidates.

21. Now the second question posed is being looked into that in the absence of Schedule caste/Scheduled Tribes category candidate being available in the feeder cadre, can the post be offered to General category candidate from promotion quota or same shall be filled by way of direct recruitment, from amongst reserve category candidate. State Government in its wisdom had chosen to provide reservation in promotion to SC/ST category candidates and has also prepared roster for implementation of the aforementioned policy of promotion. Provision of promotion with roster for promotion of SC/ST employees was already there when U.P. Act No. 4 of 1994 had been enforced. On 16.10.1994 percentage of reservation was increased

qua SC candidates and of the same date fresh roster was published. Thereafter another roster for promotion of SC/ST employees was prepared on 15.12.2001 but same was cancelled on 23.11.2001 and fresh roster has been introduced on 25.06.2002. Thus, provision of promotion of SC/ST category candidate with roster has been inexistence both before enforcement of U.P. Act No. 4 of 1994 and after enforcement of U.P. Act No. 4 of 1994. The purpose of providing roster has been considered by Hon'ble Apex Court in the case of ***R.K.Sabharwal and others Vs. State of Punjab and others*** reported in 1995 (2) Supreme Court Cases 745. Relevant paragraphs of aforementioned Constitutional Bench judgement 4,5,6 and 10 are being quoted below:

"4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts and in the event of their appoint to the said posts their number cannot be added and taken into consideration for working out the percentage or reservation. Article 16 (4) of the Constitution of India permits the State Government to make any provisions for the reservation of appointments or post in favour of any backward Class of citizens which in the opinion of the State is not adequately represented in the Services under the State. It is, therefore incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State services. While doing so the State Government may take the total population of a particular backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Classes have already been appointed/ promoted against the general seats. As mentioned above the roster point which is reserved for a backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidates can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/ rules providing certain percentage of reservations for the Backward Classes are operative the same have be followed. Despite any number of appointees/promotes belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition. We, therefore, see no force in the first contention raised by the learned counsel and reject the same.

5. We see considerable force in the second contention raised by the learned counsel for the petitioners. The reservations provided under the impugned

Government instructions are to be operated in accordance with the roster to be maintained in each department. The roster is implemented in the form of running account from year to year. The purpose of "running account" is to make sure that the Scheduled Castes/ Schedule Tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. " 16% of the posts..... are reserved for members of the Scheduled Caste and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1,7,15,22,30,37,44,51,58,65,72,80,87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of the Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved category is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and no thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired representation of the Backward Classes in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation of their population. The numerical quota of post is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the 'running account' must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1,7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation.

6. The expressions 'post' and vacancies, often used in the executive instructions providing for reservations are rather problematical. The word "post means an appointment, job, office, or employment. A position to which a person is appointed. 'Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must

be a 'post' in existence to enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservations has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation.

10. We may examine the likely result if the roster is permitted to operate in respect of the vacancies arising after the total posts in a cadre are filled. In a 100 point roster., 14 posts at various roster points are filled from amongst the Scheduled Caste/Scheduled Tribe candidates, 2 posts are filled from amongst the Backward Classes and the remaining 84 posts are filled from amongst the general category. Suppose all the posts in a cadre consisting of 100 posts are filled in accordance with the roster by 31.12.1994. Thereafter in the year 1995, 25 general category persons (out of the 84) retire. Again in the year 1996, 25 more persons belonging to the general category retire. The position which would emerge would be that the Scheduled Castes and Backward Classes would claim 16% share out of the 50 vacancies. If 8 vacancies are given to them then in the cadre of 100 posts the reserve categories would be holding 24 posts thereby increasing the reservation from 16% to 24%. On the contrary if the roster is permitted to operate till the total posts in a cadre are filled and thereafter the vacancies falling in the cadre are to be filled by the same category of persons whose retirement etc. caused the vacancies then the balance between the reserve category and the general category shall always be maintained. We make it clear that in the event of non-availability of a reserve candidate at the roster point it would be open to the State Government to forward the point in a just and fair manner."

22. As per the said judgment reservation has to be done in relation to the number of post comprising the cadre and not in relation to vacancies. The Word "posts" means an appointment, job, office or employment a position to which person is appointed. On the other hand, Vacancy means an unoccupied post or office. The place meaning of the two expressions makes it clear that there must be a 'post' in existence to enable the vacancy to occur. The cadre-strength is always measured by the number of posts comprising the cadre. The roster indicates the reserve points, when percentage for reservation is fixed in respect of a particular cadre and same has to be taken that the posts shown at the reserve points are to be filled up from amongst the members of reserve category candidates and the candidates belonging general category are not entitled to be considered for the reserved posts. State Government, however has been vested with the authority in the event of non-availability of reserved candidate at the roster point to carry forward the point in just and fair manner. Thus, this much is clear that when the point is fixed for reserved category candidates by way of roster then same has to be filled from amongst the members of reserve category and the candidates belonging to General category are not entitled to be considered on the reserved post and the Sate Government has discretion to carry forward the point in just and fair manner. Thus, reserved post cannot be offered to other category

candidate and State Government is empowered to carry forward the said point in just and fair manner.

23. In the case of ***Ajit Singh and others Vs. State of Punjab and others*** reported in 1999 (7) Supreme Court Cases 209 Hon'ble Apex Court while considering the question as to whether right to be considered for promotion is a fundamental right granted under Article 16 (1) or mere statutory right has taken the view that right to be considered for promotion is fundamental right and further that the provision as contained under Article 16 (4), 16 (4-A) of the Constitution is in the nature of enabling provisions and there is no directive or command implicit in it and same vest discretion in the State to consider providing reservation. In the said judgement itself after noticing Article 16 (1) dealing with fundamental right and Article 16(4) and 16(4-A) as enabling provisions, the exercise of balancing Article 16(1) and Article 16 (4) and 16(4-A) has been undertaken and in this direction earlier judgement of Hon'ble Apex Court has been referred to where in balancing principles has been enunciated. Constitutional Bench judgement reported in AIR 1963 SC 649 ***M.R. Balaji Vs. State of Mysore*** has been referred to wherein it has been stated that the interests of reserved classes must be balanced against the interests of other segments of society. Further observations made in the case of ***Indra Sawhney and others Vs. Union of India and other*** reported in 1992 Supp. (3) SCC 217 has been extracted by mentioning that provisions under Article 16(4) has been conceived in the interest of certain sections of society and same should be balanced against the guarantee of equality enshrined in Clause 1 of Article 16 held out to every citizens and to the entire society, and the Court has to ensure that in the matters relating to affirmative action by the State, the rights under Article 14 and 16 of the Constitution of India of an individual to equality of opportunity are not affected. A reasonable balance has to be struck so that affirmative action does not lead to reverse discrimination. These two decisions of Hon'ble Apex Court has been followed in the case ***PGI of Medical Educations Research Chandigarh vs. Faculty Education*** reported in 1998 (4) SCC. Relevant paragraph 31 and 32 is being quoted below:

31. There is no difficulty in appreciating that there is need for reservation for the members of the Scheduled Castes and Scheduled Tribes and Other Backward Classes and such reservation is not confined to the initial appointment in a cadre by also to the appointment in a promotional post. It cannot however be lost sight of that in the anxiety for such reservation for the backward classes, a situation should not be brought about by which the chance of appointment is completely taken away so far as the members of the other segments of the society are concerned by making such a single post cent percent reserved for the reserved categories to the exclusi8on of other members of the community even when such a member is senior in service and is otherwise more meritorious.

32. Articles 14, 15 and 16 including Articles 16(4), 16(4-A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other

members of the community who do not belong to reserved classes. Such view has been indicated in the Constitution Bench decision of this Court in ***M.R. Balaji Vs. State of Mysore*** reported in AIR 1963 SC 649 and ***T Devadasan Vs. Union of India*** reported in AIR 1964 SC 179 and ***R.K.Sabharwal and others Vs. State of Punjab and others*** reported in 1995 (2) Supreme Court Cases 745. Even in ***Indra Sawhney and others Vs. Union of India and others*** reported in 1992 Supp. (3) SCC 217 the same view has been held by indicating that only a limited reservation not exceeding 50% is permissible. It is to be appreciated that Article 15(4) is an enabling provision like Article 16(4) and the reservation under either provision should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of the citizens. The special provision under Article 15(4) [sic 16(4)] must therefore strike a balance between several relevant considerations and proceed objectively. In this connection reference may be made to the decisions of this Court in ***State of A.P. Vs. U.S.V Balram*** reported in 1972 1 SCC 660 and ***C.A Rajendran Vs. Union of India*** AIR 1968 SC 507. It has been indicated in ***Indra Swhney*** case that clause (4) of Article 16 is not in the nature of an exception to classes (1) and (2) of Article 16 but in an instance of classification permitted by Clause (1). It has also been indicated in the said decision that Clause (4) of Article 16 does not cover the entire filed covered by Clauses (1) and (2) of Article. In ***Indra Swhney*** this court has also indicated that in the interest of the backward classes of citizens, the State cannot reserve all the appointments under the State of even a majority of them. The doctrine of equality of opportunity in clause (1) of Article 16 is to be reconciled in favour of backward classes under clause (4) of Article 16 in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality.

24. Article 14, 15 and 16 including Articles 16(4) and Article 16 (4-A) has to be applied in such a manner so that balance is struck in the matter of appointments, by creating reasonable opportunities for reserved class both in the matter of direct appointment and in promotion for SC/ST category candidate, as well as candidates from other segments of society, State Government in order to provide adequate representation to SC/ST category candidates has chosen to provide reservation t0 SC/ST category candidate, and the same has been sought to be extended in the matter of promotion also. State Government in its wisdom has published roster, qua the promotion and therein, fixed points have been provided for. Roster points are nothing else but the indicator of balance which has been sought to be maintained qua candidates of other category. By preparation of roster, balance has been struck qua the interest of reserve category candidate and other segments of the Society. Managing Committee of every institution is obliged to prepare roster, qua their respective institution grade wise as per model roster, prescribing fixed points, and the concerned District Inspector of Schools has full authority to see and supervise that said roster has been prepared strictly in consonance with the model roster and its implementation is also in accordance to the same. If this is ensured, the parties will know their position and there will be no much room of grievance on the part of

both category of candidates in this respect as it would be maintaining balance between the demands of merit and social justice. Once a particular point for a particular section under the roster has been declared, then the post at the said point would be offered to candidate from the said category and to no one else. Roster would operate, only till all the roster points in cadre are filled and quota prescribed in instruction are achieved. The same would be in the form of running account, from year to year, and subsequent vacancies are to be filled from the categories to which the post belonged. The operations of roster, for filling cadre strength by itself ensures that reservations remains, within 50% limit so that balance is not disturbed and right of General Category candidates is not defeated. Right of consideration of candidature for promotion has been held to be fundamental right, but said right will come into play, when incumbent falls within the zone of consideration. Once post in question is reserved by providing fix point, then general category candidate is excluded from the zone of consideration. This is the rigor of roster point. Thus, post meant for SC/ST candidate, shown in roster has to be offered to SC/ST candidate and as mentioned in **R.K. Sabarwals (supra)** case, roster cannot be changed or altered and said point post has to be filled up only from the said category and State Government can only forward the said point and here State Government has taken decision, that in the event of non availability of reserve category candidate, in the matter of promotion, the said post would be shifted to direct recruitment quota and in future, if candidates are available in feeder cadre, then necessary adjustment would be made .

Now taking the case in hand it is reflected that Deputy Director of Education in the present case at no point of time has adverted to all these aspects of the matter that there was existing Government Order which covered the field of reservation in the matter of promotion and there was an exiting roster. In the present case as Deputy Director of Eduction has not undertaken any exercise while directing promotion of Rama Kant Mishra whereas Deputy Director of Education was enjoined upon to see as to whether post in question was reserved for Scheduled Caste/Scheduled Tribes or not. As no exercise whatsoever has been done in the present case as such entire proceedings undertaken by the Deputy Director of Education is clearly vitiated and is unsustainable.

25. Consequently, writ petition filed by Management is allowed and two writ petitions filed by Ramakant Mishra are dismissed. Joint Director of Education, Allahabad is directed to decide the matter afresh, after providing opportunity to Management as well as Sri Rama Kant Mishra.

No orders as to cost. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2005

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

Civil Misc. Writ Petition/(PIL) No.71469 of 2005

Rajeev Kumar and another ...Petitioners

Versus

The State of U.P. & others ...Respondents

Counsel for the Petitioners:

Sri Radha Kant Ojha
Sri Rajesh Singh
Sri D.K. Arora
Sri K.P. Shukla
S.C.

(A) Constitution of India-Art. 226-Public Interest Litigation Petition-nature and scope for interference under writ jurisdiction explained.

Held: Para 29

Thus, in view of the above, the ratio of all these judgments is that there must be a public injury and public wrong caused by wrongful or ultra vires acts or omission of the state or a public authority. It is for the enforcement of basic human rights of weaker sections of the community who are poor, down-trodden, ignorant, illiterates and whose fundamental rights and statutory rights have been violated. In fact, it is for compelling the executive to carry out its constitutional and legal obligations. It must not be frivolous litigation by persons having vested interests.

(B) Constitution of India, Art. 226/227-Practice & Procedure- petitioner filed false affidavit-initially mislead the Court-to obtain favourable Order-amount to Criminal Contempt-Conduct of petitioner-highly depreciated-Petition dismissed with cost of Rs. One lac-apart from proceeding for Criminal Contempt.

Held: Para 31 & 38

In view of the above, it is evident that the petitioners did not approach the Court with clean hands. They tried to mislead the Court making totally false averments and relying upon forged and fabricated documents.

Counsel for the Respondents:

Sri V.K. Upadhyay
Sri K.C. Sinha
Sri K.R. Singh

The facts stated above also amply depict that the manner in which the petition has been drafted exposes the petitioners to be prosecuted for criminal Contempt. It is a settled proposition of law that a false statement made in the Court or in the pleadings, intentionally to mislead the Court and obtain a favourable order, amounts to criminal contempt, as it tends to impede the administration of justice. A Constitution Bench of the Hon'ble Supreme Court in Narain Das Vs. Government of Madhya Pradesh & Ors. AIR 1974 SC 1252 has held as under.

Case law discussed:

1998 (6) SCC-2326
1998 (6) SCC-686
1996 (6) SCC-14
AIR 1995 SC-1795
AIR 1974 SC 1252
AIR 2004 SC-2421
2003 AIR Scw-14
AIR 1995 SC-1947
1999 (1) SCC-271
AIR 1997 SC 1236
AIR 1996 SC-2687
1995 (1) SCC-242
1994 (6) SCC-620
AIR 1993 SC-852
2005 (3) SCC-91
2005 (1) SCC-590
2003 (8) SCC-100
2003 (7) SCC-546
2000 (7) SCC-718
1999 (1) SCC-53
1994 (1) SCC-145
AIR 1995 SC-1847
J.T. 1988 (4) SC-557
AIR 1985 SC-910
AIR 1983 SC-339
AIR 1982 SC-149
AIR 1981 SC-344
AIR 1981 SC-298
AIR 1984 SC-802
2000 (7) SCC-465
2000 (7) SCC-552

AIR 1976 SC-578
AIR 1999 SC-943
AIR 1988 SC-3104
AIR 1989 SC-49
AIR 1996 SC-2737
1996 (6) SCC-734

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

1. The present petition has been filed as Public Interest Litigation by the petitioners claiming the following reliefs:-

"1. A writ order or direction in the nature of mandamus commanding the respondents/Bajaj Groups not to install and run their Mill in village Nekofal @ Bilai, Pargana Dara Nagar, Tehsil Sadar, District Bijnor.

2. A writ order or direction in the nature of mandamus commanding the respondents to comply with all environmental needs as required under law before installing Mills.

3. A writ order or direction in the nature of mandamus commanding the respondents/Bajaj Groups to immediate comply with agreement said to be executed by D.G.M. (Cane) namely Surya Prakash Ojha dated 15.04.2005 (Annex.2).

2. The aforesaid reliefs have been claimed by the petitioners submitting that they are public spirited persons representing the interest of the poor, downtrodden villagers who have been cheated by the respondent nos. 6 to 8 in purchasing their land in contravention of the statutory provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter called the "Act, 1950'). They further prayed for enforcement of the agreement executed by said respondent nos. 6 to 8 providing that they would provide employment to the dependents of the farmers who have sold their land to them; there would be a pipeline upto five kilometres and the said respondents would supply free light over the roads and water to the villagers; the Mill has been established without getting No Objection Certificate from the U.P. Pollution Control Board which is mandatorily required; the drainage is not being made as promised rather the permission has been sought to establish the said drainage on 11.08.2005 from the officials which is nothing but a conspiracy between the statutory authorities and the Bajaj Groups which is creating a lot of problems to the villagers as it will always create a very foul smell vis-Ã-vis it will generate several diseases like Malaria, Filaria and it would be dangerous for adjacent agricultural land as chemical going through water will also damage agricultural land adjacent to the said drainage; the environmental pollution would adversely affect the health of the villagers and would cause environmental hazards to the land, plant and agriculture lying over the land; the land had been purchased from the farmers without seeking permission from the Competent Authority to convert the agricultural land into non-agricultural land, in violation of the Legislative mandate to protect the farmers to be misutilised by the persons who are land grabbers or Mill owners; by running of the Mill, the health and the properties of large number of people would have an adverse affect and the future generation would also be adversely affected; the sale deeds obtained by the said respondent nos. 6 to 8 are void as no permission from the Competent Authority under Section 143 of the Act has been taken. Thus, the Mill is being established by illegal method for grabbing the public

properties without taking prior permission.

3. Shri R.K. Ojha, learned counsel for the petitioners vehemently pressed the aforesaid submissions and asked for the reliefs sought in this petition.

4. On the other hand, when the matter was heard on the first date, i.e. 21.11.2005, Shri V.K. Upadhyay, learned counsel appearing for respondent nos. 6, 7 and 8, filed a compilation containing 23 documents running into 81 pages which contained the permission of the Statutory Authority regarding purchase of land; No Objection Certificate under the provisions of Water (Prevention and Control of Pollution) Act, 1974 (hereinafter called the "Act 1974'); No Objection Certificate from the U.P. Pollution Control Board dated 15.07.2004; Permission under Section 21 of the Air (Prevention and Control of Pollution) Act, 1981 (hereinafter called the Act, 1981) dated 21.10.2005; permission under Section 21/22 of the Act, 1981; permission under Section 25/26 of the Act, 1974 dated 21-10-2005; Test Certificate dated 09.11.2005 regarding effluent water; report regarding construction of main drain from factory to Vaan river, and submitted that the petition has been filed to achieve an ulterior purpose as petitioner no.1 had been awarded contract for construction of the said drainage against which main grievance has been raised by him. Since he did not complete the work in time, his contract was cancelled. The agreement purported to have been executed on behalf of respondent nos. 6 to 8 filed as Annexure 2 to the writ petition is a forged document as there is no such person in the employment of the said respondent nos. 6 to 8 nor any agreement has ever been signed by any other person. The petitioners did not disclose the material fact that they were themselves responsible for delaying the drainage from sugar Mill to river and a blackmailing tactics is being adopted inspite of the fact that the construction of the Mill has been established strictly in accordance with law and it started the sugar production with effect from 03.11.2005 and this petition has been filed on 17.11.2005 on the facts which are totally false.

5. The copy of the compilation filed by Shri V.K, Upadhyay was served upon Shri R.K. Ojha and he was asked to take instructions and file an affidavit in this regard. As the compilation was not supported by any affidavit, Shri V.K. Upadhyay was also asked to file an affidavit in support of the same which was filed. A counter affidavit has also been filed by Shri V.K. Upadhyay pointing out that petitioner no.1 is inimical to the said respondents as his contract for construction of drainage, which according to the petitioners would be a cause of pollution was delayed by him without any reason, has been cancelled vide order dated 30.06.2005. The copies awarding contract vide letter dated 20.05.2005 and the cancellation order dated 11.07.2005 have been filed along with the affidavit. It has further been submitted in paragraph 7 of the affidavit that the Annexure 2 is a forged document as it is purported to have been signed by Shri Satya Prakash Ojha and there was no such person in the name of Satya Prakash Ojha in the employment of the said respondents and there has been no agreement with any person whose land was acquired.

6. An affidavit has been filed on behalf of the U.P. Pollution Control Board annexing the copies of the No Objection Certificate issued from time to time and it has been submitted that the No Object Certificate was valid upto 31.12.2005 and the photo copies of the said Permissions/No Objection Certificates have been filed.

7. The petitioners were directed to explain their conduct as how the petition had been filed suppressing the facts and on false premises. They filed a supplementary affidavit on 29.11.2005 without disclosing any reason as under what circumstances this writ petition has been filed without disclosing the factum that petitioner no.1 was given the contract for construction of the said drainage which, according to him would cause serious pollution problem in the area. He has not disputed that he has been given the contract. He has produced certain bills having certain disputes regarding payment of bills. He has not explained as under what circumstances he has taken the factual averments regarding not taking the permission for purchasing the land from statutory authorities and for its conversion from agricultural to non-agricultural use and under what circumstances it has been stated that the Permission/No Objection Certificate has not been obtained from the Pollution Control Board. First time in this affidavit, it has been submitted that petitioner no.1 is having a Mango grove in a land measuring .019 hectares and the said garden will be spoiled, but the facts remain admitted that the petitioners are not bonafide persons nor they have filed this petition in public interest. The Court not being satisfied from the affidavit filed by the petitioners on 29.11.2005 adjourned the case further. On 30.11.2005 it was again adjourned for 02.12.2005 and on that date a specific direction was given to the petitioners to explain their conduct and file a proper affidavit as under what circumstances they could muster the courage to abuse the process of the Court and why did they not disclose the true facts. In response to the said order, no reply has been filed. Today, Mr. R.K. Ojha, learned counsel appearing for the petitioners submitted that the petitioners are not in a position to submit any reply or explain their conduct as under what circumstances the petition has been filed. Shri Ojha prayed that he should be permitted to withdraw the writ petition as the petitioners are not interested to prosecute the case further. However, in view of the law laid down by the Hon'ble Supreme Court in S.P. Anand Vs. S.D. Deve Gowda & Ors., (1996) 6 SCC 734, as the Public Interest Litigation cannot be permitted to be withdrawn as Court's cannot be permitted to be a forum to be used to achieve an ulterior purpose, we rejected the oral prayed made by Shri Ojha.

8. It is settled law that a person who suffers from legal injury only can challenge the act/action/order etc. Writ petition under Article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the respondents. Therefore, there must be judicially enforceable right for the enforcement on which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the Court that he has a legal right to insist on such

performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction. (Vide Calcutta Gas Company (Proprietor Ltd.) Vs. State of West Bengal & Ors., AIR 1962 SC 1044; Mani Subrat Jain & Ors. Vs. State of Haryana, AIR 1977 SC 276; State of Kerala Vs. Smt A. Lakshmikutty & Ors., AIR 1987 SC 331; State of Kerala & Ors. Vs. K.G. Madhavan Pillai & Ors., AIR 1989 SC 49; Rajendra Singh Vs. State of Madhya Pradesh, AIR 1996 SC 2736; Rani Laxmibai Kshetriya Gramin Bank Vs. Chand Behari Kapoor & Ors., AIR 1998 SC 3104; & Utkal University Vs. Dr. Nrusingha Charan Sarangi & Ors., AIR 1999 SC 943).

9. In Jasbhai Motibhai Desai Vs. Roshan Kumar Haji Bashir Ahmed, AIR 1976 SC 578, the Apex Court has held that only a person who is aggrieved by an order, can maintain a writ petition. The expression "aggrieved person" has been explained by the Apex Court observing that such a person must show that he has more particular or peculiar interest on his own beyond that of general public in seeing that the law is properly administered.

10. In M.S. Jayaraj Vs. Commissioner of Excise, Kerala & Ors., (2000) 7 SCC 552, the Hon'ble Supreme Court considered the matter at length and placed reliance upon a large number of its earlier judgments including the Chairman, Railway Board Vs. Chandrimadas, (2000) 7 SCC 465; and held that the Court must examine the issue of locus standi from all angles and the petitioner should be asked to disclose as what is the legal injury suffered by him.

11. In Ghulam Qadir Vs. Special Tribunal & Ors., (2002) 1 SCC 33, the Hon'ble Supreme Court considered the similar issue and observed as under:-

"There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed for is for habeas corpus or quo warranto. Another exception in the general rule is the filing of a writ petition in public interest. The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid article. ***The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea change*** *with the development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dislodging the claim of a litigant merely on hyper-technical grounds.---------In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi."*

12. The party has to satisfy as what is the legal injury caused by that violation of law for the redressal of which the party has approached the Court.

13. However, need was felt to relax the rule of locus standi wherever person aggrieved could not have the resources to approach the Court. The Hon'ble Apex Court entertained the petition even of unregistered Association espousing the

cause of over down-trodden or its members observing that the cause of "little Indians" can be espoused by any person having no interest in the matter. However, the said person should be bona fide, not a **intermeddler** or **busy-body**. (Vide Bandhua Mukti Morcha Vs. Union of India & Ors., AIR 1984 SC 802).

14. In Akhil Bharatiya Soshit Karamchari Sangh (Railway) Vs. Union of India & Ors., AIR 1981 SC 298, the Hon'ble Supreme Court while dealing with the issue of locus standi observed as under:-

"Our current processual jurisprudence is not an individualistic Anglo-Indian mould. It is broad based and people-oriented, and envisions access to justice through "class actions', "Public Interest Litigation', and representative proceedings'. Indeed, **little Indians** in larger numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of "cause of action' and "person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions."

15. In Fertilizer Corporation Kamagar Union (Regd.), Sindri & Ors. Vs. Union of India & Ors., AIR 1981 SC 344, the Hon'ble Supreme Court held as under:-

"Public Interest Litigation is part of the process of participate justice and "standing' in civil litigation of that pattern must have liberal reception at the judicial doorsteps."

16. Public Interest Litigation is not in the nature of adversary litigation. The purpose of P.I.L. is to promote the public interest which mandates that violation of legal or constitutional rights of a large number of persons, poor, down-trodden, ignorant, socially or economically disadvantaged should not go un-redressed. The Court can take cognizance in P.I.L. when there are complaints which shocks the judicial conscience. P.I.L. is pro bono publico and should not smack of any ulterior motive and no person has a right to achieve any ulterior purpose through such litigations.

17. In S.P. Gupta & Ors. Vs. President of India & Ors., AIR 1982 SC 149, the Hon'ble Apex Court has warned by saying that the Court must be careful that the members of the public who approach the court are acting bona fide and not in personal garb of private profit or political motivation or other oblique considerations. "The Court must not allow its process to be abused". Similar view has been taken in Kazi Lhendup Dorji Vs. Central Bureau of Investigation & Ors., 1994 (Supp) 2 SCC 116.

18. In Veena Sethi Vs. State of Bihar 7 Ors., AIR 1983 SC 339, the Apex Court has observed that the role of law requires to be played for the poor and ignorant who constitute a large bulk of humanity in this country and the Court must uphold the basic human rights of weaker sections of the society.

19. In the case of State of Himachal Pradesh Vs. A Parent of a Student of Medical College, AIR 1985 SC 910, the Hon'ble Supreme Court held as under:

"Where the Court finds, on being moved by an aggrieved party or by **any public spirited individual** or social action group, that the executive is remiss in discharging its obligation under the Constitution or the law, so that the poor and the under-privileged continued to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social and economic entitlements or that social legislation enacted for their benefit is not being implemented thus depriving of their rights and benefits conferred upon them, the Courts certainly can be must intervene and compel the executive to carry out its constitutional and legal obligations and ensure that the deprived and vulnerable sections of the community are no longer subjected to exploitation or injustice and they are able to realise their social and economical rights."

20. In Sachidanand Pandey (Supra), the Apex Court observed that the Court should not take cognizance in such matters merely because of its attractive name. The petitioner must inspire the confidence of the Court and must be above suspicion.

21. In Ram Saran Ayotan Parasi Vs. Union of India, JT (1988) 4 SC 557, the Hon'ble Supreme Court observed that the P.I.L. Is for making basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social, economic and political justice.

22. In Giani Devender Singh Sant Sepoy Sikh Vs. Union of India & Ors., AIR 1995 SC 1847, the Hon'ble Supreme Court has held that the High Court, while entertaining a P.I.L must indicate how the public interest was involved in the case.

23. In R.K. Jain Vs. Union of India & Ors., AIR 1993 SC 1769, the Apex Court observed that it was for the aggrieved person to assail the illegality of the offending action and no third party has a locus standi to canvass the legality or correctness of the action. Similarly, in Mohmmed Anis Vs. Union of India & Ors., 1994 (Supp) 1 SCC 145, the Apex Court has held that a case should not be entertained unless the petitioner points out that his legal rights have been infringed.

24. In Jasbhai Motibhai Desai (Supra), the Hon'ble Supreme Court observed as under:

"If a person wants a relief in a Court independent of a statutory remedy, he must show that he is injured or subjected to or threatened with a legal wrong. The Courts can interfere only wehre legal rights are involved. In fact legal wrong requires judicially enforceable right and "the touchstone to justiciability is injury to a legally protected right'. A nominal or a highly speculative adverse effect on the interest of a person or right of a person is sufficient to give him the "standing to sue'. Again, the "adverse effect' and the requisite for "standing to sue' must be an illegal effect.....Such persons are merely busy body of middlesome interloper...They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the .....judicial process.....from improper motives.....The High Court should do well to reject the application of all such busybodies at the threshold."

25. In S.P. Anand (supra), the Hon'ble Supreme Court has observed that, "no person has a right to waiver of the locus standi rule and court should permit it only when it is satisfied that the carriage of proceedings is in the competent hands of a person, who is **genuinely concerned in public interest** and is not moved by other **extraneous considerations**, so also the Court must be careful to ensure that the process of the court is not sought to be abused....."

26. P.I.L. can also be filed by any person challenging the misuse or improper use of any public property, including the political party in power for the reason that interest of individuals cannot be placed above or preferred to a larger public interest. But such a petition can be entertained for the protection of the society. (Vide J. Jayalalitha Vs. Govt. of Tamil Nadu & Ors., (1999) 1 SCC 53; L. Muthukumar & Anr. Vs. State of Tamil Nadu & Ors., (2000) 7 SCC 618; and M.C. Mehta Vs. Union of India & Ors., AIR 2001 SC 1544; Guruvayoor Devaswom Managing Committee & Anr. Vs. C.K. Rajan & Ors., (2003) 7 SCC 546; 5 M & T Consultants Secunderabad Vs. S.Y. Nawab & Anr., (2003) 8 SCC 100).

27. In Raunaq International Ltd. Vs. I.V.R. Construction Ltd. & Ors., AIR 1999 SC 393, the Apex Court observed as under:-

"The Public Interest Litigation should not be merely a cloak for **attaining private ends** of a third party or of the party bringing the petition. The Court can examine the previous record of public service rendered by the organization bringing the Public Interest Litigation. Even when a Public Interest Litigation is entertained, the court must be careful to weigh conflicting public interests before intervening."

28. In BALCO Employees' Union (Regd.) Vs. Union of India & Ors., AIR 2002 SC 350, the Hon'ble Supreme Court held that the jurisdiction is being abused by unscrupulous persons for their personal gain. Therefore, the Court must take care that the forum be not abused by any person for personal gain. The Court observed as under:-

"There is, in recent years, a feeling which is not without any foundation that Public Interest Litigation is now tending to become publicity interest litigation or private interest litigation as a tendency to be counter productive. PIL is not a pill or a panacea for all wrongs. It is essentially meant to protect basic human rights of the weak and disadvantaged and was a procedure which was innovated where a public spirited person files a petition in effect on behalf of such persons who, on account of poverty, helplessness or economic and social disabilities could not approach the Court for relief. There have been in recent times, increasingly abuse of PIL."

Similarly, in Dattaraj Nathuji Thaware Vs. State of Maharastra & Ors., (2005) 1 SCC 590, the Hon'ble Supreme Court expressed its anguish on misuse of the forum of the Court under the garb of PIL observing as under:-

"Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested

interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not be publicity oriented or founded on personal vendetta."

In R & M Trust Vs. Koramangala Residents Vigilance Group & Ors., (2005) 3 SCC 91, the Hon'ble Supreme Court cautioned the Courts that the Public Interest Litigation should be entertained in rare cases where it is satisfied that public at large stands to suffer. The jurisdiction cannot be allowed to be invoked for the purpose of serving private ends and professional rivalry. The Court observed that the Public Interest Litigation is no doubt a very useful handle for redressing the grievances of the people but unfortunately lately it has been abused by some interested persons and it has brought a very bad name. Courts should be very very slow in entertaining petitions involving public interest: in very rare cases where the public at large stand to suffer. This jurisdiction is meant for the purpose of coming to the rescue of the downtrodden. This sacrosanct jurisdiction of public interest litigation should be invoked very sparingly and in favour of vigilant litigant and not for the persons who invoke this jurisdiction for the sake of publicity or for the purpose of serving their private ends. It has now become common for unscrupulous people to serve their private ends and jeopardise the rights of innocent people so as to wreak vengeance for their personal ends. This has become very handy to the developers and in matters of public contract. In order to serve their professional rivalry they utilise the service of the innocent people or organisation in filing public interest litigation. The courts are sometimes persuaded to issue certain directions without understanding the implications and giving a handle in the hands of the authorities to misuse it. Therefore, courts should not exercise this jurisdiction lightly but should exercise in very rare and few cases involving public interest of a large number of people who cannot afford litigation and are made to suffer at the hands of the authorities.

29. Thus, in view of the above, the ratio of all these judgments is that there must be a public injury and public wrong caused by wrongful or ultra vires acts or omission of the state or a public authority. It is for the enforcement of basic human rights of weaker sections of the community who are poor, down-trodden, ignorant, illiterates and whose fundamental rights and statutory rights have been violated. In fact, it is for compelling the executive to carry out its constitutional and legal obligations. It must not be frivolous litigation by persons having vested interests.

30. The factual matrix of this case if examined properly, reveals the following facts:-

1. The petition is based on false factual averments.
2. Material facts have been suppressed in order to obtain the favourable order from this Court.
3. Petition for restraining the respondent nos. 6 to 8 to establish the Sugar Mill has been filed after it started production of sugar on commercial level.

4. It has falsely been stated in the petition that land had been purchased for the sugar mills in contravention of the provisions of the Act, 1960 as the said respondents had taken permission from the Competent Authority.
5. It has falsely been pleaded that the respondent nos. 6 to 8 are running the Mills without prior permission/No Objection Certificate from the U.P. Pollution Control Board.
6. Petitioner no.1 had been awarded the contract to construct the drainage and he could not complete the construction in time, his contract was cancelled vide order dated 30.06.2005.
7. Petitioners filed a forged document (Annex.2) to show that there was some agreement on behalf of the respondent nos. 6 to 8 and the farmers, whose land had been purchased, on the other side. The said document does not bear signature of any person on behalf of the said respondents. Nor there could be any valid agreement unilaterally.
8. Petitioners prayed for enforcement of the unenforceable agreement purported to have been executed on behalf of the said respondents.

31. In view of the above, it is evident that the petitioners did not approach the Court with clean hands. They tried to mislead the Court making totally false averments and relying upon forged and fabricated documents.

32. When a person approaches a Court of Equity in exercise of its extraordinary jurisdiction under Article 226/227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective. (Vide The Ramjas Foundation & Ors. Vs. Union of India & Ors., AIR 1993 SC 852; K.R. Srinivas Vs. R.M. Premchand & Ors., (1994) 6 SCC 620). Thus, who seeks equity must do equity. The legal maxim "Jure Naturae Aequum Est Neminem cum Alterius Detrimento Et Injuria Fieri Locupletiorem", means that it is a law of nature that one should not be enriched by the loss or injury to another.

33. Similarly, judicial process should not become an instrument of oppression or abuse of a means in the process of the Court to subvert justice for the reason that the interest of justice and public interest coalesce. The Courts have to weigh the public interest vis-Ã-vis private interest while exercising their discretionary powers. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (Vide Nooruddin Vs. Dr. K.L. Anand, (1995) 1 SCC 242; Dr. Buddhi Kota Subbarao Vs. K. Parasaran & Ors., AIR 1996 SC 2687; and Ramniklal N. Bhutta & Anr. Vs. State of Maharashtra & Ors., AIR 1997 SC 1236).

34. In Tilokchand Motichand Vs. H.B. Munshi, AIR 1970 SC 898; State of Haryana Vs. Karnal Distillery Co. Ltd., AIR 1977 SC 781; and Sabia Khan & Ors. Vs. State of U.P. & Ors., (1999) 1 SCC 271, the Hon'ble Apex Court held that filing totally misconceived petition amounts to abuse of the process of the Court and such litigant is not required to be dealt with lightly, as petition containing misleading and inaccurate statement, if filed, to achieve an ulterior

purpose amounts to abuse of the process of the Court.

35. In Agriculture & Processed Food Products Vs. Oswal Agro Furane, AIR 1996 SC 1947, the Apex Court had taken a serious objection in a case filed by suppressing the material facts and held that if a petitioner is guilty of suppression of very important fact and his case cannot be considered on merits. Thus, a litigant is bound to make "full and true disclosure of facts". While deciding the said case, the Hon'ble Supreme Court had placed reliance upon the judgment in King Vs. General Commissioner, (1917) 1 KB 486, wherein it has been observed as under:-

"Where an ex parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent abuse of its process, to refuse to proceed any further with the examination of its merits....."

36. In Abdul Rahman Vs. Prasony Bai & Anr., 2003 AIR SCW 14; and S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors., AIR 2004 SC 2421, the Hon'ble Supreme Court held that whenever the Court comes to the conclusion that the process of the Court is being abused, the Court would be justified in refusing to proceed further and refuse relief to the party. This rule has been evolved out of need of the Courts to deter a litigant from abusing the process of the Court by deceiving it. However, the suppressed fact must be material one in the sense that had it not been suppressed, it would have led any fact on the on the merit of the case.

37. Legal maxim "Juri Ex Injuria Non Oritur" means that a right cannot arise out of wrong doing, and it becomes applicable in case like this.

38. The facts stated above also amply depict that the manner in which the petition has been drafted exposes the petitioners to be prosecuted for criminal Contempt. It is a settled proposition of law that a false statement made in the Court or in the pleadings, intentionally to mislead the Court and obtain a favourable order, amounts to criminal contempt, as it tends to impede the administration of justice. A Constitution Bench of the Hon'ble Supreme Court in Narain Das Vs. Government of Madhya Pradesh & Ors. AIR 1974 SC 1252 has held as under:-

"Now there can be no doubt that if a wrong or misleading statement is deliberately and wilfully made by a party to a litigation with a view to obtain a favourable order, it would prejudice or interfere with the due course of the judicial proceeding, and thus, amount to contempt of court."

39. In The Advocate General, State of Bihar Vs. M/s. Madhya Pradesh Khair Industries & Anr., AIR 1980 SC 946, the Apex Court held that every abuse of the process of the Court does not necessarily amount to contempt of Court, but a calculated attempt to hamper the due course of the judicial proceeding or administration of justice shall definitely amount to contempt of the Court, and in such a case, punishment to the contemnor is necessary to prevent the abuse and making a mockery of the judicial process,

as it adversely affects the interest of the public in the administration of justice. The Court further held as under.

"The public have an interest, an abiding and a real interest, and a vital stake in the effective and orderly administration of justice, because, unless justice is so administered, there is the peril of all rights and liberties perishing. The Court has the duty of protecting the interest of the public in the due administration of justice, and so, it is entrusted with the power to commit for contempt of Court, not in order to protect the dignity of the Court against insult or injury as the expression 'contempt of Court' may seem to suggest, but, to protect and to vindicate the right of the public that the administration of justice shall not be prevented, prejudiced, obstructed or interfered with."

40. In The Secretary, Hailakandi Bar Association Vs. State of Assam & Anr., AIR 1996 SC 1925, the Apex Court held that filing inaccurate documents deliberately, with a view to mislead the Court, amounts to interference with the due course of justice by attempting to obstruct the Court from reaching a correct conclusion, and thus, amounts to contempt of Court.

41. Similar view has been reiterated by the Apex Court in Dhananjay Sharma Vs. State of Haryana & Ors., AIR 1995 SC 1795; and Rita Markandey Vs. Surjit Singh Arora, (1996) 6 SCC 14, observing that deliberate attempt to impede the administration of justice or interference or tending to interfere with or obstruct, or tend to obstruct the administration of justice, in any manner, amounts to criminal contempt.

42. In Afzal & Anr. Vs. State of Haryana & Ors., AIR 1996 SC 2326; and Mohan Singh Vs. Late Amar Singh, (1998) 6 SCC 686, the Apex Court held that a false and a misleading statement deliberately and wilfully made by a party to the proceedings to obtain a favourable order, amounts to prejudice or interference with the due course of judicial proceedings, and it will amount to criminal contempt. The Court further held that every party is under a legal obligation to make truthful statement before the Court, for the reason that causing obstruction in the due course of justice "undermines and obstructs the very flow of the unsoiled stream of justice, which has to be kept clear and pure, and no one can be permitted to take liberties with it by soiling its purity".

43. In view of the above, we are of the considered opinion that as the petitioners filed a forge document purporting to be an agreement reached on behalf of respondent nos. 6 to 8 (Annex.2), and filed the petition totally on false averments in order to mislead the Court to obtain a favourable order, they are liable to be tried for committing criminal contempt and are further liable to be dealt with heavy hands.

44. Thus we dismiss this petition deprecating the conduct of the petitioners with the cost of Rs.1,00,000/- (Rupees One Lac Only) and request the learned District Collector, Bijnor to recover the same in equal amount from both the petitioner as arrears of land revenue within a period of four weeks' from the date of receipt of certified copy of this order and deposit the same with the High

Court Legal Services Committee, Allahabad.

45. Registry is directed to transmit a copy of this order forthwith to the learned district Collector, Bijnor for compliance.

suppressing the material facts that you had been awarded the contract which was cancelled vide order dated 30.06.2005 for not completing the work in time and filed the agreement dated 15.04.2005 in the aforesaid writ petition which is admittedly forged and fabricated and tried to mislead the Court in order to obtain a favourable orders, and thereby committed criminal contempt of this Court and you are hereby charged as such."

47. They may file reply to the aforesaid charge within a period of two weeks.

48. List the matter before the appropriate Bench having the jurisdiction for that purpose on 05.01.2006. On that date, both the petitioners are directed to remain present before the said Court.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2006

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

Civil Misc. Writ Petition No. 78010 of 2005

Ram Sufal Saroj ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri D.K. Mishra

Counsel for the Respondents:

46. The petitioners are charged for committing criminal contempt on following charge:-

"Whereas you Shri Rajeev Kumar and Shri Hem Raj Singh filed Civil Misc. Writ Petition No.71469 of 2005

S.C.

U.P. Intermediate Education Act 1921-Section 9 (4)- Payment of Gratuity-class III employees of Private Inter College-claimed for extension of the age of superanuation from 60 to 62 years-likewise the teachers of the said colleges-government by Order 29.8.05 rejection the claim-writ of mandamus can not be issued directly by the court-petitioner on ground by the statutory rules framed under U.P. Intermediate Education-Payment of gratuity being policy matter-held-No case of discrimination or arbitrariness make out for interference under writ jurisdiction.

Held: Para 10

In the instant case, there is nothing on record to indicate that the petitioner or such similarly situated employees had raised any such claim of extension of benefit of gratuity on the basis of the logic which the petitioner contends is applicable in the present case and contained in the decision dated 25.8.2005. It appears that the petitioner and such other employees, who failed to get their requests accepted by the State Government with regard to enhancement in the age of superannuation have come up before this Court straightway for a mandamus calling upon the State Government to extend the benefit of gratuity. As already noticed herein above, the petitioner has failed to make out any case of discrimination or arbitrariness so as to attract the applicability of Article 14 of the Constitution of India. In view of the observations made herein above, this

Court does not find any cause for any interference.

Case law discussed:
1971 (2) SCC-188

(Delivered by Hon'ble A.P. Sahi, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the Respondent Nos. 1 and 2.

2. The petitioner has already attained the age of superannation and has retired from his services as a class III employee in Vidyawati Darabary Balika Inter College, Allahabad, w.e.f. 31.12.2005. The present petition has been filed by him for a mandamus commanding the respondents to extend the benefits of gratuity and other consequential benefits which are available to the employees of the State Government.

3. Learned counsel for the petitioner Sri D.K. Mishra contends that the petitioner has a legitimate expectation of receiving the aforesaid benefits in view of the position taken by the State Government in its order dated 29.8.2005, Annexure-3 to the writ petition. The said order was passed by the State Government rejecting the claim of the ministerial staff association of Intermediate Colleges governed by the provisions of the U.P. Intermediate Education Act whereby the claim of enhancement of the age of superannuation at par with the Teachers of such institution was found to be untenable and accordingly, the State Government for the reasons recorded in the said order refused to extend the benefits of class III employees from 60 to 62 years.

4. Learned counsel for the petitioner contends that while recording reasons in the said order, the State Government has detailed the consequences that the State Government may have to face on account of such enhancement keeping in view the fact that such a demand would also be raised by the government employees of the same category. Sri Mishra contends that since the State Government was comparing the status of the petitioner and other such similarly situated employees with that of the State Government employees, therefore, while refusing to grant the claim of enhancement, the State Government ought to have considered the extension of such other benefits which were being already given to the government employees and teachers of secondary institutions. He has pointedly raised the issue of extending the benefit of payment of gratuity, which according to him, was being made available to the government employees and was also being made available to the Teachers of the institution on exercising their option to retire at the age of 58 years. He contends that upon the enhancement of the age of retirement of Teachers to 62 years, the provisions of gratuity stands automatically extended to them as well and they now have the option of retiring at the age of 60 years with gratuity. In this view of the matter, the petitioner contends that the benefits of gratuity should be extended on the same parity of reasoning to the petitioner and the similarly situated employees.

5. Sri Mishra has further invited the attention of the Court to similar benefits being extended to the class III employees of Junior High Schools by the Government order dated 25.8.2005, copy whereof has been appended as Annexure-

6 to the writ petition. He contends that if the class III employees of Junior High Schools are being given the benefit of gratuity together with the benefit of enhancement of retirement of age at 60 years, the petitioner who is also a class III employee should be extended the same benefit.

6. Learned Standing Counsel on behalf of the Respondents has urged that since the petitioner or such other employees do not form the same class, therefore, the petitioner cannot be extended the same benefit and the extension of benefit of gratuity is a matter of policy which cannot be thrust upon the State Government by way of judicial intervention.

7. Having heard the learned counsel for the parties, in order to invoke the applicability of Article 14 what has to be established is that the petitioner belongs to the same class of employees, who have been extended the benefits which are being claimed by the petitioner. The Apex Court in the case of Md. Usman and others Vs. State of Andhra Pradesh and others, (1971) 2 SCC 188, has held that doctrine of equality is attracted not only when equals are treated as unequals but also when unequals are treated as equals. It has further been held that a statutory provision or Act of an authority may offend Article 14 of the Constitution, both by-finding differences where there are none and by making no difference where there is one.

8. The payment of gratuity is a matter of service condition to be laid down by the State Government or the employer concerned extending the benefits of such payment keeping in view the service conditions of an employee, who is governed by a particular set of statutory Rules. In the instant case, services of the petitioner are governed by a set of Statutory Rules framed under the U.P. Intermediate Education Act and the Regulations framed thereunder. The said regulations have been framed under the exercise of powers conferred on State Government under the U.P. Intermediate Education Act. The legislature did not itself make any provision for payment of gratuity under the U.P. Intermediate Education Act to such employees. However, by issuing Government Orders under Section 9 (4) of the U.P. Intermediate Education Act, 1921, directives were issued from time to time extending the service benefits to the employees of such privately aided institutions. The payment of gratuity and benefits thereof extended to Teachers only, was made available under the exercise of such powers. Teachers by themselves form a different class. The aforesaid issue need not detained this Court for deliberation any further. Dealing with similar contentions, this Court in the case of Ram Mohan (Annexure-2 to the writ petition) came to the conclusion that class III employees and Teachers do not form the same class and, as such, it would not be possible to test the case on the touch stone of Article 14. The aforesaid judgment clearly finds support from the principle laid down by the Apex Court in the case of Md. Usman quoted herein above. Since the petitioner who a is class III employee and does not belong to the class of Teachers, therefore, the argument that since such benefits were extended to teachers should also be made available to the petitioner, does not hold water.

9. The next illustration cited by the petitioner was that of class III employees of Junior High Schools and to which the attention of the Court was invited, wherein it is stated that the benefit of extension of services to the age of 60 years will also include the benefit of payment of gratuity to the class III employees of Junior High Schools. Again at this juncture, it would be useful to reiterate that class III employees of Junior High Schools are governed by a different set of Rules. Their employment and terms and conditions of service are not similar to that of the petitioner whose services are governed under the provisions of U.P. Intermediate Education Act and Regulations framed therein. It is something different that both the petitioner and the employees of Junior High School are performing the job of a clerk, but by mere performance of duties which the petitioner claims to be of a similar nature, would not by itself be the basis of a legitimate expectation to claim similar benefits. Legitimate expectation is to be grounded on the basis of some existing rights or on the basis of some lawful legitimate undertaking given by the employer. In the instant case, the State Government has neither framed any Rules nor has it extended any such benefits or given an undertaking to the petitioner or such similarly situated employees on the basis whereof the petitioner can claim any legitimate expectation. The contention on behalf of the petitioner that legitimate expectation arises out of the benefits being given to employees of Junior High School cannot be accepted. As already noticed herein above, they are employees governed by a different set of Rules. The Rules by which the employees of a Junior High School are governed cannot be deployed for any support in order to extend the benefit of gratuity to the petitioner.

10. The matter of payment of gratuity involves a policy decision to be taken by the State Government which entails fiscal burden, such matters should not be ordinarily tinkered with by the Courts inasmuch as the question of payment to be made out of State funds and exchequer have to be determined on the basis of deliberations to be made by the State Government in order to ensure any such benefit as claimed by the petitioner. In the instant case, there is nothing on record to indicate that the petitioner or such similarly situated employees had raised any such claim of extension of benefit of gratuity on the basis of the logic which the petitioner contends is applicable in the present case and contained in the decision dated 25.8.2005. It appears that the petitioner and such other employees, who failed to get their requests accepted by the State Government with regard to enhancement in the age of superannuation have come up before this Court straightway for a mandamus calling upon the State Government to extend the benefit of gratuity. As already noticed herein above, the petitioner has failed to make out any case of discrimination or arbitrariness so as to attract the applicability of Article 14 of the Constitution of India. In view of the observations made herein above, this Court does not find any cause for any interference, much less for grant of any relief as claimed by the petitioner.

11. The writ petition, accordingly, lacks merit and is hereby dismissed.

Petition dismissed.

ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 13.07.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 30291 of 2002

Rajani Pandey ...Petitioner

Counsel for the Respondents:
Sri B.N. Singh
Sri H.R.S. Bist
Sri A.K. Misra
Sri R.K. Misra
Sri K.C. Sinha

Versus

The Chief of the Army Staff, New Delhi and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri Sanjai Srivastava

Constitution of India, Art. 226-Service law-Right to Appointment-Posts of Stenographer advertised by Rajput Regimental Centre-essential Qualification prescribed as matriculation with short hand speed of 150 words per minute-petitioner qualified the written test and placed at serial no. 2 in merit list-appointment denied on the ground-petitioner possessed two years course certificate-held-it was neither essential nor preferential qualification-non production of additional qualification by the last date-could not be ground to deny the appointment.

Held: Para 8

The requirement of valid certificate from technical education Board/University was neither prescribed in the rules nor in the advertisement. The authority issuing call letters for written test and interview was not competent authority to lay down the essential qualification for the post. The petitioner was fully qualified and had attained the required speed in short hand and typing. She had secured second position in the merit list. The fact that she possessed only first year mark sheet in diploma in Office Management and Secretarial Practice from Government Girls Polytechnic, Gorakhpur was not of any consequence as this was neither essential qualification nor preferential qualification for appointment to the post. When a candidate holds the minimum qualification provided in the rules and in the advertisement the fact that she could not produce the certificate of the additional qualification by the last date provided by the appointment authority could not be a ground to deny appointment to her. The affidavit of the petitioner accompanying the application dated 13.11.2002, discloses that she has completed two years Diploma Course and her result was available on the Internet before 29.6.2002 and she expected to be issued the certificate in the first week of August, 2002. She in fact received the certificate of the two years course on 1.8.2002 and the mark sheet on 13.8.2002 which has been brought on record. The respondents, however, did not accept the certificate as the post was sanctioned to be filled up only upto 30.6.2002. In my opinion the petitioner was treated arbitrarily in rejecting her candidate and refusing her request to produce the certificate, the result of which was available on the Internet. Even otherwise this certificate of the course pursued by her as additional qualification was not essential for appointment. She had passed the test and was declared selected. She, therefore, could not be refused appointment.

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

1. Heard Sri Sanjai Srivastava, learned counsel for the petitioner and Sri H.R.S. Bist for respondents 1, 2 and 3. Sri A.K. Misra appears for respondent no. 4

and 5. He had put appearance in the year 2002 but has not filed any counter affidavit. His request for adjournment was not accepted.

2. The petitioner was an applicant for the two posts of stenographers advertised by Rajput Regimental Centre, Fatehgarh along with other posts. The publication declared the posts to be in the pay scale of Rs.4000-6000/-; the age of the candidate to be between 18-25 years and qualifications to be matriculate with shorthand speed of 150 word per minute, and typing speed of 40 word per minute (English). The note appended to the advertisement required applications along with testimonials to reach the Quarter Master, Rajput Regimental Centre, Fatehgarh, U.P. by 15.2.2002. The petitioner had passed Secondary School Examination in the year 1994 from Central Board of Secondary Education and had passed the first year of the two year Diploma course in Modern Office Management and Secretarial Practice vide certificate dated 2.8.2001. She applied and was selected and placed at serial no. 2 in the select list. By letter dated 17.6.2002 she was sent a medical certificate form and was informed by Lt. Col. of Officiating Quarter Master for Commandant that her police verification papers have been forwarded to the Superintendent of Police, District Ghazipur and that her appointment will be considered subject to production of Technical Diploma Certificate (short hand) by 29.6.2002.

3. The petitioner by her letter dated 20.6.2002 made a representation to Chief of Army Staff, Army Headquarters, New Delhi stating that the advertisement provided the qualifications to be matriculate with requisite speed of short hand and typing. The concerned officer has raised a doubt on his first year Diploma Certificate issued by Government Girls, Polytechnic, Gorakhpur. Inspite of medical examination and police verification completed on 26.6.2002, she was not considered for appointment. She requested that since she will complete the maximum age of 25 years of age on 11.8.2002, the appointment letter be issued to her.

4. By this writ petition, she has prayed for a writ of certiorari calling for the record and quashing the letter/order dated 17.6.2002 requiring her to produce two years diploma certificate and for a direction to decide her representation. By an amendment vide order dated 2.1.2003, she has prayed for quashing the whole selection/appointments made in pursuance of advertisement dated 9.2.2002 and to direct the respondent no. 2 to appoint petitioner on the post of Stenographer in Rajput Regimental Centre, Fatehgarh.

5. In the counter affidavit, it is stated that two posts of stenographers were authorised in the peace establishment of the centre on 31.7.1997, but no stenographers were posted. The Army Headquarters gave sanction for direct recruitment of two stenographers vide letter dated 26.6.2001 with validity of six months only. On receipt of no objection certificate from Department of Personnel and Training, DGI and Ministry of Labour, Jam Nagar House, New Delhi, the vacancies were notified to District Employment Exchange vide letter dated 24.9.2001. The required number of candidates did not respond. The vacancies were, therefore, again notified in local

news paper "Dainik Jagran' on 5.12.2001. Once again the required number of candidates did not apply and thus the Army Headquarters was approached to extend the validity of sanction. The validity was extended till 31.3.2002. Once again since required number of candidates were not available and thus on a request the validity was again extended and the posts were advertised. A total number of 60 candidates applied for the post of stenographer Group III and were issued call letters to report to Rejput Regimental Centre on 9.3.2002 for written test and interview. The technical educational certificate were required to be produced by the candidates. Sri Ravindra Singh Rathor and Rajni Pandey (petitioner) and Sri Jitendra Kumar Singh in the order to merit passed the written test and interview and were called vide call letter for final scrutiny of documents on 15.5.2002. The petitioner was found to possess first year diploma of two years diploma course on Modern Office Management and Secretarial Practice from Government Mahila Polytechnic, Gorakhpur. She had not completed the course, and could not produce the certificate of technical qualification from the qualifications testing board. The office had not instructed the candidates to produce two years Diploma Certificate. She was asked to produce valid technical qualification, short hand (English) and Type writing (English) certificate issued by the Board of Technical Education. The Army Headquarters had extended the validity of sanction for recruitment on 30.6.2002. The petitioner could not produce the valid certificate by 29.6.2002 and thus the results were announced and her name were struck out of the merit list and the next reserved candidates was considered for appointments.

6. Learned counsel for the petitioner states that there was no requirement of any technical educational qualification for the post to be certified by any technical education board. The Recruitment Rules for Stenographers Group III issued by Adjutant, General Branch at CRG-4 (CIB) (a) do not provide for any technical qualification. The recruitment rules issued on 12.1.1994 provide the educational and other qualifications required for direct recruitment, to be matriculate or equivalent and that the candidate must possess a speed of 80 word per minute either in English or in Hindi to be translated and typed within the time prescribed for the purpose. The petitioner had completed the second year course and the certificate was issued to her only a few days later than 30.6.2002. Her name, however, was arbitrarily struck off from the select list and the next person was given appointment. It is contended that where a technical qualification is not necessary, the insistence to produce the second year certificate was illegal and arbitrary and was made only to favour the reserve candidate. Lastly it is contended that the sanction of the post to fill up the post was extended on 30.6.2002 could not be a ground to reject the candidature of a selected candidate awaiting appointment orders.

7. After hearing parties and perusing the relevant rules including the general guidelines/procedural formalities to be followed for filling up Group C & D vacancies through direct recruitment, I find that a technical certificate issued by technical education board was not the essential qualification for appointment. The Rules and guidelines for recruitment as well as the advertisement did not

provide for possessing any such technical qualification. The qualification announced as essential for the post of stenographers was matriculate with short hand speed of 100 per minute (English) and typing speed of 40 word per minute (English). In the supplementary counter affidavit of Lt. Col. M.S. Raju, Quarter Master for Commandant, Rajput Regimental Central, Fatehgarh, it is clearly stated in paragraph 5 that the requisite qualifications were not amended and no corrigendum was issued. The requirement of valid certificate from technical education board/universities was insisted only in the call letter issued for written test and interview dated 26.2.2002. The petitioner was required to submit the original certificates by 29.6.2002. She was thus illegally disqualified.

8. The requirement of valid certificate from technical education Board/University was neither prescribed in the rules nor in the advertisement. The authority issuing call letters for written test and interview was not competent authority to lay down the essential qualification for the post. The petitioner was fully qualified and had attained the required speed in short hand and typing. She had secured second position in the merit list. The fact that she possessed only first year mark sheet in diploma in Office Management and Secretarial Practice from Government Girls Polytechnic, Gorakhpur was not of any consequence as this was neither essential qualification nor preferential qualification for appointment to the post. When a candidate holds the minimum qualification provided in the rules and in the advertisement the fact that she could not produce the certificate of the additional qualification by the last date provided by the appointment authority could not be a ground to deny appointment to her. The affidavit of the petitioner accompanying the application dated 13.11.2002, discloses that she has completed two years Diploma Course and her result was available on the Internet before 29.6.2002 and she expected to be issued the certificate in the first week of August, 2002. She in fact received the certificate of the two years course on 1.8.2002 and the mark sheet on 13.8.2002 which has been brought on record. The respondents, however, did not accept the certificate as the post was sanctioned to be filled up only upto 30.6.2002. In my opinion the petitioner was treated arbitrarily in rejecting her candidate and refusing her request to produce the certificate, the result of which was available on the Internet. Even otherwise this certificate of the course pursued by her as additional qualification was not essential for appointment. She had passed the test and was declared selected. She, therefore, could not be refused appointment.

9. The writ petition is allowed. The order of appointment of Sri Jitendra Kumar, respondent no. 4 placed at third in the merit list is set aside. The petitioner shall be given appointment without any delay with seniority with effect from the date she was entitled to be appointed if her candidature was not struck out.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.19348 of 2003

Ram Narain Tripathi ...Petitioner

Versus

State of U.P. through its Finance Secretary, U.P. Government, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Shukla
Sri R.K. Pandey

Counsel for the Respondents:
Sri K.N. Saksena
Sri Sarvesh Singh
Sri Suresh Singh
C.S.C.

Constitution of India, Art. 21-Interest-Pension gratuity with hold for 10 years-cause of delay in payment of pension-disclosed the financial constraint held-

clearly and springy infringes the fundamental of right under Art. 21 of the Constitution-instead of remand the matter for calculation of interest-at the rate of 10% about Rs.35000/- as well as the cost of Rs.50,000/- to be paid within two months.

Held: Para 8

Consequently, in the opinion of the Court, since the post retirement benefits has been paid after a period of 10 years and the delay was without any justification, consequently, the respondents are liable to pay penal interest. Since the post retirement benefits is the lifeline for a person after his retirement, the non-disbursement of the post retirement benefits clearly and squarely infringes the fundamental right under Article 21 of the Constitution of India to a citizen to live a life of retirement with dignity. The petitioner was made to run from pillar to post by the respondents without any justification. Consequently, the petitioner is not only entitled for interest but also cost of this litigation.

In my opinion, remitting the matter back to the authorities to calculate the interest would serve no useful purpose as it would further delay and harass the petitioner who has now reached the age of 75 years. If the amount had been released by the respondents immediately after the retirement of the petitioner, the petitioner would have earned some interest if the same was invested. Even if this Court awards interest @ 10% per annum, the minimum amount towards interest would come to approximately Rs.35,000/-. The petitioner is also entitled for cost of litigation and for the mental harassment that he underwent. Consequently, considering the entire matter, this Court quantifies the interest as well as cost at Rs.50,000/-. This amount shall be paid without any further delay within two months from the date a certified copy of this judgment is produced before the authority concerned.

Case law discussed:
1994 (6) SCC-589
2003 (3) SCC-40
1985 (1) SCC-429
2005 (1) SCC-750
2005 (3) AWC-2989

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

1. Heard Sri S.K.Shukla, the learned counsel for the petitioner and Sri Suresh Singh, the learned counsel appearing for the Zila Panchayat, Jhansi and the learned Standing Counsel for the other respondents.

2. The petitioner has filed the present petition praying for a writ of mandamus commanding the respondents to pay interest @ 18% per annum on the retirement benefits which had not been paid to him for almost 12 years. It transpires, that the petitioner retired on 31.1.1991 from the post of an Executive Officer in Zila Parishad, Jhansi. Upon his retirement after 40 years of service, he

was entitled for the post retirement benefits, namely, pension, gratuity, etc. These legitimate dues and benefits were, however, not paid nor released by the respondents for reasons best known to them. The petitioner approached this Court by filing Writ Petition No.7449 of 1996 which was disposed of with a direction to the authority to decide the representation and the claim of the petitioner. The authority, while deciding the claim of the petitioner, admitted that he was liable to be paid the pension and other retirement benefits but pleaded their helplessness in releasing the money, on the ground of financial constraints. It further transpires, that the petitioner moved a contempt application. During the pendency of these proceedings, a sum of Rs.2.85 lacs was paid on various dates, i.e., between 3.5.2002 and 29.10.2002 towards gratuity, pension and arrears of dearness allowance. Since interest was not paid by the respondents, consequently, the present writ petition was filed.

3. The learned counsel for the petitioner submitted that it was admitted by the respondents that the petitioner was entitled for the payment of the post retirement benefits and the only ground for the non-payment was the lack of finance. The petitioner submitted that in view of the admitted position and, in view of the fact that the fault clearly lay with the respondents, the petitioner was, therefore, entitled for interest @ 18% per annum on the belated payments.

4. On the other hand, the learned counsel for the respondents submitted that the payment of the interest could not be given to the petitioner as a matter of right since there is no statutory provision for the payment of the interest. The learned counsel for the respondents however, admitted that the payment of the interest could only be given on equitable grounds, provided it was found that the respondents were not justified in withholding the amount. In support of his submission, the learned counsel for the respondents relied upon a Division Bench decision of this Court, in the case of **Jaiswal Grain Agency and another Vs. State of U.P. and another,** 2005 (3) AWC 2989, in which it was held that the interest could be awarded on equitable ground, provided it was found that the respondents were not justified in withholding the amount. The Court held-

"Thus, the law can be summarised that the interest, being compensatory in nature, should be awarded if it is provided in the contract/agreement or the statutory provisions provide for it. It may also be awarded on equitable grounds provided the facts and circumstances of the case justify it and the law does not prohibit it."

5. Further reliance was made in the decision of the Supreme Court in **Union of India vs. Upper Ganges Sugar and Industries Ltd., 2005(1)SCC 750**, wherein it was held that if the Tribunal did not grant any interest while awarding the compensation, the same could not be claimed again by the respondents and that the interest could be awarded on the ground of equity provided the payment was withheld unjustifiably.

6. There is no quarrel with the aforesaid proposition. The interest would be payable on equitable grounds, if the amount had been withheld unjustifiably by the respondents. In the present case, the respondents have admitted that the

post retirement benefits was payable to the petitioner with effect from the date of his retirement, but the same was not paid. The only ground alleged was that the respondents did not have the finance to pay the post retirement benefits. In my opinion, this cannot be a ground for not releasing the post retirement benefits. In **State of U.P. vs. M. Padmanabhan** with the penalty and payment of interest at the current market rate till the date of the actual payment.

7. In **H. Gangahanume Gowda vs. Karnataka Agro Industries Corporation Ltd,** 2003(3) SCC 40, the Supreme Court held that if there was a delay on the part of the employer in not releasing the post retirement benefits, it was mandatory for the Court to award interest. Similar view was also given by this Court in **Tirath Raj Upadhyay vs. State of U.P. and others**, 2004 (2) UPLBEC 1652 as well as in **R. Kapur vs. Director of Inspection (Painting and Publication) Income Tax and another**,1994(6)SCC 589.

8. In view of the aforesaid decisions, it does not lie in the mouth of the respondents to contend that they do not have the finance to pay the post retirement benefits. Consequently, in the opinion of the Court, since the post retirement benefits has been paid after a period of 10 years and the delay was without any justification, consequently, the respondents are liable to pay penal interest. Since the post retirement benefits is the lifeline for a person after his retirement, the non-disbursement of the post retirement benefits clearly and squarely infringes the fundamental right under Article 21 of the Constitution of India to a citizen to live a life of **Nair**, 1985 (1) SCC 429, the Supreme Court held that the pension and gratuity are no longer a bounty to be distributed by the Government to its employees on their retirement and that the pension and gratuity are valuable rights and property in their hands and that any culpable delay in the settlement and disbursement of the post retirement benefits must be visited retirement with dignity. The petitioner was made to run from pillar to post by the respondents without any justification. Consequently, the petitioner is not only entitled for interest but also cost of this litigation.

9. In my opinion, remitting the matter back to the authorities to calculate the interest would serve no useful purpose as it would further delay and harass the petitioner who has now reached the age of 75 years. If the amount had been released by the respondents immediately after the retirement of the petitioner, the petitioner would have earned some interest if the same was invested. Even if this Court awards interest @ 10% per annum, the minimum amount towards interest would come to approximately Rs.35,000/-. The petitioner is also entitled for cost of litigation and for the mental harassment that he underwent. Consequently, considering the entire matter, this Court quantifies the interest as well as cost at Rs.50,000/-. This amount shall be paid without any further delay within two months from the date a certified copy of this judgment is produced before the authority concerned.

10. The writ petition stands allowed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 29.09.2005

BEFORE
THE HON'BLE AJOY NATH RAY, CJ.
THE HON'BLE R.K. AGARWAL, J
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 23932 of 2001

Ram Kumar and others ...Petitioners
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri Kamlesh Chandra Srivastava
Sri Rajesh Kumar Srivastava
Sri Alok Kumar Yadav

Counsel for the Respondents:
Sri S.M.A. Kazmi
Sri G.N. Verma
Sri R.V. Singh
Sri L.P. Tiwari
Sri Sankatha Rai
S.C.

(A) High Court Rules-Chapter V Rule 6-Practice of Procedure-Division Bench decision of Coordinate jurisdiction- in a case of disagreement-the question be referred to larger Bench.

Held: Para 4

So far as first two questions are concerned, we answer those in the affirmative, i.e., a Division Bench seeking to disagree with an earlier Division Bench cannot do it itself, but it can record its desire to disagree and thereafter call for a reference to a Larger Bench. Following authorities might be referred to in this regard; (1975) 2 SCC 232; (Mamleshwar Prasad v. Kanhaiya Lal), (1997) 10 SCC 258, (State Bank of India and others Versus Labour Enforcement Officer (Central) and another) (2003) 5 SCC 448, especially at page 454 (State of Bihar Versus Kalika Kuer Alias Singh and others) and (2001) 6 SCC 356, especially at paragraph 22 (Fuerst Day Lawson Ltd. Versus Jindal Exports Ltd.).

Case law discussed:
1975 (2) SCC-232
1997 (10) SCC-258
2003 (5) SCC-448
2001 (6) SCC-356

(B) Gaon Sabha Manual-Para 60-2 (kha)-Renewal of lease-for fisheries rights over the Ponds situated within the territorial limit of concerned Gaon Sabha-Full Bench has correctly held ultra vires-in feru's case

Held: Para 16

From the perusal of the abovequoted judgment, it is clear that Full Bench only examined the clause for renewal of lease and observations made by the Full Bench were for purposes of holding the renewal clause as ultra vires. With respect, we are of the same view with regard to renewal clause as expressed by the Full Bench in Feru's case (supra). The renewal of lease is impermissible and renewal clause as contained in paragraph 60(2)(kha) of Gaon Sabha Manual has correctly been held to be ultra vires to Article 14 of the Constitution.
1997 R.D.-157
1973 AWC-1665
1995 ACJ-1066
1997 (88) RD-656
1990 RD-385
1999 RD-186
2004 (96) 645 (FB)

(C) Constitution of India Art. 19-readwith U.P.Z.A. & L.R. Act 1950-S.-126-Reasonalble restrictions- of Government Order providing preferential rights-cooperative Society of fishermen or other similar communities-held-proper-mere getting more revenue is not only the object-does not violate the rights of any person-settlement of fisheries rights by way of auction-does not lay down correct law.

Held: Para 26 & 27

From the above pronouncements made by the apex Court, it is well settled that restrictions imposed to give effect to the constitutional goals as laid down in Directive Principles of State Policy are restrictions with intention to give certain benefits to weaker section of the society which are reasonable restrictions which does not infringe any right of individual citizen under Article 19(1)(g). The rights under Article 19(1)(g) are not absolute rights. As noted above, every individual has also right of consideration but according to preference laid down in the Government orders issued under Section 126 of the 1950 Act. The preferences have been provided in the scheme of the Government with object of providing livelihood to fishermen and fishermen cooperative societies. The view of the Division Bench in Panchoo's case (supra) and other cases that unless fishing right is not settled by auction it will violate Article 19(1)(g) is not correct. The settlement of fishing right by auction will necessarily be in favour of a person giving highest bid. The big contractors and moneyed persons will steal a march over poor fishermen and other poor people of the village who are unable to organise themselves and the result would be that a sizeable section of fishermen and other communities will be deprived of their livelihood. To stop the settlement from going into the hands of big contractors and middlemen, the scheme was enforced by the State Government. The scheme has rational nexus with the object sought to be achieved and the persons for whose benefits the scheme has been framed definitely falls in a separate class having intelligible differentia. The settlement of fishing right in ponds and tanks by public auction cannot be held to serve the purpose and object nor the same can carry forward the goals as laid down in the Directive Principles of State Policy. Mere getting more revenue by public auction is not only object for letting out the fishing right. The objective as displayed from the directions of the State Government under Section 126 of 1950 Act is to provide livelihood to fishermen and other similar communities and also to give preference to the cooperative societies of such fishermen so that they may organise themselves and carry on their traditional vocation for the benefit of large part of weaker section of the society.

We are, thus, of the clear opinion that the directions issued by the State Government under Section 126 of 1950 Act read with Rule 115-A of 1952 Rules, as noted above, does not violate rights of any person under Article 19(1)(g) and Article 14 of the Constitution of India and the view expressed by the Division Bench in Panchoo's case (supra) and Abdul Gaffar's case (supra) in so far as they hold the settlement of fishing right only by way of public auction does not lay down the correct law. As noted above, the view in the aforesaid judgments as well as the view expressed in Ajai Sonkar's case (supra) and in Gram Panchayat Kanta's case (supra) that the renewal of lease is not permissible is absolutely correct and the same view has found favour with the Full Bench judgment of this Court in Feru's case (supra).

Case law discussed:

1992 ALJ 482
1994 (1) SCC-301
1993 (2) SCC-221
1978 (2) SCC-1
1988 UPLBEC-487

(D) U.P.Z.A. & L.R. Act-S-126-Settlement of property vested in Gaon Sabha fisheries Rights over the ponds, tanks-situated within territorial limit of Gaon Sabha-S.D.O. should publish in a news papers having vide circulation-inviting bids by tender on auction not prohibited-where more than one person in particular category of preference are there.

Held: Para 29 & 32

As a general rule the Sub Divisional Officer should publish in a newspaper having wide circulation of the settlement of fishing right to enable all concerned to participate. As observed above, in the event there are more than one person in one particular category of preference, the Sub Divisional Officer is not prohibited to award the said fishing right by inviting bids by tender or auction.

Whereas in the present case, as held by us, the direction issued by the State Government under Section 126 of 1950 Act is a scheme for promotion of social justice and providing for employment to large section of weaker section of the society. Thus the judgment of Full Bench in Ram Chandra's case (supra) is clearly distinguishable and is not attracted in the present case.

Case law discussed:

1992 ALJ 482

(**E) U.P.Z.A. & L.R. Act-Section 126-Revision-cancellation of lease for exercising fishers Rights or refusing to cancel the lease by collector-held-amendable to revisional jurisdiction.**

Held: Para 35

The Collector when considers an application for cancellation of fishery lease, it decides a lis between parties and act as revenue Court. The order passed by Collector cancelling a fishery lease or refusing to cancel a fishery lease is, thus, clearly amenable to revisional jurisdiction as provided under 1950 Act. 1950 Act being a complete code, the remedy with regard to fishery lease has to be first obtained under the four corners of the Act and Rules. Learned single Judge has referred to Section 122-C sub-sections 6 & 7 which has no applicable in the present case. Section 122-C relates to allotment of land for housing site to member of scheduled caste, agricultural labour etc. The said provision is not attracted.

1986 ALJ 188
1997 (5) SCC-536

Transfer of Property Act-Section-117-Registration of lease deed-for exercising fisheries right over the ponds and tanks-settlement of fisheries rights-held-settlement of property-is a right in I immovable property-left open to the government to issue notification for exemption from compulsory registration.

Held: Para 39

The settlement of fishery rights is settlement of property and is a right in immovable property in the nature of a "profit a prendere" These rights have always been held as registrable and do not cease to be so merely because the grant is being made by or at the instance of the State Government. Question No.8 is accordingly answered in the affirmative. However, we also make it clear that fishery right being obviously for purposes which are agricultural within the meaning of Section 117 of the Transfer of Property Act, it would be open to the State Government to issue appropriate notification for taking those outside the purview of compulsory registration. If such notification is issued, the same would be followed, but without such notification the necessity of registration remains.

Case law discussed:

1975 (2) SCC-232
1997 SCC (10)258
2003 (5) SCC-448
2001 (6) SCC-356
1997 R.D.-157
1997 (3) AWC-1665
1995 ACJ-1066
1997 (88) RD-656
1990 RD-385
1999 RD-186
1988 UPLBEC-487
1978 (2) SCC-1
1993 (2) SCC-221
1994 (1) SCC-301
1992 ALJ-482
1994 (1) CRC 53
1986 ALJ-188
1997 (5) SCC-536
AIR 1977 Alld. 360
1997 (2) UPLBEC-872

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

1. We have heard Sri Alok Kumar Yadav, learned counsel appearing on behalf of the writ petitioners, Sri S.M.A. Kazmi, learned Chief Standing Counsel and Sri R.V. Singh, learned standing counsel appearing on behalf of the State.

2. This Full Bench has been constituted on a reference made to it by a learned single Judge vide its referring order dated 25th September, 2001 passed in this writ petition.

3. Learned single Judge found conflict in judgment of Division Benches which necessitated the reference. The following eight questions have been referred to this Full Bench:-

(i) Whether judicial propriety demands that if a Bench of High Court is unable to agree with the decision already rendered by earlier Division Bench of co-ordinate jurisdiction, the question of disagreement should be referred to a Larger Bench under Chapter V Rule 6 of the Rules of the Court, 1951?

(ii) Whether the decisions rendered in former two Division Benches in the case of Ajai Shanker (supra), which were brought to the notice of learned Judges constituting Division Bench in case of Panchoo (supra), the latter Division Bench instead of disagreement with ratio decidendi of two former Division Benches, it ought to have referred the same to a larger Bench of this Court?

(iii) Whether Article 14 and Article 19(1) (g) of the Constitution postulate a reasonable classification to ameliorate the economic condition of weaker section of society of fishermen community enumerated under Paragraph 62 (2) (kha) of Gaon Sabha Manual and also for elimination of middlemen to save the said weaker section of society from exploitation as the Directive Principles embodied the ideal of socio economic justice as assured in the preamble of the Constitution and the Courts are to adopt the principle of harmonious interpretation of Article 14 and 19 (1) (g) of the Constitution so as to give effect to the Fundamental rights as well as Directive Principles of State Policy?

(iv) Whether in view of the State List of Seventh Schedule Item No.21 empowers State Legislature to enact on the subject of fisheries, placing U.P. Act No.1 of 1951, with Ninth Schedule of the Constitution and the mandatory provisions enshrined under Article 243-G read with Item No.5 of Eleventh Schedule which includes settlement of fisheries of the ponds and tanks vested in Gaon Sabha with powers, authority and responsibility of Panchayat, the preparation of plans for economic development and social justice and the implementation of scheme for economic development and social justice as entrusted to them under Paragraph 60 (2) (Kha) of Gaon Sabha Manual issued by the State Government in exercise of its power

under Section 126 of U.P. Act No.1 of 1951 and the Rules framed thereunder are sacrosanct being policy of affirmative action of the State Government giving Distributive justice to the weaker section of society and to protect them from social injustice and all forms of exploitation?

(v) Whether the decision rendered by learned Single Judge in case of Man Singh (supra) conferring jurisdiction upon Sub Divisional Officer and Collector both for cancellation of Patta of fishery right making the order of Collector revisable requires reconsideration in view of sub-sections (6) and (7) of Section 122-C of U.P. Act No.1 of 1951 and decision rendered by Supreme Court in case of Dhulabhai (supra)?

(vi) Whether jurisdiction of Civil Court is expressly barred to cancel the fisheries rights granted under paragraph 60(2) (Kha) of Gaon Sabha Manual and the decision rendered by Division Bench of this Court in case of Todi (supra) requires reconsideration in view of decision rendered by Full Bench of this Court in case of Similesh Kumar (supra) ?

(vii) Whether rights of appeals and revisions are creation of statute and once statutory provisions indicate the manner of settlement of dispute, no other authority including Civil Court has jurisdiction to re-adjudicate the matter covered thereby?

(viii) Whether leases of rearing of fishes in ponds and tanks vested in Gaon Sabha under Section 117 of U.P. Act No.1 of 1951 fall within the meaning of agricultural land as defined under Section 3(14) of the said Act and such leases are exempted from Registration as envisaged under Section 117 of Transfer of Property Act?

4. So far as first two questions are concerned, we answer those in the affirmative, i.e., a Division Bench seeking to disagree with an earlier Division Bench cannot do it itself, but it can record its desire to disagree and thereafter call for a reference to a Larger Bench. Following authorities might be referred to in this regard; (1975) 2 SCC 232; **(Mamleshwar Prasad v. Kanhaiya Lal),** (1997) 10 SCC 258, **(State Bank of India and others Versus Labour Enforcement Officer (Central) and another)** (2003) 5 SCC 448, especially at page 454 **(State of Bihar Versus Kalika Kuer Alias Singh and others)** and (2001) 6 SCC 356, especially at paragraph 22 **(Fuerst Day Lawson Ltd. Versus Jindal Exports Ltd.).**

5. Before the learned single Judge bunch of writ petitions were posted, Writ Petition No. 23932 of 2001 being leading writ petition, arising out of various orders passed by Sub Divisional Officers granting fishery leases, refusing to renew fishery leases and in some of the writ petitions question was involved as to which is the appropriate forum for cancelling the fishery lease granted under the provisions of the Uttar Pradesh Zamindary Abolition and Land Reforms Act, 1950 and the rules framed thereunder. It is necessary to note the

relevant provisions of Uttar Pradesh Zamindary Abolition and Land Reforms Act, 1950 (hereinafter referred to as 1950 Act) and the rules and other relevant provisions relating to grant of fishery lease.

6. Under Section 117 of 1950 Act, the State Government may declare that the things mentioned therein, which had vested in the State, shall vest in the Gaon Sabha or any other local authorities. In this writ petition we are concerned with fishery which has been vested in the Gaon Sabha by virtue of notification of the State Government under Section 117 of 1950 Act. According to Section 122-A of 1950 Act general superintendence, management, preservation and control of all the land, forests, fisheries, tanks, ponds, water channels, pathways, abadi site and hats, bazars and melas vested in the Gaon Sabha are under the charge of Land Management Committee. The functions and duties of the Land Management Committee include development of animal husbandry which include pisciculture. Under Section 28-B of the U.P. Pranchayat Raj Act, 1947, Bhumi Prabandhak Samiti is charged with the general management, preservation and control of all the properties as referred to under Section 28-A of the U.P. Pranchayat Raj Act, 1947 including the maintenance and development of the fisheries and tanks. Section 126 of the 1950 Act is extracted below:-

"126. Gaon Panchayat or the Committee to carry on orders and directions of the *State Government.-(1) The State Government may issue sucyh orders and directions to the [Land Management Committee] as may appear to be necessary for purposes of this Act.*

(2) It shall be the duty of the [Land Management Committee] and [its] office bearers to forthwith carry out such orders and comply with such directions.

7. Rules framed under the 1950 Act, namely, Uttar Pradesh Zamindari Abolition & Land Reforms Rules, 1952 (hereinafter referred to as 1952 Rules), provide for mode of settlement of land, abadi sites and other properties vested in Gaon Sabha. Rule 115-A of 1952 Rules empowers the State Government to issue direction to Bhumi Prabandhak Samiti. Rule 115-A of 1952 Rules is extracted below:-

"[115-A. *The State Government may issue directions to the Bhumi Prabandhak Samities (Land Management Committees) established under Section 28-A of the U.P. Pranchayat Raj Act, 1947, on the following among other matters:-*

(1) land management, including preservation of land for purposes of public utility;

(2) expenditure of the amount placed at the disposal of the Bhumi Prabandhak Samiti by the Gaon Panchayt; and

(3) matters relating to the functions of the Bhumi Prabandhak Samitis as laid down in Section 28-B of the U.P. Pranchayat Raj Act, 1947, in so far they appear necessary for the purposes of the Act]"

8. Rule 115-S of 1952 Rules provides for manner and procedure for grant of lease and licence in respect of any property vested in the Gaon Sabha. Rule 115-S(1) specifically provides that

no lease or licence shall be made in favour of a person except by public auction held in accordance with the procedure given thereunder. However, Rule 115-S(1) has a proviso which is of following effect:-

[115-S. (1). .....

Provided that the provisions of this rule shall not apply to

(i) cases of allotment of agricultural land and abadi sites covered by Rules 173 to 177 and Rules 115-L to 115-R, respectively; and

(ii) cases in which the State Government issue directions under Section 126 of the Act read with Rules 115-A and 115-B] :

Provided further that in case of perennial tanks of three or more acres in ara, the Land Management Committee may, with the previous permission of the Assistant Collector-in-Charge of the sub-division concerned, grant a lease for a period not exceeding seven years in favour of one or more than one fisherman residing within the circle of the Gaon Sabha or in favour of a co operative society of such fisherman registered under the Co-operative Societies Act, 1912 (Act No.2 of 1912), and registered place whereof situate within such circle.]"

9. The State Government in exercise of its power under Section 126 of 1950 Act read with Rule 115-A and 115-B of 1952 Rules had issued various Government orders providing for regulating the settlement of fishery lease in the ponds and tanks vested in the Gaon Sabha. The provisions of Uttar Pradesh Gram Sabha Manual contains procedure for regulating fishery in tanks, ponds and water channels. The said settlement is made in accordance with various Government orders issued from time to time. Learned standing counsel has placed before us, the Government orders dated 24th April, 1990, 4th January, 1994 and 17th October, 1995 issued by the State Government in exercise of its power under Section 126 of 1950 Act read with Rules 115-A and 115-B of 1952 Rules. A procedure is provided for settlement of fishing right in the tanks and ponds vested in the Gaon Sabha. According to Government order separate provisions have been made for settlement of fishing right in ponds and tanks more than two hectares and in ponds and tanks less than two hectares. The grant of lease is provided to various categories of persons which include cooperative societies of fishermen. An order of preference is provided under the Government order according to which the lease is to be granted.

10. Now at this juncture conflicting views expressed by various Division Benches are to be noted for answering the remaining questions referred to us. A Division Bench of this Court in ***Ajai Sonkar Vs. State of U.P.;*** 1997 RD 157, had occasion to consider the preference given to the Fishing Cooperative Society. The Division Bench held that giving preference to Cooperative Societies does not amount to discrimination attracting Article 14 of the Constitution. Following was observed in paragraph 5:-

"5. Pursuant to above Rules notice dated 17.6.96 (Annexure-1) was published, in clause 2 of which it has been specifically mentioned that in granting lease cooperative matsya societies of

same village or Gaon Sabha are to be given preference. The idea behind it is to promote the cooperative movement. Thus, if by giving preference to cooperative societies applications for granting lease are invited, it is settled that it does not amount to discrimination attracting Article 14 of the Constitution but it is in consonance with the cooperative jurisprudence. Therefore, the submission made by the learned counsel for the petitioner that the petitioner who belongs to a general category has been discriminated, has no legs to stand.

11. Another Division Bench of this Court in **Gram Panchayat, Kanta Gulzarpur, Unnao Vs. Collector, Unnao and others; 1997(3) A.W.C. 1665 (L.B.)** again considered the directions issued by the State Government under Section 126 of 1950 Act. The Division Bench also noticed the provisions contained in the Gaon Sabha Manual providing for renewal of lease for a period of five years. The Division Bench also observed that direction issued by the State Government under Section 126 of the Act are in consonance with the constitutional provisions of Article 38(2) and Article 39(c) of the Constitution of India. The Division Bench, however, took the view that renewal of lease cannot be granted without first considering the directions issued under Section 126 of 1950 Act since the renewal is also a grant of lease. While noticing the directions issued by the State Government under Section 126 of 1950 Act, following observations were made by the Division Bench in paragraphs 21 and 22:-

*"**21.** If the State Government under the provisions of Article 15(4) of the Constitution and directive principle of the State Policy passed Government orders which are contained in Gaon Sabha Manual or other orders, it cannot be said that it amounts to discrimination because the State can make any special provision for the advancement of any socially and educationally backward classes of citizens.*

***22.** It has also been contended that neither any Cooperative Society nor any person belonging to the caste of Mallah and Nishad, etc., were available in the village in question, hence the lease in favour of respondent cannot be faulted. But this Court cannot ignore that one community, i.e., Kahar, was available and, therefore, it was incumbent upon the authorities to have followed the provision pertaining to preferences contained in Gaon Sabha Manual or other Government Orders, while renewing the Theka in favour of the respondent No.3 but even when persons belonging to other preferential categories were not considered and the lease deed was renewed in favour of the respondent No.3."*

12. The above Division Benches have held that directions issued by the State Government under Section 126 of 1950 Act, i.e., by various Government orders for providing preference for grant of fishery lease are not not discriminatory and the same have been issued in consonance with the directive principle of State policy.

13. The contrary view to the aforesaid Division Benches have been expressed by several other Division Benches, namely, **Ashok Kumar Vs. State of U.P. & others;** 1995 ACJ 1066, **Abdul Gaffar Vs. State of U.P. and**

others; 1997 (88) RD 656, **Desh Kumar Vs. State of U.P.**; 1990 RD 385, 1999 RD 186; **Panchoo Vs. The Collector/D.M., Gorakhpur and others**. The Division Bench in **Panchoo's** case (supra) also noted earlier two Division Benches in **Ajay Sonkar's** case (supra) and Gram **Panchayat Kant's** case (supra). The Division Bench also held in the above case that fishery lease has to be granted after advertising it in widely circulated newspapers and after holding public auctions. The Division Bench held that unless the above procedure is followed, it will be violative of Articles 14 and 19(1)(g) of the Constitution. Following was observed in paragraph 4 of the said judgment:-

"4. Shri Swaraj Prakash learned counsel for petitioner has relied upon the decision of a division bench of this court Ajai Singh v. State of U.P., and the decision in Gram Panchayat v. Collector. In our opinion these decisions are distinguishable as they have not dealt with Article 19(1)(g) of the Constitution. Article 19(1)(g) states that every citizen has freedom to do business or trade. Hence in our opinion every citizen of any community or caste can do business of fishery, and it cannot be restricted to any particular caste or community. Any Rule or G.O. to the contrary is in our opinion violative of Article 19(1)(g) and wholly unconstitutional. We are of the opinion that if the lease in question has been granted without advertisement in well known newspapers having wide circulation and thereafter holding public auction that lease will also be invalid. Hence if as yet no fishery lease after 1997 has been granted after advertisement it in well known newspapers and holding public auction/tender then we direct the authorities concerned to grant it only after following the aforesaid procedure otherwise it will be violative of Articles 14 and 19(1)(g) of the Constitution."

14. Noticing the above conflict, learned single Judge has made this reference. Before proceeding to consider the correctness of the views expressed by judgments of various Division Benches, as noted above, it is relevant to note that with regard to one aspect there is no conflict in the views of the abovenoted Division Benches, i.e., renewal of lease. All the Division Benches have held that renewal of lease is not permissible. With regard to renewal of lease the matter was already referred to a Full Bench and a Full Bench of this Court has answered the same which judgment is reported in 2004(96) RD 645; **Feru Vs. State of U.P. and others**. The Full Bench formulated the question, which arose for consideration in paragraph 8 of the judgment, which is extracted below:-

"8. On the facts and circumstances of the case, the following questions of law arise for consideration:-

Whether para 60(2)(kha) is violative of Article 14 of the Constitution.

Whether period of lease can be extended under the renewal clause of the patta."

15. While answering the above two questions, the Full Bench held that Clause (2)(kha) of paragraph 60 is ultra vires to Article 14 of the Constitution and Patta cannot be renewed for fisheries rights by the Land Management Committee/Sub Divisional Officer after expiry of the period for which it was granted. Before

proceeding to examine the question any further, it is relevant to note various observations made by the Full Bench in **Feru's** case (supra) to examine as to whether the Full Bench in **Feru's** case (supra) had also expressed any opinion with regard to the questions which have been referred to this Bench. As noted above before the Full Bench only two questions were referred. Clause (2)(Kha) of paragraph 60 of Gaon Sabha Manual provided that the Collector in his discretion after the expiry of 10 years of lease can grant Patta for next five years if the conduct of the lessee was satisfactory. The Full Bench declared the renewal clause in Gaon Sabha Manual in Paragraph 60 (2)(kha) as ultra vires on three reasons, namely, (i) it creates monopoly in favour of a person holding fishery right; (ii) under the renewal clause increase of the rent is only 20% while after the expiry of 10 years the amount may increase by 100% or more; and (iii) after the issuance of the Government order dated 17.10.1995 certain preferential rights has been given to the fishing Cooperative Societies and that subsequent Government order has to be taken into account for settlement of fishing rights in a pond after the expiry of period of lease granted to a person. It is relevant to quote paragraph 10 to 15 of the Full Bench to find out as to what was actually decided by the Full Bench. Paragraph 10 to 15 of the Full Bench judgment in **Feru's** case (supra) are extracted below:-

"10. The renewal clause as provided under clause (2)(kha) creates a monopoly in favour of a person holding fisheries rights under a patta. The only condition for its renewal is that his conduct should be satisfactory and if the Collector finds that his conduct was satisfactory, he can grant it for the next 5 years. This will create a monopoly in favour of the lessee. After the expiry of the lease every one is entitled to apply for grant of lease of fisheries rights. This equal opportunity is denied when a monopoly is created in favour of a person by renewal of the lease. The fishing is connected with the livelihood of a person. Everybody can participate in a public auction or submit his tender for settlement of fisheries rights. The person, who is a highest bidder, is entitled for consideration for settlement of fisheries rights.

11. Secondly, under the renewal clause increase of the rent is only 20% while after the expiry of 10 years, the amount may increase by 100% or more of the amount which was fixed 10 years ago. It will be loss of revenue of the Gaon Sabha. The revenue of the Gaon Sabha depends upon the realization of the amount by settlement of pond for fishing, growing 'singhara' etc.

12. Thirdly, after the issuance of the Government order dated 17.10.1996 certain preferential rights has been given to fishing Cooperative Societies and that subsequent Government order is to be taken into account for settlement of fishing rights in a pond after the expiry of period of lease granted to a person.

13. The settlement of the fisheries rights afresh on the ground that such person has a right of renewal either under the agreement or under para 60(2)(kha) will be in violation of Article 14 of the Constitution for the reason it denies equal opportunity to all the persons concerned. The Division Bench in Ashok Kumar's case (supra) took the view that after the

expiry of the lease, the fisheries rights should be settled only by public auction or public tender and the same view has been expressed in Abdul Gaffar's case (supra).

14. The clause for renewal of the lease under the agreement will be invalid as we have held that para 60(2)(kha) is ultra vires of Article 14 of the Constitution. Even otherwise the agreement will be arbitrary without giving an opportunity of equal participation to others as held in Ramana Dayaram Shetty vs. The International Airport Authority of India and others.

16. From the perusal of the abovequoted judgment, it is clear that Full Bench only examined the clause for renewal of lease and observations made by the Full Bench were for purposes of holding the renewal clause as ultra vires. With respect, we are of the same view with regard to renewal clause as expressed by the Full Bench in **Feru's** case (supra). The renewal of lease is impermissible and renewal clause as contained in paragraph 60(2)(kha) of Gaon Sabha Manual has correctly been held to be ultra vires to Article 14 of the Constitution. However, the observations of the Full Bench make it clear that Full Bench already took notice of the Government order dated 17th October, 1995 and also observed that preferential right given to fishing Cooperative Societies has also to be taken into account for settlement of fishing right. The Full Bench in **Feru's** case (supra), however, was not concerned with the conflicting views expressed by two set of Full Benches as noted above. Further two questions which have been answered by the Full Bench, as already been quoted by us, did not decide or express any opinion on the questions which have been referred to this Bench and the judgment of Full Bench is only confined to the renewal clause of the fishery lease as contained in paragraph 60(2)(kha) of the Gaon Sabha Manual.

17. The Division Bench in **Panchoo's** case (supra), **Desh Kumar's** case (supra) and **Abdul Gaffar's** case (supra) held that every individual has right to be given opportunity to have a fishery lease and grant of lease cannot be restricted to any particular caste or community and any rule or Government order to the contrary is violative of Article 19 (1)(g) of the Constitution of India.

18. The question for our consideration is as to whether the directions issued by the State Government under Section 126 of 1950 Act and Rule 115-A (3) of 1952 Rules are violative of rights guaranteed under Article 19(1)(g) of the Constitution. Before proceeding further, it is also relevant to note the provisions of Part IX of the Constitution of India inserted by 73rd amendment in 1982. Article 243-G contemplate giving Panchayats such power and authority as may be necessary to enable them to function as institutions of self-government. The provisions further provides that power and responsibility of a Panchayat shall be with respect to preparation of plan for economic development and social justice and the implementation of scheme for economic development and social justice as may be entrusted to them including those in relation to the matter listed in Eleventh Schedule. Article 243-G of the Constitution is quoted below:-

***"243-G. Powers, authority and responsibilities of Panchayats**.- Subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to-*

(a) The preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

19. The Eleventh Schedule of the Constitution, which is referred to under Article 243-G includes fishery at Item No.5. The directions issued by the State Government contained in Government orders dated 8th July, 1987, 24th April, 1990, 4th January, 1994 and 17th October, 1995 have been issued in exercise of power given to the State Government by Section 126 of 1950 Act read with Rule 115-A (3) of the 1952 Rules. From the aforesaid Government orders, it is to be noted that separate procedures have provided for ponds and tanks of more than two hectares and ponds and tanks of less than two hectares. The Government orders further specifically provides that ponds and tanks of less than 0.5 (half) acre should be reserved only for community use and shall not be let out for fishery. The Government orders provide for a preference in granting lease of fishery. With regard to tanks and ponds up to two hectares the category of preference is different from the ponds of tanks of more than two hectares. With regard to ponds and tanks up to two hectares first category of preference is the persons of same village belonging to Machhua, Kewat, Nishad, Mallah, Bind, Dheevar, Dhhmar, Kashyap, Vatham, Raikawar, Manjhi, Godia, Kahar, Tureha or Turaha community. The preference proceed from Gaon Sabha to Nyaya Panchayat and thereafter to Block. With regard to ponds and tanks of more than two hectares the Cooperative Societies even of district level and State level are contemplated and individual of the same village/Nyaya Panchayat/Vikas Khan/district is also included as last preference. From the scheme of the directions issued under Section 126 of 1950 Act, it is clear that first emphasis is on the Gaon Sabha concerned where tank or pond is situated and individual belonging to fishermen community and other similar communities are preferred for ponds and tanks up to two hectares and thereafter Cooperative Societies of fishermen. Giving preference to fishermen of the village concerned is with object to provide livelihood to the fishermen who are traditionally engaged in fishing and to other similar communities who are socially and economically weak. Preference to cooperative Societies of fishermen is also with the same object i.e., to provide means of livelihood to fishermen who form cooperative society.

20. The Government order dated 17th October, 1995 specifically notes that the scheme is framed keeping in view that the benefit of the scheme be availed by the persons of fishermen community and leases of ponds and tanks could not be

made in favour of middlemen and unsocial elements. The scheme has been framed as a measure of social justice to provide means of livelihood to fishermen and other similar communities who had been traditionally engaged in fishing. Prefers of Gaon Sabha concerned is also with object that person of Gaon Sabha should get livelihood in the same village.

21. The category of preference further reveals that an individual of any caste or community of the same Village/Nyaya Panchayt/Block/District is also included in the preference and it cannot be hold that a persons belonging to other communities have been completely denied from consideration for grant of lease.

22. The apex Court in 1988 UPLBEC 487; ***Gulshan and another Vs. Zila Parishad and others***, had occasion to consider a similar policy decision taken by the State Government providing for creating cooperative society of the persons traditionally engaged in work of disposal of carcasses of dead animals. The apex Court approved the policy of the State which was framed in the larger interests of the sizeable segment of the weaker sections of the society. Under the scheme of the Government the work of collecting carcasses of dead animals was to be entrusted to cooperative societies of such persons. The apex Court made following observations in paragraphs 5, 6 and 7 of the said judgment:-

"5. *After the matters were heard before us at quite some length, our attention was drawn to Circular No.2670-G dated June 7, 1986 issued by the Special Secretary to the Government of Uttar Pradesh addressed to the Commissioner in the State to the following effect:*

"I have been directed to invite your attention to the above subject and state that the disposal of carcasses of animals is performed by the District Boards under their own Bye-laws and the District Boards generally get this work performed by taking recourse to auction. With a view to safeguarding the interests of the persons, who are Traditionally engaged in this work, the Government after due consideration have decided that the in future the licences for disposal of carcasses of animals should be granted only to registered industrial co-operative societies formed by the persons engaged in this work and for this purpose the average income of such society during the last three years enhanced by 158 thereof should be treated its potential income. Apart from this, care should be taken to ensure that orthodox contractors are not allowed to enter this society in preudo-from."

It is plain upon the reading of the aforesaid Circular that the contract system envisaged by the impugned bye-law framed by the different Zila Parishads in the State has been virtually abandoned, and the State Government proposes to replace the system of auction by a system of licensing, giving preferential right to co-operative societies consisting of members of the traditional occupation, for the disposal of carcass of dead animals.

6. *In view of the subsequent policy decision taken by the State Government, the present controversy no longer survives and it would be open to different Zila Parishads, in view of the directive of the State Government, to frame the*

appropriate bye-laws consistent with and for the implementation of the policy declared by the State Government. Zila Parishads while considering the question, shall keep in view the directions issued by this Court in Writ Petition No. 499 of 1983 decided on April 15, 1983. I shall also keep in view the order passed by this Court in Gulshan's case introducing the licence-system in the Zila Parishad, Etawah on an experimental basis.

7. *For a meaningful effectuation of the policy-decision of the Government, which is taken in the larger interest of the sizeable segment of the weaker sections of the society, it is of the utmost importance that the work of formation of cooperative society of the members of the traditional-occupation, who owing to their illiteracy, penury, and social disadvantages lack the will and the ability to organise themselves, should be taken-up by the social welfare department of the State Government and every effort should be made to bring the members of the traditional occupation within the fold of these cooperative societies. The social welfare department shall take effective steps to organise such cooperative Societies."*

23. In 1978 (2) S.C.C. 1; **Pathumma and others Vs. State of Kerala and others**, the apex Court had examined the constitutional validity of Section 20 of the Kerala Agriculturist (Debt Relief) Act, 1970. The challenge was made before the Supreme Court that the restriction contained in Section 20 are violative of Article 19 (1)(f) of the Constitution. The apex Court observed the restrictions which have been made to give effect to the directive Principles of State Policy have to be treated as reasonable restrictions. Paragraphs 12 and 13 of the said judgment are extracted below:-

"12*. In the case of Fatehchand Himmatlal Vs. State of Maharashtra (supra) the Constitution Bench of this Court observed as follows (SCC p.680, para 22):*

Incorporation of Directive of Principles of State policy casting the high duty upon the State to strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice-social, economic and political- shall inform all the institutions of the national life, is not idle print but command to action. We can never forget, except at our peril, that the Constitution obligates the State to ensure an adequate means of livelihood to its citizens and to see that the health and strength of workers, men and women, are not abused, that exploitation, moral and material, shall be extradited. In short, State action defending the weaker sections from social injustice and all forms of exploitation and raising the standard of living of the people, necessarily imply that economic activities, attired as trade or business or commerce, can be de-recognized as trade or business.

13. In the instant case, therefore, we are not able to see any conflict between the directive principles contained in Articles 38 and 39(b) and the restrictions placed by the Act. In the case of the State of Bombay v. F.M. Balsara this Court observed as follows:

"In judging the reasonableness of the restrictions imposed by the Act, one has to bear in mind the directive principles of

State policy set forth in Article 47 of the Constitution."

24. In 1993(2) S.C.C. 221; **Parvej Aktar and others Vs. Union of India and others,** the apex Court had occasion to consider the orders issued under Section 3(1) of Handlooms (Reservation of Articles for Production) Act, 1985 reserving certain articles of exclusive production of handlooms. Challenged was made to the order of reservation for exclusive production of handlooms on the ground of violation of Article 19(1)(g) by certain persons. The apex Court noticed the provisions of Article 45 of the Constitution which require the State to promote with special care the educational and economical interests of the weaker sections of the people. The protection was given by the Government to handloom weavers because the livelihood of handloom weavers was threatened due to production of all types of items and varieties by the powerloom industry. Following observations were made by the apex Court in paragraphs 56, 58 and 59 of the said judgment:-

"56. *The protection has been given by the Government to handloom weavers because the livelihood of handloom weavers is threatened due to the production of all types of items and varieties by the powerloom industry. It is common knowledge that the handloom weavers are economically very poor and will have no alternative employment in the rural areas unless protected through reservation of varieties for them. So poor is the weaver that he could well say in the words of Karl Marx:*

"Half a century on my back and still a pauper."

.....

58. *No doubt, there are restrictions under the impugned order but the question would be whether they are reasonable. The Act, as seen above, has come to be enacted for the protection of the interests of the handloom weavers, mostly concentrated in rural areas. They are pitted against a powerful sector, namely, the mills and the powerloom. As such, they face unequal competition. The restrictions are not only reasonable but also fully justified. Further, the objectives sought to be achieved by way of these restrictions should derive support from Article 43 of the Constitution which reads as follows:-*

"43. Living wage, etc., for workers.- The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas."

The said article ordains that the State shall endeavour to promote cottage industries on individual or cooperative basis in rural areas. It is a welcome measure. We can usefully refer to Orient Weaving Mills P. Ltd. v. Union of India:

".....The Directive Principles of the Constitution, contained in Part-IV, lay down the policies and objectives to be achieved, for promoting the welfare of the

people. In this context of the present controversy, the following words of Article 43 are particularly apposite:

".....and in particular, the state shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas.

It has rightly been pointed out in the affidavit filed on behalf of respondents 1-4 that the exemption granted by the impugned notifications is meant primarily for the protection of petty producers of cotton fabrics not owing more than four power looms, from unreasonable competition by big producers, like the petitioner-Company. The State has, therefore, made a valid classification between goods produced in big establishments and similar goods produced by small powerloom weavers in the mofussil, who are usually ignorant, illiterate and poor and suffer from handicaps to which big establishment like the petitioner-Company are not subject."

59. *Equally, Article 46 inter alia requires the State to promote with special care the educational and economical interests of the weaker sections of the people. Therefore, these restrictions can easily be sustained as reasonable since it is in furtherance of the objectives laid down in the directive principles."*

25. Another judgment of the apex Court in 1994(1) S.C.C. 301; **State of Kerala Vs. Joseph Antony** which had arisen before the apex Court essentially as a dispute between the fishermen in the State of Kerala who use traditional fishing crafts such as catamarans, country crafs and canoes which use manually operated traditional nets and those who use mechanised crafts which mechanically operate sophisticated nets. The Kerala Marine Fishing Regulation Act, 1980 was enacted to regulate fishing vessels in the sea along the coastline of the State. Section 4 empowered the Government to regulate, restrict or prohibit fishing in any specified area by such class or classes of fishing vessels as may be prescribed. The Government issued notification prohibiting fishing by mechanised vessels in the territorial waters except for small specified zones. The notification was challenged as violative of Article 19(1)(g) of the Constitution. The apex Court observed following in paragraph 28:-

"28. *By monopolising the pelagic fish stock within and by indiscriminate fishing in the territorial waters they are today denying the vast masses of the poor fishermen their right to life in two different ways. The catch that should come to their share is cordoned off by the giant and closely meshed gears leaving negligible quantity for them. Secondly, the closely meshed nets kill indiscriminately the juvenile with the adult fish and their eggs as well. That is preventing breeding of the fish which is bound in course of time to lead to depletion and extinction of the fish stock. There is thus an imminent threat to the source of livelihood of the vast section of the society. The State is enjoined under Article 46 of the Constitution in particular to protect the poor fisherman-population. As against this, the respondent-operators are not prohibited from fishing within the territorial waters. They are only prohibited from using certain types of nets, viz., purse seines, ring seines, pelagic and mid-water trawls. There is, therefore, no restriction on their fundamental right under Article 19(1)(g) to carry on their occupation, trade or*

business. They cannot insist on carrying on their occupation in a manner which is demonstrably harmful to others and in this case, threatends others with deprivation of their source of livelihood. Since, in the circumstances, the protection of the interests of the weaker sections of the society is warranted as enjoined by Article 46 of the Constitution and the protection is also in the interest of the general public, the restriction imposed by the impugned notifications on the use of the gears in question is a reasonable restriction within the meaning of Article 19(6) of the Constitution.

26. From the above pronouncements made by the apex Court, it is well settled that restrictions imposed to give effect to the constitutional goals as laid down in Directive Principles of State Policy are restrictions with intention to give certain benefits to weaker section of the society which are reasonable restrictions which does not infringe any right of individual citizen under Article 19(1)(g). The rights under Article 19(1)(g) are not absolute rights. As noted above, every individual has also right of consideration but according to preference laid down in the Government orders issued under Section 126 of the 1950 Act. The preferences have been provided in the scheme of the Government with object of providing livelihood to fishermen and fishermen cooperative societies. The view of the Division Bench in **Panchoo's** case (supra) and other cases that unless fishing right is not settled by auction it will violate Article 19 (1)(g) is not correct. The settlement of fishing right by auction will necessarily be in favour of a person giving highest bid. The big contractors and moneyed persons will steal a march over poor fishermen and other poor people of the village who are unable to organise themselves and the result would be that a sizeable section of fishermen and other communities will be deprived of their livelihood. To stop the settlement from going into the hands of big contractors and middlemen, the scheme was enforced by the State Government. The scheme has rational nexus with the object sought to be achieved and the persons for whose benefits the scheme has been framed definitely falls in a separate class having intelligible differentia. The settlement of fishing right in ponds and tanks by public auction cannot be held to serve the purpose and object nor the same can carry forward the goals as laid down in the Directive Principles of State Policy. Mere getting more revenue by public auction is not only object for letting out the fishing right. The objective as displayed from the directions of the State Government under Section 126 of 1950 Act is to provide livelihood to fishermen and other similar communities and also to give preference to the cooperative societies of such fishermen so that they may organise themselves and carry on their traditional vocation for the benefit of large part of weaker section of the society.

27. We are, thus, of the clear opinion that the directions issued by the State Government under Section 126 of 1950 Act read with Rule 115-A of 1952 Rules, as noted above, does not violate rights of any person under Article 19 (1)(g) and Article 14 of the Constitution of India and the view expressed by the Division Bench in **Panchoo's** case (supra) and **Abdul Gaffar's** case (supra) in so far as they hold the settlement of fishing right only by way of public auction does not lay down the correct law. As noted above, the view in the aforesaid judgments as

well as the view expressed in **Ajai Sonkar's** case (supra) and in **Gram Panchayat Kanta's** case (supra) that the renewal of lease is not permissible is absolutely correct and the same view has found favour with the Full Bench judgment of this Court in **Feru's** case (supra).

28. However, it is relevant to note that the directions issued under Section 126 of 1950 Act itself provides that settlement of fishing right shall be done with proper and extensive publicity so that all who are eligible to participate may be aware of such proposed settlement and may participate. It is true that without information or knowledge of all concerned who are eligible to participate the settlement will be arbitrary. The Division Bench of this Court in 1992 A.L.J. 482; **Gaon Sabha, Tuja, Vs. The Sub Divisional Officers and others**, had noted the proviso to Rule 115-S and observed that public auction for settlement of fishery right is not mandatory. The Division Bench, however, in the said judgment has observed that although there is no requirement to the Sub Divisional Officer to settle the fishery lease by auction but the said procedure of auction can be exercised by the Sub Divisional Officer when there are more than one person claiming entitlement for grant of lease. Following was laid down by the above Division Bench in paragraph 5:-

"5. *..... While laying down order of preference for the grant of Patta it has been provided that if there are more than one person of one group the Patta shall be granted by auction in favour of the highest bidder. The normal rule laid down by aforesaid Government order is the grant of Patta by Sub Divisional Officer without any public auction, unless the case falls within the last part of Clause-2 which has provided for public auction, if there are more than one person of one group. It may, however, be observed that though there is no statutory requirement requiring the Sub Divisional Officer to settle the land by auction, there is no prohibition either and if he is of the opinion that in view of the facts and circumstances of a particular case it will be expedient to grant the Patta of the fisheries right by means of public auction, he may do so. But if he has settled the fisheries by means of other than the auction his order cannot be set-aside on the ground that he has not settled it by holding public auction."*

29. The settlement of fishery according to the directions under Section 126 of 1950 Act is settlement of property vested in the Gaon Sabha which should be done in a prescribed manner giving opportunity to all eligible persons to participate. The Revenue Officers, who are entrusted with duty, shall ensure proper advertisement of the date of settlement so that all persons who are eligible to participate have sufficient notice of the proposed settlement. The Government order itself contemplate "wide publicity". The Sub Divisional Officer himself should see that wide publicity is made. Now a days newspapers having wide circulation in the area is surest mode to publish a proposed settlement. As a general rule the Sub Divisional Officer should publish in a newspaper having wide circulation of the settlement of fishing right to enable all concerned to participate. As observed above, in the event there are more than one person in one particular category of

preference, the Sub Divisional Officer is not prohibited to award the said fishing right by inviting bids by tender or auction.

30. Before concluding the discussion on the above issues, Full Bench judgment of this Court in Writ Petition No.256 (M/B) of 1997 (Ram Chandra Vs. The State of U.P. And another) needs to be noted. Before the Full Bench validity of Rule 9A and Rule 53A of U.P. Minor Minerals (Concession) Rules, 1963 (hereinafter referred to as 1963 Rules) was challenged. Rule 9 of 1963 Rules lays down preference for grant of mining lease. Rule 9-A inserted by amendment, provided as follows:-

"9-A. Preferential right of certain persons in respect of sand etc.:-

(1) Notwithstanding anything contained in rule 0, in respect of mining lease for sand or morrum or bajari or boulder or any of these in mixed state exclusively found in the river bed, preference shall be given in the following order to a person or group of persons, whether or not incorporated, who:

(a) Belong to socially and educationally backward classes of citizens are engaged in carrying on the occupation of excavation of sand or morrum as a profession and are resident f the same district in which the area in respect of which the lease is applied for, is situate;

(b) Have established or intend to establish the aforesaid minor mineral based industry in the State.

Explanation:- *For the purpose of clause (a) the persons belonging to socially and educationally backward classes of citizens engaged in carrying on the excavation of sand or morrum as profession means Mallah, Kewat, Bind, Nishad, Manjhi, Batham, Dhiwar, Themer, Chai, Sorahia, Turha, Raikwar, Kaiwat, Khulwat, Tiyar, Gaudia, Godia and Kashyap and includes such other persons as are specified as such by the State Government, by notification, in the official Gazette.*

(2) Where two or more persons or group of persons belonging to any of the categories specified in sub-rule (1) have applied for a mining lease in respect of the same land the applicant whose application was received earlier shall have the preferential right :

Provided that where such applications are received on the same day preference shall be decided by draw of lots."

31. Similarly Rule 53-A relates to right of certain persons for grant of permit. The Full Bench of this Court held the Rules 9A and 53A of 1963 Rules arbitrary. The reasons given by Full Bench for holding the said provision arbitrary were, "the provisions deems that members of the communities mentioned therein would be carrying out the profession of excavating sand or morrum, which is arbitrary and unreasonable". The Full Bench in the aforesaid judgment further observed, "Further, Rule 9-A does not attach any significance to the guidelines such as special knowledge of excavation, experience in mining operation, financial resources and nature and quality of the technical staff employed. It was held by the Hon'ble Supreme Court in "Prem Nath Sharma Vs. State of U.P. And another, (1997)4 SCC 552" that the conditions specified in rule

9(2) are "conditions necessarily to be incorporated for ensuring selection of most deserving candidates." A perusal of rule 9(2) would reveal that the Government while considering the matter regarding grant of mining lease have to scrutinise as to whether the applicant has any experience or special knowledge in mining operations or not. His financial resources have also to play a vital role in considering his candidature. Sub-clause (c) of the aforesaid rule further provides that the Government will have to consider the nature and quality of the technical staff employed or to be employed by the applicant. Sub-clause (d) says that the conduct of the applicant in carrying out mining operations on the basis of previous lease or permit and in complying with the conditions of such lease or permit or provisions of any law in connection therewith have also to be scrutinised. However, for special reasons the State Government may relax the aforesaid rules. The impugned rule 9-A completely ignores the guidelines referred to above." The Full Bench further in the said judgment observed, "The crux is that the reservation, authorising preferential right under the impugned rule 9-A is totally on caste basis and not based on any rational experience, financial resources, special knowledge or expertise in the field of excavation of sand or morrum. The Full Bench lastly observed that "the emphasis is on regulation of mines and development of minerals. It is not, as observed above, a legislation for promotion of social justice or for better distribution of wealth within the meaning of Article 39(b) and (c) of the Constitution of India."

32. From the aforesaid, it is clear that the provisions of Rules 9A and 53A of 1963 Rules were struck down for the reasons as given by the Full Bench in **Ram Chandra's** case (supra). The emphasis has been given by the Full Bench that the legislation is not for promotion of social justice or for better distribution of wealth within the meaning of Article 39 (b) and (c) of the Constitution. Whereas in the present case, as held by us, the direction issued by the State Government under Section 126 of 1950 Act is a scheme for promotion of social justice and providing for employment to large section of weaker section of the society. Thus the judgment of Full Bench in **Ram Chandra's** case (supra) is clearly distinguishable and is not attracted in the present case.

33. Although the Act is in the Ninth Schedule of the Constitution and is not challengeable for Part III violations, yet action taken by promulgating an order under the Act is not necessarily under the constitutional protection; although it is not so protected, it is otherwise cleared by us. As such questions No.3 and 4 both are answered in affirmative.

34. The question No.5 as framed by learned single Judge is as to whether the judgment of this Court in **Man Singh and others Vs. Board of Revenue and others;** (1994) 1 CRC 53, which held that the Sub Divisional Officer and Collector have jurisdiction to cancel the fishery lease and the order of Collector is revisable, requires reconsideration in view of sub-sections (6) and (7) of the Section 122-C of 1950 Act. The learned single Judge in **Man Singh's** case (supra) took the view that Sub Divisional Officer who grants a fishery lease has jurisdiction to recall his order if the said grant was obtained surreptitiously and fraudulently

in breach of the provisions and directions contained in the Government order. Every administrative authority has jurisdiction to recall its order if it was obtained surreptitiously or fraudulently. We only clarify that the power to recall the grant by Sub Divisional Officer of a fishery lease can only be exercised on accepted ground of recall, i.e., when it is obtained by fraud or misrepresentation. Apart from fraud or misrepresentation, the Sub Divisional Officer can neither suo moto nor on the application of any interested person cancel the lease. According to the scheme of the directions under Section 126 of 1950 Act itself Collector has been given power to cancel the lease. As per the scheme of the Government order any aggrieved person can approach the Collector for cancelling the lease. The question for consideration is as to whether the grant of lease by Sub Divisional Officer under the directions of the State Government or an order of the Collector cancelling the lease is subject to revision by revisional jurisdiction of the revisional authority under the Act. The learned single Judge of this Court in 1986 All.L.J. 188; **Matsya Jivi Sahkari Samiti, Semari Vs. Addl. Commissioner (Admn.), Gorakhpur Division and others** had occasion to consider as to whether order of Sub Divisional Officer granting permission to fishery lease is revisable under Section 333 and 333-A of 1950 Act. The learned single Judge held that revisional jurisdiction extended to any suit or proceeding decided by any Court subordinate to him. The learned single Judge in the said case held that the grant of lease by Sub Divisional Officer is proceeding within the meaning of Act and jurisdiction of Sub Divisional Officer is subject to revisional jurisdiction under Section 333 of 1950 Act. The proceeding by Sub Divisional Officer is certainly a proceeding for grant of lease in favour of other persons. In **Man Singh's** case (supra) the learned single Judge took the view that order of cancellation passed by Collector is amenable to revisional jurisdiction under Section 333 and 333-A of 1950 Act. The learned single Judge in **Man Singh's** case (supra) also took the view that the order of Sub Divisional Officer cancelling or refusing to cancel the lease under the relevant Government orders although open to judicial review under Articled 226 but is neither appelable nor revisable under 1950 Act.

35. The Collector when considers an application for cancellation of fishery lease, it decides a lis between parties and act as revenue Court. The order passed by Collector cancelling a fishery lease or refusing to cancel a fishery lease is, thus, clearly amenable to revisional jurisdiction as provided under 1950 Act. 1950 Act being a complete code, the remedy with regard to fishery lease has to be first obtained under the four corners of the Act and Rules. Learned single Judge has referred to Section 122-C sub-sections 6 & 7 which has no applicable in the present case. Section 122-C relates to allotment of land for housing site to member of scheduled caste, agricultural labour etc. The said provision is not attracted.

36. The case of **Dhulabhai** decided by the Supreme Court has to be read in the light of subsequent decision in the case of **Mafat Lal Vs. Union of India**, 1997 (5) SCC 536. The decision given in **Man Singh's** case (supra) does not require any reconsideration. The question No.5 is answered accordingly.

37. Questions No.6 and 7 both are answered in affirmative. The Civil Court, meaning thereby, Courts dealing with suits and such matters would not have jurisdiction to consider matters regarding settlement of fisheries rights. In **Similesh Kumar Vs. Gaon Sabha Uskar Ghazipur and others**; AIR 1977 earlier Five Judges Full Bench judgment of this Court in **Smt. Guddi Vs. State of U.P. and others**; (1997) 2 UPLBEC 872. The Full Bench in **Smt. Guddi's** case (supra) considered one of the questions as to whether right created under the instrument in question of catching the fish, in favour of the petitioner from Pachaura Tank reservoir for a period of five years on payment of premium is a lease within the meaning of Section 2(16) of the Act, chargeable to stamp duty in accordance with Article 35 of Schedule 1-B of the Stamp Act in the light of the pronouncement of the Supreme Court referred to therein or it is a licence chargeable to stamp duty under Article 5 (c) of Schedule 1-B of the Act as held by the three Judge Special Bench of this Court in Board of Revenue Vs. Mulak Raj (supra). The Full Bench in paragraph 10 of the said judgment held that right to catch any carry away fish from a tank/reservoir for a specified period for consideration is immovable property as defined in Section 3 (26) of the General Clauses Act and it may be made only by a registered instrument under Section 107 of Transfer of Property Act and as such requires stamp duty under Article 35 (b) of Schedule 1-B of the Indian Stamp Act.

39. The settlement of fishery rights is settlement of property and is a right in immovable property in the nature of a "profit a prendere" These rights have always been held as registrable and do not Allahabad 360, a Full Bench of this Court took the view that validity of lease granted under 1950 Act is final which bars civil suit or any other proceeding in the civil Court.

38. While considering the question No.8, it is necessary to take note of an cease to be so merely because the grant is being made by or at the instance of the State Government. Question No.8 is accordingly answered in the affirmative. However, we also make it clear that fishery right being obviously for purposes which are agricultural within the meaning of Section 117 of the Transfer of Property Act, it would be open to the State Government to issue appropriate notification for taking those outside the purview of compulsory registration. If such notification is issued, the same would be followed, but without such notification the necessity of registration remains.

With these answers, the matter will go back to the respective Benches having jurisdiction for disposal thereof in accordance with the views that we have expressed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2006

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Second Appeal No. 2904 of 1986

Ram Lakhan and another ...Appellants
Versus
Ghurahoo ...Respondent

Counsel for the Appellant:
Sri R.B. Pradhan

Sri R.S. Ram

Counsel for the Respondents:
Sri S.K. Verma
Sri Siddharth Verma

Code of Civil Procedure-180 S-Section 100-Second Appeal-Substantial question of law-explained-a question law-directly and substantially affecting the rights of parties-not covered by the decision of Supreme Court or Privi Council of the Federal court-document obtained by playing fraud and mis representation render the deed as voidable document-Lower appellate Court side tracking these issues-wrongly interpreted as gift deed-ignoring the reasons given by Trail Court-held-lower court directing and substantially effected the rights of the parties-hence rightly interpreted as substantial question of law.

Held: Para 20

In view of the aforesaid proposition and also in the circumstances and facts available on record, this appeal appears to have enough merit and the judgment and decree passed by the appellate court requires to be set aside and thus the appeal should be allowed.

Case law discussed:
AIR 1971 Alld-151
AIR 1999 SC-2213
J.T. 2005 (7) SC-630
AIR 1953 SC-521
AIR 1962 SC-1314
AIR 1982 Alld-376
AIR 1968 SC-956
1979 R.D.-212
1992 RD-231

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

1. This second appeal of the plaintiff has been filed against the judgment and decree dated 20.9.1986 passed by the lower appellate court (IInd. Addl. District Judge, Ghazipur).

2. The appellant had filed a suit for cancellation of a sale-deed dated 10.12.1984 on several grounds taken in the pleadings including the ground that the sale had been obtained by practicing fraud upon him which could be easily manipulated by the defendant/respondent on account of his old age and also on account of his being illiterate. He further stated that no consideration in the present transfer by sale had passed from the defendant to him and he was cleverly deceived by the respondent, who represented to the plaintiff that he wanted a surety bond to be executed by him to indemnify the defendant towards the payment of some dues to the Government. The plaintiff was also given to understand that in case he did not execute the surety bond, the defendant/respondent might face arrest and detention for such non-payment of the dues. After having been fully convinced by the crafty talks of the defendant and on account of being under his influence from before, the plaintiff agreed to execute the surety bond and he was taken to the court premises where instead a bond this sale-deed was got executed by fraud and misrepresentation.

3. The defendant/respondent contested the suit and filed a written statement disclosing certain facts and pleading inter alia that the sale-deed in question was not got executed by him by practising fraud or any sort of misrepresentation nor did he unduly influence the plaintiff, an old man of seventy years of age. He further pleaded that the plaintiff had three daughters only who had been married and finding himself all alone and lonely he started living with the defendant who happens to be his nephew. He was taking his meals and

staying with the defendant and after the defendant joined a service he used to give all money which he received as his salary to the plaintiff only. The plaintiff's daughters and his sons-in-law did not take any care of him and as such the defendant had been looking after his uncle (plaintiff) with utmost sincerity and care. Since the defendant's father had died and he had separated from his other brothers, his marriage was also got arranged and conducted by the plaintiff himself. The defendant's wife also took maximum care of plaintiff's comfort while he was residing with her. Later on since the plaintiff was extremely pleased with the care and comfort accorded to him by the defendant and the wife he told his daughters that he was going to transfer his entire property to his nephew (defendant). The defendant further pleaded that in the circumstances as stated above, this sale-deed was executed and no element of fraud had been there in this transfer of plaintiff's property through the impugned sale-deed.

4. On the pleadings of the parties, the trial court framed as many as five issues and in the findings of issues No. 1 and 5 taken together it was held that no consideration passed for the disputed sale of property and that was the only property held and possessed by the plaintiff as a source of his livelihood and virtually there was no occasion in such circumstances to transfer the property showing it to be a transaction of sale. Accordingly the learned trial court having believed the story set up in the plaint about fraud and misrepresentation played upon the plaintiff by the defendant found that the sale-deed in question was liable to be cancelled and accordingly after giving formal finding on the other issues decreed the suit with costs.

5. The respondent/defendant preferred an appeal before the lower appellate court against the judgment and decree passed by the trial court in which the findings, as had been recorded by the trial court that the sale-deed in question was a result of fraud and misrepresentation practised upon the plaintiff, were reversed and it has been held that the document was executed by way of love and affection which the plaintiff possessed for the defendant. The parties are uncle and nephew and since the plaintiff (uncle) was residing for the last several years with the defendant this execution of the sale-deed transferring the property belonging to the plaintiff was a natural and phenomenal result of that relation. The lower appellate court has though specifically concurred with the findings recorded by the trial court that no consideration in the present sale as mentioned in the sale-deed, had passed, yet the sale-deed could not be set aside in view of the provisions of Section 25 (i) of the Contract Act. Accordingly the appeal was allowed by the lower appellate court and the judgment and decree of the trial court was set aside. Consequently the suit of the appellant was dismissed.

Aggrieved by the judgment of the lower appellate court this second appeal has been preferred.

6. While admitting this appeal, the Court adopted questions No. 3 and 4 as referred to in the memo of appeal as the substantial questions of law which are reproduced as below:

1. **Whether the lower appellate court is right in not considering the fraud played upon the plaintiff/appellant and the inducement on him made by the defendant?**
2. **Whether the principle of Pardanashin lady will apply in case of seventy years old illiterate villager as well and the burden lies upon the defendant to prove due attestation of the document?**

FINDINGS

7. A perusal of the judgment of the lower appellate court shows that it had concurred with the findings recorded by the trial court that no consideration in the present transaction of sale had passed from the vendee to the vendor. Taking the protection of Section 25 (i) of the Contract Act, the learned counsel has tried to emphasise that even if no consideration in the present case had passed for the transfer of the property, it will not make any difference in view of Section 25 (i) of the Contract Act. This transfer is by virtue of natural love and affection between the parties. The learned counsel further tried to impress upon the Court that not passing of consideration in such agreements does not render the transaction as void. In this context he has referred to the case law of **Smt. Mania Vs. Deputy Director of Consolidation, AIR 1971 Allahabad 151**.

8. It would be relevant to refer to Section 25 (i) of the Contract Act which is reproduced below:

"An agreement made without consideration is void unless –

(i) it is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other or unless."

9. The lower appellate court has considered the pleading and the evidence led from the side of the defendant that in lieu of the service and comfort accorded to the plaintiff by the defendant in last several years while living with him this document of transfer of property by sale was executed. Accordingly the findings have been recorded that the sale-deed was executed by way of love and affection between the uncle and the nephew and the agreement was protected under Section 25 (i) of the Contract Act. A perusal of the impugned sale-deed shows that it has been executed in return of the sale consideration of Rs. 22,500/- received by the transferor. This part of the recital of the sale-deed is admittedly false. In the case of **Smt. Manhia (supra)**, the Court has taken the agreement questioned in that case to be valid because it had been arrived at between the parties by way of certain reproachment and it was treated as a gift. Here the defendant/respondent himself in his pleadings has stated about passing of certain consideration when in para 6 of the written statement he states that for the last eight years of his earnings from the service had been given by him to plaintiff/appellant. Of course it has also been pleaded by the defendant in his written statement that he had been looking after his uncle (the plaintiff) who all through, after the marriage of his daughters, had been staying with him, but at the same time reference to the passing of consideration by way of money

regularly paid by him to the plaintiff has also been given in the pleadings. Therefore, the document in question has to be treated as a sale-deed and accordingly the argument for treating it to be a document of gift cannot be accepted. The recitals in the sale-deed are that as the executant urgently needed money for certain repayment of loan and also for meeting his personal expenses and for that purpose he intended to transfer the property to the vendee for a sum of Rs. 22,500/-. In such circumstances, if the consideration which has not passed for the execution of such a sale-deed which is so patent and also held by both the courts below, it is definitely not a gift-deed and it could not have been validly held to be a transaction of gift executed by the plaintiff in favour of his nephew (defendant) out of love and affection. An express case of love and affection has nowhere been taken by the defendant in his pleadings except mere mention of facts that he had been maintaining and looking after his uncle (plaintiff) during the last several years. It is stated in para 6 of the written statement that the plaintiff before executing the transfer in his favour had told his daughters that he was going to transfer his property.

10. While arguing in the aforesaid context, the learned counsel for the respondents citing the case law of ***Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and others***, ***AIR 1999 supreme Court 2213***, has tried to emphasise that even though a point of law has not been pleaded specifically by a party or is found to be assigned between the parties in absence of any factual format a litigant should not be allowed to raise that question as substantial question of law. The substantial question of law would definitely arise when the first appellate court has assumed jurisdiction which did not vest in it. That question is a question which is adjudicatable in the second appeal.

11. As already observed in the preceding paragraph that in the face of the fact as pleaded in the written statement of the respondent defendant and as also from the documents (impugned sale deed) it is not decipherable that at any point of time this transaction of sale was ever treated by the parties as a gift deed and the provisions of Section 25 (1) of the T.P. Act, were thus could not be attracted. The trial court has held this document to be a void deed on the ground that no consideration in the transaction actually passed from the vendee to the vendor. From the discussions made in the judgment by the trial court, it was found that misusing the confidence reposed by the appellant plaintiff in the respondent defendant, the document in question was got executed projecting it to be a surety bond for indemnifying the defendant from his liability and thus, avoiding his arrest in pursuance to the recovery certificate issued against him. A perusal of the impugned appellate judgment shows that at no place a proper discussion has been made about the fact that this deed in question while apparently being executed as a sale deed could turn out, without any specific pleading to that effect, to be a deed of gift. The judgment also does not have any discussion as to how and in what circumstances the plaintiff who was admittedly a man of about 70 years of age and reposing confidence in the defendant could execute a clear and patent sale deed instead a gift deed. As per the judgment of the lower appellate court, the appellant plaintiff's evidence has been recorded and

he specifically stated before the court that he was taken by the defendant to District Hqrs. Ghazipur for purchasing some clothes for him on the assurance that he would obtain the clothes at cheaper rate through him (defendant). The plaintiff was told there at Ghazipur that some repayment of Govt. loan is to be made by the defendant which he is not able to make for the time being and the plaintiff may sign a surety bond or put his thumb impression thereon to which he agreed. In these circumstances, the document in question was got executed. Actually the evidence which was given by the plaintiff is more than sufficient to cover the entire pleadings of the plaint regarding misrepresentation and fraud, which was committed by the defendant while getting the impugned deed executed by him. The alleged fraud as described in the plaint, in the light of the evidence and circumstances available, which has been fully discussed by the trial court, does not find proper discussion in the appellate court's judgment while reversing those findings. A sale deed on the face of it when not executed after receiving the due consideration, mentioned in the deed itself, such document is definitely a void document and the claim of its validity could not have been upheld in the present context by taking the help of Section 25 (1) of the Contract Act. Therefore, it is apparent from the judgment of the lower appellate court itself that it has not considered all these circumstances and facts in the light of the pleadings and evidence available on record while holding that the document was a valid agreement duly executed by the appellant plaintiff as a gift deed. The lower appellate court was under legal obligation while reversing the findings of the trial court, to go into the substance of matter and only then find out if the document was a document of gift or sale. In no otherwise manner such finding of the trial court could be validly reversed and the appeal could be allowed. Here the findings of fact given by courts below are not concurrent. The lower appellate court has assumed the impugned sale as a transaction of gift which it would not do in the facts and circumstances available in the case. This is nothing but a wrongly assumed jurisdiction which did not vest in it. The case law of Kondiba Dagadu Kadam (supra) does not help out the submission made on behalf of the respondent.

12. In the case of ***Rajeshwari Vs. Puran Indoria JT 2005 (7) SC 630,*** the Hon'ble Supreme Court while summarising the case law of ***Raghunath Prasad Singh Vs. Deputy Commissioner of Pratabgarh, 54 Indian Appeals 126, Dy. Commissioner Vs. Rama Krishna, AIR 1953 S.C. 521 and Chunnilal Vs. Mehta and sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd. AIR 1962 S.C. 1314***, has propounded in this context in the following words:

"Thus, it was accepted that a question of law would be a substantial question of law if it directly and substantially affects the rights of the parties and if it was not covered by a decision of the Supreme Court or of the Privy Council of the Federal Court."

13. Much emphasise has been given by the learned counsel for the defendant respondent that such questions involving mixed question of law and facts are not to be taken as a substantial questions of law for the purpose of second appeal and such

question is beyond the scope of Section 100 C.P.C.

14. As I have discussed above that the lower appellate court has taken up a case of Section 25 (1) of Contract Act, which has not been specifically pleaded in the written statement and thus has given the benefit of the same to the defendant respondent for reversing the findings of the trial court and dismissing the plaintiff's suit. Besides that the lower appellate court has also not, as discussed above, considered the reasonings given in the judgment of the trial court for holding the questioned sale being a resultant fraud and misrepresentation and has straightway given a finding that the defendant proved the questioned deed as a valid peace of agreement. The reasonings and findings recorded by the lower appellate court cannot be justified by the case law of Smt. Mania (supra)

15. In the aforesaid context the case law of ***Rajeshwari Vs. Puran Indoria, JT 2005 (7) SC 630*** is relevant to mention in which the apex court in following two paragraphs has suggested for restoration of position in Section 100 C.P.C. prior to 1976 amendment and has observed that there are instances when the first appellate court merely, mechanically, confirm the findings of fact rendered by the trial court without an independent reappraisal of the pleadings and the evidence in the case. There are occasions when the High Court feels constraint of Section 100 C.P.C. and declines to interfere though such interference is proper to render justice between the parties. In the present case it is not only a matter of mechanical confirmation of the finding of fact by the appellate court but it is a definite case of carving out a case which is nowhere inferable either form the deed or the pleadings of parties. Thus, it is a judgment of reversal given by lower appellate court without properly justifying the dismissal of the reasons given by the trial court in its judgment. The paragraphs 6 and 7 of the aforesaid judgment are as below:-

"6. Before parting, we feel that we would be justified in pointing out that the amendment brought to Section 100 of the Code with effect from 1.2.1977 by Act 104 of 1976, has really not advanced the cause of justice. Earlier, interference could be had under Section 100 of the code if the decision was contrary to law or some usage having the force of law; or the decision had failed to determine some material issue of law or usage having the force of law; or suffered from a substantial error or defect in procedure provided by the Code or any other law for the time being in force, which may possibly have produced the error or defect in the decision of the case upon the merits. The provision enabled the court to correct errors of law or of procedure in an appropriate case and even unreasonable appreciation of evidence could have been brought within the contours of error of law in the circumstances of a given case. But by introducing the concept of "substantial question of law" in Section 100 of the Code, the right of the litigants to have a decision after a reappraisal of the relevant materials by the High Court has been curtailed. Though, courts of first appeal are made the final courts of facts, there are instances when first appellate courts merely, mechanically, confirm the findings of fact rendered by the trial court without an independent reappraisal of the pleadings and the evidence in the case.

Since a judgment of affirmance need not be as elaborate as a judgment reversing the decision of the court below, it is often contended that the judgment of the appellate court satisfies the requirements of Order XLI Rule 31 of the Code. There are occasions when the High Court feels the constraint of Section 100 and reluctantly declines to interfere though interference would have been proper to render justice between the parties. High Courts are often confronted with an argument that even if what was involved was a mixed question of fact and law or even a question of law, that did not constitute a substantial question of law justifying interference under Section 100 of the Code. Why not an error of law committed by the appellate court be corrected in second appeal? Why should not a litigant have an opportunity of having the decision in his case corrected for an error of law by the High Court at the second appellate stage? When a substantial question of law as expounded by this Court is only an open question of law substantial as between the parties, a restoration of the position as it existed prior to 1.2.1977 does not appear to be reopening of the door too wide. It must be remembered, that now, after the amendment of the Code by Act 22 of 2002, interference in revision under Section 115 of the Code of Civil Procedure, 1908 has also been substantially curtailed. Even if the High Court is satisfied that there would be failure of justice if the order is allowed to stand, the High Court cannot interfere under Section 115 of the Code, in view of the deletion of the particular proviso which extended prior to the amendment. Therefore, the High Courts cannot correct errors that could lead to a mis-trial or a finding of fact to be arrived at based on an erroneous approach that is proposed then and there by exercising a revisional jurisdiction, even at the initial stage so that at a later stage, a remand by the first appellate court is avoided. The curtailment of the right to interfere under Section 115 of the Code has only resulted in the High Courts being flooded with proceedings under Article 227of the Constitution of India challenging all sorts of interlocutory orders. It is for the law makers to consider whether it would not be more appropriate to restore Section 115 of the Code as it existed prior to its amendment by Act 22 of 2002 and confer a broader right of second appeal as it existed prior to the introduction of the concept of substantial question of law into Section 100 of the Code, by Act 104 of 1976.

7. It is true that it is in consonance with public policy, to curtail a right of appeal (that too, a second appeal) so as to ensure that a litigation attains finality as early as possible. At the same time, it has also to be ensured that justice, according to law, is made available to the litigants who approaches the court. Our experience, as lawyers and Judges of High Courts shows that more often than not, first appellate courts, simply, mechanically, reiterate what is stated by the trial court and confirm findings of fact rendered by the trial court without making an independent reappraisal of the pleadings and the evidence in the case as they are bound to do as courts of appeal. But even in such cases, the High Courts find it difficult to interfere, though, they do interfere, when the injustice caused to the litigants is so apparent that the same could not be overlooked and the judgment under appeal allowed to pass muster. There have also been occasions when the

High Courts had felt compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100 of the Code of Civil Procedure, and on occasions such decisions have been interfered with by this Court, on the ground that the High Court has exceeded its jurisdiction under Section 100 of the Code of Civil Procedure. After all, the purpose of the establishment of courts of justice is to render justice between the parties. Is it necessary to unduly curtail the jurisdiction of the High Courts, either under Section 100 of the Code of Civil Procedure or under Section 115 of the Code of Civil Procedure in that context? Of course, the High Courts have to act with circumspection while exercising these jurisdictions. Certainly, it is for the Parliament to take into account all the relevant aspects. We are making these observations only with a view to highlight the position at has emerged in the light of the amendments to Section 100 and 115 of the Code of Civil Procedure as they are now obtaining."

16. The point which has been indicated in the second question framed by this court that the plaintiff vendor being old man of 70 years and illiterate villager should be accorded the same benefit as that of pardanaseen lady, the law is settled on this point. It is true that in a deed duly registered, there is legal presumption of its correctness so the original person who is challenging the validity of transaction on the ground of fraud and undue influence etc. the burden of proof of such fraud etc. rests on him. But a major exception to this rule is that the initial burden would not be on the party, who is old and illiterate challenging the transaction and will, instead be cast on the person who relies on such deed if there exists any fiduciary relationship between the parties. The possibility of this relationship and probability of dominating will over the challenging party arises either directly from the very nature of the relationship existing between the parties or some times from a peculiar handicap or disability from which that party suffers. Section 111 of the Evidence Act read with Section 16 of the Contract Act, the the principle enshrined therein is also extendable to cases where there is a proof of a person dependent, by virtue of his physical or mental infirmity or disability on another party and the circumstances have been proved to show that the other party, taking advantage of such position, has secured a deed or instrument for his own benefit. In such cases a Division Bench of this court in ***Daya Shankar Vs. Smt. Bachi and others, AIR 1982 Allahabad 376***, has held that the burden to prove the genuineness of the deed lies on dominating party and not on a person challenging it. In this context the following paragraphs of the decision of Daya Shankar (supra) is quite remarkable and is quoted as below:-

"In Parasnath Rai V. Tileshra Kuar, 1965, All. LJ 1080, Gangeshwar Prasad, J. followed the decision of the Calcutta High Court in Chinta Dasya V. Bhalku Das, AIR 1930 Cal 591, wherein Mitter, J. held, that rules regarding transactions by a pardahnashin lady were equally applicable to an illiterate and ignorant woman, though she may not be pardahnashin. We are unable to comprehend as to why the broad principle which has been accepted and widely applied in the numerous decisions to which we have adverted should not also embrace within its sweep the cases of males who by reasons of their apparent

physical or mental incapacity or infirmity or being placed in circumstances where they are greatly amenable to the overpowering influence of another person are induced to enter into conveyances and transactions relating to their property. The basic principle is the same and where it is proved to the satisfaction of the court either that the bargain was on the face of it unconscionable or the executant was the victim of physical or mental handicap or that he was subdued by the complexity of circumstances in which another person had an upper hand, the burden must be cast squarely on the person enjoying the dominating position to show that he secured the deed in good faith."

17. In the present case, the plaintiff appellant was admittedly an old man of 70 years of age and as per the defendant's case itself there did exist a fiduciary relationship between the two. Since those days the plaintiff was dependent on the defendant and was living with him, he was obviously suffering from these handicaps and thus, the defendant was definitely in a dominating position being his nephew. The transaction is also unconscionable as being a sale deed of the entire property held by the vendor, the only source of his livelihood. By this transfer the plaintiff is also found to have excluded his all the three daughters from getting any share in the property. In such circumstances, the initial burden was on the defendant to prove that the deed was valid and had been executed in all fairness and bonafide and not otherwise influenced by any fraud or misrepresentation. The mere observation of the lower appellate court that since the defendant has come in the witness box he actually has discharged his burden by saying that he got the sale deed validly executed, will not definitely be a finding as to amount holding that the requirements of the provisions of Section 111 of Evidence Act read along with provisions of Section 16 of the Contract Act were in reality fulfilled. When there was no finding recorded in favour of this aspect of the matter by the trial court the detailed findings should have been recorded by the appellate court in that regard.

18. Learned counsel for the respondent/defendant while relying upon the case law of ***Ningawwa Vs. Byrappa, AIR 1968 SC 956*** has further raised a point that in the present case if the contentions of the plaint are to be taken on its face value, the transaction should be treated as void and no decree for its cancellation as sought by the appellant/plaintiff is required to be passed. He has tried to demonstrate from the pleadings in the plaint that the deed in question has been obtained by making fraudulent representation as to its character and the fraud allegedly committed by the respondent defendant is not a misrepresentation as to the contents of the document and thus emphasised that in the present case the suit was not at all maintainable. The case, as has been taken by the plaintiffs regarding questioned deed, is that of void deed and such suit is not maintainable in the Civil Court. Learned counsel has further relied upon the case law of ***Ram Roop Vs. Smt. Budhiya, 1979 R.D. 212 and Indra Pal Vs. Jagan Nath, 1992 R.D. 231*** in same context.

19. As per the plaint case the sale deed in question was got executed by the respondent defendant misrepresenting it to be a document of security indemnifying

the defendant from repayment of Govt. dues. But the contents of document are otherwise stating it to be a sale deed after having received the amount shown therein as consideration. So far as the element of fraud and misrepresentation is concerned, it is obvious in the pleadings itself. Whether the pleadings are squarely to be categorized as denoting fraudulent and These mixed facts as demonstrated from the circumstances as well as from the contents of deed in question make the document as one obtained by playing fraud and misrepresentation as to its contents also and that renders the deed as a voidable document which requires to be cancelled in law. The lower appellate court side-tracking of these issues has interpreted this document to be a deed of gift and as per the discussions made above, without going into other merits of the evidence and attending circumstances has actually ignored all the reasonings given by the trial court in its judgment and thus, has reversed it. The question thus, so arises in this second appeal from the facts and circumstances available in the present case which is more than obvious that that the judgment of lower appellate court has directly and substantially affected the right of the parties and it has been rightly interpreted as a substantial question of law arising before this court for adjudication.

20. In view of the aforesaid proposition and also in the circumstances and facts available on record, this appeal appears to have enough merit and the judgment and decree passed by the appellate court requires to be set aside and thus the appeal should be allowed.

21. In result, the appeal is allowed and the judgment and decree dated misrepresentation as to the character of document or as to the contents of document, is a question which is in itself unanswerable from the contents of the deed. The facts were misrepresented to the plaintiff by the defendant and taking the plaintiff into his confidence and dominating him by his position as such, he got fraudulent deed of sale executed. 20.9.1986 passed by the II Addl. District Judge, Ghazipur, is hereby set aside. The judgment and decree passed by the trial court is restored. Costs of this appeal shall be easy.

Appeal Allowed.

APPELLATE JURISDICION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2005

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

Special Appeal No. 769 of 2005

Ram Niwas Pandey (constable no. 5796) and others ...Appellants/ Petitioners
Versus
Union of India and others
...Defendants/Respondents

Counsel for the Appellants:
Sri Shashi Nandan
Sri A.A. Khan

Counsel for the Respondents:
Sri Govind Saran

Railway protection force Rules 1987–Rule 93.5–Transfer/posting on Non sensitive post–it prohibit only these tainted members of service-otherwise large number of sensitive post remained vacant–rule 93.5 has no application

Held: Para 7

In our view, the manner in which the appellant is trying to read Rule 93.5 and is applying the same, in the present case, is also incorrect inasmuch a simple reading of Rule 93.5 would show that it only prohibits tainted members of service from being posted on sensitive post but converse is not true. It does not say that even if a person has no such adverse entry or poor reputation, yet he also cannot be posted on non-sensitive post. There may be several occasions when the number of persons having bad service record or reputation ma be less than the number of non-sensitive posts. If the contention of the appellant is accepted, it may result in a large number of sensitive post remained vacant since they are to be filled in only by tainted officers and none else. Neither rule say so nor there is any other reason to warrant such interpretation. Therefore, the aforesaid submission of the appellant is clearly incorrect in so far as it submits that the impugned order of transfer is by way of punishment taking support of Rule 93.5. The said rule has no application in the present case at all.

Case law discussed:
AIR 1974 SC-555
1986(4) SCC-131
AIR 1991 SC–532
AIR 1993 SC–2444
2001(91) ELR-259
AIR 2004 SC-2165
2005 (107) FIR-37

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

1. This special appeals is preferred against the order of the Hon'ble Single Judge dated 1.6.2005 dismissing writ petition no. 44362 of 2005 the appellant filed against the order of transfer dated 27.5.2005.

2. Heard Shri Shashi Nandan, learned Senior Counsel appearing for the appellant and perused the aforesaid order of the Hon'ble Single Judge.

3. Learned counsel for the appellant submitted that the impugned order of transfer has been passed by way of punishment inasmuch as it has been passed on administrative grounds posting the appellant on non-sensitive post. He further relied upon Rule 93.5 of the Railway Protection Force Rules, 1987, which reads as under:-

"**93.5** Members of the Force who have got adverse entries or enjoy poor reputation shall not be posted to sensitive posts till they get good entries for three consecutive years."

4. The appellant submits that since the aforesaid provisions bars such members of force, who have got adverse entry or enjoy poor reputation, from being posted on sensitive post, therefore, the appellant, being equated with such tainted officers, by means of the impugned order and as a measure of punishment, has also been posted on non-sensitive post.

5. We do not find the aforesaid contention of the appellant tenable. Under 1987 rules subject of transfer has been dealt with from Rule 90 to 93.10 under Chapter 7. Rule 90 empowers transfer of any members of force. For ready reference Rule 90, which is relevant for the purposes of present case, is quoted as under:-

"90. General: Transfer of members of the Force may be ordered from one place to any other place in India in the exigencies of service or for administrative reasons or to avoid local entanglements of such members or for any other consideration."

6. A perusal of the aforesaid provision shows that a member of force may be transferred from one place to another throughout India in the **exigencies of service or for administrative reasons or to avoid local entanglements or for any other consideration.** Obviously, the impugned order of transfer, in the present appeal, has been passed on administrative reasons and is referable to Rule 90 of the aforesaid rules.

7. In our view, the manner in which the appellant is trying to read Rule 93.5 and is applying the same, in the present case, is also incorrect inasmuch a simple reading of Rule 93.5 would show that it only prohibits tainted members of service from being posted on sensitive post but converse is not true. It does not say that even if a person has no such adverse entry or poor reputation, yet he also cannot be posted on non-sensitive post. There may be several occasions when the number of persons having bad service record or reputation ma be less than the number of non-sensitive posts. If the contention of the appellant is accepted, it may result in a large number of sensitive post remained vacant since they are to be filled in only by tainted officers and none else. Neither rule say so nor there is any other reason to warrant such interpretation. Therefore, the aforesaid submission of the appellant is clearly incorrect in so far as it submits that the impugned order of transfer is by way of punishment taking support of Rule 93.5. The said rule has no application in the present case at all.

8. Besides that the employee cannot claim, as a matter of right, that he should be given a particular posting against a sensitive post or non-sensitive post. It is the prerogative of the employer to choose as to which employee is posted where, according to the exigency of service and in administrative exigency.

9. In the case of ***E.P. Royappa Versus State of Tamil Nadu, AIR 1974 SC 555*** the Hon'ble Apex Court held as under

"It is an accepted principle that in public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in the matter. The government is the best judge to decide how to distribute and utilize the services of its employees. However, this power

must be exercised honestly, bona fide and reasonably."

In **1986 (4) SCC 131** the Hon'ble Apex Court in the case of ***B. Varadha Rao Versus State of Karnataka and others*** held as under: -

"It is well understood that transfer of a government servant who is appointed to a particular cadre of transferable posts from one place to another is an ordinary incident of service and therefore does not result in any alteration of any of the conditions of service to his disadvantage. That a government servant is liable to be transferred to a similar post in the same cadre is a normal feature and incident of government service and no government servant can claim to remain in a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post." **(Para-5)**.

In ***Mrs. Shilpi Bose and others Versus state of Bihar & others, AIR 1991 SC 532*** the Hon'ble Apex Court held as under: -

"A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department. **If the courts continue to interfere with day-to-day transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administration, which would not be conducive to public interest. The High Court over looked these aspects in interfering with the transfer orders."**
(Para-5)

Reiterating the aforesaid view, in the case of ***Union of India and others Versus S.L. Abbas, AIR 1993 SC 2444*** the Hon'ble Apex Court held that the transfer is an incident of service and in **para-7** their Lordship held as under: -

"Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it."

In ***National Hydro-Electric Power Corporation Ltd. Versus Shri Bhagwan and another, 2001 (91) FLR 259*** the Hon'ble Apex Court held as under : -

"It is by now well settled and often reiterated by this Court that no Government servant of employee of public undertaking has any legal right to be posted forever at any one particular place since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. **Unless an order of transfer is shown to be an outcome of mala fide exercise of poser or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals cannot interfere with such orders, as a matter of routine**

as through they are the appellate authorities substituting their own decision for that of the management, as against such orders, passed in the interest of administrative exigencies of the service concerned."

In the case of ***State of U.P. Versus Gobardhan Lal, AIR 2004 SC 2165*** the Hon'ble Apex Court held as Under:-

"It is too late in the day for any government servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra, in the law governing or conditions of service. Unless the order if transfer is This court has reiterated that the order of **transfer made even in transgression of administrative guidelines cannot also be interfered with,** as they do not confer any legally enforceable rights, **unless,** as noticed supra, shown to be **vitiated by mala fides or is made in violation of any statutory provision."**
(Emphasis added).

10. Instead of burdening this judgment referring catena of decisions on this aspect, it would be fruitful to refer a very recent three judges judgments of the Hon'ble Apex Court in the case of **Major General J.K. Bansal Versus Union of India and others reported in 2005 (107) FLR 37** wherein in order to appreciate the scope of interference in a writ jurisdiction under Article 226 of the Constitution of India assailing the order of transfer the Hon'ble Apex Court referred to the earlier shown to be an outcome of a mala fide exercise of power or violative of any statutory provision (an Act or rule) or passed by an authority not competent to do so, an order or transfer cannot lightly be interfered with as a mater of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the office or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and is found necessitated by exigencies of service **as long as the official status is not affected adversely and there is no infraction of any career prospects such an seniority, scale of pay and secured emoluments.**

law laid down in the case of **Mrs. Shilpi Bose and others Versus State of Bihar & others (Supra)** and **National Hydro-Electric Power Corporation Ltd. Versus Shri Bhagwan and another (Supra),** and held in para-12 as follows :-

"It will be noticed that these decisions have been rendered in the case of civilian employees or those who are working in Public Sector Undertaking. The scope of interference by Courts in regard to members of armed forces is far more limited and narrow. It is for the higher authorities to decide when and where a member of the armed forces should be posted. The Courts should be extremely slow in interfering with an order of transfer of such category of persons and unless an exceptionally strong case is made out, no interference should be made."

11. This Court has also reiterated the same view in **Special Appeal No. 1293 of 2005, Gulzar Singh vs. State of U.P. and others** decided on 7.11.2005.

12. In the aforesaid circumstances, we do not find any reason to interfere with the order of the Hon'ble Single Judge. Therefore, the special appeal, being without merit, is dismissed. No order as to costs. Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.03.2006

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 43128 of 2003

Ram Pratap Shukla ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ramanuj Pandey

Counsel for the Respondents:
S.C.

Fundamental Rules-Rule 56 (e) Constitution of India, Art. 226-readwith Civil Services Regulation-Regulation 361-grant of Pension-petitioner initially appointed as helper on 20.12.76 on work charge basis-by notice dated 30.7.02 information given to retire on 31.7.02-24.4.03 application for payment of post retrial benefit-rejected as he was regularized 1993 hence the period from 20.12.76 to 93 shall not be counted-held in view of G.O. 1.7.89 after completing 10 years service be treated regular in nature-26 years continuous working-entitled for pension.

Held: Para 17 and 18

The Government Order dated 1.7.1989 meant ten years government servant should be regular in nature meaning thereby that if the temporary government servant has performed his duties irregularly i.e. with gaps of years, his services may not be treated to be regular. Thus, the contention of the learned Standing Counsel that the words "*regular service*' used in the Government Order means substantive service or service rendered by an employee in regular capacity cannot be accepted. The petitioner admittedly, rendered 26 years under the respondent. From the record, it is clear that the petitioner has continuous worked from 20.12.1976 and was permitted to retire at the age of superannuation on 31.6.2002 and from 1976 to 2002, he has continuously worked. From the foregoing discussions it is clear that as the petitioner has rendered considerable period of service, he was entitled for the benefit of the Government Order dated 1.7.1989 and if the interpretation as given by the respondent is accepted, that the government order excluded the temporary government servants, who has retired after 26 years of service and is not entitled for pension the said Government Order will become bad on account of unreasonable and arbitrary classification put by the respondent. Furthermore, as observed the fundamental Rule 56 sub clause (e) mandade grant of retiring pension to the temporary Government Servants. The Government Order dated 1.7.1989 has to be read subject to the Fundament Rules 56 (e). The similar controversy came up for consideration before this Court in case of *Dr. Hari Shankar Asopa Vs. State of U.P. and others* reported in 1989, ACJ 337, (Supra). After referring to the fundamental Rule, 56, and various provisions contained in Civil Service Regulations, this Court has observed as under-

"Clause (e) of Rule 56 unequivocally recognizes, declares and guarantees retiring pension to every Government

servant who retires on attaining the age of superannuation, or who is prematurely retired or who retires voluntarily. To be precise, every Government servant whether permanent or temporary) who retires under Clause (a) or Clause (b), or who is required to retire or who is allowed to retire under Clause (c) of Rule 56, becomes entitled for a retiring pension, of course, the first and third conditions stipulated in Article 361 of the Regulations are satisfied."

In view of the matter the contention of the respondents that since the petitioner was not a permanent confirmed employee and hence not entitled for pension, is clearly misconceived and is rejected.

Case law discussed:

2003 (3) UPLBEC-2521
AIR 1980 SCC-1464
2000 (2) AWC-1261
1996 (7) SCC-113
1995 (3) UPLBEC-1842
AIR 1981 SC-41
2006 (1) ESC-611
1989 ACJ-337

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

1. The present writ petition has been filed for quashing the order dated 31.1.2003 (Annexure 4 to the writ petition) passed by the respondent No.5 and issuing a writ of mandamus directing the respondents to grant pension and other post retirement benefits to the petitioner forthwith with interest at the rate of 18% till the actual payment is made to the petitioner.

2. The facts arising out of the present writ petition are that the petitioner was initially appointed as helper under the control of the respondent No.3 w.e.f. 20.12.1976 and thereafter the petitioner was given all the benefits of revised pay scale from time to time. The work and conduct of the petitioner was always excellent and no disciplinary proceeding was initiated against the petitioner. Taking into consideration the work and seniority of the petitioner, the respondent No.4 confirmed the petitioner in the pay scale of Rs.750-940. A copy of the same has been annexed with the writ petition as Annexure 1 to the writ petition. The respondent No.4 served a notice of retirement-dated 30.7.2002 upon the petitioner indicating therein that the petitioner will be retired in the after noon of 31.7.2002 on attaining the age of superannuation. Though, it was obligatory on the part of the respondents to complete all the papers within a period of six months before the retirement of the petitioner for payment of post retrial benefits but with a malafide intention the respondents have not done anything. When nothing was done for the purposes of payment of post retrial benefits to the petitioner, the petitioner moved an application on 25.4.2003 to the respondent No.3 for making the payment of post retrial benefits to the petitioner. It is necessary to mention here that the petitioner received a copy of the letter of Additional Director, Pension, Allahabad, in which it has been stated that the matter of the petitioner shall be dealt by the respondent No.4, as the petitioner belongs to Class IV category and further as the services rendered by the petitioner is less than 10 years, as such, the petitioner is not entitled for pension. A copy of the order-dated 31.1.2003 has been filed as Annexure 4 to the writ petition. It has been submitted by the petitioner that the petitioner was in continuous service since 20.12.1976 and retired on 31.7.2002 and has rendered service for more than 26 years, as such, the petitioner is entitled for pension and other post retrial benefits.

This Court has held that if the temporary and regular employee in the government service appointed and if he is working on any post and has completed 10 years of service is entitled to get the pension under the law. Admittedly, the appointment of the petitioner is 20.12.1976 in accordance with the rules and after completing all the requisite formalities, and as such, there was no occasion not to count the services from 20.12.1976 to 1993, i.e. the date of regularization and thus, the past services rendered by the petitioner ought to have counted for calculation of pension and other post retrial benefits. Aggrieved by the aforesaid order, the petitioner has filed the present writ petition.

3. The writ petition was entertained and the counter and rejoinder affidavit have been filed, as such, the writ petition is being disposed of finally.

4. It has been submitted on behalf of the petitioner that the Government order dated 1.7.1989 relates to regularization of service, 10 years continuous service have been treated as regular service and 20 years has been treated on temporary basis. The contention of the respondents to this effect that the petitioner is not eligible for pension and other post retrial benefits is totally misconceived. The petitioner is entitled to get the pensionary benefits after rendering continuous service for about 26 years. The respondents are disputing the claim on the ground that the employment of the petitioner was not on substantive character. It is further stated that after amendment of Fundamental Rules, 1956, by U.P. Act No.24 of 1975 which allows retirement of a temporary employee also and provides in Clause (e) that a retiring pension is payable and other retrial benefits shall be available to every government servant who retires under this Rule. It is further stated that the provisions of Fundamental Rules 56 shall prevail over Civil Service Regulations and moreover, on the government orders which have been annexed upon by the answering respondent. Words "regular service' has not defined in the Government Order. The word ten years regular service has been referred to service rendered and not to the status of an employee and employee substantively appointed and permanent is automatically entitled for pension. The Government Order dated 1.7.1989 does not contemplate 10 years "substantive service'. The words "regular service' used in the Government Orders is not anonymous to substantive service. The benefit of Government servant is to be extended to temporary government servant. The temporary government servant cannot be said to have substantive regular service, as such, the word "regular service' has not been used as specifying the capacity or status as a whole but has been used to denote and specify the nature of his service rendered, meaning thereby that the service should be regular.

5. The regular means steady or uniform in course practice or occurrence not subject to unexplained or irrational variation. The right of the petitioner flows from rendering of service for such a long period, which is a statutory right of the petitioner and cannot be ignored in any manner.

6. The reliance has been placed by the petitioner in ***Shakuntala alias Bhahmodevi (Smt.) Vs. Director of Pension***, reported in 2002 (3) UPLBEC 2521, the said judgment followed by AIR 1980 Supreme Court 1464 ***Messers***

Rajkanta Vs. The Finance Commissioner, Punjab and another. The reliance has been placed upon Para 10 of the said judgment. The same is being reproduced below:-

10. Fundamental Rule 56 empowers the Government to compulsory retire a Government servant after he attains the age of 58 years. The same provision i.e. sub-clause (C) also provides that Government servant may by notice to the appointing authority voluntarily retire at any time after attaining the age of 45 years or after completing qualifying service of 20 years. Sub-clause (e) of Fundamental Rule 56 is relevant for the present controversy. Sub-clause (e) provides that the retiring pension shall be payable and other retirement benefits, if any, shall be available in accordance with and subject to the provisions of the relevant rules to very Government Servant who retires or is required or allowed to retire under this rule. Fundamental Rule 56(e) thus clearly contemplate payment of retiring pension in both categories i.e., voluntary retirement and compulsory retirement. Fundamental Rule, thus, mandate for payment of retiring pension even to a person who has compulsory retired. Thus, the rule do not make any distinction with regard to payment of retiring pension to a person who has voluntary retired or has been compulsory retired. By Government Order dated 1.7.1989 it was provided that temporary Government Servants who have rendered ten years regular service are also entitled for the retirement benefits. The aforesaid Government Order was issued with intent to extend the pensionary benefits to temporary Government Servants, which is clear from the first Paragraph of the Government Order. Paragraph 2 of the Government Order further provides that those temporary Government Servants who have completed minimum ten yeas regular service on the date of retirement/superannuation or who have declared invalid by the appointing Authority will be entitled the superannuation/invalid pension, gratuity, family pension as admissible to a permanent employee. Paragraph 3 further provides that this provision will also be applicable in those cases where permission has been granted for voluntary retirement in accordance with the Fundamental Rule 56. The Government Order do not specifically provide that the persons who are compulsory retired will not be given the benefit. Reliance has been placed on the guidelines of Clause 14 circulated along with Government order dated 24.6.1996. The aforesaid Clause 14 provides:

14. अनिवार्य सेवानिव्रति १.७.८६ के सासनादेस से आच्छादित नही है अत; अनिवार्य सेवानिव्रति पर पेसंन की देयता के ळिये स्थाई होना आवसयक है ।"

7. The ad hoc employee on daily wages basis, contract basis or work charge basis to be treated as falling within ambit of expression ad hoc appointee continued fairly long spell of time, as such, presumption may arise that there was a regular need of service, as such, it was obligatory on the part of the employer to take steps for regularization of such employees which has been held in various judgments. The reliance has been placed upon a judgment reported in 1997 AWC (Supplement) 550 ***Anil Kumar Kaushik Vs. New Okhla Industrial Development Authority Nodia and another*** and 2000 (2) AWC, 1261 ***State of U.P. and others Vs. Dileram and***

others. It has been submitted that the Court has considered that rendering a service for a long period is status of such employee in absence of material on record to show as to why he had not been permanent despite such a long service. It has been held that he should be deemed to have become permanent as such, he is entitled for pension. The reliance has been place upon a judgment of this Court in ***Yashwant Hari Katakkar Vs. Union of India and others*** reported in 1996 part-7, Supreme Court Cases, 113. It has also been held that an employee who has served more than 20 years of service is entitled for pension and denial of retiring pension to the petitioner on the ground of not being permanent in on any post clearly violative to Clause (e) of Fundamental Rules, 56 which clearly entitle for pension. The temporary department cannot keep a person as temporary or on daily wages indefinitely. It has been submitted that in case reported in (1995) 3 UPLBEC 1842 (Supplement) ***A.P. Srivastava Vs. Union of India and others*** the Apex Court has clearly taken a view the condition precedent for being entitlement to pension in case of a temporary employee who has rendered 20 years of service is entitled to pension. The Apex Court while dealing with ***''substantive capacity'*** the emphasis imparted by the adjective ***''substantive'*** is that a thing is substantive if it is essential part of constituent or relating to what is essential. Therefore, when a post is vacant, however, designated in officials, the capacity in which the person holds the post has to be ascertained by the State. The substantive capacity refers to capacity in which person holds the post and not necessarily to the nature and character of the post. Thus, a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially for a long duration in contradistinction to a person who holds it for a definite or a temporary period or holds it on probation subject to confirmation. The reliance has been placed in AIR 1981 Supreme Court, 41 ***Baleshwar Dass Vs. State of U.P.*** and reliance has been placed upon Para 9 of the said judgment. The same is being reproduced below:-

''9. So, the order of appointment to the service is decisive of Seniority and the survive horoscope of each Assistant Engineer has to be cast with reference to his appointment order. The next question then, is when is an engineer appointed to the service? When, under the Rules, he becomes a member of the Service. For until he gains entry into the service he cannot claim to be appointed to it. To hover around with prospects of entry is not the same as actual entry. Therefore, we have to examine when an engineer becomes a member of the Service under the Rules. Clause (b) of Rule 3 defines ''Member of the Service'' to mean a Government servant ''appointed in a substantive capacity under the provisions of these rules.... to a post in the cadre of the Service.' What, then, is the cadre of the Service?. What do we mean by appointment in a substantive capacity to a post in the cadre? Can there be a temporary post included in the cadre. Here. Rule 4 becomes relevant. Rule 4 prescribes the sanctioned strength of the cadre. It provides that the Government may, subject to the provisions of Rule 40 of the Civil Service (Classification, Control and Appeal) Rules, 1930 ''increase the cadre by creating permanent or temporary posts from time to time as may be found necessary.' So a

cadre post can be permanent or temporary and if an engineer were appointed substantively to a temporary or permanent post he becomes a member of the Service. The touchstone then is the substantive capacity of the appointment. Here we get into service jargon with slippery semantic and flavored officalese."

8. The further reliance has been placed by the counsel for the petitioner in a Division Bench Judgment of this Court reported in 2006 (1) ESC 611 (Allahabad) (Division Bench) ***Board of Revenue and others Vs. Prasidh Narayan Upadhayay*** and has submitted that in the aforesaid case, the interpreting various position this Court has taken a view that "continuous working for more than 37 years of the petitioner cannot be ignored on the basis of vague and unsustainable plea which has been raised by the appellant." The statutory right of the petitioner respondent flowing by rendering service for such a long service, cannot be brushed aside lightly. The court has also taken into consideration the Articles 465 and 465 (A) of Civil Service Regulation.

9. In such a situation, the petitioner submits that action of the respondents is wholly illegal and without jurisdiction and against the well settled principle of law and as the petitioner has continuously worked, as such, he is entitled for pension.

10. A counter affidavit has been filed and in the counter affidavit it has been stated that as the petitioner has not completed 10 years of regular service and the competent authority has clearly held that he is not entitled for post retrial benefits due to non completion of service of 10 years either in regular or temporary. According to Civil Regulation, Rule 368, the service does not qualify unless the officer holds a substantive office on a permanent establishment. Further Rule 370 provides that period of service in work charged establishment does not qualify a person for an entitlement of pension. As such, the petitioner is not entitled for pensionary benefits. According to Government Order, dated 26.5.1993, the calculation of post retrial benefits is made by the head of the department.

11. In view of the aforesaid fact, the respondents' submits that the petitioner is not entitled for post retrial benefits.

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

12. It is clear from the record that there is no dispute between the partiers regarding the facts. Admittedly, the petitioner has rendered 26 years of service. In the counter affidavit it is admitted that in accordance with the Government Order dated 1.7.1989 a temporary government servant who retires after completing 58 /60 years of age or voluntary retires from service is entitled for pensionary benefits.

13. The provisions relating to sanction of pensionary benefits to a government servant are contained in Civil Service Regulation framed by the Government. The qualifying service and other provisions pertaining to entitlement of pensionary benefits have been provided in Civil Service Regulations. Regulation 361 of the Civil Service Regulation provides that service of an officer does

not qualify for pension unless the employment is substantive and permanent. Rule 361 is being quoted below-

361. *The service of an officer does not qualify for pension unless it conforms to the following three conditions:*
First- The service must be under Government.
Second- The employment must be substantive and permanent.
Third- The service must be paid by Government.
These three conditions are fully explained in the following section."

14. There are four kind of pension, which have been defined in Regulation 424. The superannuation pension is granted to an officer in superior or inferior service entitled or compelled by Rule, to retire at a particular age Regulation 465 deals with retiring pension. A retiring pension is granted to a government servant who is permitted to retire after completing qualifying service for 25 years or on attaining the age of 58 years. The retiring pension is also entitled to government servant, who is required by government servant to retire after attaining the age of 58 years. The age of retirement of a Government servant is prescribed under Fundamental Rules, 56.

15. The Standing Counsel has submitted and laid much emphasis on the word "दस वर्स की नियमित सेवा" as used in Government order dated 1.7.1989. The submission of the learned Standing Counsel is that the petitioner was a worker charge employee and has not completed 10 years of regular service, as such, he is not entitled for pensionary benefits. The words "regular service' has not been defined in the government order. From the repelling of the aforesaid government order, it is clear that words "ten years regular service' has been referred to the service rendered and not to the status of employee, an employee substantively appointed and permanent automatically entitled for pension, if he has rendered a considerable period of service. The Government Order dated 1.7.1989 does not contemplate the ten years substantive service. The emphasis is that the service should be regular and the Apex Court in the judgment reported in AIR 1980 Supreme Court 1464 (supra) has observed as follows-

"To begin with the word "regular" is derived from the word "regular" which means "rule' and its first the legitimate signification, according to Webster, is conformable to a rule, or agreeable to an established rule, law, or principle to a prescribed mode. In Words and Phrases (Vol.36-A, P 241) the word 'regular" has been defined as steady or uniform in course practice or occurrence, etc. and implies conformity to a rule, standard, or pattern. It is further stated in the said Book that "regular' means steady or uniform in course, practice, or occurrence not subject to unexplained or irrational variation. The word "regular" means in a regular manner, methodically, in due order. Similarly, Webster's New World Dictionary defines "regular' as "consistent or habitual in action' not changing uniform, conforming to a standard or to a generally accepted rule or mode of conduct."

16. From the perusal of the above passage of the Apex Court the judgment which is clear that service of temporary employee should be in regular manner.

17. The Government Order dated 1.7.1989 meant ten years government servant should be regular in nature meaning thereby that if the temporary government servant has performed his duties irregularly i.e. with gaps of years, his services may not be treated to be regular. Thus, the contention of the learned Standing Counsel that the words "***regular service***' used in the Government Order means substantive service or service rendered by an employee in regular capacity cannot be accepted. The petitioner admittedly, rendered 26 years under the respondent. From the record, it is clear that the petitioner has continuous worked from 20.12.1976 and was permitted to retire at the age of superannuation on 31.6.2002 and from 1976 to 2002, he has continuously worked. From the foregoing discussions it is clear that as the petitioner has rendered considerable period of service, he was provisions contained in Civil Service Regulations, this Court has observed as under-

"Clause (e) of Rule 56 unequivocally recognizes, declares and guarantees retiring pension to every Government servant who retires on attaining the age of superannuation, or who is prematurely retired or who retires voluntarily. To be precise, every Government servant whether permanent or temporary) who retires under Clause (a) or Clause (b), or who is required to retire or who is allowed to retire under Clause (c) of Rule 56, becomes entitled for a retiring pension, of course, the first and third conditions stipulated in Article 361 of the Regulations are satisfied."

18. In view of the matter the contention of the respondents that since entitled for the benefit of the Government Order dated 1.7.1989 and if the interpretation as given by the respondent is accepted, that the government order excluded the temporary government servants, who has retired after 26 years of service and is not entitled for pension the said Government Order will become bad on account of unreasonable and arbitrary classification put by the respondent. Furthermore, as observed the fundamental Rule 56 sub clause (e) mandade grant of retiring pension to the temporary Government Servants. The Government Order dated 1.7.1989 has to be read subject to the Fundament Rules 56 (e). The similar controversy came up for consideration before this Court in case of ***Dr. Hari Shankar Asopa Vs. State of U.P. and others*** reported in 1989, ACJ 337, (Supra). After referring to the fundamental Rule, 56, and various

the petitioner was not a permanent confirmed employee and hence not entitled for pension, is clearly misconceived and is rejected.

19. In view of the aforesaid fact, and after going through the discussions the writ petition succeeds and is allowed. The order-dated 31.1.2003 (Annexure 4 to the writ petition) is hereby quashed. The respondents are directed to pay the pensionary benefits to the petitioner within a period of three months from the date of production of the certified copy of this order. It is also made clear that the petitioner will be entitled for interest at the rate of 6% from the date of entitlement till the date of payment. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2006

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

Civil Misc. Writ Petition No. 44373 of 1998

Ramesh Chandra Sharma ...Petitioner
Versus
The Punjab National Bank and others ...Respondents

Counsel for the Petitioner:
Sri S.N. Pandey
Km. Suman Sirohi

Counsel for the Respondents:
Sri Satish Chaturvedi
Sri K.L. Grover

Bank Officer, Employees (Disciple and Appeal) Regulation Regulation-4-readwith circular dated 5.3.99-Dismissal order petitioner working as manager-committed certain financial irregularities-after serving the charge sheet disciplinary proceeding concluded with punishment of dismissal after retirement-held-illegal only the Bank can make recovery of financial loss and to deprive from retirement benefit-dismissal order quashed with consequential direction.

Held: Para 15

The said circular provides that where the departmental proceedings are instituted while a person is in service and the said proceedings are continuing after he has reached the age of superannuation, then none of the penalties as provided under Regulation 4 of the Bank Officers Employees (Discipline and Appeal) Regulations can be imposed at the conclusion of the proceedings but the Bank can make recoveries in the event the officer have been found guilty of causing monetary loss to the Bank and also deprive him of retiral benefits to the permissible extent.

Case law discussed:
AIR 1972 SC-1343
AIR 1973 SC-1403
AIR 1987 SC-229
AIR 1971 SC-2414
2004 (8) SCC-218
AIR 1997 SC-2249
2005 (7) SCC-435
1996 (9) SCC-69
AIR 1987 SC-943
AIR 1988 SC-842
AIR 1989 SC-1843

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

1. This writ petition has been filed for quashing the order dated 13th November, 1997, by which the Zonal Manager Central, U.P. Zone, Agra of the Punjab National Bank (hereinafter called the "Bank'), imposed the major penalty of dismissal from service of the Bank and the appellate order dated 21.10.1998 by which the appeal filed by the petitioner against the aforesaid order of dismissal was dismissed by the Appellate Authority. A further relief has been sought that a direction should be issued to the respondents to pay the post-retiral benefits to the petitioner.

2. The petitioner, who was working as a Manager in the Bank, was served with a charge sheet dated 06.03.1996 for committing certain lapses. The petitioner did not submit any statement of defence even though the time was extended on his request several times. The disciplinary proceedings were initiated against the petitioner vide order dated 23rd April, 1996 and the Inquiry Officer was appointed. The Inquiry Officer found the charges proved against the petitioner. The copy of the enquiry report was thereafter

sent to the petitioner for submission of his representation. The petitioner submitted his representation and after considering the same, the order was passed by the Disciplinary Authority. It was noticed in the order that the petitioner had engaged himself in reckless lending and thereby violated the lending norms and disbursed loans through middlemen. He also had demanded and received an illegal gratification from borrowers and failed to keep the limitation alive in borrowal accounts and incurred expenses beyond his vested powers; and on account of his reckless lending, the Bank had suffered huge loss to the extent of Rs.1,14,87,164.76 (Rupees One Crore Fourteen Lacs Eighty Seven Thousands One Hundred Sixty Four and Paise Seventy Six Only). The Appellate Authority also rejected the appeal filed by the petitioner. Hence the present petition.

3. We have heard learned counsel for the petitioner and have perused the material available on record. None appeared for the respondents.

4. Learned counsel for the petitioner submitted that while enquiring the matter, the principles of natural justice had been violated inasmuch as proper opportunity had not been given to him.

5. We are unable to accept the aforesaid contention of the learned counsel for the petitioner for the simple reason that, in our opinion, the petitioner himself avoided appearing before the Inquiry Officer as is apparent from a bare perusal of the inquiry report dated 30th September, 1997, which clearly shows that in spite of repeated notices informing the date and venue of the enquiry sent to the petitioner through registered post as well as through courier and also through the messenger, the petitioner did not respond and so the enquiry was conducted ex parte. It was only on 24.01.1997 that the petitioner appeared when the presentation by the Presenting Officer was over and made a request to fix the next date of enquiry after a week due to his illness. This request was accepted by the Inquiry Officer and 13th March, 1997 was fixed but the petitioner again absented himself as a result of which the enquiry proceedings were concluded ex parte on 13th March, 1997. However, on the request of the petitioner, the Inquiry Officer granted one more opportunity to the petitioner and fixed 29th May, 1997. As the petitioner did not appear on the said date also, another opportunity was given by fixing 19th July, 1997. The petitioner failed to utilize this opportunity also and informed the Inquiry Officer that he would not be able to attend as his son-in-law was ill. This request was accepted by the Inquiry Officer and 2nd August, 1997 was fixed, which was noted by the petitioner. The petitioner for the reasons best known to him, did not turn up on the said date also. The Inquiry Officer however gave another opportunity to the petitioner and fixed the enquiry for 19th August, 1997. The petitioner failed to utilize all these opportunities and, therefore, the Inquiry Officer asked the Presenting officer to submit his written brief. The written brief was submitted by the Presenting Officer and a copy of the same was then sent to the petitioner for submitting his reply but the petitioner did not submit any reply to the same. It is, therefore, clear that in spite of repeated opportunities having been given to the petitioner, he did not avail the same. It is, thus, not open to the petitioner to now

contend that proper opportunities had not been given to him.

6. The charges leveled against the petitioner, which were found proved upon enquiry, are quite serious in nature. The petitioner had engaged himself in reckless lending causing huge financial loss to the Bank to the extent of Rs.1,14,87,164,76. It also shows that the petitioner had disbursed loan through middlemen and demanded and received illegal gratification from a borrower. We are of the considered opinion that in such cases, the officers of the Bank should not be permitted to continue in service at all.

7. Once the employer has lost the confidence in the employee and the bona fide loss of confidence is affirmed, the order of punishment must be considered to be immune from challenge, for the reason that discharging the office of trust and confidence requires absolute integrity. A necessary implication which must be engrafted on the contract of service is that the servant must undertake to serve his master with good faith and fidelity. In a case of loss of confidence, reinstatement cannot be directed. Granting such an employee the relief of reinstatement would be "an act of misplaced sympathy which can find no foundation in law or in equity." (Vide Air India Corporation Bombay Vs. V.A. Ravellow, AIR 1972 SC 1343; The Binny Ltd. Vs. Their Workmen, AIR 1973 SC 1403; Kamal Kishore Lakshman Vs. Management of M/s. Pan American World Airways Inc & Ors., AIR 1987 SC 229; Francis Kalein & Co. Pvt. Ltd. Vs. Their Workmen, AIR 1971 SC 2414; Regional Manager, Rajasthan SRTC Vs. Sohan Lal, (2004) 8 SCC 218; and Bharat Heavy Electricals Ltd. Vs. M. Chandrashekhar Reddy & Ors., 2005 AIR SCW 1232).

8. In Kanhaiyalal Agrawal & Ors. Vs. Factory Manager, Gwaliar Sugar Co. Ltd., (2001) 9 SCC 609, the Hon'ble Supreme Court laid down the test for loss of confidence to find out as to whether there was bona fide loss of confidence in the employee, observing that, (i) the workman is holding the position of trust and confidence; (ii) by abusing such position, he commits act which results in forfeiting the same; and (iii) to continue him in service/establishment would be embarrassing and inconvenient to the employer, or would be detrimental to the discipline or security of the establishment. Loss of confidence cannot be subjective, based upon the mind of the management. Objective facts which would lead to a definite inference of apprehension in the mind of the management, regarding trustworthiness or reliability of the employee, must be alleged and proved.

9. In Sudhir Vishnu Panvalkar Vs. Bank of India, AIR 1997 SC 2249, the Apex Court while dealing with the issue in hand, held that in certain cases, where there is sufficient material available against the employee and is a case of loss of confidence, even the formal enquiry is not required. However, in Chandu Lal Vs. The Management of M/s. Pan American World Airways Inc., AIR 1985 SC 1128, the Apex Court held that where termination on the ground of loss of confidence casts stigma, enquiry must be held.

10. Be that as it may, in the instant case, regular inquiry has been conducted.

In State Bank of India Vs. Bela Bagchi & Ors., (2005) 7 SCC 435, the Hon'ble Supreme Court repelled the contention that even if by the misconduct of the employee the employer does not suffer any financial loss, he can be removed from service in a case of loss of confidence, particularly, in the services of the financial institutions where the higher standard of honesty and integrity is required as he has to deal with the money of the depositors and the customers. Every employee of the Bank is required to take all possible steps to protect the interests of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a Bank Officer. Good conduct and discipline are inseparable from the functioning of every employee of the Bank. Whether the charges are of the grave nature and not merely casual, the major punishment is to be inflicted even if there is absence of pecuniary loss to the Bank. While deciding the said case, reliance has been placed upon its earlier judgment in Disciplinary Authority-cum-Regional Manager Vs. Nikunja Bihari Patnaik, (1996) 9 SCC 69.

11. In view of the above, we are not in a position to accept the submissions on behalf of the petitioner that in such a fact situation punishment of dismissal from service is not warranted.

12. Learned counsel for the petitioner then contended that as the petitioner had attained the age of superannuation and stood retired on 31.01.1997, the order of dismissal from services of the Bank was wholly unjustified and in support of this contention, learned counsel for the petitioner placed reliance upon the decision of the Hon'ble Supreme Court in State of Uttar Pradesh Vs. Shri Brahm Datt Sharma & Anr., AIR 1987 SC 943 wherein it had been held that if the disciplinary proceedings against an employee of the Government are initiated in respect of misconduct committed by him and he retires from service on attaining the age of superannuation, before the completion of the proceedings, it is open to the State Government to direct deduction from his pension on the proof of allegations made against him. However, if the charges are not established in disciplinary proceedings or the disciplinary proceedings are quashed, it is not permissible to the State Government to direct deduction in pension on the same allegations. However, if the charges of misconduct have been of serious nature and are established and have bearing on the question of rendering efficient and satisfactory service, it would be open for the Government to proceed against him in accordance with law and to reduce his pension and gratuity to the extent demanded by the facts of a particular case.

13. This proposition is worth acceptance. The same view has been reiterated by the Hon'ble Apex Court in M. Narasimhachar Vs. The State of Mysore, AIR 1960 SC 247; State of Maharastra Vs. M.H. Mazumdar, AIR 1988 SC 842; and Takhatray Shivadattray Mankad Vs. State of Gujarat, AIR 1989 SC 1843, while interpreting similar provisions applicable in the cases.

14. Thus, in view of the above, it can be held that once a person retires on reaching the age of superannuating,

punishment of dismissal or removal cannot be imposed and the only option left to the employer is to continue with the enquiry initiated earlier when he was in service, to reach its logical conclusion and pass an order of withholding the retiral benefits fully or to certain extent as per the facts of the case applying the Rules involved therein.

15. In the present case, admittedly, it was not permissible for the respondents to pass the order of dismissal after the petitioner had reached the age of superannuation. Question of such an order does not arise as the employee is no more in service. He gets pension and other retiral benefits for the services rendered by him. However, in the counter affidavit, the respondents have explained the order by contending that the punishment of dismissal results in legal consequences, i.e. the punished employee is deprived of pension, gratuity and leave encashment as per the provisions of Punjab National Bank (Officers) Service Regulations 1977. The respondents have also filed a copy of the Circular dated 5th March, 1999, though subsequent to the order imposing punishment and the order of the Appellate Authority is relevant to determine the controversy. Learned counsel for the petitioner has insisted that his case is to be considered under the said circular. The said circular provides that where the departmental proceedings are instituted while a person is in service and the said proceedings are continuing after he has reached the age of superannuation, then none of the penalties as provided under Regulation 4 of the Bank Officers Employees (Discipline and Appeal) Regulations can be imposed at the conclusion of the proceedings but the Bank can make recoveries in the event the officer have been found guilty of causing monetary loss to the Bank and also deprive him of retiral benefits to the permissible extent.

16. In view of the above, it may be desirable that the matter be remanded to the respondent authorities to pass an appropriate order setting aside the impugned orders. However, considering the fact that the matter is pending since long and in order to bring the litigation to an end and considering the gravity of the charges and financial loss suffered by the Bank, we substitute the order of dismissal by the order of withholding all retiral benefits as has been explained in the counter affidavit. However, no recovery of the loss to the Bank to the tune of Rs.1,14, 87,164.76 shall be made from him.

Petition is disposed of accordingly.

ORIGINAL JURISDICION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2005

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE (MRS.) M. CHAUDHARY, J.

Civil Misc. Writ Petition No. 30281 of 2003

Sangam Eent Nirmata Samiti and another ...Petitioners
Versus
Zila panchayat Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Singh
Sri Vishnu Behari Tewari

Counsel for the Respondent:
Sri W.H. Khan
Sri A. Singh

C.S.C.

U.P. Kshetriya Punchayat & Zila Punchayat Adhiniyam 1961-
Section 239 (2) E (a) (iv)–Enhancement of licence fee–to run the bricks kilns-from Rs.2000/- to 19000/-challenged on the ground of highly excessive–without any justification as supervising, checking and issuing licence–not within the managing of service rendered–rather in nature of Tax–considering the escalation in price, cost of living, hike in salary and maintenance of establishment of enfareing regulation held–enhancement cannot be said to be excessive.

Held: Para 21

Applying the principles laid down in the aforesaid cases to the facts of the present case, i.e., services are not required to be rendered where the fee has been imposed to regulate the trade, we are of the considered opinion that the present is a case where the fee has been imposed to regulate the brick-kiln trade. On behalf of the contesting respondents, Sri Rakesh Kumar Verma has stated in paragraph 10 of the counter affidavit that the Parishad has to spend a sum of Rs.30,00,000/- every year in connection with the establishment regarding collection of tax and licence fee, which amount goes on increasing every year. Thus, from the facts brought on record we are of the considered opinion that the enhancement of the licence fee in 10 years by 5 times from Rs.2,000/- to Rs.10,000/- cannot be said to be excessive taking into consideration the escalation in prices, cost of living, hike in salary and maintenance of establishment for enforcing the regulations. It is in the nature of regulatory fee for which no services are required to be rendered.

Case law discussed:
PIR 1980 SC 1008
W.P. NO. 43220/02 Decided on 7.2.03
1974 A.L.S. 37, 1980 UPLBEC–148
1999 (2) SEE 274, 2001 (3) UPLBEC – 2483
1996(5) SCC-670, 1997 (2) SCC 715
1997 (3) SCC 665,2002(4) SCC 566
2004(1) SCC–225, 2005(2) SCC–345

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

1. By means of the present writ petition filed under Article 226 of the constitution of India, the petitioners, Sangam Eent Nirmata Samiti, Allahabad through its President Sri Uma Shanker Ailwani and Pratap Eent Udyog, Andawa Village, Phoolpur, Allahabad through its partner Devendra Pratap Singh, seek the following relief :-

"(i) a writ, order or direction in the nature of mandamus declaring the enhancement of licence fee from Rs.2000/- to Rs.10,000/- vide notification dated 01.10.2002 (Annexure –1) as ultra vires and unconstitutional;

(ii) a writ, order or direction in the nature of prohibition restraining the respondents from realizing enhanced licence fee of Rs.10,000/- instead of Rs.2000/- for renewal of petitioners licence for running its brick kiln vide notification dated 01.10.2002 published in U.P. Gazette dated 12.10.2002 (Annexure – 1)

(iii) any other suitable writ order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iv) Award the cost of writ petition to the petitioners."

2. Briefly stated, the facts giving rise to the present petition are as follows:-

According to the petitioners, the petitioner no. 1 is an association of brick-kiln owners of Allahabad and is registered under the provision of the Societies Registration Act, 1860. It has been formed with an object to promote and

safeguard the legitimate interest and privilege of brick-kiln owners of Allahabad and to take steps that may be for the general good of the trade. The petitioner no. 2 is a partnership firm duly registered under the Indian Partnership Act. The members of the petitioner no. 1 association as also the petitioner no. 2 are carrying on the business of manufacture and sale of bricks. Their brick-kilns are situate within the limits of the Zila Parishad, Allahabad (hereinafter referred to as "the Parishad"). The Parishad had framed the bye laws on 28.11.1992 in which it had prescribed for a licence fee of Rs.2,000/- per annum for running the brick-kiln. The bye laws had been framed under Section 239(2)(E)(a)(iv) of the U.P. Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961 (hereinafter referred to as "the Adhiniyam"). The bye laws have been amended on 1.10.2002 whereby the licence fee has been increased from Rs.2,000/- to Rs.10,000/- per annum the increase of licence fee from Rs.2,000/- to Rs.10,000/- is under challenge in the present writ petition.

3. We have heard Sri R.N. Singh, learned Senior Counsel, assisted by Sri Vishnu Bihari Tiwari, Advocate, on behalf of the petitioner, and Sri W.H. Khan, learned Senior Counsel, assisted by Sri A. Singh, Advocate, on behalf of the Parishad.

4. Sri R.N. Singh, the learned Senior Counsel, submitted that the Parishad is not spending any amount for the purpose of rendering any service for which they could charge the licence fee and enhancement has been made without any reason. According to him supervising, checking and issuing of licence cannot be said to be the service rendered. In the circumstances, the amount of licence fee being realized from the members of the petitioner no. 1 association or the petitioner no. 2 is in the nature of a tax and not a fee. He further submitted that if the fee is held to be regulatory in nature, it is highly excessive and the Parishad has not justified it by placing sufficient material and evidence on record so as to enable the Court to uphold the enhancement of licence fee. He has referred to a decision of the Apex Court in the case of **Kewal Krishan Puri and another v. State of Punjab and others,** AIR 1980 SC 1008. Relying upon paragraphs 54 and 55 of the judgment, he submitted that enhancement of the licence fee from Rs.2,000/- to Rs.10,000/- is wholly illegal and unjustified. He also relied upon a Division Bench decision of this Court in **Civil Misc. Writ Petition No. 43220 of 2002, Uttar Pradesh Udyog Vyapar Pratinidhi Mandal and others v. State of U.P. and others,** decided on 7.2.2003, wherein this Court has declared bye-law no. 19 framed by the Zila Parishad, Agra, providing for imposition of charge paid on every trip of the vehicle from Agra district to outside and from outside the district to Agra carrying Gitti, Patthar Boulder, Coal, Marble, Yamuna sand and Balu etc. which were to be utilized for providing drinking water facility to the vehicle owners and drivers and medical facilities at the point of loading or any other specified place. Sri Singh submitted that these facilities, as held by this Court in the aforesaid case, is the statutory duty of the Parishad to provide and for incurring expenditure on these facilities the impost of the present levy cannot be justified.

5. Sri W.H. Khan, on the other hand, submitted that the licence fee of

Rs.10,000/- levied by the parishad is, in fact, in the nature of a regulatory fee for which no services are required to be rendered. In the alternative, he submitted that if it is held to be a fee co-related with the services rendered, the Parishad is spending huge amount towards facilities being offered by way of maintenance of road, approach road, allowing parking, providing drinking water etc. and also for maintaining sufficient staff to regulate the trade. He, thus, submitted that the enhancement of licence fee to Rs.10,000/- is perfectly justified. He further submitted that out of the about 271 brick-kiln owners operating within the limits of the Parishad, 218 brick-kiln owners have already deposited the licence fee and the renewal fee and, therefore, the plea that the petitioner no. 1 is espousing the cause of its members, is not correct. For justifying the levy of the licence fee, Sri Khan has relied upon the following decisions: -

(i) **Commissioner, Agra Division, Agra and another v. Durgesh Prasad Bhargava and another,** 1974 ALJ 37;
(ii) **Zila Parishad, Budaun v. Shiv Lal and others,** 1980 UPLBEC 148;
(iii) **Secunderabad Hyderabad Hotel Owners' Association and others v. Hyderabad Municipal Corporation, Hyderabad and another,** (1999) 2 SCC 274; and
(iv) **Dr. Chandresh Kumar Jain and others. V. State of U.P. and others,** (2001) 3 UPLBEC 2483.

6. It is not necessary to go into the question as to whether the petitioner no. 1 represents the interest of its members or not, viz., the stand taken by the Parishad that 218 brick-kiln owners have already deposited the licence fee and renewal fee. We find that the petitioner no. 2 who is a partnership firm and is engaged in brick-kiln trade and since brick-kiln has challenged the levy of licence fee, therefore the Court has to adjudicate upon the questions raised in the writ petition.

7. Having given our anxious consideration to the various pleas raised by the learned counsel for the parties on the question as to whether any services are required to be rendered or there should be an element of quid pro quo where the fee charged is regulatory in nature, we find that the Apex Court in the case of **P. Kannadasan and others v. State of T.N. and others,** (1996) 5 SCC 670, in paragraph 36, has held as under :-

"36 ……. Even in the matter of fees, it is not necessary that element of quid pro quo should be established in each and every case, for it is well settled that fees can be both regulatory and compensatory and that in the case of regulatory fees, the element of quid pro quo is totally irrelevant. (See Corpn. Of Calcutta v. Liberty Cinema, AIR 1965 SC 1107)."

8. In the case of **Vam Organic Chemicals Ltd. and another v. State of U.P. and others,** (1997) 2 SCC 715, the Apex Court has held as follows:-

"18. The High Court in the impugned judgment has drawn a distinction between fees charged for licences, i.e. regulatory fees and the fees for services rendered as compensatory fees. The distinction pointed out by the High Court can be seen in clause (2) of Article 110:

"110(2) A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the

demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, emission, alteration or regulation of any tax by any local authority or body for local purpose.

The High Court quoted from this Court's decision in Corpn. Of Calcuttal v. Libertyu Cinema, AIR 1965 SC 1107, which was based on a Privy Council judgent in George Walkem Shannon v. Lower Mainland Dairy Products Board, 1938 AC 708. This Court said in Corpn. Of Calcutta v. Liberty Cinema, AIR 1965 SC 1107:

"In fact, in our Constitution fee for licence and fee for services rendered are contemplated as different kinds of levy. The former is not intended to be a fee for services rendered. This is apparent from a consideration of Article 110(2) and Article 199(2) where both the expressions are used indicating thereby that they are not the same.

The High Court has taken the view that in the case of regulatory fees, like the licence fees, existence of quid pro quo is not necessary although the fee imposed must not be, I the circumstances of the case, excessive. The High Court further held that keeping in view the quantum and nature of the work involved in supervising the process of denaturation and the consequent expenses incurred by the state, the fee of 7 paise per litre was reasonable and proper. We see no reason to differ with the view of the High Court.

9. In the case of **State of Tripura and others v. Sudhir Ranjan Nath,** (1997) 3 SCC 665,the Apex Court has held as follows

"14. We next take up the validity of the levy of application fee and licence fee of Rupees one thousand and Rupees two thousand respectively. In our opinion, the High Court was not right in holding that the said fee amounts to tax on the ground that it has not been proved to be compensatory within the meaning of clause (c) of sub-section (2) of section 41. it is regulatory fee and not compensatory fee. The distinction between compensatory fee and regulatory fee is well established by several decisions of this Court. Reference may be had to the decision of the constitution Bench in Corpn. Of Calcutta v. Liberty Cinema AIR 1965 SC 1107. It has been held I the said decision that the expression "licence fee" does not necessarily mean a fee in lieu of services and that in the case of regulatory fees, no quid pro quo need be established. The following observations may usefully be quoted: -

"This contention is not really open to the respondent for Section 548 does not use the world 'fee'; it uses the words 'licence fee' and those words do not necessarily mean a fee in return for services. The former is not intended to be a fee for services rendered. In fact, in our Constitution fee for licence and fee for services rendered are contemplated as different kinds of levy. This is apparent from a consideration of Article 110(2) and Article 199(2) where both the expression are used indicating thereby that they are not the same. In George Walkem Shannon v. Lower Mainland Dairy Products Board, 1938 AC 708, it was observed (at pp. 721-722 of AC):

"if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province or for both purposes….. it cannot, as their Lordship think, be an objection to a

licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue.'
It would, therefore, appear that a provision or the imposition of a licence fee does not necessarily lead to the conclusion that the fee must be only for services rendered."
15. This decision has been followed in several decisions, including the recent decisions of this Court in Vam Organic Chemicals Ltd. v. State of U.P., (1997) 2 SCC 715 and Bihar Distillery v. Union of India, (1997) 2 SCC 727. The High Court was, therefore, not right in proceeding on the assumption that every fee must necessarily satisfy the test of quid pro quo and in declaring the fee levied by sub-rules (3) and (4) of Rule 3 as bad on that basis. Since we hold that the fees levied by the said sub-rules is regulatory in nature, the said levy must be held to be valid and competent, being fully warranted by Section 41."

10. In the case of **Secunderabad Hyderabad Hotel Owners' Association** (supra), the Apex Court has held in paragraph 9 as under: -

"9. It is, by now, well settled that a licence fee may be either regulatory or compensatory. When a fee is charged for rendering specific services, a certain element of quid pro quo must be there between the service rendered and the fee charged so that the licence fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. Licence fees can also be regulatory when the activities for which a licence is given require to be regulated or controlled. The fee which is charged for regulation for such activity would be validly classified as a fee and not a tax although no service is rendered. An element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive."

11. The Apex Court has further held that in the case of regulatory fee, no quid pro quo was necessary but such fee should not be excessive.

12. In the case of **State of U.P. v. Sitapur Packing Wood Suppliers,** (2002) 4 SCC 566, the Apex Court has held that the question of quid pro quo is necessary when a fee is compensatory, for every fee paid quid pro quo is not necessary. In the case of regulatory fee it is not necessary to establish the factum of rendering of service. Therefore, there is no question of regulatory fee being invalidated on the ground that quid pro quo has not been established.

13. In the case of **State of U.P. and another v. Vam Organic chemicals Ltd. and others,** (2004) 1 SCC 225, the Apex Court has considered the question regarding the distinction between a fee and a tax and correlation ship or correspondence for upholding the fee in paragraph 35 as under: -

"35. This test of correlation ship or "correspondence" has been repeatedly used by this Court either to uphold the fee holding that it was reasonable for the requirement of the authority for fulfilling its statutory obligations [B.S.E. Brokers" Forum v. Securities and Exchange Board of India, (2001) 3 SCC 482 (505); Secunderabad Hyderabad Hotel Owners' Assn. v. Hyderabad Municipal Corporation. (1999) 2 SCC 274 (286); State of Tripura v. Sudhir Ranjan Nath, (1997) 3 SCC 665; Shri Vileshwar Khand

Udyog Khedut Shahakari Mandali Ltd. v. State of Gujarat, (1992) 2 SCC 42 and Gujchem Distillers India Ltd. v. State of Gujrat (1992) 2 SCC 399] or to strike it down on the ground that the fee charge was not established to be so commensurate. (See Indian Mica and Micanite Industries v. State Of Bihar, (1971) 2 SCC 236 (243) and A.P. Paper Mills Ltd. v. Govt. of A.P. (2000) 8 SCC 167)."

14. In the case of **Sona Chandi Oal Committee and others v. State of Maharasthra,** (2005) 2 SCC 345, the Apex Court has held that the traditional concept of quid pro quo in a fee has undergone considerable transformation. So far as the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not lose the character of a fee provided the fee so charged is not excessive. It has further held that the fee charged in respect of renewal under the Bombay Money Lenders Act, 1946 is regulatory in nature to control and supervise the functioning of the money lending business to protect the debtors, the vast majority of which are poor peasants, tenants, agricultural labourers and salaried workers who are unable to repay their loans. The object of the Act is to control the money lending business and protect the debtors from the malpractices in the business by detecting illegal money lending. This exercise is a must to carry out the object of the Act for which a lot of infrastructure is required. The duty of the staff and the officers of the department is to visit the places of money lending business, inspect the accounts and other matters relating to the business, to find out illegal money lending, carry out raids in suspicious cases and do regular inspection as provided in the Act. The Act serves a larger public interest.

15. In the case of **State of Bihar and others v. Shree Baidyanath Ayurved Bhawan (P) Ltd. and others,** (2005) 2 SCC 762, the Apex Court has held that in the case of regulatory fees, like licence fees, existence of quid pro quo is not necessary although such fees must not be excessive. It has upheld the levy of licence fee under the Bihar and Orissa Excise Act, 1915 in view of the quantum of nature of work involved in supervising the activities under the said Act.

16. We find that in the counter affidavit filed by the Parishad it has been stated that the trade of brick-kiln comes within an offensive trade as mentioned in clause E(iv) of sub-section (2) of Section 239 of the Adhiniyam and the Parishad is fully empowered to impose licence fee for regulating and controlling the trade. It has to maintain a big establishment and to employ different persons such as Inspectors, Tax Collectors, Overseers, Engineers etc. for maintaining road, construction of road, approach road and making for inspections and collecting licence fee etc. The Parishad has to spend a huge amount of Rs.30,00,000/- every year in connection with the establishment regarding collection of tax and licence fee which goes on increasing every year and, therefore, the enhancement of the licence fee from Rs.2,000/- to Rs.10,000/- after more than 10 years cannot be said to be excessive.

17. In the case of **Kewal Krishan Puri** (supra) the Apex Court was considering the question about the validity of market fee of Rs.2/- levied by

the Market Committees under the Punjab Agricultural Produce Market Act on the touchstone of services rendered. The question of fee being regulatory in nature was not up for consideration before the Apex Court.

18. In the case of **Durgesh Prasad Bhargava** (supra) this Court has upheld the levy of licence fee of Rs. 250/- for running the brick-kiln. This amount was levied in the year 1974.

19. In the case of **Shiv Lal** (supra) this Court has upheld the imposition of licence fee for brick-kiln on the ground that it cannot be challenged that there was no quid pro quo between the licence fee charged and the services rendered a s the impost in question was not fee simpliciter.

20. In the case of **Dr. Chandresh Kumar Jain** (supra) this Court has upheld the levy of licence fee imposed on the nursing homes, Private Clinics, Pathology Centres and Maternity Homes etc. on the ground of being regulatory in nature. This Court has laid down the broad distinguishing features between compensatory and regulatory fee as follows:-

"24. The broad distinguishing features between compulsory and regulatory fee are –

In compensatory fee, the element of quid pro quo is necessary while in regulatory fee it is not necessary;

1. In compensatory fee the amount realized is to be spent for the services to be rendered for which the fee has been realized but this is not necessary in the case of regulatory fee;
2. In compensatory fee the amount realized is to be spent for the services to be rendered for which the fee has been realized but this is not necessary in the case of regulatory fee;
3. The regulatory fee is realised to regulate the activities of the persons who are to obtain licence under a bye law, rules, regulations or statute. The amount realised as regulatory fee is to be spent for regulating their activities."

21. Applying the principles laid down in the aforesaid cases to the facts of the present case, i.e., services are not required to be rendered where the fee has been imposed to regulate the trade, we are of the considered opinion that the present is a case where the fee has been imposed to regulate the brick-kiln trade. On behalf of the contesting respondents, Sri Rakesh Kumar Verma has stated in paragraph 10 of the counter affidavit that the Parishad has to spend a sum of Rs.30,00,000/- every year in connection with the establishment regarding collection of tax and licence fee, which amount goes on increasing every year. Thus, from the facts brought on record we are of the considered opinion that the enhancement of the licence fee in 10 years by 5 times from Rs.2,000/- to Rs.10,000/- cannot be said to be excessive taking into consideration the escalation in prices, cost of living, hike in salary and maintenance of establishment for enforcing the regulations. It is in the nature of regulatory fee for which no services are required to be rendered.

22. The law laid down by the Division Bench of this Court in the case of **Uttar Pradesh Udyog Vyapar Pratinidhi Mandal** (supra) is not

applicable to the facts of the present case inasmuch as in the present case the fee is being justified on the ground of being regulatory in nature, which question was not up for consideration in the said case.

23. No other point has been pressed.

In view of the foregoing discussions, we do not find any merit in this petition. It is dismissed with costs which we assess at Rs.10,000/-. Petition dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2006

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

Special Appeal No. 141 of 2005

Secretary, Board of High School and Intermediate Education, U.P., Allahabad ...Appellant/Respondent
Versus
Ram Jatan ...Respondent/Writ Petitioner

Counsel for the Appellant:
S.C.

Counsel for the Respondent:
Sri Kamlesh Kumar
Sri S.D. Shukla

U.P. High School & Intermediate Education Board-Chapter-III Regulation 7-Correction of entry made in High School certificate-Petitioner appeared in High School Examination in the year 1967-In examination form given the particulars of his date of Birth as 1.7.1982-applied for rectification of the date of Birth after 28 years-Board refused that the same particular are there in the Concerned college record also-under writ jurisdiction High Court can not interfere on assumption that the correction sought by the petitioner shall made to retire 3 years earlier-hence the correction is not bonafide.

Held: Para 7 & 8

The said amended provision clearly prescribe that the correction of certificate of the Board is permissible only within two years from the date of issuance of such certificate if there is mistake or omission occurred due to carelessness in the record of the Board or in the record of the institution.

The learned counsel for the petitioner respondents submits that the aforesaid amendment came in 1983 and therefore, will not apply to his case since the petitioner respondents passed High School examination in 1967. We do not agree with the aforesaid submission for the reason that the petitioner respondents sought correction of date of birth in the records of the appellant respondent in the year 1995, i.e. after 12 years from the date the Regulation 7 Chapter III was already amended. Thus even if the period of two years if not counted from 1967 yet, the respondent at the best could have applied within two years from 1983 i.e. upto 1985.

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

1. This special appeal is preferred against the order of Hon'ble single Judge of this Court dated 6.4.1999 whereby the writ petition of the petitioner respondents was disposed of with the direction to the Board to issue a fresh and corrected certificate changing the date of birth of the respondent as 12.7.1949 instead of 1.7.1952 within a period of two months from the date of receipt of the certified copy of this order.

2. The brief facts are that the petitioner respondent appeared in the High School examination in the year 1967

mentioning his date of birth as Ist July, 1952 in the examination form filled by him. He passed High School Examination, 1967 and the certificate issued by the appellant mentioned his date of birth as 1.7.1952 on the basis of entry made by him in his examination form. Thereafter the petitioner respondent applied for appointment as constable in C.R.P.F. in the year 1969 showing therein his date of birth as 12.7.1949. The petitioner respondent was selected and appointed. However, the C.R.P.F. asked the petitioner respondent to furnish High School certificate for verification of his date of birth as disclosed by him at the time of getting appointment which he failed to furnish. The officials of C.R.P.F. made verification from the Board. It was found that his actual date of birth was 1st July, 1952 as printed in the High School certificate. Consequently an enquiry was initiated against him since as per his date of birth i.e. 1.7.1952, he was under age for recruitment in C.R.P.F. However, the respondent in the meanwhile applied in 1995 for correction of his date of birth in the High School certificate. When the said application was not being entertained, he approached this court by Writ petition No.36718 of 1997 which was disposed of vide order dated 5.11.1997 with the direction to the Board to decide his application in accordance with law within a period of two months from the date of production of the certified copy of the order. The Secretary of the Board thereafter disposed of the representation by a reasoned order dated 12.1.1998 rejecting the same on the ground that even the Principal of the institution after verifying has endorsed that as per record of his school, the date of birth is 1.7.1952. The petitioner respondent being aggrieved filed writ petition No. 10093 of 1998 for quashing of the order of Secretary dated 12.1.1998 and also seeking a mandamus commanding the (Board) to correct his date of birth in the High School certificate issued in the year 1967. The Hon'ble Single Judge was of the view that the change in the date of birth sought by the petitioner is of no advantageous position in the sense that he would be required to retire three years earlier to his otherwise date of retirement based on 1.7.1952. The writ petition was therefore, on the aforesaid ground, allowed and the Board was directed to correct the date of birth of the petitioner respondent in the High School certificate and issue correct certificate within a period of two months.

3. Learned counsel for the appellant vehemently contended that after receipt of the representation of the respondent, pursuant to the direction of this court in writ petition No.36718 of 1997, the matter was examined and the certificate of the petitioner respondent was also sent to the concerned school whereupon it found that the date of birth entered in the certificate is correct and no change is required. He further submitted on behalf of the appellant that the correction in High School certificate can only be made where any clerical mistake or omission is found at the Board level. It is submitted that since in the case in hand no error was found, rather the entry in the High School certificate was on the basis of entry made in Examination form submitted by the appellant, the same was considered, examined and rejected by a reasoned order. It is also submitted that the disciplinary proceeding against the appellant was initiated by C.R.P.F. wherein the charges against the petitioner respondent was regarding furnishing incorrect date of birth due to which he

secured appointment otherwise he was not eligible on the date when he applied for such appointment being under age and the belated exercise on the part of the respondent is only to wriggle out of the said proceedings by getting the date of birth changed in High School certificate and this is not bonafide.

4. Learned counsel for the respondent contended that the High School certificate was not immediately given to the petitioner respondent and it was only given in the year 1995. When he got the certificate it was found that the date of birth had not correctly been recorded and thus applied for correction of the same. It is submitted that there were no laches on the part of the petitioner respondent.

5. Having considered the rival submissions advanced on behalf of the parties, we find, that under the regulations, clerical error, if any occurred on account of mistake of the Board Office, can only be rectified. Obviously Regulation 7 Chapter III as stood in the year 1967 did not prescribe any period during which such error could have been corrected but it could not be presumed that correction can be permitted to be made even after several decades. It is inconceivable that the appellant which conducts examination of High School and Intermediate at such a massive level would be able to keep all the examination forms and other records of all the candidates without any limitation of period. Therefore, at the best, if any correction is required it could have been allowed to be rectified within a reasonable time. Moreover such correction would be permissible only when it has occurred due to the mistake of the Board Office and not otherwise. The appellants have categorically pleaded that the date of birth has been recorded in the certificate on the basis of entry made by the petitioner respondents in his examination form which was duly verified and certified by the Principal of the college where the petitioner respondent was studying on the basis of the records maintained in the college. It is also inconceivable that a student who has passed High School in 1967 did not collect his High School certificate for more than 28 years. Although the petitioner respondent has tried to blame the Board for the alleged mistake but in the facts and circumstances of the case, we are not able to persuade ourselves to agree with the submissions made by the petitioner respondents. In our view, the date of birth recorded in the High School certificate of the appellant is not to be changed lightly unless and until there are cogent and substantive material showing that the date of birth has been wrongly mentioned in the certificate due to the fault of the office of the Board and not otherwise and it is sought to be rectified within a reasonable time and not after decades. There is another aspect in favour of the appellant.

6. We also find that Regulation 7, Chapter III was amended in the year 1983 as hereunder:

"[7. Secretary, on behalf of the Board shall give a certificate of passing the examination on prescribed pro forma to successful candidates and later on correct the entries therein, if any, provided that any such wrong entry in the certificate has appeared due to any clerical mistake or omission which occurred due to carelessness in the records of the Board of in the records of

institution wherefrom the last education has been received.

This correction may be made by Secretary only when the candidate within two years from the date of issuance of concerned certificate by the Board, has submitted an application for the rectification of mistake to the Principal/Centre Manager concerned attracting his notice regarding clerical mistake and one of its copy has also been sent to the Secretary through registered post].”

7. The said amended provision clearly prescribe that the correction of certificate of the Board is permissible only within two years from the date of issuance of such certificate if there is mistake or omission occurred due to carelessness in the record of the Board or in the record of the institution.

could not be entertained in view of the provisions contained in Regulation 7 Chapter III of the Regulation. We also notice that the Hon’ble Single Judge has not at all considered the aforesaid regulation in the judgment under appeal and has decided merely on the ground that since the petitioner respondent is seeking change of date of birth in the High School certificate, it would be against his interest and only on that basis writ petition has been decided directing the appellant (Board) to make necessary correction in the certificate of the petitioner respondent. In our view, the Hon’ble Single Judge has erred in law in issuing such mandamus to the appellant and therefore, the judgment under appeal is liable to be set aside.

10. In the result, the special appeal succeeds and is allowed. The judgment under appeal is set aside. Accordingly the

8. The learned counsel for the petitioner respondents submits that the aforesaid amendment came in 1983 and therefore, will not apply to his case since the petitioner respondents passed High School examination in 1967. We do not agree with the aforesaid submission for the reason that the petitioner respondents sought correction of date of birth in the records of the appellant respondent in the year 1995, i.e. after 12 years from the date the Regulation 7 Chapter III was already amended. Thus even if the period of two years if not counted from 1967 yet, the respondent at the best could have applied within two years from 1983 i.e. upto 1985.

9. Therefore, in the entirety of the circumstances, in our view the appellant is correct in submitting that the application of the petitioner respondents

writ petition is also dismissed. No order as to costs. Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2006

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

Civil Misc. Writ Petition No. 1328 of 2006

Shankar Dayal Tewari and another ...Petitioners
Versus
Deputy Director of Consolidation, Gorakhpur and others ...Respondents

Counsel for the Petitioners:
Sri A.P. Tewari
Sri S.S. Tripathi

Counsel for the Respondents:
S.C.

Code of Civil Procedure Ord. 23 Rule-I readwith U.P. Consolidation of Holding Act 1953-Section 48-Power of Revisional Court-incompetent Revision filed instead of appeal-application to withdraw the incompetent revision seeking liberty to file appeal -whether the provisions of Order 23 C.P.C. are applicable in consolidation proceeding? Held-'No' but for substantial justice-Rule 1 discretionary power can be exercised to secure the end of justice.

Held: Para 8 & 9

Though Order 23 Rule 1 of the C.P.C. is not applicable to the U.P. Consolidation of Holdings Act, but Consolidation authorities can exercise discretion to secure end of justice in the case and as revision was not competent, the Deputy Director of Consolidation rightly permitted to withdraw the same. An Authority having no jurisdiction to entertain the revision has no jurisdiction to decide the revision on merit. The order was rightly passed by the Deputy Director of Consolidation permitting to withdraw the revision.

Thus, it is clear that if an authority has power to entertain any revision, it has also power to permit withdrawal of the revision.

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

1. This writ petition is directed against the order dated 21.12.2005, passed by the Deputy Director of Consolidation, Gorakhpur allowing the application to withdraw revision to avail alternative remedy of appeal.

2. The facts of the case are that against an order passed by the Consolidation Officer, Opposite Party no.2 preferred a revision. Subsequently he was advised to file an appeal. Opp. Party no.2 then filed an appeal before the Appellate authority and also moved an application before the Deputy Director of Consolidation to permit to withdraw the revision to persue his remedy in Appeal which was allowed by the Deputy Director of Consolidation. This order is impugned in the present writ petition.

3. Heard learned counsel for the petitioners and learned Standing Counsel.

4. Learned counsel for the petitioners urged that there was no provision under the U.P. Consolidation of Holdings Act under which Deputy Director of Consolidation could grant such permission to withdraw revision in order to persue alternative remedy of appeal, hence the order passed by the Deputy Director of Consolidation was without jurisdiction and is liable to be quashed. In support of his arguments, learned counsel for the petitioners urged that by virtue of Section 41 of the U.P. Consolidation of Holdings Act, the provisions of Chapters IX and X of the U.P. Land Revenue Act are applicable, even though the provisions Chapters of the U.P. Land Revenue Act do not mention any such power to the Deputy Director of Consolidation to allow an application to grant permission to withdraw revision. Learned counsel for the petitioners further urged that as C.P.C. is not applicable to the proceedings under U.P. Consolidation of Holdings Act, provisions of Order 23 Rule 1 of the C.P.C. applicable to the Civil Courts to grant permission to withdraw the suit is not available to the Consolidation authorities. He prayed for quashing the order passed by the Deputy Director of Consolidation and remanding the matter

to the Deputy Director of Consolidation to decide the revision on merits.

5. Considered arguments of learned counsel for the petitioners and perused the record as well as relevant provisions on the point.

6. In the present case, this is not disputed that only appeal was maintainable, but an incompetent revision was preferred. As soon as the mistake was detected, an appeal was preferred and an application was moved to the Deputy Director of Consolidation to grant permission to withdraw the revision which was allowed by the impugned order.

7. Rule 111 of the U.P. Consolidation of Holdings Rules, 1954 provides for presenting the application for revision which reads as under:-

"An application under Section 48 of the Act shall be presented by applicant or his duly authorised agent to the Joint/Deputy/Assistant Director of Consolidation, nominated by the Director of Consolidation, Uttar Pradesh for the District or Settlement Officer (Consolidation) unit concerned or failing posting of any such Joint/Deputy/Assistant Director of Consolidation in the district, to the District Deputy Director (Consolidation within 30 days of the order against which the application is directed. It shall be accompanied by copy of the judgment or order in respect of which the application is preferred. Copies of judgment or order, if any, of other subordinate authorities in respect of dispute shall be filed alongwith the application."

8. Though Order 23 Rule 1 of the C.P.C. is not applicable to the U.P. Consolidation of Holdings Act, but is no error of law apparent on the face of record.

Consolidation authorities can exercise discretion to secure end of justice in the case and as revision was not competent, the Deputy Director of Consolidation rightly permitted to withdraw the same. An Authority having no jurisdiction to entertain the revision has no jurisdiction to decide the revision on merit. The order was rightly passed by the Deputy Director of Consolidation permitting to withdraw the revision.

9. Thus, it is clear that if an authority has power to entertain any revision, it has also power to permit withdrawal of the revision.

10. The Deputy Director of Consolidation has permitted to withdraw the revision in the facts of the case. There

For the reasons, as above, writ petition has no force and is dismissed.

Petition dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2006

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 12249 of 2003

Sanjay Kumar Verma...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:

Sri S.K. Mishra
Sri Dileep Kumar
Sri Rajeev Gupta
Counsel for the Opposite Party:
Sri A.N. Mulla
A.G.A.

Code of Criminal Procedure-Section 439-Bail Application offence u/s 18/21 N.D.P.S. Act-applicant while driving Maruti car-during course of search two polythene bags containing brown powder-detected as Smack-recovered-difference in weight of the recovered contraband mentioned in recovery memo and in the report of Public Analyst-found too much-according to prosecution version-the recovered contraband substance was smack-while according to public analyst report it is hearing both contraband substance are separately defined in the Act-held-entitled for Bail.

Held: Para 6

Considering the facts and circumstances of the case and the decision of Apex Court as referred above, in the present case the difference in the weight of recovered contraband mentioned in the recovery memo and in the report of Public Analyst is too much. It is not a minor difference because in a sample of 10 grams contraband there is difference of more that 6 grams. It is major difference. It will have its own adverse. It is not proper to record any finding at this stage. The same shall be considered at the stage of the trial on the basis of the evidence. According to prosecution version the recovered contraband was smack (brown sugar), but according to Public Analyst report it was found heroine. According to the N.D.P.S. Act both the contrabands are separately defined and both are not the same. Therefore, without expressing any opinion on the merits of the case the applicant is entitled for bail.

Case law discussed:
2005 (51) ACC-315 (SC) relied on.

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

1. Heard Sri Dileep Kumar, Sri Rajeev Gupta and Sri S.K. Mishra learned counsel for the applicant and the learned A.G.A.

2. This application is filed by the applicant Sanjay Kumar Verma with a prayer that he may be released on bail in case crime no. 64 of 2003 under Sections 18/21 N.D.P.S. Act., P.S. Jaspura, District Banda.

3. According to prosecution version the first informant S.I. Kamal Yadav got an information that the applicant had gone to Banda to purchase smack (Brown sugar). Therefore, the first informant along with some other police personnel proceeded towards the Banda where an information was given by Mukhvir Khas that the applicant was moving in Banda city, in a white maruti car and he was having smack. The Maruti Car bearing registration No. UP 32-W- 2594 of the applicant was intercepted. An attempt was made to collect the public witnesses but nobody was ready to become the witness. The applicant was arrested on 8.5.2003 at 7.55 p.m. At that time the applicant was driving a maruti car. He disclosed his name and he was asked to give his search and he was apprised about his right that search may be given by him before a Gazetted Officer or the Magistrate, but he stated that the search may be given before any Gazetted Officer. Therefore, through R.D. Set information was given to C.O. (City), Banda. On that information Sri Subhash Chandra Shakya C.O. (City), Banda came at the place of occurrence and at about 9.00 p.m. the search of the applicant was made and from a cavity of the Maruti car he taken out two polythene

bags containing brown powder, by its smell it was detected as smack. The applicant confessed that he was taking the recovered contraband to Lucknow and Barabanki for the purpose of sale. The recovered contraband was weighed. In the first packet it was found 470 grams and in the second packet it was found 535 grams and from each the packets 5 grams smack was taken and each was kept and sealed in two different match boxes. According to prosecution version 1005 grms smack was recovered from the possession of the applicant. According to prosecution both the match boxes were sealed on the spot and the remaining recovered contraband was also sealed.

4. It is contended by the learned counsel for the applicant that in the present case for the purpose of sample 5 grams recovered contraband was taken from the each packet and packed and sealed in two different match boxes. One match box was having the brand of Chameli and the second match box was having the Hurricane brand and according to Chemical Analyst report only 1970 mg heroine was found in a sample kept in the hurricane match box and 1950 mg heroine was found in a second sample kept in Chamely brand match box. According to prosecution version in each match boxes the recovered contraband was kept. According to prosecution version the total weight of sample sent for chemical analysis was 10 grams, but according to the report the weight of total sample was found 3.920 grams. There is a difference of 6.080 gms. There is a variation in the weight of the recovered sample and it is not a minor difference, because there is a difference of more than 6.00 grams. It is a major difference. In such a major difference no reliance can be placed on the prosecution story, because it is demolishing the factum of the recovery and sampling the same. It is further contended that according to prosecution version the recovered contraband was smack, but according to Chemical Analyst report dated 27.6.2003 it was found heroine which belies the whole prosecution story. It shows that the sample of the recovered contraband was not sent for the Chemical Analyst. The reliance has been place on the decision of the Apex court of the case of '***Rajesh Jagdamba Avasthi Vs. State of Goa {2005(51)ACC 315***}. In this case from the shoe of right foot 100 grams charas and from the shoe of left foot 115 grams charas was recovered. The recovered charas was packed and sealed in two envelops A and B, but according to Chemical Analyst report 98.16 grams charas was recovered from envelop A in which according to prosecution version 100 grams charas was packed and sealed and from envelop B 82.54 grams charas was found in which accoording to prosecution version 150 grams charas was packed and sealed. The accused was convicted by the trial court as well as by the High Court, but the accused was acquitted by the Apex Court by observing in para 12 and 13 of the Judgement, which is as under :-

"We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gms. The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by Junior Scientific Officer, P.W. 1. he found the quantity to be different. While in one envelop the difference was only

minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned Counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelop 'A' ignoring the quantity of charas found in envelope 'B'. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceedings is considerably eroded if it is found that the quantity actually found by P.W. 1 was less than the quantity sealed and sent to him. As he rightly emphasized, the question was no how much was seized, but whether there was an actual seizure and whether what was seized was really sent for chemical analysis to P.W. 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful.

This is not all. We find from the evidence of P.W. 4 that he had taken the seal from PSI Thorat and after preparing the seizure report, panchnama, etc. he carried both the packets to the police station and handed over the packets as well as the seal to inspector Yadav. According to him on the next day, he took back the packets from the police station and sent them to P.W. 3, Manohar Joshi, Scientific Assistant in the Crime Branch, who forwarded the same to P.W. 1 for chemical analysis. In these circumstances, there is justification for the argument that since the seal as well as the packets were in the custody of the same person, there was every possibility of the seized substance being tampered with and that is the only hypothesis on which the discrepancy in weight can be explained. The least that can be said in the facts of the case is that there is serious doubt about the truthfulness of the prosecution case."

5. It is opposed by the learned A.G.A. by submitting that there is minor discrepancies in the weight of the sample. According to prosecution version according to public analyst report due to such minor difference the prosecution story can not be demolished. It is further contended that there is minor difference between the smack and the heroine. The applicant has himself disclosed that he was having a smack. Therefore, in the recovery memo the recovered contraband was mentioned as smack (brown sugar), but according to Public Analyst report it was confirmed that the alleged recovered contraband was heroine and there is no other discrepancies in the prosecution story. Therefore, the applicant is not entitled for bail.

6. Considering the facts and circumstances of the case and the decision of Apex Court as referred above, in the present case the difference in the weight of recovered contraband mentioned in the recovery memo and in the report of Public Analyst is too much. It is not a minor difference because in a sample of 10 grams contraband there is difference of more that 6 grams. It is major difference. It will have its own adverse. It is not proper to record any finding at this stage. The same shall be considered at the stage of the trial on the basis of the evidence. According to prosecution version the recovered contraband was smack (brown sugar), but according to Public Analyst report it was found heroine. According to

the N.D.P.S. Act both the contrabands are separately defined and both are not the same. Therefore, without expressing any opinion on the merits of the case the applicant is entitled for bail.

7. Let the applicant Sanjay Kumar Verma involved in case crime no. 64 of 2003, under Sections 8/21/ N.D.P.S. Act, P.S. Jaspura, District Banda be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned.

Application Allowed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2005

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 51275 of 2004

Seema Mourya ...Petitioner

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

Counsel for the Petitioner:
Sri Ashok Khare
Sri S.D. Shukla

Counsel for the Respondents:
Sri Ajit Kumar Singh
S.C.

Constitution of India, Art. 226-Writ jurisdiction-Petition govt. selected for Special B.T.C.-based on forged and fabricated document-after verification-it was found that such marks sheet was never issued from university argument even on the basis of correct mark sheet admission can not be denied-held-not to be accepted-Teacher a noble profession-under writ jurisdiction-apart from discretion-equity must be in feavor of petitioner.

Held: Para 7

1. By means of this writ petition the petitioner has challenged the order dated 11.11.2004 passed Principal, District Institute of Education & Training, Robertsganj, District Sonbhaddra, Respondent no.3, by which the admission of the petitioner in the institute for undergoing the course of B.T.C. has been cancelled. A further prayer has been made for a direction in the nature of mandamus commanding the respondents to permit the petitioner to pursue her studies in the second year B.T.C. training course and to appear in the final examination.

2. The main ground for cancellation of the admission of the petitioner as set out in the impugned order is that in the admission form, the petitioner had declared that she had obtained 1143/1800 marks in B.A. examination which she

As such, in the aforesaid circumstances the petitioner would not be entitled to any indulgence by this Court, specially in its discretionary jurisdiction under Article 226 of the Constitution of India. For a petitioner to be entitled to the relief under this jurisdiction, she is not only expected to show that law is in her favour but that equity is also in her favour. In the present case, may be the petitioner would be entitled to admission on the basis of her correct marksheet but in the present case, equity being totally against her, as she had initially approached the authorities for admission on the basis of forged and fabricated marksheet and giving wrong declaration, she would not be entitled to any relief.

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

claims to have passed from Veer Bahadur Singh Purvanchal University, Jaunpur. After selection, the marksheet submitted by her was also to the effect that she had obtained 1143/1800 marks and on such basis she had got admission. However, on verification of the said marksheet from the respondent-University it was found to be forged and fabricated. After issuing notice to the petitioner on 29.10.2004, to which the petitioner submitted her reply on 2.11.2004 and on consideration of the same, the impugned order has been passed.

3. I have heard Sri Ashok Khare, learned Senior counsel assisted by Sri S.D.Shukla, learned counsel appearing for the petitioner as well as learned Standing Counsel appearing for the Respondent nos. 1 to 3 and Sri Ajit Kumar Singh, learned counsel appearing on behalf of Respondent no.4. Counter and rejoinder affidavits have been exchanged and with the consent of the learned counsel for the parties this writ petition is being disposed of at the admission stage itself.

4. Nowhere in the writ petition has it been stated that in the form submitted by the petitioner filled up by her at the time of seeking admission she had not declared that she had obtained 1143/1800 marks although that was the specific ground for canceling her admission. It has also not been stated in the writ petition that she had not produced the mark sheet showing that she had obtained 1143/1800 marks on the basis of which she had got admission. In paragraph 8 of the counter affidavit filed by the State-respondents it has been specifically averred that the petitioner herself filled up the data sheet in her own hand-writing and made the declaration that she had secured 1143 marks out of 1800 marks. There is no specific denial of the said assertion of the respondents.

5. The case of the petitioner now is that she had passed the B.A. Examination from Rajkiya Snatkottar Mahavidyalay Obra, Sonbhadra affiliated to Veer Bahadur Singh Purvanchal University, Jaunpur and had obtained 809 out of 1800 marks and even if such marks are taken into account, she would be selected for undergoing the B.T.C. course and as such there is no justification for canceling her admission. In the counter affidavit filed by the respondent-University, although it is accepted that the petitioner has passed B.A. with 809/1800 marks but it is categorically stated that the marksheet which had been submitted by the petitioner and had been sent to the University for verification was forged and fabricated as no such marksheet had ever been issued by the University.

6. The petitioner is seeking admission in a course after which she would be appointed as a teacher, which is a noble profession. It being not denied anywhere in the writ petition that she had filled up the form stating that she had obtained 1143/18000 marks and had submitted a marksheet supporting the same, which was ultimately found to be forged and fabricated, such person should not be allowed to undergo teacher's training. When the very foundation of seeking admission is on the basis of forgery, even if such a candidate is eligible for admission on the basis of her correct marksheet, the same should not be permitted. It appears that the petitioner had submitted the forged marksheet showing that she had obtained very high marks only in order to ensure and guarantee her admission. She did not want

to take a chance of being denied admission on the basis of her actual marksheet as she had actually obtained much lesser marks on which basis she may or may not have been selected for admission in the B.T.C. course but she knew that on the basis of the fabricated marksheet she would be assured of admission.

7. As such, in the aforesaid circumstances the petitioner would not be entitled to any indulgence by this Court, specially in its discretionary jurisdiction under Article 226 of the Constitution of India. For a petitioner to be entitled to the relief under this jurisdiction, she is not only expected to show that law is in her favour but that equity is also in her favour. In the present case, may be the petitioner would be entitled to admission on the basis of her correct marksheet but in the present case, equity being totally against her, as she had initially approached the authorities for admission on the basis of forged and fabricated marksheet and giving wrong declaration, she would not be entitled to any relief.

Accordingly, this writ petition is dismissed. No order as to cost.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2006

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

Civil Misc. Contempt Appeal No.25 of 2004

Shiv Lal ...Respondent No.3/Applicant
Versus
Ram Babu Dwivedi ...Opposite party

Counsel for the Appellant:
Sri Umesh Narain Sharma
Sri Anil Kumar Bajpai

Counsel for the Opposite Party:
Sri D.S. Srivastava
Sri H.R. Misra
A.G.A.

(A) Contempt of Courts Act-1972-Section 12-Civil Contempt-willful disobedience of interim Orders-about reinstatement and the arrears of salary-delay caused due to Transfer and posting of the executive officer of the concerned Nagar Panchayat-held-can not be said to be willful defiance-unconditional apology can not be refused.

Held: Para 30

Thus in given facts and circumstances of the case, we are of the considered opinion that the delayed compliance of order passed by writ court as well as contempt court referred earlier cannot be said to be wilful defiance and disobedience of the interim order either passed by writ court or order dated 18.9.2004 passed by contempt court and the appellant cannot be held guilty of committing any contempt punishable under the provisions of Contempt of Court Act. Besides this, in the affidavit filed in the appeal, the appellant has also tendered his unconditional apology as it was tendered before the learned Single Judge dealing with the contempt application. In given facts and circumstances of the case we do not find any justification to reject the same accordingly the unconditional apology tendered by the appellant is hereby accepted.

(B) Constitution of India Art. 141-Binding precedence-longer Bench of Supreme Court in Mohd. Yakoob Khan's

case-taken view so long the stay vacate application in pending writ petition finally decided-the contempt proceeding is premature-while the relevant smaller Bench of the Apex Court taken otherwise view-held-even if smaller Bench considered the earlier larger Bench decision-can not be construed at variance with larger Bench decision.

Held: Para 20

Thus in view of law laid down by the Hon'ble Apex Court we have no hesitation to hold that law laid down by earlier larger Bench of Hon'ble Apex Court will prevail over the later smaller Bench decision of the Hon'ble Apex Court, even if later smaller Bench of Hon'ble Apex Court considered the earlier larger Bench decision the same cannot be construed at variance with the larger Bench decision.

(C) Contempt of Court Act 1972-Section 12-Civil contempt-Order of punishment-without framing the charges-without affording an opportunity of fair hearing-held-Order can not sustained.

Held: Para 26

Therefore, it was necessary for learned single Judge to frame specific charge against the appellant and intimate him asking his reply thereon and after affording him opportunity of fair hearing, if he would have been found guilty of committing contempt for wilful disobedience of the order passed by this court only in that eventuality any order punishing the appellant could be justified. But from the perusal of the records, it is clear that on 6th October 2004 the appellant was impleaded as opposite party no. 3 in the contempt application for the first time at the instance of respondent herein through an Impleadment application. There upon only notice was issued to the appellant directing him to appear in person before the court on 3.11.2004. On that day also neither any specific charge either of non-compliance of the order was framed nor any charge regarding delayed compliance of the order passed by such courts has been framed and served upon the appellant nor he was asked to reply any such charge rather learned Single Judge has straightway assumed the facts stated in the affidavit filed in support of Impleadment application as correct and held the appellant guilty of committing contempt of this court. This approach of learned single Judge in our considered opinion, does not satisfy requirement of law and falls short of it, therefore held to be erroneous and contrary to law. Accordingly the impugned order passed by learned Single Judge is not sustainable in the eye of law and liable to be set aside.

Case law discussed:

1992 (2) UPLBEC-1166
1995 (Suppl) (4) SCC-465
1998 (8) SCC-640
2002 (1) SCC-766
1989 (4) SCC-418
1976 (3) SCC-677
1985 (Suppl) SCC-280
AIR 1974 Mad. 313
AIR 1936 PC-141
AIR 1959 SC-186
AIR 1936 P.C.-141
AIR 1954 SC-186
AIR 1956 Cal.-484
1922-1 Q.B.-95
AIR 1960 Alld. 231

(Delivered by Hon'ble Sabhajeet Yadav,J)

1. This appeal is directed against the judgment and order of conviction and sentence dated 3.11.2004 passed by the learned Single Judge of this Court in Contempt Petition No. 2101 of 2004 Ram Babu Dwivedi Vs. Smt. Rama Devi and others under the contempt of Courts Act whereby the Appellant is convicted and sentenced for a period of 15 days imprisonment with fine of Rs.1000/- and in failure to deposit the aforesaid amount of fine the appellant is further directed to

under go imprisonment for a period of one week.

2. The facts of the case in brief are that the opposite party was working as Tax Moharrir cum clerk in the Nagar Panchayat Kabrai District Mahoba. He was placed under suspension by an order dated 28.2.2003. The aforesaid order was challenged by him in writ petition No.14661 of 2003. Vide order dated 4.4.2003 passed by writ court the aforesaid order has been stayed. The interim order dated 4.4.2003 is reproduced as under:

"In view of the aforesaid submission it is hereby directed that the operation of the order passed by the respondent no.5 dated 28.2.2003 (Annexure 1 of the writ petition) shall remain stayed and the petitioner will not be treated under suspension till the next date of listing. However, it is made clear that enquiry against the petitioner shall go on to which the petitioner undertakes to cooperate which will be taken to its logical end."

3. It is alleged that this interim order was duly served on the opposite parties of the writ petition but they failed to comply with the order. The opposite party herein approached the District Magistrate who had also passed the orders directing the Executive Officer to comply with the order of writ court, but the order was not complied with hence the contempt petition.

4. On 23.7.2003 while issuing notice to the opposite parties in the contempt petition they were given one more opportunity to comply with the order within a month. It appears that aforesaid orders were not complied with and the counter affidavit was filed stating therein that the stay vacation application and Special Appeal against the order dated 4.4.2003 passed in the writ petition is pending. The opposite party no.2 in the contempt application has filed his affidavit stating that he has already passed an order dated 19.8.2003 directing that the charge of post be handed over to the applicant but the opposite party no.1 in the contempt petition did not comply with the aforesaid orders as such vide order dated 20.5.2004 the learned Single Judge gave an opportunity to the opposite party no.1 in the contempt petition either to get the stay vacation application disposed of or obtain any interim stay order in special appeal. In the case no such order is obtained she was directed to appear in person. Thereafter, it appears that an order of removal of opposite party no.1 was passed by the State Government. Opposite party no.1 has challenged her removal and obtained stay order from the court, which is in operation. It was brought on record that the Special Appeal is time barred and till date the delay has not been condoned. The enquiry has been completed and the applicant has been exonerated from the charges but the opposite party no. 1 has not yet passed any final order thereon. It appears that on the basis of the aforesaid facts and circumstances of the case the Superintendent of Police, Mahoba was directed forthwith to take into custody Smt.Rama Devi opposite party no.1 in contempt petition and to cause her production in custody before the Court on 18.8.2004. However, on 19.8.2004 learned Single Judge framed the charge against opposite party no.1 which reads as under:-

"You Smt. Rama Devi, Chairman, Nagarpalika, Kabrai District Mahoba

show cause why you should not be brought and punish under section 12 of the Contempt of Courts Act for wilful and deliberate violation of order dated 4.4.2003 in writ petition no.14661 of 2003. Your reply can be filed on or before 13.9.2004 after serving a copy on the counsel for the applicant. The case was directed to be listed on 17.9.2004 by which time the counsel for the applicant was also directed to file reply, if any."

5. On 18.9.2004 the learned Single Judge has observed that it transpires that the applicant has since been reinstated, however, his arrears of salary and current salary has not been paid. Whosoever is holding the charge may release the arrears and current salary of the applicant. The case was directed to be listed on 6th October 2004. On this date the learned Single Judge has permitted the counsel for the applicant to implead Shri Shiv Lal, S.D.M. Mahoba/Administrator, Nagar Palika, Kabrai District Mahoba appellant herein as opposite party no.3 in the contempt petition and issued notice directing him to appear in the Court on date fixed 3.11.2004. On 3.11.2004 the appellant opposite party no.3 of contempt application appeared before the Court and filed an affidavit stating that the order has been complied with and payment has been made to the applicant on 29.10.2004. However, he did not reply the specific allegations made in the affidavit accompanying to the Impleadment application dated 6.10.2004.

6. On 3.11.2004 it appears that learned Single Judge while taking note of the allegations mentioned in the affidavit filed in support of the Impleadment application has observed that serious allegations made in the aforesaid affidavit have not been specifically denied. The Court is left with no other option but to presume the same to be true and further went on recording a finding that Shri Shiv Lal, S.D.M., Mahoba is guilty under section 12 of the Contempt of Courts Act. Although an apology was tendered but the same was not accepted. The Court has directed the learned counsel for the parties to address on the question of sentence on the aforesaid date. After hearing the parties on the question of sentence the learned Single Judge has held that opposite party 3 has not only deliberately and wilfully refused to obey the command of the Court, but he has also harassed the applicant for approaching the writ court and the contempt court and a fresh charge sheet has been issued against the applicant, on the very same charges for which earlier inquiry had already been held in pursuance of the order of the writ court and he has been exonerated there from. Thus mere fine would not meet the ends of justice and recorded his opinion that the facts of the case demands that Shri Shiv Lal S.D.M. Mahoba be sentenced to simple imprisonment of 15 days and a fine of Rs.1000/- payable to the Registrar General of this Court within a month. In case of failure to deposit the fine the opposite party no.3 shall further undergo 7 days simple imprisonment in lieu thereof. Against this order of conviction and sentence the abovenoted appeal has been filed by the appellant (opposite party No.3 of contempt application) under Section 19 of the Contempt of Courts Act.

We have heard Sri A.K. Bajpai, learned counsel for the appellant and Sri D.S. Srivastava for the respondent.

7. The thrust of submission of the learned counsel for the appellant is that on 6th October, 2004 the appellant has been impleaded first time as opposite party 3 in the contempt petition and prior to it he was not party to the proceeding in question and he was directed to appear in person on 3.11.2004 on which date the impugned order has been passed. Since the appellant has complied with the order passed by this Court referred earlier, therefore, he did not make specific reply to the averments contained in the affidavit filed in support of Impleadment application moved by the applicant impleading the appellant as opposite party no.3 in the contempt petition. However, he tendered his unconditional apology filed on 3.11.2004 stating that order passed by this Court in the writ petition as well as contempt petition has been complied with both in letters and spirit. Except the allegations contained in the affidavit filed in Impleadment application neither any charge has been framed against the appellant nor he has been specifically asked to reply any charge in the contempt proceedings rather the learned Single Judge has relied upon the allegations made in the affidavit filed in support of Impleadment application and straightway held the appellant guilty of the charge alleged in the affidavit filed in support of the Impleadment application. Thus the appellant has been denied opportunity of hearing to have his say in the matter against the charge which were found proved against him without framing of any such charge and without asking his reply thereon. In support of his argument the learned counsel for the appellant has further submitted that since the contempt proceedings is quasi criminal in nature therefore before conviction order is passed in the contempt proceedings it is necessary to frame the charge and prove the same against the appellant beyond reasonable doubt. Since no such steps were taken before convicting the appellant as such the conviction and sentence of imprisonment is wholly erroneous, illegal and against well known practice of this court and not sustainable in the eye of law.

8. The learned counsel for the appellant has further urged that in given facts and circumstances of the case the appellant cannot be held guilty of the charges of contempt levelled against him. Firstly on account of fact that against the interim order passed in the writ petition the stay vacation application has already been moved by the respondents in the writ petition along with the counter affidavit and special appeal has also been filed against the same interim order along with the delay condonation application and stay application, but without waiting for final disposal of stay vacation application moved in writ petition as well as stay application moved in special appeal filed against the interim order passed by learned Single Judge in the writ petition in question he proceeded with the contempt matter and punished the appellant in such contempt proceeding before disposal of stay vacation application as well as stay application in special appeal rendering the aforesaid proceeding infructuous. Secondly in any view of the matter the appellant did not commit any contempt of this Court as he did not violate or defied any interim order passed either in the writ petition or in the contempt petition referred earlier. In case any delay was caused in compliance of the orders passed by the writ court as well as contempt court the delay was not on account of the personal fault of the

appellant rather it was unavoidable in given facts and circumstances of the case. At any rate the delay in compliance cannot be held to be wilful defiance or deliberate defiance of any interim order passed by writ court or contempt court. Thus the impugned judgment and order passed by learned Single Judge is not sustainable in the eye of law. Contrary to it learned counsel appearing for opposite party has supported the impugned judgment and order passed by learned Single Judge and made serious attempt to justify the impugned order.

9. Having gone through the rival contention and submission of the parties following question arises for consideration in this appeal.

1. As to whether in given facts and circumstances of the case the learned Single Judge was justified in proceeding with the contempt application before the disposal of the stay vacation application moved on behalf of the respondents in the writ petition in as much as stay application moved in the special appeal filed against the interim order dated 4.4.2003 passed in Civil Misc. Writ Petition No. 14661 of 2003?

2. As to whether learned Single Judge was justified in holding the appellant guilty of contempt without framing any specific charge against him and without asking any reply thereon from the appellant?

3. As to whether the appellant is guilty of committing any wilful and deliberate contempt on account of any wilful and deliberate defiance of interim order passed by the writ court and/or in the contempt proceedings?

10. Now coming to the first question as to whether As to whether in given facts and circumstances of the case the learned Single Judge was justified in proceeding with the contempt proceedings before the disposal of the stay vacation application moved on behalf of the respondents in the writ petition in as much as stay application moved in the special appeal filed on behalf of the respondents against the interim order dated 4.4.2003 passed in Civil Misc. Writ Petition No. 14661 of 2003? In this connection at the very out set it is necessary to point out that the Contempt of Courts Act 1971 defines contempt of courts and civil contempt as under:

2. Definitions.--In this Act, unless the context otherwise requires.

(a) "Contempt of Court" means civil contempt or criminal contempt;

(b) "Civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a Court or wilful breach of an undertaking given to a Court;

11. From a bare reading of the aforesaid provisions of Act it is clear that before holding a person guilty of civil contempt it is necessary to prove that there is a wilful disobedience by the said person in judgment, decree, direction, order, writ or other process of the court or wilful breach of an undertaking given to a Court. Thus primary function of this Court dealing with the contempt proceedings in civil contempt is of the nature of execution court to ensure compliance of the judgment, decree, direction, order writ or other process of

the court, the violation of which is complained of in such proceedings.

12. Now coming to the question in issue it is necessary to point out that Hon'ble Apex Court has dealt with similar issue earlier at various occasions. In ***J & K Vs. Mohd. Yaqoob Khan and others reported in (1992) 2 UPLBEC 1166***. In para 5 and 6 of the judgment Hon'ble Apex Court observed as under:-

"5. We find great force in the argument of Mr.Salve that so long the stay matter in the writ petition was not finally disposed of, the further proceeding in the contempt case was itself misconceived and no orders therein should have been passed. Mr. Phandare appearing on behalf of the writ petitioner, who is respondent before us, has strenuously contended that the orders passed in the contempt proceedings should be treated to have disposed of the stay matter in the writ petition also. He laid great emphasis on the fact that the counsel for the respondents in the writ petition had been heard before the orders were issued. He invited our attention to the merit of the claim. It is argued that the order dated March 19, 1990 must, in the circumstances, be treated to have become final and, therefore, binding on the State and the High Court was right in issuing the further direction by way of implementation of earlier order.

We do not agree. The scope of a contempt proceeding is very different from that of the pending main case yet to be heard and disposed of (in future). Besides, the respondents in a pending case are at a disadvantage if they are called upon to meet the merits of the claim in a contempt proceeding at the risk of being punished. It is, therefore, not right to suggest that it should be assumed that the initial order of stay got confirmed by the subsequent orders passed in the contempt matter.

6. We, therefore, hold that the High Court should have first taken up the stay matter without any threat to the respondents in the writ case of being punished for contempt. Only after disposing it of, the other case should have been taken up. It is further significant to note that the respondents before the High Court were raising a serious objection disputing the claim of the writ petitioner. Therefore, an order in the nature of mandatory direction could not have been justified unless the Court was in a position to consider the objections and record a finding, prima facie in nature, in favour of the writ petitioner. Besides challenging the claim on merits, the respondents is entitled to raise a plea of no maintainability of a writ application filed for the purpose of executing a decree. It appears that at an earlier stage the decree in question was actually put in execution when the parties are said to have entered into a compromise. According to the case of the State the entire liability under the decree (treated with the compromise) has already been discharged. The dispute, therefore, will be covered by Section 47 of the Code of Civil Procedure. It will be a serious question to consider whether in these circumstances the writ petitioner was entitled to maintain his application under Article 226 of the Constitution at all. We do not want to decide any of these controversies between the parties at this stage except holding that the orders passed in the contempt proceeding were not justified, being pre-mature, and must, therefore, be entirely ignored. The High Court should first take up the stay matter in the writ

case and dispose it of by an appropriate order. Only thereafter it shall proceed to consider whether the State and its authorities could be accused of being guilty of having committed contempt of Court."

13. The law laid down in Mohd.Yaqoob's Khan's case (supra) has been followed in subsequent decision of the Apex Court in ***Modern Food Industries (INDIA) Ltd. and another Vs. Sachidanand Dass and Another 1995 Supp. (4) SCC 465*** wherein in para 4,5 and 6 of the decision Hon'ble Apex Court held as under :-

"4. Before the High Court, appellants urged that before any contempt proceedings could be initiated, it was necessary and appropriate for the Division Bench to examine the prayer for stay, or else, the appeal itself might become infructuous. This did not commend itself to the High Court which sought to proceed with the contempt first. We are afraid, the course adopted by the High Court does not commend itself as proper. If, without considering the prayer for committal for contempt, the appellants may find, as has now happened, the very purpose of appeal and the prayer for interlocutory stay infructuuo7us. It is true that a mere filing of an appeal and an application for stay do not by themselves absolve the appellants from obeying the order under appeal and that any compliance with the learned Single Judge's order would be subject to the final result of the appeal. But then the changes brought about in the interregnum in obedience of the order under appeal might themselves be a cause and source of prejudice. Wherever the order whose disobedience is complained about is appealed against and stay of its operation is pending before the Court, it will be appropriate to take up for consideration the prayer for stay either earlier or at least simultaneously with the complaint for contempt. To keep the prayer for stay stand by and to insist upon proceeding with the complaint for contempt might in many conceivable cases, as here, cause serious prejudice. This is the view taken in State of J & K v. Mohd. Yaqoob Khan.

5. In the present case, under the threat of proceedings of contempt, the appellants had to comply with the order of the learned Single Judge notwithstanding the pendency of their appeal and the application for stay. The petitioners are confronted with a position where their stay application is virtually rendered infructuous by the steps they had to take on threat of contempt.

6. We, accordingly, direct that all further proceedings in the contempt proceedings be stayed. It will be appropriate for the High Court to take up and dispose of the application for stay without reference to the developments in the interregnum, namely, that the respondent had to obey the order of the learned Single Judge under pain of proceedings of contempt. Depending upon the outcome of the appellants' application for stay, the further question whether or not the reinstatement should be reversed would arise."

14. Again in a slightly different factual backdrop Hon'ble Apex Court has considered similar controversy in ***Dr.Phunindra Singh and others Vs. K.K.Sethi and Another , 1998 (8) SCC 640*** wherein in para 2 of the decision the Hon'ble Apex Court has observed as under:

"2. Heard learned counsel for the parties. In our view, in the facts of the case, particularly when the order passed by the learned Single Judge of the High Court was not stayed by the Division Bench, the contempt petition should have been disposed of on merits instead of adjourning the same till disposal of the appeal, so that question of deliberate violation of the subsisting order of the Court is considered and enforceability of the court's order is not permitted to be diluted. In the acts of the case, we feel that the contempt petition should be disposed of within a period of three months from the date of the communication of this order and we order accordingly. It is further directed that before disposal of the contempt petition, the pending appeal should not be taken up for hearing. The appeal is accordingly disposed of."

In ***Suresh Chandra Poddar Vs. Dhani Ram and others 2002 (1) SCC 766***, the Hon'ble Apex Court has considered again similar controversy and in para 9 and 11 of the decision held as under:-

"9. Section 12 of the contempt of Courts act, 1971 has indicated a caution that while dealing with the powers of contempt, the court should be generous, in discharging the contemner if he tenders an apology to the satisfaction of the court. In the present case the apology tendered was found satisfaction of the court. In the present case the apology tendered was found to be not genuine by the Tribunal. We are dismayed, if not distressed, that despite delineating on all the steps adopted by the appellant for challenging the order of the Tribunal before the High Court and despite the fact that the appellant had implemented the order even though there was no time schedule to do so, the Tribunal has chosen to depict the apology tendered by the appellant as one without contrition.

11. Even if the appellant had not implemented the order and if the appellant had brought to the notice of the Tribunal that the order of the Tribunal is under challenge before the High Court under Article 226 of the Constitution of India (the course which has been judicially recognized by a seven-Judge Bench of this Court in ***L. Chandra Kumar v. Union of India*** *the Tribunal should have been slow to proceed against the party in a contempt action. Of course it can be said that no stay was granted by the court when the appellant moved the Division Bench of the High Court under Article 226 of Constitution. Not granting the stay by itself is not enough to speed up proceedings against a person in contempt because the very order is yet to become final. At any rate the Tribunal should have directed the appellant to implement the direction, in the absence of the stay order from the High Court, within a time framed fixed by it. We would have appreciated if the Tribunal had done so and then considered whether action should be taken in the event of the non implementation of the order after the expiry of the said time-frame."*

15. Thus from a close analysis of the decisions of Hon'ble Apex Court referred herein before it appears that the three Judges Bench of Hon'ble Apex Court in **Mohd. Yaqoob Khan's** case (supra) has held that so long the stay matter in the writ petition was not finally disposed of the further proceeding in the contempt case was itself misconceived and no orders should have been passed. The

Hon'ble Apex Court has further held that in the circumstances of the case, the contempt proceeding is premature and liable to be ignored. In the aforesaid case the contempt proceedings were drawn on account of non-compliance of interim stay order against which stay vacation application of respondents in writ petition was pending before the High Court. The same view has been reiterated by two Judges Bench of Hon'ble Apex Court in **Modern Food Industries** case (supra) wherein final order of learned single Judge was challenged at appellate forum of same High Court and stay application in appeal was pending consideration, meanwhile contempt proceedings were drawn to implement the order of learned single Judge before disposal of stay application. In the aforesaid facts and situation of the case Hon'ble Apex Court has held that wherever the order whose disobedience complained about is appealed against and stay of its operation is pending before the court, it will be appropriate to take up for consideration the prayer for stay either earlier or atleast simultaneously with complaint for contempt. To keep the prayer for stay stand by and to insist upon proceeding with the complaint for contempt might in many conceivable cases, as here, cause serious prejudice. Although in **Dr. Phurindra Singh & others** case (supra) two Judges division Bench of the Hon'ble Apex Court has taken different view in the matter without noticing earlier decision of larger and co-ordinate Bench but it was in a slightly different factual backdrop of the case, wherein the order passed by learned single Judge was not stayed by the Division Bench of the same High Court, the Hon'ble Apex Court has taken different view in the matter and has held that when the order passed by learned single Judge of the High Court was not stayed by Division Bench, the contempt petition should have been disposed of on merits instead of adjourning the same till disposal of appeal so that the question of deliberate violation of subsisting order of the court is considered and enforceability of the court's order is not permitted to be diluted. Again in **Suresh Chandra Poddar's** case (supra) two Judges Division Bench of Hon'ble Apex Court has taken virtually same and similar view as was taken in first two cases referred earlier but without making reference of those cases and in given facts and situation of the case under consideration Hon'ble Apex Court has held that not granting the stay by itself is not enough to speed up proceedings against a person in contempt because the very order is yet to become final. At any rate the tribunal should have directed the appellant to implement the direction, in absence of stay order from the High Court, wherein a time frame fixed by it. We would have appreciated if the tribunal had done so and then considered whether the action should be taken in the event of the non-implementation of the order after expiry of said time frame.

16. Now before examining the extent of applicability of law laid down by the Hon'ble Apex Court in given facts and circumstances of the case, the question arises for consideration as to whether earlier decision of larger Bench of Hon'ble Apex Court rendered in Mohd. Yaqoob Khan's case followed in Modern Food Industries Case would prevail and be binding upon this court or later decision of two Judges smaller Bench, of Hon'ble Apex Court rendered in Dr. Phunindra Singh and others case? In this regard it is necessary to point out, as

discussed earlier that virtually there is no real conflict between the aforesaid decisions. The later decision has been rendered by the Hon'ble Apex Court in altogether different factual back drop of the case. Therefore, the law laid down by Hon'ble Apex Court should be understood in context of the case in which the aforesaid decisions were rendered, but assuming for the sake of clarification, if there exist any direct conflict between the decision of earlier larger Bench of Apex Court and the decision of later smaller Bench, which of the either decisions have binding effect upon this court, is a question, has already received consideration of Hon'ble Apex Court earlier at several occasions.

17. In **N. Meera Rani Vs. Government of Tamil Nadu and another, (1989) 4 S.C.C. 418**, in para 21 of the decision Hon'ble Apex Court has held that the decision of later Benches following a Constitution Bench decision can not be construed at variance with the larger Bench decision. For ready reference para 21 of the decision is reproduced as under :

"21. A review of the above decisions reaffirms the position which was settled by the decision of a Constitution Bench in Rameshwar Shaw case. The conclusion about validity of the detention order in each case was reached on the facts of the particular case and the observations made in each of them have to be read in the context in which they were made. None of the observations made in any subsequent case can be construed at variance with the principle indicated in Rameshwar Shaw case for the obvious reason that all subsequent decisions were by benches comprised of lesser number of judges. We have dealt with the matter at some length because an attempt has been made for some time to construe some of the recent decisions as modifying the principle enunciated by the Constitution Bench in Rameshwar Shaw case."

18. In **Union of India and another Vs. K. S. Subramanian , (1976) 3 S.C.C. 677**, in para 12 of the decision Hon'ble Apex Court has held as under:

"12. We do not think that the difficulty before the High Court could be resolved by it by following what it considered to be the view of a Division Bench of this Court in two cases and by merely quoting the views expressed by larger benches of this Court and then observing that these were insufficient for deciding the point before the High Court. It is true that, in each of the cases cited before the High Court, observations of this Court occur in a context different from that of the case before us. But, we do not think that the High Court acted correctly in skirting the views expressed by larger Benches of this Court in the manner in which it had done this. The proper course for a High Court, in such a case, is to try to find out and follow the opinions expressed by larger benches of this Court in preference to those expressed by smaller benches of the Court. That is the practice followed by this Court itself. The practice has now crystallized into a rule of law declared by this Court. If, however, the High Court was of opinion that the views expressed by larger benches of this Court were not applicable to the facts of the instant case it should have said so giving reasons supporting its point of view."

19. The aforesaid view has been reiterated by Hon'ble Apex Court by quoting the same in para 122 of the decision rendered in **State of Orissa and others Vs. Titaghur Paper Mills Company Ltd. and another, 1985 (supp.) S.C.C. 280**,

20. Thus in view of law laid down by the Hon'ble Apex Court we have no hesitation to hold that law laid down by earlier larger Bench of Hon'ble Apex Court will prevail over the later smaller Bench decision of the Hon'ble Apex Court, even if later smaller Bench of Hon'ble Apex Court considered the earlier larger Bench decision the same cannot be construed at variance with the larger Bench decision.

21. Now having regard to the law laid down by earlier larger Bench of Hon'ble Apex Court in **Mohd. Yaqoob Khan's** case followed in subsequent two Judges Division Bench of Apex Court it was necessary for the learned single Judge to defer/postpone the contempt proceedings till the disposal of the stay vacation application moved against the interim order dated 4.4.2003 passed in writ petition or till the disposal of the stay application moved in special appeal or it was necessary for the learned Single Judge to examine the bonafide of the respondents of the writ petition in moving such stay vacation application as well as in filing such special appeal against the interim order in question and come to a definite conclusion as to whether the respondents of the writ petition have genuinely and bonafide moved the stay vacation application and filed the special appeal or not. Unless such efforts were made by the learned Single Judge it was not desirable for the learned Single Judge to proceed with the contempt proceedings.

22. However from the perusal of impugned order it appears that at one stage of proceedings, the learned Single Judge has given an opportunity to the opposite party in the contempt petition to get the stay vacation application moved in the writ petition disposed of or obtain any interim order in the special appeal by a specific date and time with caution that In case the opposite party would fail to do so, learned Single Judge would proceed with the contempt matter and it appears that on such failure within such time frame, the learned Single Judge has proceeded with the contempt proceeding without awaiting any more and without examining the genuineness and bonafide of the actions of the opposite party in moving the stay vacation application in writ petition and stay application in special appeal against the interim order passed in writ petition in question. Thus in our considered opinion the action of the learned Single Judge in this regard does not satisfy the law laid down by the Hon'ble Apex Court. However, having regard to the facts and circumstances of the case and subsequent developments, which have taken place, we need not to go into this question further more.

Now next question arises for consideration as to whether the learned Single Judge was justified in punishing the appellant for committing contempt of the Court without framing and intimating any charge against him and without asking his reply thereon and without affording any opportunity of hearing in respect of such charge? In this connection, it is necessary to point out that the proceedings for contempt are

quasi criminal in nature and court must be satisfied about the guilt of contemner beyond reasonable doubt before action is taken there on. In the matter of **B. Yagnanarayaniah, AIR 1974 (Madras) 313,** in para 11 and 12 of the decision **Madras High Court** has held as under:

"11. In view of these decisions and the statutory provisions, it is quite clear that this court has jurisdiction to initiate contempt proceedings suo motu even in a civil contempt as defined in Section 2 of Act 70 of 1971, that no particular form of procedure is necessary so long as the proceedings are initiated giving an opportunity to the contemnor to defend himself and that Art. 21 of the Constitution is not in any way violated thereby. We are also satisfied that the procedure adopted in this case was correct, that the appellant was made aware of the charge against him and that he was given a fair opportunity to defend himself. The order dated 9.2.1973, itself gave full reasons which in the opinion of the learned Judge made him think that the title deeds were with the appellant. When he was asked to show cause why he should not be proceeded with for contempt, the appellant filed an affidavit, he was heard and only thereafter the order imposing the punishment was passed.

12. Before dealing with the merits, we must point out that proceedings for contempt's are quasi-criminal in nature as pointed out by the Privy Council in Ambard Vs. Attorney-General for Trinidad and Tobago, 1936 AC 322 and 329 = (AIR 1936 PC 141), referred to by the Supreme Court in 1954 SCR 454 and 460 = (AIR 1954 SC 186= 1954 Cri LJ 460), and that therefore we must be satisfied about the guilt of the appellant beyond reasonable doubt."

23. In the above noted decision Madras High Court has placed reliance on the decision of Their Lordship of Privy Council and Hon'ble Apex Court. In **Andre Paul Terence Ambard Vs. The Attorney-General of Trinidad and Tobago, AIR 1936 Privy Council 141** at page 143 Their Lordship of Privy Council held as under:

"But apart from any question of this kind their Lordships have come clearly to the conclusion that it is competent to His Majesty in Council to give leave to appeal and to entertain appeals against orders of the Courts overseas imposing penalties for contempt of Court. In such cases the discretionary power of the Board will no doubt be exercised with great care. Everyone will recognize the importance of maintaining the authority of the Courts in restraining and punishing interferences with the administration of justice whether they be interferences in particular civil or criminal cases or take the form of attempts to depreciate the authority of the Courts themselves. It is sufficient to say that such interferences when they amount to contempt of Court are quasi-criminal acts, and orders punishing them should, generally speaking, be treated as orders in criminal cases, and leave to appeal against them should only be granted on the well-known principles on which leave to appeal in criminal cases is given."

24. In **Sukhdev Singh Vs. Hon'ble C.J., S. Teja Singh and the Hon'ble Judges of the Pepsu High Court at Patiala, AIR 1954 SC 186**, in para 24 of the decision Hon'ble Apex Court held as under :

24……We hold, therefore, that the Code of Criminal Procedure does not apply in matters of contempt triable by the High Court. The High Court can deal with it summarily and adopt its own procedure. All that is necessary is that the procedure is fair and that the contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself. This rule was laid down by the Privy Council in -"In re Pollard', (1845) LR 2 PC 106 at p. 120 (N), and was followed in India and in Burma in -"Vallabhdas Jairam Vs. Narronjee Permanand', 27 Bom 394 at p. 399 (O) and -"Ebrahim Mamoojee Parekh Vs. Emperor', AIR 1926 Rang 188 at procedural provision. 189-190 (P), In our view that is still the law."

25. In **Aswini Kumar Rath & others Vs. P.C. Mukherjee and others A.I.R. 1965 Cal. 484**, in para 11of the decision Court held as under:

"11. In my judgment, the analogy of execution proceeding would not extend to a proceeding for contempt. Contempt of court for disobedience of an order of Court, except where it relates solely to a private injury, is an offence of a criminal nature, and a proceeding relating to the breach of a prerogative writ is no exception to this proposition ***R. Vs. Ledgard (184) 1 Q.B. 616(619),*** *because it interferes with the liberty of a persons;* ***R. Vs. Poplar Borough Council, 1922-1 KB 95 (127);*** *hence the proceeding all through takes the shape of a person charged with an offence of which he has to exculpate himself (1841) 1 Q.B. 616(ibid), and the guilt of the respondent has to be strictly established both substantively and procedurally vide Oswald on Contempt, p. 17: Gorden Vs. Gordon (1946) 1 All. E.R. 247 (253) C.A.).*

26. Thus in view of clear legal position there can be no scope for doubt to hold that proceeding for contempts are quasi-criminal in nature, therefore, guilt must be established beyond reasonable doubt. Although the Code of Criminal Procedure does not apply in the matters of contempt triable by the High Court, but the High Court can deal with it summarily and adopt its own procedure. All that is necessary is that the procedure is fair and that contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself, before holding him guilty of committing any contempt. Therefore, it was necessary for learned single Judge to frame specific charge against the appellant and intimate him asking his reply thereon and after affording him opportunity of fair hearing, if he would have been found guilty of committing contempt for wilful disobedience of the order passed by this court only in that eventuality any order punishing the appellant could be justified. But from the perusal of the records, it is clear that on 6th October 2004 the appellant was impleaded as opposite party no. 3 in the contempt application for the first time at the instance of respondent herein through an Impleadment application. There upon only notice was issued to the appellant directing him to appear in person before the court on 3.11.2004. On that day also neither any specific charge either of non-compliance of the order was framed nor any charge regarding delayed compliance of the order passed by such courts has been framed and served upon the appellant nor he was asked to reply any such charge rather

learned Single Judge has straightway assumed the facts stated in the affidavit filed in support of Impleadment application as correct and held the appellant guilty of committing contempt of this court. This approach of learned single Judge in our considered opinion, does not satisfy requirement of law and falls short of it, therefore held to be erroneous and contrary to law. Accordingly the impugned order passed by learned Single Judge is not sustainable in the eye of law and liable to be set aside.

27. Now coming to the next question as to whether the appellant was guilty of wilful defiance of the interim order dated 4.4.2003 passed by writ court and the order dated 18.9.2004 passed by contempt court or not? In this connection it is necessary to deal with legal aspect of the matter first before examining the factual aspect of the matter involved in the case. It is well settled that disobedience of the order of court in order to constitute punishable contempt must be wilful and deliberate, whether a particular acts and conduct would be amount to wilful and deliberate defiance of the order passed by the court has been under consideration at various occasion before different High Courts. In ***Manohar Lal Vs. Sri Prem Shankar Tandon and others AIR 1960 All. 231***. In para 16,17 and 18 of the decision a Division Bench of this Court held as under:-

"16. A civil contempt has been very well defined in the case of O'Shea v. O'Shea and Parnell, (1890) 15 P. D. 59—

"When a man does not obey an order of the Court made to some civil proceeding, to do or abstain from doing something - as where an injunction is granted in an action against a defendant, and he does not perform what he is ordered to perform, and then a motion is made to commit him for contempt - that is really only a procedure to get something done in the action, and has nothing of a criminal nature in it."

It is true that even a civil contempt, when proceedings are taken under the Contempt of Courts Act, assumes a quasi-criminal nature; but there are certain principles which have to be borne in mind in considering the cases of civil contempt, which is different from a criminal contempt. In a civil contempt disobedience, in order to be punishable as a contempt, must be wilful and not merely casual, accidental and unintentional. It was held in P.S.Tuljaram Rao v. Governor of Reserve Bank of India. AIR 1939 Mad 257 (SB):

"The power to commit for contempt of Court is not to be lightly used and should be reserved for cases where the contempt is deliberate and of such a nature that committal is called for."

17. Another fact which has to be considered is that contempt proceedings are of an extraordinary nature and they give special power to all the Courts of record. It is a power which is exercise summarily and the Court should be reluctant to exercise this extraordinary power particularly in a civil contempt, and this power should never be exercise if the offence complained of is of a slight or trifling nature and does not cause any substantial loss or prejudice to the complainant. This power should be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt. See Emperor v. Murli Manohar Prasad, AIR 1929 Pat. 72 (FB) and in the matter of Muslim Outlook, Lahore, AIR 1927 Levelled against him 610 (SB).

18. We should also bear in mind that so far as Prem Shanker Tandon, opposite party No.1 is concerned, he is Compensation Officer and his actions would be presumed to have been regularly performed under illustration (e) of S. 114 of the Indian Evidence act. In the case of breach of an order of the Court, if it is done by a private person, apparently to gain some unlawful advantage, the presumption would be that, that infringement or disobedience was wilful, but we think in the case of an official, if he commits a certain disobedience, there would be a presumption in his favour that he had in the ordinary circumstances, done a bonafide and unintentionally.

This presumption is not irrebuttable, an, if there are circumstances to show that the official was not acting bona fide, then his action could be treated as wilful."

In ***Aswini Kumar Rath and others Vs. P.C.Mukherjee and others AIR 1965 Cal. 484***, in para 7 the Court held as under:-

"7. In order to punish a person for contempt of court, it must be established not merely that the order of the Court has been violated but also that such violation has been wilful; vide B.K.Kar v. Chief Justice, AIR 1961 SC 1367 (1370); S. S. Roy v. State of Orissa, AIR 1960 SC 190, Mr Roy, learned counsel for the petitioners does not contest this proposition of law but urges that both conditions mentioned have been established in the instant case."

28. Thus in view of the aforesaid discussions, it is clear that the power of courts of record is extra-ordinary in nature, therefore, the courts should be reluctant to exercise this power particularly in a civil contempt and this power should not be exercised if the offence complained of is of a slight or trifling nature and does not cause any substantial loss or prejudice to the complainant. Even a civil contempt, when the proceedings are taken under the contempt of courts Act, assumes a quasi-criminal nature, therefore, this power should be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt. Before punishing a person under the provisions of Contempt of Court Act there must be wilful and deliberate defiance of the order of court, it should not be merely accidental and casual in nature. It is not each and every defiance and disobedience of the order of court can be held wilful disobedience of the order of the court. To arrive at a correct conclusion, every aspect of the matter referred herein before inasmuch as bonafide of the contemner is to be examined by the court dealing with contempt proceedings.

29. Now coming to the facts of the case again it is to be seen that on 18.9.2004 learned Single Judge has passed an order that the applicant has since been reinstated, however his arrears of salary and current salary has not been paid. It was also brought on record that Chairman has been removed from the post against which she has preferred writ petition, wherein an interim order has been passed but till date the opposite party no. 1 has not been allowed to discharge the function of Chairman and Sub-Divisional Magistrate is holding the charge and is exercising the power. Thereupon the learned Single Judge has directed that whosoever holding the

charge may release the arrears and current salary to the applicant. From perusal of the affidavit filed in support of the stay application moved in the above noted appeal it appears that it has been averred that on 25.9.2004 the copy of order of High Court dated 18.9.2004 was placed before the appellant who vide his order dated 29.9.2004 directed the Executive Officer, Nagar Panchayat, Kabrai, Mahoba to prepare the bill of arrears and current salary of the petitioner/applicant and release the same in compliance of the order of High Court. A copy of order dated 29.9.2004 passed by appellant is on record as Annexure-3 of the affidavit. In the meantime by the order of District Magistrate, Mahoba Sri Bhagwan Das, Executive Officer has joined as Executive Officer, Nagar Panchayat, Kabrai, district Mahoba on 12.10.2004 and Sri Devi Dayal Yadav, Executive Officer was relieved for working at his original post at Nagar Panchayat, Kulpahar from Nagar Panchayat, Kavrai, district Mahoba. On 29.10.2004 the new Executive Officer Sri Bhagwan Das submitted the bills of cannot be said to be wilful, disobedience or defiance of the order passed by the court rather it was on account of transfer and posting of Executive Officers of concerned Nagar Panchayat who were required to prepare necessary bills for payment of arrears of salary of the applicant (opposite party).

30. Thus in given facts and circumstances of the case, we are of the considered opinion that the delayed compliance of order passed by writ court as well as contempt court referred earlier cannot be said to be wilful defiance and disobedience of the interim order either passed by writ court or order dated 18.9.2004 passed by contempt court and arrears and current salary of the petitioner before the appellant who passed the same immediately on the same day. Thereafter a cheque of Rs.1,08,302/- was given to the applicant-opposite party towards his arrears and current salary, who have received the same on 29.10.2004. A Photostat copy of letter given by Executive Officer, Nagar Panchayat, Kavrai, district Mahoba to the opposite party (applicant), which had been received, is enclosed as Annexure-4 of the affidavit. Thus the order dated 4.4.2003 passed in the writ petition and order dated 18.9.2004 passed in the contempt petition have been fully complied with by appellant in its letter and spirit. As a matter of fact as appears from Annexure-3 of the affidavit the appellant has already passed the necessary orders on 29.9.2004 in compliance of the order dated 18.9.2004 which was received by the appellant on 25.9.2004 without causing any delay in the matter. In case any delay was caused in full compliance of the order dated 18.9.2004 by 29.10.2004 the same

the appellant cannot be held guilty of committing any contempt punishable under the provisions of Contempt of Court Act. Besides this, in the affidavit filed in the appeal, the appellant has also tendered his unconditional apology as it was tendered before the learned Single Judge dealing with the contempt application. In given facts and circumstances of the case we do not find any justification to reject the same accordingly the unconditional apology tendered by the appellant is hereby accepted.

31. Thus in view of the aforesaid discussions and observations made herein above, the impugned judgment and order

dated 3.11.2004 passed by learned Single Judge in contempt petition no. 2101 of 2003 **Ram Babu Dwivedi Vs. Smt. Rama Devi and others**, is wholly erroneous and not sustainable in the eyes of law and is liable to be set aside. Accordingly the same is set aside by this court. The contempt notice issued against the appellant is hereby discharged.

In the result, the appeal succeeds and allowed.

There shall be no order as to costs.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2005

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 16587 of 2004

Shri Kant Arya ...Petitioner
Versus
M/s New Victoria Mills and others ...Respondents

Counsel for the Petitioner:
Sri P.K. Tripathi

Counsel for the Respondents:
Sri J.N. Tiwari
Sri Gopal Misra

Constitution of India Art. 226-Voluntary Retirement-Petitioner applied for-provided entire dues given modified voluntary retirement Scheme on 12.7.02-3.3.03 petitioner applied for cancellation of the condition offer as the Respondents failed to clear the dues-and continued working-held-entitled for every consequential benefits-if New Victoria Mills Kanpur closed and such scheme for absorption of others employees is in existence-petitioner also may be considered.

Held: Para 7

Having heard learned counsel for the parties and considering the facts and circumstances of this case, in my view this writ petition deserves to be allowed and the impugned order dated 14.7.2003 passed by the respondent M/s New Victoria Mills, Kanpur is liable to be quashed only in so far as it relates to the case of the petitioner, and that the petitioner would be entitled to all consequential benefits.

Case law discussed:
2002 AIR SCW-1165
2003 AIR SCW-313
AIR 1999 SC-1571
2003 FLR-I
2003 AIR SCW-2989
2004 SCC (L&S)-428

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

1. The petitioner was initially appointed in the year 1985 as Supervisor Maintenance on probation in Atherton Mills of the National Textile Corporation. Thereafter vide order dated 27.7.1991 he was transferred to New Victoria Mills of the National Textile Corporation at Kanpur. He joined at New Victoria Mills, Kanpur on 29.7.1991. In the year 2001 some dispute arose with regard to his provident fund account. According to the petitioner, his employer (respondents) had wrongly got an account opened in the name of Shri Kant Misra instead of the petitioner's actual name which was Shri Kant Arya. The provident fund amount of the petitioner was thus deposited in a wrong name.

2. However, before the said dispute could be resolved, the Respondent-Mill came up with a Modified Voluntary Retirement Scheme. By his offer dated 12.7.2002 the petitioner opted for

voluntary retirement under the said scheme but subject to the condition that his entire dues (which included the provident fund dues) may be paid along with his said resignation letter. No formal order accepting the offer of the petitioner had been passed by the respondents. In the meantime, on 3.3.2003, the petitioner wrote to the Respondent-Mill that since his provident fund account had not been regularized and the amounts had not been deposited by the employer in his account, and further that after acceptance of his resignation, the realization of the said amount would become impossible, the petitioner wrote that his conditional offer under the Modified Voluntary Retirement Scheme may remain in abeyance. A further request was made by the same letter that his provident fund account may be regularized within 30 days. The respondents again did not thereafter send any reply/communication to the petitioner. However, vide letter/order dated 28/31.5.2003 passed by Respondent no.1 M/s New Victoria Mills, the cut off date for the acceptance of the resignation/offer of the petitioner and three other employees under the Modified voluntary Retirement Scheme was given as 1.6.2003. Then on 2.6.2003 the Respondent no.1 informed that due to certain unavoidable circumstances the cut off date fixed as 1.6.2003 had been cancelled and a new cut off date would be informed. All along, the petitioner was permitted to continue to work. Before the new cut off date could be announced, on 1.7.2003 the petitioner wrote to the Respondent-Mill that his offer for resignation under the Modified Voluntary Retirement Scheme may be treated as cancelled. It is not disputed that till such date the condition laid down by the petitioner in his offer dated 12.7.2002 and 3.3.2003 of regularizing his provident fund account had not been fulfilled by the respondents. However, no orders had also been passed on any of the communications of the petitioner i.e. 12.7.2002; 3.3.2003 and 1.7.2003. Then on 14.7.2003, the Respondent-Mill passed a fresh order, stating that the cut off date for acceptance of the offer of the petitioner and six other employees for resignation under the Modified Voluntary Retirement Scheme would be 16.7.2003.

3. Aggrieved by the said order the petitioner has filed this writ petition with the prayer that after quashing the order dated 14.7.2003, a direction be issued to the Respondents to allow the petitioner to join his duties on the post of Supervisor Weaving Maintenance and pay him all emoluments for which he is entitled; and also to pay him back wages since 16.7.2003, and further permit the petitioner to work on such post till the age of his superannuation and thereafter pay him his retiral benefits.

4. I have heard Sri P.K. Tripathi, learned counsel for the petitioner and Sri J.N. Tiwari, learned Senior counsel assisted by Sri Gopal Misra, learned counsel appearing on behalf of the respondents and have perused the record. Counter and rejoinder affidavits have been exchanged between the parties and with their consent this writ petition is being disposed of at the admission stage itself.

5. The facts as narrated above are not disputed by the parties. The contention of Sri Tripathi, learned counsel for the petitioner, is that since the offer made by the petitioner was always a conditional offer which had not been

fulfilled by the respondents, and the said offer had been withdrawn by the petitioner prior to the final cut off date and also prior to the fulfillment of the conditions made in that offer, hence the inclusion of the name of the petitioner, without passing any order on the conditional offer made by the petitioner for accepting his offer/resignation under the Modified Voluntary Retirement Scheme of the Mill, is totally unjustified and liable to be quashed. In support of his contention that the acceptance of the offer/resignation of the petitioner in such circumstances was wrong and illegal, learned counsel for the petitioner has relied upon the decision of the Apex Court in the case of **Shambhu Murari Sinha v. Project and Development India Ltd. and another** 2002 AIR SCW 1165; **Bank of India and others vs. O.P. Swaranakar** 2003 AIR SCW 313; and **J.N. Srivastava Vs. Union of India** AIR 1999 S.C.1571

6. Sri J.N. Tiwari, learned Senior counsel appearing for the respondents, has, however, submitted that once the offer of voluntary retirement made by the respondent-Mill had been accepted by the petitioner, the same could not be withdrawn specially when the initial cut off date of 1.6.2003 had already been announced, which was prior to the final letter of withdrawal of his resignation submitted by the petitioner on 1.7.2003. In support of his said submissions, the respondents have relied upon the decision of the Apex Court rendered in the following cases: **A.K. Bindal vs. Union of India** 2003 F.L.R. 1; **Vice Chairman and Managing director, APSIDC Ltd. and another vs. R. Varaprasad and others** 2003 (98) FLR 104 = 2003 AIR SCW 2989; and **State Bank of Patiala vs. Romesh Chander Kanoji and others** 2004 SCC (L&S) 428. Sri Tiwari has further submitted that since by notification of the Central Government dated 9.3.2004 issued during the pendency of this writ petition, the respondent New Victoria Mills, Kanpur has been closed down, the petitioner cannot now be reinstated in service.

7. Having heard learned counsel for the parties and considering the facts and circumstances of this case, in my view this writ petition deserves to be allowed and the impugned order dated 14.7.2003 passed by the respondent M/s New Victoria Mills, Kanpur is liable to be quashed only in so far as it relates to the case of the petitioner, and that the petitioner would be entitled to all consequential benefits.

8. From the record it is not clear that at any point of time the petitioner had ever given an unconditional offer of resignation under the Modified Voluntary Retirement Scheme of the respondent-mill. His offer/resignation was only on the condition that his entire dues, which included the provident fund dues, should first be cleared and paid to him. From the record it is also clear that till the date of acceptance of his resignation (i.e. either 28/31.5.2003 or 14.7.2003) the said dues of the petitioner had not been settled by the respondents. Admittedly the petitioner was allowed to continue to work till 14.7.2003, when his offer of resignation is said to have been accepted by the respondent-mill. It is also established from the record that prior to the said date, on 1.7.2003, the petitioner had already withdrawn his offer of resignation.

9. The Apex Court in the case of ***Bank of India*** (supra) has held that such

voluntary retirement schemes are only an invitation to offer, and the application filed by the employee under the said scheme could then be termed as an offer which the employee can withdraw before its acceptance. The decisions of the Supreme Court as relied upon by the learned counsel for the respondents are distinguishable on facts.

10. In ***A.K. Bindal*** *(supra)* the Supreme Court was dealing with a case where, the employee had accepted the voluntary retirement scheme of the employer and taken the money to which he was then found entitled to under the scheme out of his own sweet-will and without any compulsion. In such facts, it was held that such person then ceases to be under employment of the company and cannot agitate for any kind of his past right with his erstwhile employer. In the case of ***R. Varaprashad*** *(supra)* also it was held by the Supreme Court that once the employee had opted for voluntary retirement of his own choice, which had been accepted, then he could not claim anything contrary to the terms of the scheme that had been accepted by him.

11. Similarly the case of ***Romesh Chander Kanoji*** is also distinguishable on facts as it was a different scheme which the Supreme Court was dealing with, to the effect that under the said scheme an opportunity of 15 days was given to the employee/applicant to withdraw from the scheme. In the present case the respondents have not been able to show any such condition in the voluntary retirement scheme which is being considered by this Court. As such, all the aforesaid decisions which have been relied upon by the learned counsel for the respondents do not help them.

12. The modified voluntary retirement scheme of the respondent-mill, can only be said to be an invitation to an offer. In response to the same, the offer was made by the petitioner on 12.7.2002, which was only a conditional offer and was subject to fulfillment of certain condition. As such, no agreement or contract could be said to have been concluded unless offer was accepted. It is not disputed that neither the condition had been fulfilled by the respondents as had been imposed by the petitioner in his offer, nor his offer had been accepted by the respondent-mill prior to the date of the withdrawal of his offer of resignation, which was 1.7.2003.

13. In ***Shambhu Murari Sinha*** *(supra)* the Supreme Court was dealing with a case where the letter of acceptance was a conditional one, inasmuch as though option of the appellant for the voluntary retirement under the scheme was accepted, but it was stated that the "release memo alongwith detailed particulars would follow", and before the appellant was actually released from the service, he withdrew his option for voluntary retirement by sending two letters to which there was no response from the respondents. It was after the withdrawal of the option for voluntary retirement that the respondents directed for release of the employee from the service, and that too from the next date. The employee was paid his salaries etc. till his date of actual release and it was therefore held that *"the jural relationship of employee and employer between the appellant and the respondents did not come to an end on the date of acceptance of the voluntary retirement and said relationship continued till 26th of September, 1997. The appellant*

admittedly sent two letters withdrawing his voluntary retirement before his actual date of release from service. Therefore, in view of the settled position of the law and the terms of the letter of acceptance, the appellant had locus poenitentiae to withdraw his proposal for voluntary retirement before the relationship of employer and employee came to an end."

14. In the case of ***J.N. Srivastava*** *(supra)* the employee had offered for voluntary retirement on 3.10.1989 but with effect from 31.1.1990. His offer was accepted by the authorities on 2.11.1989 itself, but thereafter, before 31.1.1990 was reached, the appellant, on 11.12.1989, wrote letter to withdraw his voluntary retirement proposal, which was rejected by the authority vide communication dated 26.12.1989. The employee had also given up his charge of the post as per his memo relinquishing the charge. In such facts it was held by the Supreme Court that *"it is now well settled that even if the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus poenitentiae to withdraw the proposal for voluntary retirement."*

15. In my view, the case in hand is on a better footing, as the offer made by the petitioner under the modified voluntary retirement scheme of the respondent was only conditional and such condition has admittedly not yet been fulfilled by the respondent mill. The petitioner, first on 3.3.2003, had written to the respondent mill that since his provident fund account had not been regularized, which was a condition made in his offer of resignation under the scheme, it was specifically stated by the petitioner that the conditional offer tendered by him under the scheme may remain in abeyance. Admittedly, the petitioner continued to work and the jural relationship of employee and employer between the petitioner and the respondent mill continued. Even though the respondent mill may have intimated by communication dated 28/31.5.2003 that the cut off date for acceptance of the resignation/offer of the petitioner would be 1.6.2003, but the same is to be ignored in the case of the petitioner for two reasons; firstly, the petitioner had already (on 3.3.2003) made a request for keeping his offer of resignation in abeyance; and secondly, the cut off date as fixed for 1.6.2003 had been cancelled by the respondent mill itself, and the new cut off date was to be informed subsequently which was then on 14.7.2003 intimated to be as 16.7.2003 and prior to that, on 1.7.2003, the petitioner had already communicated to the respondent mill that his offer for resignation under the scheme may be treated as cancelled.

16. In such circumstances, the relationship of employer and employee continued between the petitioner and the respondent mill. During this period the petitioner had already withdrawn his offer for resignation under the scheme, and the condition spelled out in the initial offer of the petitioner had never at any stage been fulfilled by the respondent. In the absence of the same having been fulfilled, or the offer of the petitioner having been accepted by the respondent mill, no contract or agreement could be said to have been finalized between the petitioner and the respondent mill so as to voluntarily retire the petitioner on the basis of his offer made on 12.7.2002.

17. Accordingly, for the foregoing reasons, the impugned order dated 14.7.2003 cannot be said to be justified in the case of the petitioner and this writ petition is liable to be allowed. The impugned order dated 14.7.2003, setting out the cut off date of resignation of the petitioner under the modified voluntary retirement scheme, is quashed, but however only in so far as it relates to the petitioner. It is provided that the petitioner shall be treated as on duty with effect from 16.7.2003, and shall be entitled to all consequential benefits including payment of back wages etc. If the respondent mill has been closed down in pursuance of the notification of the Central Government dated 9.3.2004 (as has been submitted by the learned counsel for the respondent-mill), it is directed that, after the closure of the said mill, the petitioner shall be entitled to all such benefits as other employees were to get who were working with the respondent mill as on the date of its closure.

19. With the aforesaid observations/directions, this writ petition stands allowed. No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 13076 of 2003

Shiv Shanker Srivastava ...Petitioner
Versus
State of U.P. and others ...Respondents

18. In the end learned counsel for the petitioner made an oral prayer that the case of the petitioner for absorption in any other mill of the respondent-National Textile Corporation may be considered. The submission is that the petitioner was initially appointed in Atherton Mills of the National Textile Corporation which is still in operation and it was only by virtue of the petitioner being transferred to the New Victoria Mills, which has been closed down, that the petitioner would have to face the consequences of retrenchment. In the aforesaid circumstances, it is directed that in case if there is any such scheme for absorption of the employees of New Victoria Mills, Kanpur and also in case if other employees of the said New Victoria Mills, Kanpur have been so absorbed after closure of the said mill, the case of the petitioner for absorption in some other mill of the respondent-National Textile Corporation may also be considered by the Corporation, as expeditiously as possible.

Counsel for the Petitioner:
Sri Krishna Mohan

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226- Compensation-retired Senior Auditor-applied for medical reimbursement of Rs.44,277/- dated 7.11.96 the Director Medical Care send the Original Bills to Joint Director Local Funds Accounts Allahabad-4.3.97 to June, 2003 nothing done-despite of Court's order payment not made on 27.4.04 petitioner died due to want of fund-heirs claimed compensation of Rs. 6 Lakhs-courts expressed its great concern with the State of affairs prevalent in the government offices-Court can not sit silent and be mute spectator for the harassment of the citizens-for the loss

caused to the family on account of negligence of the Public officer 3 lakhs compensation would be sufficient-payble within 3 months alongwith Rs.44,272 as cost of the pace maker installed in 1995 with 9% simple interest-keeping its open to the State Govt. to fixed responsibility and take appropriate disciplinary action for recovery etc.

Held: Para 19, 20 & 21

I find that Sri Shiv Shanker Srivastava, a retired servant, was not only deprived of the basis medical facilities, he was also rendered helpless. He could not fight the red tapism and the corruption prevalent in the system. Had he gone to the office of the Director General, Medical and Health at Lucknow and bribed the concerned persons, he may have been reimbursed with the cost of the pace maker and saved his life. This is the way the Government function these days. The Court takes judicial notice of the state of affairs prevalent in the offices of the government of Uttar Pradesh. If the Courts also sit silent and be mute spectator to such harassment by public authorities, the citizens will have no place to lodge complaint and seek redressal.

The petitioner has prayed for damages of Rs. Six lakhs for untimely loss of his father, and the hardship caused to him before his death. I find that half the amount of the damages would compensate, for the loss caused to the family on account of negligence of the office of Director General, Medical and Health, U.P. shall be sufficient in the interest of justice. This would also have deterrent effect on the officers and warn them of such claims in future.

The writ petition is allowed. The respondents are directed to pay Rs.44,272/- as cost of the pace maker installed in 1995, along with 9% simple interest per annum to the petitioner. A writ of mandamus is also issued to the respondents to pay compensation to the family of the petitioner of Rs. Three Lakhs for the untimely loss of his father harassment, mental agony and hardships caused to the family to be paid to his son substituted as petitioner in this writ petition. The entire amount shall be paid to him for the benefit of the family of the deceased, within three months from the date of production of certified copy of this order before the respondents.

Case law discussed:

AIR 1967 SC-1885
19973 (5) SCC-788
1878 (3) A.C.-430 (HC)
(1964 I AER-367
2004 (5) SCC-65

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

1. Heard Sri Krishna Mohan, learned counsel for the petitioner and learned standing counsel for respondents.

2. The amendment application dated 21.3.2005 was allowed on 22.3.2005. The petitioner has carried out the amendments and has filed the amended petition. On the same date, the time was granted to the learned standing counsel to file reply amended petition. The respondent has not cared to file any reply nor have sought further time for that purpose.

3. Sri Shiv Shanker Srivastava, the petitioner died on 26.7.2004 due to heart failure leaving behind only son Sri Ajai Kumar. The substitution application filed by Sri Ajai Kumar dated 31.8.2004 is allowed. The necessary endorsement shall be made in the array of the parties.

4. Brief facts giving rise to this writ petition are that Sri Shiv Shanker Srivastava, the petitioner retired as Senior Auditor on 30.6.1993 from the office of Local Funds Account, Allahabad. He suffered a heart attack on 10.6.1995. On

medical advise a permanent pace maker Simence Pace Setter Model 2040-T Serial No. 5140-62132 and Endo Cordial-G Model 1400-T Serial No. 044073252 Rs.41,000/- was installed on the body of the petitioner. The petitioner submitted a medical claim of Rs.44,277/- as the total cost of the pace maker and other medical procedures.

5. The Director, Local Funds Account, Allahabad forwarded the bills on 26.6.96 for reimbursement to the Director/Additional Director (Medical Care) Swastha Bhawan, Lucknow, and on 7.11.1996 (Annexure No. CA-1) the Joint Director, Local Funds Accounts, Allahabad sent the application for medical claim of the petitioner along with original documents to Under Secretary, Finance (Local Funds Accounts) Department, Government of U.P. for orders. The Under Secretary, Finance (Local Funds Accounts) by his letter dated 4.1.1997 returned the original bills/vouchers to be examined by Additional Director (Medical Care) Swastha Bhawan, Lucknow along with assentiality certificate on prescribed forms to be counter signed by the Director General, Medical and Health, U.P.

6. Upon receipt of the letter from the State Government dated 4.1.1997 the Joint Director, Local Funds Accounts, Allahabad sent the original bills/vouchers to the Director (Medical Care) Swastha Bhawan, Lucknow along with covering letter dated 4.3.1997 with a request to sent the approval to the State Government. At this stage the matter came to standstill. The documents were lying in the office of Director (Medical Care) Swastha Lucknow from Marc, 1997 to June, 2003 (six years and three months). In between the Director, Local Funds Account, Allahabad sent number of reminders. Annexure 4 to 10 to the writ petition are these reminders dated 12.9.1997, 28.10.1997, 30.11.1998, 3.7.1999, 22.12.1999, 6.1.2001 and 18.6.2003.

7. In July, 2003 petitioner Shiv Shanker Srivastava was advised to get pace maker replaced urgently as the machine have become old as it was installed in 1995. IN these circumstances, the petitioner filed this writ petition with the prayer to direct to respondents to re-reimburse the medical bills relating to the pace maker along with 18% interest. On 16.7.2003 this Court passed following orders;

"A counter affidavit has been filed by Sri Satendra Kumar Srivastava, Joint Director, Local Fund Account, Audit Department, U.P. Allahabad stating that petitioner's request for purchase of pace maker has been accepted on the recommendation of the Medical Specialist and for which a bill for a sum of Rs.44,527/- was submitted to the State Government. The entire documents have been sent on 7.11.1996. The State Government has required the department vide its letter dated 9.1.1997 to send the original bills/vouchers for examination by the Additional Director (Chikitsa Upchar) Swasthya Bhawan, Lucknow and to submit the essentiality certificate counter signed by the Director General of Medical & Health. The Department has sent the original bills/vouchers along with essentiality certificate to the Additional Director (Chikitsa Upchar) on 4.3.1997, and thereafter reminders have been sent on 12.9.1997, 28.10.1997, 30.11.1998, 3.7.1999, 22.12.1999, 6.1.2001 and 18.6.2003 but no response has been received from the office of Director

General, Medical Health/Additional Director (Chikitsa Upchar) Lucknow. It is contended that pace maker was installed in the year 1995 and it needs urgent replacement on receipt of payment of old pace maker which was installed in 1995, and in case petitioner does not receive the amount he will not be able to purchase new pace maker. Petitioner is facing serious financial difficulties.

Looking to the facts and circumstances of the case, as an interim measure, a direction is issued to the Director General Medical and Health Services U.P. at Lucknow to issue necessary orders in this regard for examination of original bills and vouchers and to countersign the essentiality certificate within a week of service of certified copy of this order upon him. In case any untoward thing happens to the petitioner, in the meantime, the Director General Medical & Health, U.P. shall be held responsible for which his office is already responsible for unreasonable delay.

List on 31.7.2003"

8. A counter affidavit of Sri Satendra Kumar Srivastava, Joint Director, Local Funds Accounts, U.P. Allahabad was filed on 15.7.2003. In paragraph 3 it was stated that inspite of repeated reminders Director General, Medical and Health/Additional Director (Medical Care) did not return the bills/vouchers after verification on which further action could not be taken. The reminders sent to Additional Director (Medical Care)Swastha Bhawan, Lucknow dated 4.3.1997, 12.9.1997, 28.10.1997, 30.11.1998, 3.7.1999, 22.12.1999, 6.1.2001 and 18.6.2003 have been annexed to Annexure CA-2 to CA-10 respectively.

9. Sri Shiv Shanker Srivatava died on 26.7.2004 due to heart failure. Dr. Gopal Ji Srivastava certified that Sri Shiv Shanker Srivastava died at his residence on 26.7.2004 at 08.10 AM due to heart attack. His son Sri Ajai Kumar has applied for substitution, which has been allowed.

10. The paragraph 11-A to 11-3 of the amended petition, the writ petition as follows:-

"11-A That due to inaction/action of the respondents above referred the medical claims of Shiv Shanker Srivastava (now deceased) was not paid to him consequently no replacement of pace maker could be possible due to paucity of funds by the petitioner from his own source. Ultimately Shiv Shanker Srivastava died due to heart failure on 26.7.2004. Dr. Gopal Ji Srivastava issued death certificate dated 28.7.2004. The true and correct photocopy and its typed copy of death certificate dated 28.7.2004 is filed as Annexure-I of this application.

11-B That Shiv Shanker Srivastava prior to his death was subjected medical examinations time to time which reflected that his heart was not healthy. The applicant undertakes to place all the documents before this Hon'ble Court as and when it is required for its perusal.

11-C That the facts as have been stated above are sufficient to demonstrate that Shiv Sha nker Srivastava (now deceased) met his death only due to inaction/action of the respondents as they did not release medical claims inspite of Hon'ble High Court's order dated 16.7.2003 as such due to paucity of funds no replacement of the

out lived pace maker could be done by the petitioner from his own source.

11-D That Shiv Shanker Srivastava (now deceased) died due to collousness of the respondents. Their action/inactions compelled the dependants of Shiv Shanker Srivastava (now deceased) to suffer financially and emotionally as his financial supports was only source of the lively hood of the dependants and his family.

11-E That Shiv Shanker Srivastava was getting Rs.4308.50 paisa pension per month and died at the age of 69 years. The father of Shiv Shanker Srivastava the petitioner died at the age of 78 years and his mother died at the age of 82 years. In case the due replacement could be provided, Shiv Shanker Srivastava would have lived at least 10 years more. Thus the dependants of the deceased Shiv Shanker Srivastava are entitled to get compensation to the tune rupees six lakhs from the respondents."

11. The petitioner has also amended the prayers and has prayed for compensation to a tune of Rs. 6 lakhs. The Director General, Medical and Health, U.P. Lucknow respondent no. 2 is represented by learned standing counsel. He has not cared to file any counter affidavit. The petitioner has filed an application on 31.8.2004 for a direction to the respondents to send sanction orders for payment to respondent no. 5. Along with this application, a letter of Joint Director, (Medical and Care) dated 25.5.2004 addressed to the Director, Local Funds Accounts, U.P. Lucknow has been annexed, in which it is stated that on 30.8.1997 by letter No. 114/4893 the original documents were sent to the Director, Local Funds Accounts, Allahabad for removing objections. The office of Director, Local Funds Accounts has denied the receipt of the letter. The Joint Director has given his opinion that the claim has been misplaced in the transit and in compliance with the orders dated 16.7.2003, photocopy of the essentiality certificate for Rs.44,272/- has been returned with a caution that carte must be taken that double payment may not be made.

12. The Joint Director, Medical Care has not denied the receipt of various reminders. His first letter dated 25.5.2004 does not refer to any of these reminders. He has made a mention of his letter dated 30.8.1997 by which the bills/vouchers were sent back for removal of objections. The letter dated 30.8.1997, however, has not been filed on record nor details of the objections which were sought to be removed have been mentioned. The Joint Director, Medical Care has also not disclosed the source from which he received photocopy of the essentiality certificate. This circumstances clearly demonstrates that having realised the delay caused in his office, the Joint Director, Medical Care has in order to comply with the orders of this Court sent the letter dated 25.5.2004 to cover up the gross negligence caused by his office.

13. The Court in its order dated 16.7.2003 made it absolutely clear that in case essentiality certificate is not given within a week of service of certified copy of this order upon the Director General, Medical & Health, U.P., the Director General, Medical & Health, U.P. he shall be held responsible for any untoward happening, which unfortunately happened.

14. The fact and circumstances clearly without any doubt demonstrate that the office of Director General, Medical and Health, U.P. was responsible for delay of seven years in medical reimbursement of the pace maker. The petitioner could not get the medical reimbursement within his life time and on account of which new pace maker could not be installed and the petitioner in the meantime died due to heart attack. The office of Director General, Medical and Health, U.P. did not wake up inspite of the warning issued by the Court on 16.7.2003.

15. It is now accepted by the Supreme Court that the State is liable to compensate for loss or injury suffered by a citizen due to arbitrary actions of its employees. In **State of Gujarat Vs. Menon Mahomed Haji Hasam AIR 1967 SC 1885**, the order of the High Court directing payment of compensation for disposal of seized vehicles without waiting for the outcome of the decision in appeal was upheld both on the principals of bailee's 'legal obligation to preserve the property intact and also the obligation to take reasonable care of it to return it in the same condition in which it was seized' and also because the Government was 'bound to return the said property by reason of its statutory obligation, or to pay its value if it had disabled itself from returning it either by its own act or by act of its agents and servants. In **Lala Bishamber Nath vs. Agra Nagar Mahapalika, Agra (1973) 1 SCC 788** the Supreme Court held that where the authorities could not have taken any action against the dealer for withholding flour for sale and their order was illegal, it is immaterial that the respondents had acted bonafide and in the interest of preservation of public health. Their motive may be good but their action was illegal and thus in tort they would ordinarily be liable for any loss caused to the appellants by their actions.

16. The concept that King can do no wrong has been abandoned in England, and the State is now held responsible for tortious act of its servant. The old distinction between sovereign and non-sovereign functions is no longer invoked to determine State liability. In **Geddis vs. Proprietors of Bann Reservoir (1878) 3 AC 430 (HC)** it was observed that no action would lie for doing that which the Legislature has authorised, if it be done without negligence, although it does not occasion damage to any one; but an occasion will lie for doing what the Legislature has authorised if it be done negligently, and causes loss to a person.

17. The word 'compensation' is of very wide connotation. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. It has to be construed widely to enable the Courts to determine compensation for any loss or damage suffered by a person. The State Government has not denied that the retired employees have a right for medical reimbursement, subject to admissible deductions and limits.

18. The present case can be brought within the purview of misfeasance in public office, which has been explained by Wade in his book of Administrative Law as follows;

"Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrongdoing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury.'

19. In **Rooks vs. Barnard (1964) 1 All ER 367**, it was observed by Lord Devlin, 'the servants of the Government are also the servants of the people and the use of their power must always be subordinate to their duty of service. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of such power but its abuse. No law provides protection against it. He, who is responsible for it, must suffer it. There is, however, an exception and that is where the public functionary has discharged his duties honestly and bonafide.

In **Ghaziabad Development Authority vs. Balbir Singh (2004) 5 SCC 65,** the liability of the State authorities to pay compensation for misfeasance in public offices has been given due recognition and the State liability in tort has been accepted. Taking the case in hand, I find that Sri Shiv Shanker Srivastava, a retired servant, was not only deprived of the basis medical facilities, he was also rendered helpless. He could not fight the red tapism and the corruption prevalent in the system. Had he gone to the office of the Director General, Medical and Health at Lucknow and bribed the concerned persons, he may have been reimbursed with the cost of the pace maker and saved his life. This is the way the Government function these days. The Court takes judicial notice of the state of affairs prevalent in the offices of the government of Uttar Pradesh. If the Courts also sit silent and be mute spectator to such harassment by public authorities, the citizens will have no place to lodge complaint and seek redressal.

20. In the matter of medical reimbursement the Government officers must be made responsible for the delay in settling the claims. The Court is not aware as to how many such claims are pending and does not intend to cause any enquiry as office of Director General, Medical and Health, U.P. must take care of such delays in his office. The death in this case could be avoided if the medical reimbursement due to the deceased was allowed within reasonable time. The life expectancy in the family of the petitioner given in the amended paragraph 11-J of the writ petition has not been denied. Sri Shiv Shanker Srivastava died at the age of 69 years whereas his father and mother has died at the age of 78 and 82 years respectively. Not only his life was cut short, he must also have suffered a lot. The harassment caused to a retired employee suffering with ailments, in the delay of reimbursement of his medical bills, which are claimed as a matter of right can hardly be measured in terms of money. In this case the Joint Director, (Medical Care) Government of U.P. who works under and in the office of Director General, Medical and Health, Government of U.P., was authorised to

verify the bills/vouchers and to countersign the essentiality certificate. He was squarely liable for delay, for hardships and harassment caused to the petitioner and the consequential loss to his family. The petitioner has prayed for damages of Rs. Six lakhs for untimely loss of his father, and the hardship caused to him before his death. I find that half the amount of the damages would compensate, for the loss caused to the family on account of negligence of the office of Director General, Medical and Health, U.P. shall be sufficient in the interest of justice. This would also have deterrent effect on the officers and warn them of such claims in future.

21. The writ petition is allowed. The respondents are directed to pay Rs.44,272/- as cost of the pace maker installed in 1995, along with 9% simple interest per annum to the petitioner. A writ of mandamus is also issued to the respondents to pay compensation to the family of the petitioner of Rs. Three Lakhs for the untimely loss of his father harassment, mental agony and hardships caused to the family to be paid to his son substituted as petitioner in this writ petition. The entire amount shall be paid to him for the benefit of the family of the deceased, within three months from the date of production of certified copy of this order before the respondents. It will be open to the State Government to fix the responsibility on the officers for the delay and damages, and to take appropriate disciplinary action for punishment/recovery against such persons.

Petition Allowed.

APPELLATE JURISTICTION
CRIMINAL SIDE

DATED: ALLAHABAD 24.01.2006

BEFORE
THE HON'BLE R.P. YADAV, J.

Criminal Misc. Bail Application No. 19903 of 2004

Shyam Verma ...Applicant (IN JAIL)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri S.S. Tewari
Sri A.N. Mishra
Sri Amit Mishra

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

Code of Criminal Procedure Section–439–Bail application offence under Section 498-A, 307, 304-B, 304 IPC and 314 Dowry Prohibition Act–applicant the husband of deceased-sustained 12 injuries while trying to save the life of his wife–dying declaration no allegation of demand of dowry or cruel treatment applicant–against an attempt to save the life–reasonably can be presumed about no intention to kill–entitled for Bail.

Held: Para 9

Keeping in view of the facts that the applicant also sustained a number of injuries while trying to save the life of his wife and also the fact that in the dying declaration recorded by the Additional City Magistrate on 5th April, 2004, there is no mention of the fact that there was any demand of dowry or cruel treatment and also keeping in view the other circumstances, I find that the case is fit for bail. In a dowry death case if it is found that the husband also sustained injuries (which cannot be said as superficial in nature) in an attempt to save the life of his wife, it can be reasonably presumed that he had no intention to kill his wife.

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

Applicant Shyam Verma is involved in a case punishable under Sections 498-A, 307,304B & 304 IPC and ¾ Dowry Prohibition Act. Police Station Bah, district Agra in case Crime no. 124 of 2004.

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

3. The applicant is the husband of Smt. Priti Verma, who was married to him on 22.2.2002.

4. The applicant is a businessman in a small town of district Agra and sixth class pass, whereas Smt. Priti Verma was post Graduate and expert in handling the computer.

5. It is urged by the learned counsel for the applicant that there was disparity in the educational qualification of the spouse and the wife insisted for shifting of the business from a small town of Agra to Kanpur city, where her parents were living. The applicant was not agreeable to this for the reasons of his own. It is further submitted that some alteration took place between the couple. On account of which, the wife tried to end her life by setting fire to herself and when the applicant noticed her burning, he tried to save her and in the process, he sustained as many as 12 injuries. The wife and husband both was taken to Primary Health Centre, Bah, from where, they were referred to Agra. On receipt of the information of the burn injuries of Smt. Priti Verma, her parents came from Kanpur and forcibly took her away to Kanpur and while taking her away, they also forcibly took with them the applicant and his mother in an unnumbered TATA SUMO. He as well as Smt. Priti Verma, the wife were admitted in the hospital at Kanpur. However, the police apprehending the danger to the life of the applicant and his mother, took them away in police custody and produced before the learned Magistrate for remand in the case, which was registered on the application of the father of the wife. He was produced in the same condition and thereafter, again he was admitted in the hospital at Agra, where he was confined for medical treatment up to 19th April, 2004. It is further submitted that in the first information report, there are allegations regarding the demand of dowry and cruelty but the dying declaration, which was recorded on 5.4.2004 by the Magistrate, negatives the theory of demand of any dowry or the cruel treatment before the incident in question.

6. It is pointed out that a perusal of the dying declaration of Smt. Priti Verma shows that there was some exchange of hot words between the couple as the applicant suspected her fidelity thereafter the applicant is said to have poured the kerosene and set her to fire. It is submitted that the two theories cannot be reconciled. This is why the learned Additional Sessions Judge while framing the charge has alternatively framed the charge under Section 304 IPC also. The learned counsel has also submitted that the investigating Officer did not find any material against the other seven accused, who were nominated in the F.I.R. and this is why a final report was submitted against them.

7. Referring to the entry in the G.D. of police station Kakadeo, district Kanpur

Nagar and Agra, it has also been submitted that a case of kidnapping was registered against the parents and other persons named in the F.I.R. on the basis of the report lodged by the father of the applicant and a case under Section 364-A IPC is pending against them for disposal in the court, where they are not appearing.

8. The learned A.G.A. has submitted that in view of the dying declaration, there is a strong case against the applicant.

9. Keeping in view of the facts that the applicant also sustained a number of injuries while trying to save the life of his wife and also the fact that in the dying declaration recorded by the Additional City Magistrate on 5th April, 2004, there is no mention of the fact that there was any demand of dowry or cruel treatment and also keeping in view the other circumstances, I find that the case is fit for bail. In a dowry death case if it is found that the husband also sustained injuries (which cannot be said as superficial in nature) in an attempt to save the life of his wife, it can be reasonably presumed that he had no intention to kill his wife.

10. Let applicant Shyam Verma be enlarged on bail in case crime No. 124 of 2004, under Sections 498-A, 307/304-B & 304 I.P.C. and ¾ Dowry Prohibition Act, Police Station Bah, district Agra on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned. However, the applicant is directed to cooperate with the trial and in case, it is found at any stage that he is trying to delay or unnecessarily linger the trial, it would be open to the learned Sessions Judge/Addl. Sessions Judge seized of the trial to cancel his bail at any stage.

Application Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2006

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

Special Appeal No.46 of 2006

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

Counsel for the Petitioner:
Sri B.N. Singh
Sri G.P. Singh

Counsel for the Respondents:
Sri H.R. Mishra
C.S.C.

Constitution of India Art. 226-Service Law-Suspension-Order passed by member secretary-employee of centerlised services-without resolution of administrative committee-order of suspension-held-proper.

Held: Para 7

The facts have to be very strong in favour of the writ petitioner under suspension, if he can allege and proof that even possibility of contemplation of an inquiry against him by the District Committee cannot be even thought or imagined to exist in the facts and circumstances of a particular case. If he can show that, then he can also successfully challenge an order of suspension passed by the Member-Secretary. The facts of this case are not so strong in favour of the writ petitioner-appellant. As such the order of suspension was passed with jurisdiction.

Case law discussed:
1997 (3) UPLBEC-1747 (FB)

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

1. We are in respectful agreement with the order passed by an Hon'ble Single Judge on 30.11.2005 dismissing the writ petition of the appellant, although, with respect, we would like to add certain other reasons than those given by his Lordship.

2. The admitted fact by the appellant-writ petitioner is that he retained Rs.50,000/- (Rupees Fifty Thousand) of the respondents' money seeking to return it on monthly basis. This appears to have been done on his own unilateral decision. Not unexpectedly he was suspended and that order is dated 28.10.2005; the writ petition was directed against this order. The suspension order was communicated by the Member-Secretary.

3. In the Full Bench decision of Ram Chandra Pandey's case, reported at (1997) 3 UPLBEC 1747, the first answer to the decided questions in paragraph 16 clearly shows that the Member-Secretary can suspend a member of the centralised service even in the absence of a decision of suspension of the District Committee.

4. Learned counsel for the appellant placed reliance on this case and it was he who cited it. His submission was that the Full Bench has also decided that in the absence of the District Committee itself initiating a disciplinary inquiry, the power of suspension or the power of communication in favour of the Member-Secretary does not arise. The Full Bench stated its view both in paragraph 15 and in paragraph 16 (i): "...in the absence of a decision by the District Committee contemplating or initiating disciplinary

inquiry ..." the Member Secretary cannot pass an order of suspension.

5. With the greatest of respect, we have a little difficulty in understanding what can be meant by the phrase "decision by the District Committee contemplating....inquiry". A decision to initiate an inquiry is taken only after the contemplation is over. No Committee ever "decides' merely to contemplate an inquiry, it simply contemplates it in appropriate circumstances.

6. The above statements are made with the greatest of respect to the Full Bench. In the manner we respectfully understand the decision of the Full Bench, it appears to us that if it can be shown by the writ petitioner that in no view of the facts could it be said that the inquiry or even contemplation of an inquiry was in the mind of the District Committee or could have been in the mind of the District Committee, then and in that event, a decision to suspend taken alone by the Member Secretary cannot stand by itself.

7. The facts have to be very strong in favour of the writ petitioner under suspension, if he can allege and proof that even possibility of contemplation of an inquiry against him by the District Committee cannot be even thought or imagined to exist in the facts and circumstances of a particular case. If he can show that, then he can also successfully challenge an order of suspension passed by the Member-Secretary. The facts of this case are not so strong in favour of the writ petitioner-appellant. As such the order of suspension was passed with jurisdiction.

The appeal is **dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2005

BEFORE
THE HON'BLE VIKRAM NATH, J.

Civil Misc. Writ Petition No. 17300 of 1984

Sushil Kumar Srivastava ...Petitioner
Versus
IVth Addl. District Judge, Gorakhpur, and others ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava

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

U.P. Urban Buildings (Regulation of Letting Rent & Eviction) Act 1972- Section 20 (4)-Arrear of rent-for more than 4 months-inspite of Notice demanding rent-instead of depositing the same-tenant started raising technical plea about validity of Notice itself-deposit under Section 30-can not be held proper-unless denial by land lord established-held-benefit of Section 20 (4) can not be given-finding recorded by the Courts below neither controverted nor challenged-ejectment held proper.

Held: Para 9 & 14

Since the suit filed in the present case was based exclusively and solely on question of arrears of rent under Section 20 (2)(a) of the Act, a notice to vacate where a tenant was in arrears of more than four months of rent and had failed to deposit within one month from the date of service of notice, would be sufficient. Relying upon the judgment of

the Supreme Court referred to above and Division bench of 1974 in Abdul Jalil case, I hold that the notice given in the present case was valid notice. The finding of both the Courts below on this question is therefore correct and does not warrant any interference.

In the present case there is categorical finding recorded by both the Courts below that the tenant never tendered the rent after receipt of notice and there was no denial/refusal by the landlord to accept the rent after notice was given. This finding is not challenged by the petitioner nor is there any averment in the petition that rent was tendered after receipt of notice and the landlord refused to accept the same and therefore, the deposit under section 30 (1) of the Act continued. I am, therefore of the view that petitioner was not entitled to the benefit of deposit made by the petitioner under section 30 of the Act In the circumstances the Courts below rightly disallowed the benefit of the deposits made under section 30(1) of the Act by the tenant.

Case law discussed:

AIR 1988 A.P.-193
AIR 1971 Alld-302
AIR 1964 Alld-260
1980 ARC-1
2004 (2) ARC-118
AIR 1974 Alld-402
AIR 1984 SC-143
1985 (2) ARC-331
1997 (1) ARC-139
2004 ARC (1) 580
1991(1) ARC-268

(Delivered by Hon'ble Vikram Nath J.)

1. This writ petition by the tenant is directed against the judgment and orders dated 17.09.1984 and 30.09.1982 passed by IV Addl. District Judge, Gorakhpur and the Judge Small Causes Court, Gorakhpur whereby the suit of the respondent no.3 Devendra Bahadur Srivastava for recovery of arrears of rent and ejectment of the petitioners has been decreed and the revision of the tenant petitioner against the same has been dismissed.

2. The dispute relates to residential portion in the tenancy of the petitioners situate at 414 Ismailpur, Gorakhpur which is owned by the respondent no.3. The petitioner was a tenant at monthly rent of Rs.50/- in the upper northeast portion of the said building (hereinafter referred to as the premises in dispute). The petitioner committed default in payment of rent from March 1978 despite request by the respondent no.3. As the arrears were not paid, the respondent no.3 gave notice dated 22.09.1979 demanding the arrears and to vacate the premises within 30 days. The petitioner failed to satisfy the demand and replied denying the contents of the notice. The respondent no.3 thereafter filed JSCC Suit No. 367 of 1979 in the Court of Judge Small Causes, Court, Gorakhpur. The petitioner contested the suit and raised the following issues: Firstly that the notice under section 106 of Transfer of Property Act was invalid, secondly there was no dues against the petitioner and he was not in arrears; thirdly the landlord by conduct had waived the notice which was the basis for filing the suit, as such there being no subsequent notice the present suit was liable to be dismissed and lastly that he had made the deposits under section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent And Eviction) Act, 1972 (in short referred to as the Act) and was entitled to benefit of Section 20(4) of the Act having deposited the arrears before the first date of hearing. Both the parties led evidence in support of their contentions. The trial court vide judgment dated 30.4.1982 while decreeing the suit

recorded the following findings: Firstly that the notice was a valid notice, secondly the liability to pay the water tax and the house tax was on the petitioner; thirdly there was default of more than four months rent on the part of the petitioner; fourthly the petitioner was not entitled to the deposit made under section 30 of the Act and as such no protection under section 20(4) of the Act could be given to the tenant.

3. Aggrieved by the same the petitioner filed revision under section 25 of Provincial Small Causes Court Act which was registered as Civil Revision No. 266 of 1982 Sushil Kumar Srivastava Vs. Devendra Bahadur Srivastava. The revisional Court vide judgment dated 17.09.1984 agreed with all the findings of the trial court except that it allowed one months benefit with regard to the arrears of rent to the petitioner tenant and modified the decree to the extent that the liability to pay the rent would begin from April 1978 and not from March 1978 as claimed in the plaint and as decreed by the trial court. Aggrieved by the aforesaid two judgments the tenant has filed the present writ petition.

4. I have heard Sri Arvind Srivastava, learned counsel for the petitioner and Sri P.K. Misra learned counsel for the respondent no.3 landlord.

5. The first contention of learned counsel for the petitioner is that the notice dated 22.09.1979 (Annexure- 4 to the petition) was in praesenti and therefore invalid. According to the counsel for the petitioner, the language used in the notice was that the tenancy was terminated from the date of issue of notice, which is not legally permissible, and the tenancy could be terminated only after a period of 30 days from the service of the notice, therefore, it was invalid. For proper adjudication of the issue para 4 of the notice is quoted hereunder:

"That my client does not want to keep you as tenant and hereby terminates your tenancy through this notice and you are hereby requested to pay Rs.1395.40 to my client and vacate the premises after residing there for 30 days, failing which a suit may be filed against you and in that case you will be liable for the whole expenses of the case also."

Great stress has been given by the learned counsel for the petitioner on the word "hereby terminates your tenancy through this notice"

6. In support of his contention, the counsel for the petitioner has relied upon the following three decisions: Firstly, ***AIR 1988 Andhra Pradesh page 193 Y. Krishna Murthy Vs. A.Subba Rao***. In the said case the language used in the notice was similar to that of the present notice and Andhra Pradesh High Court held that the tenancy could be determined only after the expiry of 15 days and any language contrary to it would render the notice invalid. The next case relied upon by the counsel for the petitioner is ***AIR 1971 Allahabad page 302,Hakim Jiaul Islam Vs. Mohd.Rafi.*** In the said case the language used in the notice was the termination of tenancy with effect from today. The said notice and the present notice being differently worded the said judgment cannot help the petitioner. The third case relied upon by the petitioner is ***AIR 1964 Allahabad page 260 (Full Bench decision) in the case of Gorakhlal Vs. Maha Prasad Narain Singh***.

According to this decision it was held that the termination of tenancy in law and to vacate the premises would be different things. Relying upon these cases, the counsel for the petitioner has sought to further explain that Section 20 of the Act has to be read in consonance with the provisions of the Transfer of Property Act. It is not a dispute that the notice of demand and the notice to vacate can be a combined notice. The question is what are the essential of such a combined notice and when such notice could be held to be valid or invalid based upon the language of the notice.

7. Learned counsel for the respondent has relied upon Constitution Bench of Supreme Court in the case of ***V. Dhanpal Chettier Vs. Yashodai Ammal reported in 1980 A.R.C. page 1*** wherein the Supreme Court taking a broader and liberal view with regard to interpretation of notice has held that notice cannot be thrown out on technicalities and further where the provisions of Rent Act come into play, it is not necessary to give a notice to quit under section 106 of the Transfer of Property Act. The Apex Court held that what is required is only the termination of tenancy under the Rent Act would be sufficient. Further, reliance has been placed upon ***2004 (2) ARC page 118 Shanti Devi Nigam Vs. Madan Lal Gupta*** in which the Supreme Court has held that under the provision of Section 20 (2)(a) of the Act a notice demanding arrears of rent and seeking eviction was sufficient and there was no requirement of a notice under section 106 of Transfer of Property Act.

8. In another case decided by a Division Bench of this Court in ***Abdul Jalil versus Haji Abdul Jalil reported in AIR 1974 All. 402*** after giving illustration of different language used in the notice has held a similar notice as in the present case to be a valid notice.

9. Since the suit filed in the present case was based exclusively and solely on question of arrears of rent under Section 20(2)(a) of the Act, a notice to vacate where a tenant was in arrears of more than four months of rent and had failed to deposit within one month from the date of service of notice, would be sufficient. Relying upon the judgment of the Supreme Court referred to above and Division bench of 1974 in Abdul Jalil case, I hold that the notice given in the present case was valid notice. The finding of both the Courts below on this question is therefore correct and does not warrant any interference.

10. The next contention of learned counsel for the petitioner is that the respondent no.3 having waived the notice dated 22.09.1979 and there being no fresh notice, demanding rent up to 30.11.1979, the proceedings were vitiated in law. The counsel for the petitioner has pointed out that in the notice dated 22.09.1979 the rent from March 1978 up to 31.08.1979 was claimed. It is not disputed that this notice was served upon the petitioner on 26.09.1979. In the plaint the rent was claimed for the period from March 1978 up to 30.11.1979 and therefore, the petitioner alleges that the respondent no.3 had waived the previous notice, in as much as the respondent no.3 treated /accepted the petitioner to be tenant up to 30.11.1979. According to the petitioner, the notice having been served on 26.09.1979, and period of one month expired on 25.10.1979; therefore, the claim of rent up to 30.11.1979 is not

inconformity with the notice issued to the petitioner, as such the suit must fail. In support of his contention, the petitioner has relied upon the judgment of the Supreme Court in the case of ***Satish Chand Vs. Goverdhan Das reported in AIR 1984 S.C. page 143*** which was dealing with the case of the notice under section 106 Transfer of Property Act and where the facts were totally different which cannot be compared with the facts of the present case which required only a notice as contemplated under section 20 (2)(a) of the Act. The said judgment of the Supreme Court cannot be of any help to the petitioner and more so when the Supreme Court has already held in case of ***Shanti Devi Nigam (Supra)*** that where Rent Act has come into play there was no requirement of notice under section 106 of the Transfer of Property Act.

11. The next contention of the learned counsel for the petitioner is that the Courts below illegally and wrongly disallowed the benefit of the deposit made under section 30 of the Act. It is urged that in case the deposits under section 30 (1) of the Act were taken into consideration there would be no default and the petitioner would have been entitled to protection from eviction under section 20(4) of the Act. The petitioner has deposited rent under section 30 (1) of the Act for the period August 1979 till June 1980. It is not in dispute that notice demanding rent was given in September 1979, which is also accepted by the petitioner. There was no justification for depositing rent under section 30 of the Act once the landlord had shown willingness to accept the rent by giving notice. This is what is clearly intended by section 30 (1) of the Act. For sake of convenience the section 30 (1) of the Act is quoted below.

30. Deposit of rent in court in certain circumstances. (1) If any person claiming to be a tenant of a building tenders any amount as rent in respect of the building to its alleged landlord and the alleged landlord refuses to accept the same then the former may deposit such amount in the prescribed manner and continue to deposit any rent which he alleges to be due for any subsequent period in respect of such building until the landlord in the meantime signifies by notice in writing to the tenant his willingness to accept it.

12. Learned counsel for the petitioner has relied upon ***1985(2) ARC 331 Shankar Lal Sharma V. Ram Adhar and others, 1997(1) ARC 139 Mahendra Nath Tandon v. VI A.D.J. Kanpur Nagar and others and 2004(1) ARC 580 Babu Ram and others v. Special Judge/ Additional District Judge, Bijnor*** for the said proposition. In all these cases the landlord had either refused to accept rent when it was tendered by the tenant after receipt of notice or had with drawn the amount deposited under section 30 of the Act and therefore, the deposit made under section 30 (1) of the Act after expiry of notice was held to be a valid deposit. They are of no help to the petitioner.

13. On the other hand learned counsel for the respondent relying upon the contents of section 30(1) of the Act contended that once notice for demand was given which clearly indicates the willingness of the landlord to accept the arrears of rent there is no justification for continuing to deposit rent under section 30 (1) of the Act. Any such deposit would

be illegal and no benefit can accrue to the petitioner tenant. Reliance is placed upon a decision of this Court in the case of **Ayodhya Nath Dubey Versus XIII the Addl. District & Sessions Judge, Kanpur Nagar reported in 1991(1) ARC 268** wherein this Court held that once willingness is expressed by the landlord to accept the rent and the tenant despite the same continues to deposit in Court under section 30(1) of the Act, the tenant would not be entitled to claim benefit of such deposit.

14. In the present case there is categorical finding recorded by both the Courts below that the tenant never tendered the rent after receipt of notice and there was no denial/refusal by the landlord to accept the rent after notice was given. This finding is not challenged by the petitioner nor is there any averment in the petition that rent was tendered after receipt of notice and the landlord refused to accept the same and therefore, the deposit under section 30 (1) of the Act continued. I am, therefore of the view that petitioner was not entitled to the benefit of deposit made by the petitioner under section 30 of the Act In the circumstances the Courts below rightly disallowed the benefit of the deposits made under section 30(1) of the Act by the tenant.

15. The last contention of the petitioner is that electricity charges could not have been included while determining the validity and sufficiency of the deposit made under section 20(4) of the Act and even if considered the deficit would be very small and could be ignored in order to advance substantial justice and the petitioner would be entitled to benefit of the protection from eviction under section 20 (4) of the Act. This contention loses its significance in view of the finding recorded with regard to benefit of the deposit under section 30 (1) of the Act.

16. In the result the writ petition fails and is accordingly dismissed, however there will be no order as to costs.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED; ALLAHABAD 23.12.2005

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE DEVENDRA PRATAP SINGH, J.

Civil Misc. Writ Petition No. 12776 Of 1999

Surya Deo Mishra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.B. Singh
Sri M.D. Mishra
Sri R.C. Tripathi

Counsel for the Respondents:
Sri Sudhir Agrawal, Addl. A.G.
Sri S.P. Kesarwani, S.C.

(A) Constitution of India, Art. 226- Payment of Salary-working on basis of interim order-even after the dismissal of writ petition-held-entitled for salary for the period of working under interim order.

Held: para 24 (1)

The petitioner is entitled to the salary for the period that he has worked under the interim order of the Court in view of the law laid down in Shobh Nath "s case which has now been overruled. We have therefore, modified the order passed in the first petition.

(B) Allahabad High Court Rules 1952- Chapter XXII rule-7-Second writ petition for arrear of salary-earliar writ petition dismissed without reference to salary-on the basis of interim order-held-cardinal Rule of Policy to discourage the multiplicity of proceedings-second writ petition-not maintainable.

Held: Para 24 (2)

Where a writ petition in which interim orders were granted is dismissed without any reference to the salary for the period that the petitioner had worked under the interim orders of the Court, a second writ petition for claiming the salary of the same period is not maintainable. However, it may be maintainable to quash any subsequent illegal order regarding payment of post retirement benefit, as it would be a fresh cause of action.

Case law discussed:

1995 ALJ 1603
1998 (8) SCC 102
1995 (2) SCC-98
1995 (4) SCC-172
1998 (3) UPLBEC-1954
AIR 1992 SC-1439
AIR 1968 Alld-139
AIR 1975 Alld.-280
1986 (4) LCD-196
AIR 1994 (Alld) 273
1980 (2) SCC-191
2003 (8) SCC-648
1996 (1) SCC-597
1994 (2) SCC-521
1995 (Supple) 149
1997 J.T. (1) 353
W.P. No. 18104 of 1988 decided on 18.1.89
W.P. No. 19223/90 decided on 7.2.91
1998 (4) SCC-284
1993 (2) SCC-495

(Delivered by Hon'ble D.P. Singh, J.)

1. An important issue, which is often confronting courts, falls for determination by this Full Bench. An employee, continues in service beyond the superannuation age of 58 years on the strength of an interim order, is fastened with deduction of the amounts paid as salary from his retiral benefits on the dismissal of the writ petition as infructuous.

2. A learned Single Judge of this Court was confronted with the decisions of the Apex Court in the case of **State of U.P. Vs. Harendra Kunwar [1995 A.L.J. 1603] and State of J&K Vs. Pirzada Ghulam Nabi [(1998) 8 SCC 102]** where it was held that an incumbent who has continued in service beyond the age of superannuation on the strength of an interim order, may not be entitled to retain or receive salary in case the writ petition is ultimately dismissed either on merits or as infructuous. And the contrary view also of the Apex Court in the case of **Collector of Madras and another Vs. K.M. Rajamanikkan [1995 (2) SCC 98] and Burn Standard Company Limited and others Vs. Deen Bandhu Majumdar and others [1995 4 SCC 172]** both followed by a learned Single Judge of our Court in **Ram Khelawan Pathak Vs. State of U.P. and others [1998 (3) U.P.L.B.E.C. 1954]** where it was held that an employee who actually worked on the strength of an interim order would be entitled to his salary even though the writ petition may have been dismissed subsequently. Thus, he referred the issue to a Larger Bench.

3. Minimal facts, necessary for deciding the issue in this petition are:

4. Petitioner, a driver in the Irrigation Department of State of Uttar Pradesh challenged a notice dated 8.12.1993 retiring him on 31.1.1994 on attaining the age of 58 years, through writ

petition no. 3308 of 1994 claiming that retirement age was 60 years. A Learned Single Judge of this Court stayed the operation of the said notice but clarified that the petitioner would be allowed to continue only uptil the age of 60 years. This petition was dismissed as infructuous on 7.8.1996. But as no retiral benefits were released, he preferred writ petition no. 34927 of 1996 which remains pending. A third writ petition no. 5649 of 1998 for release of retiral benefits was again filed but was finally disposed off on 19.12.1998 directing the respondent to decide the representation with regard to the claim of retiral benefits treating the retirement age as 58 years. In pursuance thereof, by an order dated 25.9.1998, claim was decided holding that the retiral benefits could be released after adjustment of Rs.81,836/-, the amount received by the petitioner as salary for two years on the strength of the aforesaid interim order in the first writ petition. This order was subjected to challenge in the fourth writ petition no. 12776 of 1999 when the Learned Single Judge referred it to a Larger Bench.

5. When these petitions were taken up on 20.10.2004, we framed the following two questions:

i) Whether the petitioner is entitled to get salary for the period that he has worked under the interim orders of the Court even if the writ petition (in which the interim order is granted) is dismissed, as infructuous or after holding that he was not so entitled to work?

ii) In case the writ petition in which interim order was granted is dismissed without any reference to the salary for the period that the petitioner had worked under the interim orders of the Court then, whether a second writ petition is maintainable for the salary of that period?

6. We have heard learned counsel for the parties.

7. Before we proceed to answer the two questions framed by us, it would be appropriate to examine the law with regard to interim orders.

8. The interim orders cannot but merge with the final orders passed in the proceedings as has been held by the Apex Court in the case of **Shree Chamundi Mopeds Limited Vs. Church of South India Trust [AIR 1992 SC 1439].** The three Judge Bench was considering whether the rent decree against a company wound up can be enforced where winding up order of the Appellate Authority under Sick Industrial Companies (Special provision) Act has been stayed. The Court, finding that interim order staying operation of an order under challenge, and, quashing of an order are two different things, held;

"quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from the existence."

9. In the case of **State of U.P. Vs. Harendra Kunwar** (Supra), the Apex Court sounded a note of caution considering that a large number of unscrupulous employees go scot free by availing the benefits under the interim order even after the dismissal of the petition as infructuous. It throws considerable light on the first question. In this case, on the strength of an interim order, the incumbent had continued in service uptil 60 years though the actual retirement age was 58 years, but he got the writ petition dismissed as infructuous with an observation for payment of retiral benefits after continuing till 60 years on the strength of the interim order. The Apex Court held that the High Court should have considered whether the incumbent deserved benefits under the Rules and the issue whether the retirement age was 60 years or 58 years ought to have been decided because that will directly relate to the settlement of retiral benefits, and thus, it allowed the appeal and remanded the matter to the High Court to consider deduction of the salary already paid for those two years to deter people from questioning their date of birth at belated stages.

10. More than three and a half decades ago a Division Bench of our Court in the case of **Shyam Lal Vs.State of U.P. [AIR 1968 (Alld) 139]** was considering whether an incumbent who had been compulsorily retired but was being paid his salary on the strength of an interim order without actually working, could retain the amount so paid even after dismissal of the writ petition. The Bench held that the interim order merges in the final order and it does not exist by itself and once the writ petition is dismissed the order of compulsory retirement would take effect from the date it was passed and therefore the incumbent could not retain the amount. This view was consistently reiterated by our Court in the case of **Sri Ram Charan Das Vs. Pyare Lal [AIR 1975 (Alld.) 280, Shyam Manohar Shukla Vs. State of U.P. [1986 (4) LCD 196] and M/s. Karoria Chemicals and India Limited Vs. U.P.S.E.B. and others [AIR 1994 (Alld.) 273].**

11. In **Grindlays Bank Limited Vs. IOC [(1980) 2 SCC 191]**, the Supreme Court affirmed the principle that any undeserved and unfair advantage obtained by a party invoking the jurisdiction of the Court must be neutralized. In **South Eastern Coalfields Ltd. Vs. State of M.P. [2003 (8) SCC 648]** it has reiterated the principle that none should suffer by an act of court and explained the concept of restitution. In this case it was confronted with a situation where royalty of coal was increased which was subjected to challenge and interim orders were passed but finally the enhancement in royalty was upheld by it and when interest for the period of non-payment of the enhanced royalty was sought to be recovered, another set of litigation started and the Supreme Court came down heavily, observing that litigation may turn into a fruitful industry, in the following words:-

"Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has

been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."

12. In the case of **State of J&K Vs. Pirzada Ghulam Nabi,** (Supra), the Apex Court was considering the claim of salary by an incumbent who continued to render service on the strength of an interim order but was not paid after the dismissal of the petition even on the basis of two earlier judgments of that court in **Collector of Madras and Burn Standard Company** (Supra). It refuted the claim, after distinguishing the two decisions, and held:

"In the present case, however, no amount has been paid by the appellant to the respondent for the service rendered by the respondent after the date of superannuation. The department was throughout contesting the claim of the respondent. It agreed to hold a fresh inquiry regarding his date of birth, but did not agree to payment of any salary after the respondent's superannuation as per their records. We fail to see how we can direct any payment for any service rendered during the period this inquiry after the date of superannuation. When salary is already paid under any misapprehension the court may be reluctant to order recovery from a retired employee who may be put to hardship if he has to repay the amount. But these considerations do not operate in present situation. Hence the appeal is allowed and the impugned order is set aside. The writ petition is dismissed."

13. In **Kerala State Electricity Board Vs. M.R.F. Limited [(1996) 1 SCC 597],** the Apex Court while upholding a notification enhancing the electricity tariff, while considering whether the consumer was liable to pay penal charges for the period the interim order operated in their favour, though it found that they were liable but it held that such action by way of restitution was not an inflexible rule and the relief would depend on facts of each case, it went on to hold;

"But in giving such relief, the Court should not be oblivious of any unmerited hardship to be suffered by the party against whom action by way of restitution is taken. In deciding appropriate action by way of restitution, the court should take pragmatic view and frame relief in such a manner as may be reasonable, fair and practicable and does not bring about unmerited hardship to either of the parties."

14. But in the case of **Collector, Madras and another Vs. K. Raja Mallikkam** (Supra) while considering the case of an employee who remained in office on the strength of an interim order even after his superannuation on the basis of the recorded date of birth in the service record, the apex Court directed that the salary already paid for the said period when he had worked would not be recovered but the retiral benefits should be computed from the date on which he stood superannuated on the strength of the service record. This case was noted and considered subsequently in Pirzada's case (Supra), but distinguished on the ground

that no salary had been paid in Pirzada's case.

15. Again, a three Judge Bench of the Apex Court in the case of **Shyam Babu Verma and another Vs. Union of India and others [1994 (2) SCC 521]** was confronted with a situation where several incumbents had been drawing higher pay scale without their fault, but subsequently the scale was reduced, it refused adjustment in the following words:-

"Accordingly, we direct no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."

16. Yet again in **Gabriel Saver Fernandes and others Vs. State of Karnataka and others [1995 (Suppl. 1) S.C.C. 149],** while considering whether the higher scale illegally granted to the incumbent should be recovered after their retirement, it directed that since they had been paid the higher scale and had retired since then, the difference should not be recovered from the salary even though they were not eligible to receive it.

17. In **Mahmood Hasan Vs. State of U.P. [1997 (1) J.T. 353],** a three Judge Bench of the Apex Court was confronted with interim and final orders of the High Court which formed the basis of promotion of juniors who had been paid higher pay scale, but while passing final orders it held;

"However, those who will have to step down on account of this correctional process need not to refund the pecuniary and other benefits enjoyed by them for they had actually worked as Supply Inspector during that period."

18. Thus, broadly speaking, the principle which can be culled out from these decisions is that in commercial matters, the successful party is not only entitled to the amount withheld on the basis of the interim order, but it is also entitled to interest thereon. However, in service matters, if the incumbent has worked and has been paid, unless his claim was fraudulent, based upon frivolous grounds or upon acute factual dispute, the amount so paid ought not to be recovered. Even in cases of excess payment, it cannot be recovered unless said payment is result of the employee's mistake or on his showing. But, if the employee has been paid without working or has not been paid though has worked, he would not be entitled to it if the petition is dismissed as infructuous. We hasten to add, that the court cannot draw a exhaustive list of such situation, as each case is to be decided on its facts.

19. Let us apply the aforesaid principle to the facts of this case.

20. From the record it is evident that the claim of the petitioner that the retirement age of the drivers in the department was 60 years is solely based on a Division Bench judgment of this Court rendered in the case of **Subh Nath Dubey Vs. State of U.P. (Writ Petition No. 18104 of 1988)** decided on 18.1.1989 and subsequent Single Judge decision following the aforesaid Division Bench in the case of **Srikant Shukla Vs. Executive Engineer (Writ Petition No. 19223 of 1990)** decided on 7.2.1991. While entertaining the petition and

granting interim order, this Court had granted six weeks time to the Standing Counsel to file counter affidavit, in vain. Till the pendency of the writ petition, no counter affidavit was filed and it was dismissed on 7.8.1996 as infructuous since during the pendency of the petition the petitioner had already attained the age of 60 years on 31.1.1996. It is settled law that the right of the parties are to be determined on the date of initiation of the proceedings and its judgment is retrospective "inter se' parties but prospective for the rest of the world. The Apex Court in **Atma Ram Mittal Vs. Ishwar Singh Punia [1998 (4) SCC 284]** has held:-

"It is well settled that the right of the parties will have to be determined on the basis of the right available to them on the date of the suit....."

Thus, as the law propounded by this Court in the aforesaid two judgments was that the retirement age of drivers in the department was 60 years, the petition was rightly dismissed as infructuous.

21. However, Sri Sudhir Aggrawal, learned Additional Advocate General for the State respondent has urged that the two cases of **Shubh Nath Dubey and Srikant Shukla** (Supra) were not correctly decided. He has urged that the age of superannuation for Government servants is provided under Rule 56 (3) of the Fundamental Rules Chapter II part 2 to 4. The age of superannuation of all the Government servants of inferior category was 60 years. Clause (1) of the amended Government Order dated 28.7.1987 provides that the age of retirement of all Government servants is 58 years but those employees who were appointed in Group "D' prior to 5.11.1985, would retire at the age of 60 years. Nevertheless, Government vide an order dated 14.6.1984 declared drivers to be members of technical service and in 1986 they were given higher pay scale, therefore, he has rightly urged, that the drivers were no longer member of Group "D' service and they became group "C' employees therefore the proviso to Rule 56(3) was not applicable to them. A perusal of the decisions in **Shubh Nath Dubey and Srikant Shukla** (Supra) shows that the provision relating to higher pay scale and treating drivers as "technical employees' were neither brought to the notice of the Court nor were considered. No doubt, the petitioner was appointed prior to 5.11.1985 and earlier he was drawing a salary of less than Rs.354/- and belonged to group "D', but after reclassification of the post of Driver and increase in salary he ceased to be a member of Group "D' service and thus was not entitled to the benefit of the proviso to Rule 56 (3). In Our opinion, the aforesaid two decisions have not been correctly decided and as such they are hereby over-ruled.

22. Sri M.D. Mishra, learned counsel for the petitioner has filed an application in writ petition no. 3308 of 1994 to modify the order dated 7.6.1996 claiming that he should be paid the retiral benefits treating his date of retirement as 31.1.1996. We have already held that the ratio in **Subh Nath Dubey and Srikant Shukla** (Supra) was incorrectly decided, therefore, there is no question of treating the retirement age of the petitioner as 31.1.1996. Nevertheless, the interim order in writ petition no. 3308 of 1994 was neither obtained by misrepresentation nor on fraud but having been based on a Division Bench decision of this Court, the

benefit accrued to the petitioner on the strength of the interim order should not be denied. In view of this, we allow the modification application partly and the order dated 7.8.1996 in the first writ petition is modified to the effect that the petitioner would only be entitled to his retiral benefits treating his age of superannuation to be 58 years but salaries paid to him during the pendency of the first petition for the work performed may not be deducted from his post retirement benefits.

23. The second question need not detain us any longer. In the first writ petition relief of mandamus was sought not to retire the petitioner on 31.1.1994 instead of 31.1.1996 and salary was also claimed. The writ petition was dismissed as infructuous. He therefore, cannot be permitted to take up the same issue by means of any subsequent writ petition. The rules of this Court clearly prohibit such course of action. Rule 7 of Chapter XXII of the Allahabad High Court Rules 1952 provides that, where an application has been rejected, it shall not be competent for the applicant to move a second application on the same fact. Even if the petitioner has withdrawn the earlier writ petition without a prayer to file a fresh writ petition, a second writ petition for the same cause of action is not maintainable. This cardinal rule of public policy to discourage multiplicity of proceedings, also incorporated in Order 2 Rule 2 of the Code of Civil Procedure, the principles whereof are also applicable to writ proceedings, is too well settled to merit any elaboration. For this, it will be sufficient to refer to the judgments in **B.N. Singh Vs. State of U.P; [1979 ALJ 1184]; Dr. Ramji Dwivedi Vs. State of and others [AIR 1984 SC 1506] equivalent to 1983 UPLBEC 426; Niranjan Rai Vs. District Inspector of Schools [(1991) 2 UPLBEC 1416; Sahib Ram Vs. State of Haryana [JT 1995(1) SC 24; Harish Chandra Srivastava Vs. State of U.P. and others [(1967) 3 UPLBEC 1840 (DB); Keshav Tripathi Vs. State of U.NP. and others [1997 ALJ 28 (DB) and S.L. Bathla Vs. State Bank of India [(1999) 1 UPLBEC 233].** This rule was succinctly explained in **State of U.P. and another Vs. Labh Chand [(1993) 2 SCC 495]** by the Apex Court in paragraph 20 as follows:-

"20. When a Judge of Single Judge Bench of a High Court is required to entertain a second writ petition of a person on a matter, he cannot, as a matter of course, entertain such petition, if an earlier writ petition of the same person on the same matter had been dismissed already by another Single Judge Bench or a Division Bench of the same High Court, even if such dismissal was on the ground of laches or on the ground of non availing of alternative remedy. Second writ petition cannot be so entertained not because the learned Single Judge has no jurisdiction to entertain the same, but because entertaining of such a second writ petition would render the order of the same court dismissing the earlier writ petition redundant and nugatory, although not reviewed by it in exercise of the recognized power. Besides, if a learned Single Judge could entertain a second writ petition of a person respecting a matter on which his first writ petition was dismissed in limine by another learned Single Judge or a Division Bench of the same court, it would encourage an unsuccessful writ petition to go on filing writ petition after writ petition in the same matter in the

same High Court, and have it brought up for consideration before one Judge and another. Such a thing, if is allowed to happen, it could result in giving full scope and encouragement to an unscrupulous litigant to abuse the process of the High Court exercising its writ jurisdiction under Article 226 of the Constitution in that any order of any bench of such court refusing to entertain a writ petition could be ignored by him with impunity and relief sought in the same matter by filing a fresh writ petition. This would only lead to introduction of disorder, confusion and chaos relating to exercise of writ jurisdiction by Judges of the High Court for there could be no finality for an order of the court refusing to entertain a writ petition. It is why, the rule of judicial practice and procedure that a second writ petition shall not be entertained by the High Court on the subject matter respecting which the first writ petition of the same person was dismissed by the same court even if the order of such dismissal was in limine, be it on the ground of laches or on the ground of non-exhaustion of alternative remedy, has come to the accepted and followed as salutary rule in exercise of writ jurisdiction of courts."

24. In the result the answers to the questions formulated for decisions by us are as follows;

1. The petitioner is entitled to the salary for the period that he has worked under the interim order of the Court in view of the law laid down in Shobh Nath "s case which has now been overruled. We have therefore, modified the order passed in the first petition.

2. Where a writ petition in which interim orders were granted is dismissed without any reference to the salary for the period that the petitioner had worked under the interim orders of the Court, a second writ petition for claiming the salary of the same period is not maintainable. However, it may be maintainable to quash any subsequent illegal order regarding payment of post retirement benefit, as it would be a fresh cause of action.

25. In view of our discussions;

(i) Writ petition no. 34927 of 1996 is dismissed.

(ii) The application to modify the order dated 7.8.1996 in writ petition no. 3308 of 1994 is partly allowed. The order dated 7.8.1996 is modified to the extent that the respondent shall not recover/adjust the salary paid to the petitioner in pursuance of interim order however his post retirement benefit may be calculated treating his age of retirement to be 58 years.

(iii) Writ petition no. 12776 of 1999 is partly allowed and order dated 25.9.1999 is quashed. Respondents shall pass fresh order regarding post retirement benefits in accordance with the order dated 7.8.1996 as modified by us today and pay it to the petitioner at an early date if possible within three months of date of receipt of certified copy of this order, failing which the petitioner would be entitled to simple interest @ 6% per annum after expiry of three months from the date of receipt of the order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2006

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE (MRS.) SAROJ BALA, J.

Civil Misc. Writ Petition No. 3521 of 2003

Smt. Meena Sahu @ Meenu Sahu ...Petitioner
Versus
Life Insurance Corporation of India and another ...Respondents

Counsel for the Petitioner:
Sri R.S. Pandey
Sri Rajesh Kesarwani

Counsel for the Respondents:
Sri R.G. Padia
Sri Prakash Padia

Constitution of India, Art. 226-Benefit of Insurance Policy-Policy purchased on 31.10.98-died on 14.1.2000-ause of death brain heamorhage-claim denied on the ground of incorrect particulars given in the form-as the assured was suffering from various liver disorders-cirrhosis recurrent Jaundice and hepatic encephalopathy since 1997-held-the Development Officer including the medical practitioner had examined the insured-LIC can not dine the payment for act and omission of his officers-direction issued to pay the assured with 10% interest within one month.

Held: Para 9

The L.I.C. of India, its agents and other staff owe a responsibility to the person to whom they sell insurance and they are presumed to be acting in the interest of the Corporation. The L.I.C. of India cannot disclaim the liability to make payment of assured amount under life policy no. 310786680 for the acts and omissions of its agent or medical practitioner appointed by it to examine the deceased before accepting the proposal.

Case law discussed:
AIR 1962 SC-814 distinguished.

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

1. This writ petition, under Article 226 of the Constitution of India, has been filed for issuance of a writ, order or direction in the nature of mandamus commanding the respondents to make payment of Rs.50,000/- P.T. 124-15 with interest under the Life Insurance Policy no.310786680.

The facts leading to the writ petition put briefly are these:

2. The petitioner's husband Ashok Babu Sahu had purchased Life Insurance Policy no. 310786680 on 31.10.1998 for a sum of Rs.50,000/-. The petitioner's husband who was admitted in Anand Hospital, Allahabad on 10.1.2000 expired on 14.1.2000 at 8 a.m. due to brain heamorrhage. The petitioner/nominee filed assurance claim before the respondents which was repudiated on the score that the answers given to the question no. 11 (a) (b). (d) and (i) of proposal for insurance were incorrect as the assured suffered from various liver disorders such as cirrhosis, recurrent jaundice episode and hepatic encephalopathy since June 1997 and was operated for piles in July 1998. The petitioner filed a writ petition against the order of repudiation of claim dated 30.8.2000 before this Court which was registered as Civil Misc. Writ Petition No. 43751 of 2001-Smt. Meena Sahu alias Meenu Sahu Versus Life Insurance Corporation of India and others. This Court vide order dated 21.12.2001 finally

disposed of the writ petition and directed the respondents to decide the pending representation within a time bound period. In compliance of the order of this Court the petitioner filed a representation dated 25.1.2002. The representation of the petitioner in relation to Life Insurance Policy no. 310786680 was rejected vide order dated 27.3.2002 on the ground that on the date of proposal the life assured was a patient of jaundice and he suppressed this material fact while filling in the proposal form. The assured had taken another Life Insurance Policy of Rs.50,000/- under table and term 74-15 on 25.9.1997 being policy no. 310474179. The claim of the petitioner in relation to the said Life Insurance Policy was accepted. The contention of the petitioner is that the claim has been repudiated on flimsy grounds without any enquiry. According to the petitioner her claim for the amount assured under Life Insurance Policy of her husband has been illegally repudiated by the respondents, therefore, she is entitled to interest at the rate of 18% per annum.

3. On behalf of the respondents Sri Sant Lal, Deputy Manager of Life Insurance Corporation of India, Divisional Office 19-A, Tagore Town, Allahabad, has filed a supplementary counter affidavit. The respondents have admitted that the life insurance policy in question was issued by the corporation in favour of the assured deceased under the proposal form submitted on 31.10.1998 (Annexure-3 to the supplementary counter affidavit). The respondents have admitted that the Medical Examiner, L.I.C. of India had submitted confidential report on 31.10.1998 (Annexure-4 to the SCA). According to the respondents the life insurance policy was issued in favour of the assured by the corporation on 3.11.1998 (Annexure-5 to the SCA).

4. The petitioner has filed a supplementary rejoinder affidavit reiterating the averments made in the writ petition. According to the petitioner her husband died due to brain haemorrhage as is evident from the death certificate. She has denied that material facts about the illness were concealed by her husband. The petitioner in her supplementary rejoinder affidavit has emphatically stated that her husband was not suffering from any disease at the time of purchasing the policy in question. According to her the respondents have not produced any evidence in support of their allegation that the assured was suffering from jaundice prior to and on the date of filling in of the proposal form.

5. We have heard Sri R.S. Pandey, the learned counsel appearing on behalf of the petitioner and Sri Prakash Padia, learned counsel for the respondents and have scrutinized the record in minute details.

6. This fact has not been challenged that the life insurance policy no. 310786680, for sum assured Rs.50,000/- was issued on 3.11.1998 under proposal form dated 31.10.1998 (Annexure-3 to the SCA) in favour of the assured, the husband of the petitioner. The petitioner's husband/assured died on 14.1.2000 at Anand Hospital, Allahabad. The claim of the petitioner for the assured amount of Rs.50,000/- under the life insurance policy no. 310786680 has been repudiated on the ground that the material information about his health were suppressed by the deceased at the time of filling in the proposal form. According to

the respondents the life assured remained admitted in the Raj Nursing Home from 29.6.1997 to 2.7.1997 for the treatment of hepetic encephalopathy jaundice since June 1998. The contention of the respondents is that the assured had answered all the questions posed in column no. 11 of the proposal form in negative.

7. The proposal form (Annexure-3 to the SCA) has not been filled in the own hand writing of the assured. The assured was not an educated person as in column no. 5, which relates to the educational qualification, home education has been mentioned. Column no. 11 (a) to (i) have been filled in by an agent. Column no. 3 of the confidential report of the agent enclosed with the form indicates that the assured was aged 36 years and was a healthy person. The Development Officer submitted the certificate stating that the facts stated in the proposal form are true and correct to his knowledge and belief. The medical examiner's confidential report (Annexure-4 to the SCA) annexed with the proposal form bears certificate dated 31.10.1998 of medical examiner, L.I.C. of India stating that life assured was examined personally, in private and has recorded the true and correct findings. The answers to question no. 4 have been written after ascertainment from the person examined. Column no. 10 of the medical examiner's confidential report which was filled in after ascertaining from the assured relates to the questions of hospitalization, involvement in accident, radiological, cardiological, pathological tests under gone and current treatment. All these questions have been answered in the negative. The findings to the questions no. 5 to 13 of medical examiner's confidential report are based on personal medical examination of assured by the medical examiner of the L.I.C. of India. The question no.10 of the report relates to the presence of evidence of enlargement of liver or spleen. The medical examiner of L.I.C. of India has recorded his findings in the negative. The finding with regard to question no. 7 which relates to abnormality found in the examination of mouth, ear, nose, throat or eyes has been recorded by the Medical Examiner in the negative. The judicial notice can be taken of the fact that the jaundice is a disease characterised by yellowing of eyes, skin etc. and enlargement of liver.

The deceased having died within two years of taking Life Insurance Policy the provisions of Section 45 of the Insurance Act are not applicable to the present case. The matter is governed by Section 19 of the Indian Contract Act, which runs as under:

"19.When the consent to an agreement is caused by coercion, fraud or misrepresentation the agreement is a contract viodable at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by fraud or misrepresentation, may, if the thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception-If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not viodable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.-A fraud or misrepresentation which did not cause the

consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract viodable."

"Misrepresentation" as defined under section 18 of the Contract Act means and includes-

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
(2) any breach of duty which without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;
(3) causing however innocently a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement"

8. The Corporation has repudiated the claim on the ground of suppression of material facts. There is no allegation of playing fraud. The pleas taken by the respondent Corporation for avoiding its liability under the policy in question are that the deceased made a declaration in the proposal form that the statements and answers contained therein were true in every particular and that the assured suppressed the material facts about his health. The learned counsel for the respondents submitted that the assured having suppressed material facts about his health, the policy is void. It was argued that acceptance of the proposal was recommended by the doctor and agent because of misstatements and suppression made by the assured. The learned counsel for the respondent in support of his contentions relied on the decision in Mitthoolal Nayak Versus L.I.C. of India, AIR 1962 SC 814.

9. In the instant case, the proposal form was not filled in by the deceased in his own hand writing. The deceased had no educational qualification. The deceased being a man of 36 years was supposed to be a healthy person. The medical examiner's confidential report enclosed with the policy in question reveals that no sign or symptoms of suffering from any physical disorder more particularly of jaundice were found in the medical examination of life assured by the doctor of the corporation nor the Life Insurance Corporation has produced any evidence to show that there was misrepresentation of facts which if know earlier would have stopped the Corporation from issuing the policy. The medical examiner of the Corporation having examined the assured and submitted a favourable report regarding his health, the Insurance Corporation cannot wriggle out of the contract by saying that it was void or viodable at its option. It is not a case where the L.I.C. of India would not have consented to the contract of the insurance but for misrepresentation or suppression of material facts. The facts of the present case are distinguishable from Mitthoolal Nayak's case (supra). In the said case the policyholder had taken policy a few months before his death. In the present case there is no evidence that the policyholder was treated for any serious ailment short time before the taking of the policy. The L.I.C. of India, its agents and other staff owe a responsibility to the person to whom they sell insurance and they are presumed to be acting in the

interest of the Corporation. The L.I.C. of India cannot disclaim the liability to make payment of assured amount under life policy no. 310786680 for the acts and omissions of its agent or medical practitioner appointed by it to examine the deceased before accepting the proposal.

10. In view of the forgoing discussion, we allow the writ petition with no order as to costs. The respondents are directed to make payment of the assured amount with interest under the life policy no. 310786680 within a period of one month from the date of production of a certified copy of this order.

Petition Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2006

BEFORE
THE HON'BLE SYED RAFAT ALAM, J.
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No. 2282 of 2004

Smt. Neera Yadav ...Revisionist
Versus
C.B.I. (Bharat Sangh) ...Respondent

Counsel for the Revisionist:
Sri Daya Shanker Misra
Sri Chandra Kesh Misra
Sri Gopal Chaturvedi
Sri U.N. Sharma
Sri V.P. Srivastava

Counsel for the Respondent:
Sri G.S. Hajela
Sri Baldeo Raj (In Person)
A.G.A.

(A) Code of Criminal Procedure-S-197-Saenction by state Government-for prosecuting a serving Public Servant under the provision of Prevention of corruption Act 1988 as well as Indian Penal Code necessary when the central Government has already granted sanction u/s 19 of the Act of 1988.

Held: Para 91,98 & 125

In respect to a member of Indian Administrative Service the Cadre controlling authority is Government of India. We are of the view that whereas conduct of a member of All India Service is of concern of both the Governments, namely, State Government and Central Government, the ultimate prevailing authority is the Central Government and not the State Government. This, however, would not have much relevance in order to determine the authority competent to grant sanction.

Once the authority competent to remove a public servant, has recorded its satisfaction and has granted the sanction, the requirement of any further sanction may create substantive obstruction in the way of prosecution of such public servant. There is no reason or compulsion to assume a similar scrutiny by a different authority particularly when the appointing authority itself has analyzed the matter and has recorded its satisfaction. It would not only be superfluous but may frustrate the very object of grant of sanction. A member of Indian Administrative Services working in State cadre may develop, with the passage of time, and in discharge of his duties, cordial relations with the politicians and others, who matter in the concerned State.

Thus, answering question no.1, we are not agreeable with the contention of the learned counsel for the petitioners that sanction, under both the Acts, i.e., the Act of 1988 & Cr.P.C., is necessary, for

prosecution under Section 13 or any other provision of the Act of 1988.
(B) Prevention of corruption Act 1988 S-13 (1) (d) and (2) readwith Indian Penal Code S-120-B-offence u/s 13 (1)(d) and (2) of the Act No. 88 offence of Criminal conspiracy would not came within the term in discharge of official duty"-held-provision of S-197 Cr.P.C. no application.

Held: Para 143

In the present case, three charge sheets contain offence under Section 13(1)(d) and (2) of Act of 1988 read with Section 120-B, I.P.C. and one charge sheet is only under Section 13(1) (d) & (2) of the Act of 1988. The offences under Act of 1988 as has been held by the Hon'ble Apex Court in Harihar Prasad (Supra), Kalicharan Mahapatra (Supra), which still holds field, does not come within the purview of word "in discharge of the official duty". Thus, the offence of criminal conspiracy under Section 120-B, I.P.C., would also not be within the term "in discharge of official duty" and, therefore, Section 197 Cr.P.C. has no application at all.

Case law discussed:
AIR 1962 SC-1573
1996 (1) SCC-177
J.T. 2005 (12) SC-369
2001 SCC (Cr.) 872
AIR 1955 SC-287
2001 Alld. Crl. Reporter-7
AIR 2005 SC-325
1978 (15) ACC 192
AIR 1988 SC-2595
AIR 1999 SC-1767
AIR 1988 SC-1537
AIR 1948 P.C.-82
1997 SCC (Crl.) 420
2000 ACC-123
2005 (1) Crime I
2004 (2) SCC-349
2005 (1) Crime-54
AIR 1958 SC-107
AIR 1963 SC-1116
AIR 1975 SC-1835
1991 (3) SCC-655
31 Cr.L.J.-1930
1953 Cr.L.J.-1929
AIR 1955 Cal.-430
1973 Mad Law J. (Crl.)-660
1996 (1) SCC-478
2000 (Crl) SCC-872
1996 (1) SCC-478
2004 (2) SCC-349
AIR 2004 SC-2179
2004 (2) SCC-349
J.T. 2006 (1) SC-1

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

1. The Division Bench after hearing the aforesaid matter, delivered two different opinions on the question of requirement of sanction under Section 197 of Criminal Procedure Code, 1973 (in short "the Cr.P.C.'), and has referred the questions to be answered by the Full Bench. The basic issue relates to the requirement of sanction by the State Government under Section 197, Cr.P.C. for prosecuting a serving public servant under the provisions of Prevention of Corruption Act, 1988 (in short "the Act of 1988') as well as the Indian Penal Code, when sanction under Section 19 of the Act of 1988 has been granted by the Central Government. Whether in such case, a further sanction under Section 197, Cr.P.C. will also be necessary, and if so, the effect of the absence thereof.

2. In order to appreciate the issues arising in the case, it is necessary to examine the facts of the case upon which the issues have arisen.

3. The petitioners, Smt. Neera Yadav and Shri Rajiv Kumar are members of the Indian Administrative Service of U.P. cadre. Smt.Neera Yadav was posted as Chairman and Chief Executive Officer, New Okhla Industrial Development Authority (in short NOIDA) vide order dated 7.3.94 (Annex. S.R.A.5

(Cha) in Special Appeal No. 2300/2004) in pursuance thereto she joined on 10.1.94 and worked till 8.11.1995. Sri Rajeev Kumar was posted as Deputy Chief Executive Officer, NOIDA during the relevant time.

4. Alleging that in aforesaid capacity lots of irregularities and illegalities were committed by them along with others, a writ petition (C) No.150/97 was filed before the Apex Court under Article 32 of the Constitution of India as a Public Interest Litigation by NOIDA Entrepreneurs Association, wherein the Hon'ble Apex Court passed an order dated 20.1.98 directing the Central Bureau of Investigation (in short `CBI') to investigate into the allotment of plots of NOIDA and to launch prosecution and departmental inquiries on the basis of investigation, if the same is called for.

5. For brevity the order of the Hon'ble Supreme Court is quoted as under:

"In pursuance to the order dated January 6, 1998, an affidavit of Shri Sudhir Kumar, Secretary (Appointment), Government of U.P. has been filed on behalf of the State of U.P. wherein the course of the action which the State Govt. proposes to adopt with regard to the report of the Inquiry Commission has been indicated. It has been stated that the State Govt. proposes to initiate disciplinary proceedings against respondent No.7 and to have the charges about which the Commission has expressed its inability to give specific recommendation for want of further investigation to be inquired into by the Vigilance Department of the State. Having regard to the seriousness of the allegations that have been made in the matter of irregularities in the matter of allotment as well as conversion of plots in ***NOIDA we are of the opinion that it would be appropriate that the matter is investigated by the Central Bureau of Investigation (CBI) and if such investigation discloses commission of a criminal offence the persons found responsible should be prosecuted in a criminal court.*** *For the time being, we are directing the CBI to conduct an investigation in respect of the irregularities in the matter of allotments and conversions of the plots to which reference has been made in the letters of the Director (CBI) dated December 6, 1995 and December 16, 1996 (at pages 115 and 116 of the paperbook) and the self-contained note appended to the letter dated December 16, 1996.*

Shri G.L. Sanghi, the learned senior counsel appearing for respondent No.7 states that though the respondent No.7 does not admit that she has committed any irregularity in the matter of allotment or conversion of plots in NOIDA but according to respondent No.7 there are other persons who might have committed such irregularity and he seeks leave to file an affidavit in this regard. He may file an affidavit giving particulars of such irregular allotments and in the event of such affidavit being filed further directions in that regard will be given.

As regards the irregular allotment and conversion of plots that which have been found to have been made in the report of the Inquiry Commission, ***we are of the view that it is necessary that action should be taken for cancellation of such allotments and conversions****. Shri Rajeev Dhawan, prays for two weeks time to file a list of persons who have been fitted by such irregular allotments/ conversions.*

He may do so within two weeks. As regards the plots which have been irregularly allotted or converted as mentioned in the report of the Inquiry Commission, it is directed that the allottees as well as the persons in possession thereof shall maintain status quo as it exists today with regard to possession and constructions over the same and that they shall not alienate or create any third party rights in these properties. Respondent No.1 is directed to ensure compliance of these directions. It is, however, made clear that while passing these directions we are not expressing any view of the validity of the allotment or conversion of the said plots.

The learned counsel for the State of U.P. undertakes to supply a copy of the report of Inquiry Commission to the learned counsel for respondent No.1 and the learned counsel for the CBI."(Emphasis added)

6. In compliance of the aforesaid order CBI registered a case RC No.3 (A)/98/ACU-VII, New Delhi on 26.2.98 and made its investigation. On the basis of its findings, it appears that a letter dated 28.3.2002 was sent by CBI to the Government of India stating that the petitioners and some other persons were guilty of certain offences under Section 420 read with 120-B IPC and therefore, if sanction of the State Government is necessary, suitable action may be taken. A copy of this letter was endorsed to the State Government of U.P.

7. The Government of India sent letter dated 15.4.2002 to the D.I.G., C.B.I. suggesting if the State Government's sanction is required in respect of certain offences under I.P.C., the same may be deleted. In the meantime, the State Government considered the matter on its own on the basis of letter dated 28.3.2002, which was endorsed to it only by way of information, and conveyed to Government of India its refusal to grant sanction under Section 197, Cr.P.C. for prosecution of Smt. Neera Yadav and Mr.Rajiv Kumar. The said letter also states that the State Government has also taken a decision that no departmental action is required to be taken against Smt. Neera Yadav and Mr. Rajiv Kumar. It also requested the Government of India to close the matter against them.

8. The Government of India, however, considered the recommendations and the findings of investigation of C.B.I. and vide its order dated 9.9.2002 granted sanction under Section 19 of Act of 1988 for prosecuting petitioners under Sections 13 (1) (d) and 13 (2) of Act of 1988 read with 120-B IPC and for any other offences punishable under other provisions of law in respect of the aforesaid acts and for taking cognizance of the said offences by the Court of competent jurisdiction. The C.B.I., consequently, filed separate charge sheets before the Special Judge, C.B.I. under Act of 1988 against these petitioners.

9. It would be relevant in the context to quote in verbatim the charge sheets submitted by the CBI in the Court of Special Judge;

"Charge sheet No. 1/2002-

10. Sector 14-A in NOIDA was carved out in 1984 as a residential colony for the staff and officers of NOIDA. The lay out of this sector was prepared in the year 1991 earmarking five residential plots Nos.25, 25A, 26, 27 and 28, besides

a plot of land for a club house. The areas of Plot Nos.26, 27 and 28 were of uneven sizes upto 10.02.1994 when the same were re-organised to 450 Sq. mtrs. each by Shri S.P. Gautam, the then Chief Architect Planner (CAP), NOIDA. Out of the said plots, two were kept for residential purposes and rest (7) check for the guest house of NOIDA with the approval of Smt. Neera Yadav, the then CCEO, on 21.02.1994. On 28.5.94, Shri S.P. Gautam, as per directions of Smt. Neera Yadav, put up a proposal for providing 7.5 mtrs. wide road in between the residence of Chairman, Greater NOIDA and Plot No.26 in sector 14-A and also for increasing the area of Plot No.26 from 450 Sq. mtrs. to 562.5 Sq. mtrs., Plot No.27 from 450 Sq. mtrs. to 525 Sq. mtrs. and Plot No.28 from 450 Sq. mtrs. to 487.5 Sq. mtrs. and earmarked Plot No.27 for guest house of NOIDA. This re-organisation was approved by Smt. Neera Yadav on 31.5.1994.

11. Shri Rajiv Kumar, DCEO made an application dated 16.8.94 for allotment of a plot of land of the largest size available measuring 450 sq. mtrs. in the residential plot scheme No.1994 (III) in category VI and deposited Rs.50,000/- as registration money. The plot of 450 Sq. Meters was the largest in use of the plots available for allotment in the said scheme. His application was registered vide Sl.No.6/94 (III) on 16.8.1994. The draw of lots for the said scheme was held on 21.9.94 vide which Sh. Rajiv Kumar was allotted plot No.B-86, Sector-51, NOIDA measuring 450 sq. mtrs.

12. Sh. Rajiv Kumar was informed about the allotment of Plot No.B-86 measuring 450 sq. mtrs, Sector 51, NOIDA vide letter No.NOIDA /DMC (R) /94/5474 dt.27.9.94. On the very same day, he made request for conversion of his aforesaid allotted plot to a smaller plot in Sector-14-A, which was a prestigious sector of NOIDA. Shri Rajiv Kumar was allowed conversion of his plot in Sector-51 to a plot No.A-36 in Sector 44, Noida on 15.10.1994, which was communicated to him, vide the letter No. NOIDA/Sr.DM (R)/ 94/ 73 dated 15.10.94. Shri Rajiv Kumar again requested Smt. Neera Yadav vide another letter dt.15.10.94 that the plot allotted to him in Sector-44 was not as per his requirement and he was interested in getting a plot only in Sector 14-A & may be allowed conversion in only Sector-14-A by allotting a plot of smaller size. Shri S.P. Gautam, CAP, NOIDA made alterations in his note dated 31.5.1994 at the instance of Smt. Neera Yadav showing the size of plot No.27 in Sector 14-A as 300 Sq. mts. in order to suit the requirements of Shri Rajiv Kumar who was the real beneficiary of the said alterations. The request of Shri Rajiv Kumar for conversion of his plot to the plot No.27 in sector 14-A was thereafter processed and approved by Smt. Neera Yadav on 15.10.1994 itself. Even though as per conversion rules/ guidelines of NOIDA, conversion was allowed only once but in the case of Shri Rajiv Kumar the same was done twice as mentioned above to benefit him. The said conversion was communicated to Shri Rajiv Kumar vide letter No.NOIDA/ SR- DM (R) 94.74 dt. 17.10.94 and the lease deed of the said Plot was executed by Shri Rajiv Kumar jointly with his wife Smt. Neeva Kumar on 27.7.1995.

13. On the day of the draw of lots i.e. 21.9.1994, Sh. Rajiv Kumar, DCEO called Smt. Rekha Devyani, the then

Associate Architect and Shri Tribhuwan Singh, Chief Architect Planner (CAP) of the Noida Authority in his chamber and expressed his desire to change the layout plan of Sector 14-A, NOIDA and instructed them to change the nature of use of plot No.27 from `guest house' to residential. Smt. Rekha Devyani on the directions of Shri Rajiv Kumar recorded a note on 21.9.94 for change of use of plot No.27 from `guest house' to residential and put up the same to Sh. Tribhuvan Singh, the then, CAP who in turn submitted the same to Sh. Rajiv Kumar. Shri Rajiv Kumar also recommended the same and forwarded the said note to the then CCEO, Smt. Neera Yadav who approved the same on 24.9.94.

14. A strip of land measuring 3.5x30 Sq. mtrs was shown available in between Plot No.27 & 28 of Sector 14-A, NOIDA. The Residential Deptt. of the Noida Authority was not informed about availability of the said additional land in Sector 14-A, NOIDA. Shri Rajiv Kumar called ADM (R) on 6.11.1995 and directed him to prepare a letter of allotment of the said additional land of 105 sq. meters to him. A letter no.5575/ NOIDA/ DM (R) 95 dt.6.11.95 was accordingly issued to Shri Rajiv Kumar by NOIDA allotting the said additional land to him. No Competent Authority had approved allotment of the said land to him. A sum of Rs.1,41,750/- was deposited by Sh. Rajiv Kumar on the same day vide Challan No.96520 dt.06.11.95 as the cost of said additional land. On 01.12.1995 Shri Rajiv Kumar directed Shri A.K. Goel, Project Engineer (III), to put up a note relating to additional area of 105 sq. mtrs. mentioning therein that the extra space of 105 sq. mtrs. has been included in the area of plot No.27. Shri Rajiv Kumar, the then DCEO by abusing his official position approved the same for himself on the same day.

15. The aforesaid facts and circumstances constitute offences punishable u/s 120 B IPC r/w 13 (2) r/w 13 (1) (d) of the Prevention of Corruption Act 1988 and substantive offence punishable u/s 13 (2) r/w 13 (1) (d) of the Prevention of Corruption Act 1988 against Shri Rajiv Kumar, DCEO and Smt. Neera Yadav, CCEO, NOIDA.

Charge sheet No.2/2002-

16. On 25.11.1991 NOIDA launched an institutional plot scheme vide which the land for Nursing homes was offered @ Rs.2750 per sq. meter and the land for Hospitals @ Rs.2000 per sq. meter, limiting the maximum area for nursing home to 1500 sq. mts. and the minimum area for the Hospital to 4000 sq. mtrs. In response to the said advertisement Dr. Mahesh Sharma, applied for 1000 sq. mtrs. of land for a Nursing home on 27.4.92. He subsequently revised his request through another application dated 25.8.93 for one acre of land. On 3.1.1994 he was allotted plot No.11-33/ 27, Sector-27 measuring 2925 sq. mtrs. @ Rs.2750/- per sq. mtr.

17. Dr. Mahesh Sharma of Kailash Hospital vide his applications dated 4.3.94 and 7.6.94 again requested Smt. Neera Yadav, the then CCEO Noida Authority to increase the area of land from 2925 sq. mtrs. to in between 4000 and 4250 sq. mtrs. for the purposes of running a hospital. A committee under the Chairmanship of Shri Rajiv Kumar, IAS the then Dy. Chief Executive Officer, NOIDA was constituted on 24.6.94 which

opined that additional land was not available for Kailash Hospital. This committee also observed that in case extra land became available in future, the same could be allotted to Kailash Hospital @ Rs.2750/- per sq. mtr. Smt. Neera Yadav after discussing the said recommendations with Shri Rajiv Kumar, DCEO and Shri Tribhuvan Singh, Chief Architect Planner (CAP) on 27.6.94 decided to put-up the request of additional allotment of land for Kailash Hospital before the Board in its next meeting.

18. As per the original lay out plan of Sector 27, NOIDA, there was a park measuring 0.21 hectare and residential plots No.H-31, 32, 34 & 35 adjacent to the plot No.H-33/27 which had already been allotted to Kailash Nursing Home. In order to favour Dr. Mahesh Sharma, CMD, Kailash Hospital, Shri S.P. Gautam the then Chief Architect & Planner of NOIDA, on the directions of Smt. Neera Yadav revised the sector lay out plan of Sector 27, NOIDA on 16.7.94 vide which he deleted the residential plot Nos.H-31, 32, 34 & 35 and also reduced the area of adjoining park in Sector 27, NOIDA and increased the area of plot No. H-33/27 of Kailash Nursing Home by 1215 Sq. Mtrs. making total allotted area of the said plot to 4140 sq. mtrs. Even though the said amendment in the layout plan was against the established procedure as prescribed in the Gazette Notification of 1991 of U.P., Smt. Neera Yadav approved the same on 11.8.1994.

19. The original allottees of plot No.H-31, H-34 and H-35 of sector 27, NOIDA were shifted elsewhere without their consent deliberately for the purpose of making additional land available to Kailash Hospital as mentioned above. The allottee of plot No.H-31/27 Sh. Jamil Ahmed was asked to give a back dated application for conversion of his plot. Even though he did not give any application for the same, his plot was suo-moto converted to plot No.C-246/44 in Sector 44, NOIDA by Smt. Neera Yadav on 12.10.94. Similarly, the plot No.H-35/27, NOIDA of Shri S.K. Aggarwal, Junior Engineer, NOIDA was shifted to the Plot No.H-36/27, NOIDA, and the plot No.H-34/27, NOIDA of Shri Jagat Singh Pal, ACAO, NOIDA, to plot No.C-233/44, NOIDA without their consent. The conversion of the said two plots to sector 44 of NOIDA were done in violation of the laid down conversion guidelines of NOIDA dated 3.2.1992 & 29.9.1993.

20. On 12.8.1994 Shri J.S. Arya, DGM prepared an agenda note for the Board Meeting dated 23.8.1994 which was approved by Smt. Neera Yadav on 12.8.1994 itself. It was mentioned in the said note that M/s Kailash Hospital had requested for allotment of 4000 sq. mtrs. of land and the plot No.H-33/27 was allotted to it. It also gave reference of the Minutes of meeting of the committee headed by the DCEO on 24.6.94 in which it was specifically mentioned that the request of Kailash Hospital could not be accepted because no additional land was available there and if at all any land became available in the future, the Noida Authority could allot the same to the said Hospital at the rate of Rs.2750 per sq. mtr. As against the said circumstances it was mentioned in the agenda for Board meeting dated 12.8.1994 that the area of 4140 sq. mtrs. had become available for allotment to Kailash Hospital @ Rs.2000/- per sq. mtr.

21. The facts of non-availability of land as mentioned in the report dated 24.6.94 of the DCEO, NOIDA, and displacement of 4 allottees and reduction of the area of park for the purposes of making extra land available to Kailash Hospital was intentionally not mentioned in the said agenda note. The said agenda was put up before the 77th Board Meeting of NOIDA on 23.8.94 under the Chairmanship of Smt. Neera Yadav, CCEO and the same was approved accordingly. A fresh allotment letter for the entire area of 4140 sq. mtrs. was issued on 31.8.94 to Kailash Hospital vide which the entire area including the additional land of 1215 sq. mtrs. was charged @ Rs.2000/- per sq. mtr. A pecuniary benefit of Rs.31,05,000/- in addition to the allotment of land was thus caused to Dr. Mahesh Sharma of Kailash Hospital and hereby causing a corresponding wrongful loss to the Noida Authority.

22. The above facts and circumstances constitute commission of offences punishable under section 120-B of the Indian Penal Code r/w section 13 (2) r/w section 13 (1) (d) of the Prevention of Corruption Act 1988 against Smt. Neera Yadav, IAS, the then CCEO of the Noida Authority and Dr. Mahesh Sharma, CMD of the Kailash Hospital and the substantive offences punishable u/s 13 (2) r/w Sec.13 (1) (d) of the Prevention of Corruption Act 1988 against Smt. Neera Yadav.

Charge sheet No.3/2002-

23. In the 76th Board meeting of NOIDA which was held on 18.3.94, it was decided to launch a Corporate Group Housing Scheme for allotment of group housing pockets to the functional industrial and institutional units located in NOIDA. Accordingly, the Corporate Group Housing Scheme was launched on 9.6.94 offering the land at the rate of Rs.1600 per sq. meter to the eligible companies. According to the terms and conditions of the said scheme the functional industrial units of NOIDA having a capital investment of more than Rs.10 crores and annual turn over of more than Rs.30 crores or the Government/ Semi government institutions and reputed private institutions who had purchased land worth Rs.1 crore and above from NOIDA for their corporate offices were eligible for allotment of land under the said scheme.

24. Six applicants viz. M/s. Flex Industries Ltd., M/s Flex Engineering Ltd., M/s Salora International Ltd., M/s Supreme Industries Ltd., M/s Sahara India Savings & Investments Corporation Ltd. and M/s Mancare Medical Charitable Trust applied for allotment of land under the scheme mentioned above during July 1994 to Sept. 1994. Two out of aforesaid six applicants fiz M/s. Flex Industries Ltd. and M/s. Supreme Industries Ltd. were fulfilling the eligibility criteria mentioned above but their applications were neither processed nor allotment of land was made to any of them by NOIDA.

25. M/s. Flex Engineering ltd. had declared its capital investment at Rs.14.37 Crores and the annual turn over at Rs.15.98 crores in their application submitted to NOIDA in response to the advertisement issued under the Corporate Group Housing Scheme as mentioned above. The said company was therefore not eligible for allotment of any land under the said scheme.

26. Smt. Neera Yadav, CCEO, NOIDA in the 78th Board Meeting of NOIDA held on 5.10.94 relaxed the eligibility conditions of the said scheme from capital investment of Rs.10 crores and annual turnover of Rs.30 crores to Rs.3 crores and Rs.10 crores respectively only with a view to make M/s Flex Engineering Ltd. also eligible for allotment of land under the said scheme. She also reduced and the rate of land Rs.1600/- per sq. mtr. To Rs.1200/- per sq. mtrs. without assigning any valid reason. An agenda note for the above said Board Meeting was prepared on the directions of Smt. Neera Yadav, the then CCEO of the Noida Authority which was approved by her on 11.8.94. The said agenda note was put up before the board meeting held on 5.10.94 which was accordingly approved by the Board under the Chairmanship of Smt. Neera Yadav, CCEO, NOIDA. A small cryptic advertisement was published in the Rashtriya Sahara on 19.10.1994 & The Times of India on 21.10.1994 without mentioning either the revised eligibility conditions or the revised cost of land whereas in the initial advertisement both the above mentioned eligibility conditions were published.

27. The investigation further revealed that the revised scheme was to open from 22.10.94 for which the application forms were declared to be available from 22.10.94 but two deficient applications on the letter heads of the respective companies namely M/s Flex Industries Ltd. and M/s Flex Engineering Ltd. were received by Smt. Neera Yadav on 20.10.94 itself i.e. two days before opening of the said scheme. The said companies had not submitted their applications in the prescribed proforma as mentioned in the advertisement mentioned above. Even without the said revised eligibility conditions and the rate of land, M/s Flex Engineering Ltd. gave reference of the advertisement dated 19.10.1994 published in Rashtriya Sahara in their application dated 20.10.1994 & requested the Chairman, NOIDA to allot land to them. A similar application was also filed by M/s Flex Industries Ltd. on 20.10.94. A cheque of Rs.22,00,000/- and another cheque of Rs.96,000/- was enclosed with the above mentioned letters from the side of M/s Flex Engineering and Flex Industries respectively even though it was not required to be done at that time. The said money was required to be deposited only after the decisions were taken to allot land to the said companies. The proposal for allotment of land to both the above industrial units of Noida were prepared by Smt. Neera Yadav herself on 21.10.94 which were finally approved by her on 22.10.94 i.e. on the very day of opening of the scheme.

28. The applications of M/s Sahara India Saving & Investments Corporation Ltd. was received on 16.11.94 and that of M/s Rajasthan Spinning & Weaving Mills Ltd. on 20.4.95 under the revised open ended scheme and despite they being eligible for allotment of land under the said scheme no action was taken by the Noida Authority on the said applications. M/s Flex Engineering Ltd. and M/s Flex Industries were thus given undue favours in the allotment of plots to them by relaxing the terms and conditions only suited for them in the said manner.

29. That M/s Flex Industries Ltd. and M/s Flex Engineering Ltd. had already submitted their applications on 25.7.94 in reference to the earlier

advertisement dated 9.6.94 for allotment of land @ Rs.1600/- per sq. mtr. Indicating thereby that they were all willing to purchase the land at the said rate. In spite of the said facts and circumstances the rates of land were reduced from Rs.1600/- to Rs.1200/- per sq. mtr. Without any demand from any quarter or without any justification whatsoever which straightway caused the monetary benefit of Rs.80 lakhs to M/s Flex Industries Ltd. beside the allotment of lands to them as mentioned above and Rs.32 lakhs to M/s Flex Engineering Ltd. and corresponding wrongful loss to NOIDA. As such plot No.U-2/XI, NOIDA measuring 8000 sq. meters to M/s Flex Engineering and A-99/51, NOIDA measuring 20000 sq. meters to M/s Flex Industries Ltd. were allotted to them.

30. That according to clause 7 of the above mentioned scheme the allottees were required to make full payment of the cost of the plot after adjusting the reserve money within 60 days. Smt. Neera Yadav, however, relaxed the terms of payment also to the said companies by allowing payment of 75% of the cost of plot in 10 half yearly installments. Smt. Neera Yadav also approved the payment of reserve money in respect of both the companies by cheque, which as per clause 14 of the scheme was to be accepted in the form of account payee demand drafts only.

31. The above facts and circumstances constitute offences punishable under section 120-B of the Indian Penal Code r/w Section 13 (2) r/w Section 13 (1) (d) of the Prevention of Corruption Act 1988 against the aforesaid Smt. Neera Yadav, IAS the then CEO, NOIDA and Shri Ashok Chaturvedi, Chairman-cum-Managing Director of the Flex Group of Companies, NOIDA and the substantive offence punishable U/s 13 (2) r/w Section 13 (1) (d) of the Prevention of Corruption Act, 1988 against Smt. Neera Yadav.

Charge sheet No.4/2002-

32. NOIDA had announced a residential plot scheme No.1994 (1) for sectors 23, 32, 33, 34, 35, 49 and 53 from 1.3.94 to 7.3.94, and the said scheme was extended upto 15.3.94. According to the terms and conditions of the said scheme the eligible applicants were required to submit a notarized affidavit and an employee certificate issued by the personnel department of NOIDA on the prescribed proforma along with the registration money which was to be paid only through demand draft/pay order favouring NOIDA. Incomplete application without the enclosures as mentioned above would not be accepted by NOIDA for registration.

33. Smt. Neera Yadav applied for a residential plot in the said scheme in the category of an employee of NOIDA. Her application form was filled up by Shri B.K. Sharma, ADM (R) of NOIDA and the same was signed by Smt. Neera Yadav. The said application form had the following deficiencies:-

i) Attested photograph of Smt. Neera Yadav was not affixed.
ii) Date of application was not mentioned.
iii) Signature of the applicant was not attested by a competent officer.
iv) The required notarized affidavit was not submitted.

v) A certificate required from the personnel deptt. of NOIDA certifying that she was an employee of NOIDA was not enclosed.

Smt. Neera Yadav, however, managed to get her incomplete application accepted by NOIDA. She issued a cheque No.395207 drawn on SBI, Noida for Rs.40,000/- towards registration money whereas it was stipulated that the payments to NOIDA were to be made through an account payee demand draft/ pay order only. The above said cheque was dated 15.3.1994 (which was the last date of the scheme in question) but its proceeds were encashed by Allahabad bank on behalf of NOIDA only on 30.03.94.

34. A list of all the applications received by NOIDA upto the closing date of the scheme i.e., 15.3.1994 was prepared in duplicate by Sh. R.V. Tiwari, Asstt. Accountant of the residential department of NOIDA on 17.3.1994 along with the details of the bank drafts/ pay orders received towards the registration charges for handing over the same to Allahabad Bank, Sector-2, Noda for realization. The Manager, Allahabad Bank, Noida received 163 bank instruments on 17.3.94 totaling Rs.65,20,200/- under proper acknowledgement in respect of 163 applications which did not include the above mentioned cheque No.395207 dt.15.3.94 for Rs.40,000/- given by Smt. Neera Yadav, CCEO, NOIDA. The investigation has revealed that the Branch Manager of Allahabad Bank, Noida received the cheque of Smt. Neera Yadav on or around 28.3.94 and accordingly struck off the earlier endorsement of Sl. No.163 to read as 164 and the amount of Rs.65,20,200/- to read as Rs.65,60,200/- at the end of the said list and initialed the same. The proceeds of the said cheque was thereafter received in the bank account of NOIDA in the Allahabad Bank, Noida on 30.3.94.

35. Smt. Neera Yadav was allotted plot No.B-002G, measuring 300 sq. mtrs. in Sector -32, Noida vide letter No. Noida/ DM (R)/ 94/ 93 dt. 8.4.94. She was required to deposit the allotment money of Rs.1,08,000/- and one time lease rent of Rs.39,600/-. However, she deposited only Rs.3600/- as one year's lease rent on 4.5.1994.

36. On 15.4.94 Smt. Neera Yadav made a request to the Addl. Chief Executive officer of NOIDA to convert her above said plot to a plot of 450 sq. mtrs. size in some developed and safe sector on the grounds of security. The said request was allowed by Smt. Stuti Kacker, the then Officer On Special Duty (K) of the Authority on 6.5.94 who was not competent to do so because as per the delegation of powers dated 17.6.91 the Chairman/ CEO of the NOIDA was the only officer who was competent to allow conversion of plots in NOIDA. Further, Smt. Neera Yadav had not made full payment for the one time lease rent of the allotted plot as required at the time of conversion. The plot No. B-002G of Smt. Neera Yadav was thus converted to plot No.26 in Sector-14-A measuring 450 sq. mtrs. Smt. Neera Yadav and her husband Shri M.S. Yadav took possession of plot No.26, Sector 14-A, Noida from the Junior Engineer, CCD-III on 21.5.94.

37. The then Chief Architect Planner (CAP) of NOIDA on the directions of Smt. Neera Yadav, CCEO put up a note

dated 28.5.94 for revising the layout plans of the plot Nos. 26, 27 and 28 by increasing the sizes of the said plots from 450 sq. mtrs. to 562.5 sq. mtrs., 525 sq. mtrs. and 487.5 sq. mtrs. respectively thereby increasing the area of plot No.26 by 112.5 sq. mtrs. In the same note the CAP also proposed for a provision of 7.5 metres wide road between the plot No.25 and 26 of Sector 14-A to make plot No.26 a corner plot. This was approved by Smt. Neera Yadav on 31.5.94. The possession of additional area of 112.5 sq. meters was taken by Smt. Neera Yadav and her husband on 2.6.94, although, as per the normal procedure of NOIDA the area of the plots cannot be increased after handing over possession to its allottees.

38. Smt. Neera Yadav while working as the CCEO, NOIDA had two unmarried dependent daughters namely Ms. Samskriti Yadav (Date of Birth 4.10.73), studying in UK and Ms. Suruchi Yadav (Date of Birth 4.8.75), Studying in Kirorimal College, Delhi during the year 1994. They were part and parcel of the family of Smt. Neera Yadav who had already been allotted a plot of land in NOIDA as mentioned above. The investigation disclosed that as per the terms and conditions of the relevant residential scheme of 1994 (II) and 1994 (III), the husband, wife and their dependent children were not separately eligible for allotment of any plot of land in NOIDA in the said schemes as they were to be treated as a single family for the purpose of allotment of plot of land to them. Both the said daughters of Smt. Neera Yadav were, therefore not eligible for allotment of any plot of land in NOIDA under any scheme.

39. Smt. Neera Yadav adopted the modus operandi of getting two different commercial shops slotted in the names of her daughters Ms. Samskriti Yadav and Ms. Suruchi Yadav in NOIDA which she got declared as functional by NOIDA, even though the said shops were not functional. The payments for the said two shops were made by Smt. Neeera Yadav. She thereafter, got two separate applications filed for allotment of residential plots in the names of Ms. Samskriti and Ms. Suruchi in the residential scheme 1994 (II) which remained open from 24.5.94 to 8.6.94. Ms. Samskriti was declared successful in the draw of lots in the said scheme and allotted plot No.B-73/44 of 450 sq. mtrs. vide allotment letter dated 1.8.94. Thereafter, Smt. Neera Yadav in an irregular manner converted the plot of her daughter Ms. Samskriti from the plot No.B-73/ 44 to plot No. A-33, Sector 44, Noida on 12.10.94 without any formal request from the allottee.

40. The shop of Ms. Samskriti Yadav was, thereafter, sold to one Mrs. Mennakshi Vijay on 19.10.95. It is worth mentioning that Ms. Samskriti Yadav while requesting the Development Manager (C) NOIDA on 19.10.95 to transfer her shop in the name of Mrs. Meenakshi Vijay mentioned that she had already availed of the benefit of taking a residential plot against the said shop indicating, thereby the said shop was acquired by her only with the ulterior motive of getting a residential plot allotted to her.

41. Ms. Suruchi also applied for allotment of a plot of land in the next residential scheme No.1994 (III) which remained open from 8.8.94 to 22.8.94.

She was declared successful in the draw of lots and got allotment of the plot No.B-88 in Sector 51, Noida on 23.9.94. Smt. Neera Yadav also converted her plot to the Plot No. A-32, Sector-44, Noida on 10.10.94 in violation of the laid down guidelines dated 3.2.1992 and 29.9.93 of NOIDA. She thus intentionally brought both her daughters to the immediate neighbourhood of each other in Sector-44, NOIDA.

42. Major payments for the above said shops and plots were made from the joint accounts of Smt. Neera Yadav and her husband Sh. M.S. Yadav maintained in different banks of Noida and Delhi and also from the two joint accounts maintained in Oriental Bank of Commerce, Basant Lok, New Delhi in the names of (a) Ms. Samskriti, Smt. Neera Yadav & Shri M.S. Yadav and (b) Ms. Suruchi, Smt. Neera Yadav and Shri M.S. Yadav during the years 1994 and 1995.

43. The lease deeds of both the aforesaid converted residential plots in the name of both the daughters of Smt. Neera Yadav were executed on 26.12.94 duly signed by Ms. Suruchi Yadav on the basis of a power of attorney held by her from Ms. Samskriti Yadav which she had sent from Glasgow (UK) where she was studying during the relevant period. One year's lease rent of both the plots was also deposited on the same day from the joint account of Smt. Neera Yadav and Shri M.S. Yadav in Bareilly Corporation Bank, Ghaziabad. Ms. Suruchi Yadav had taken possession of both the said plots from NOIDA on the same day.

44. Thus, Smt. Neera Yadav, IAS (U.P. 1971) while posted and functioning as the Chairman-cum-Chief Executive Officer (CCEO), NOIDA by corrupt and/ or illegal means or by otherwise abusing her official position as public servant got the allotment of plot No.B-002G in Sector -32, NOIDA measuring 300 sq. mtrs. in her name and subsequently got it converted to plot 26/ Sector -14-A despite the fact that the application submitted by her was incomplete in many respects and further that the same was submitted after closing date of the scheme. She also dishonestly got the area of her plot No.26 in Sector 14-A, NOIDA increased from 450 sq. mtrs. to 562.5 sq. mtrs. after taking possession of the same. She also got two plots allotted in the names of her two daughters Ms. Samskriti Yadav and Ms. Suruchi Yadav who were dependent on her and she was knowing it well that as per rules of NOIDA only one plot of land could be allotted in NOIDA to one family. In spite of this, she got the additional plots allotted in her daughter's name. Smt. Neera Yadav also converted the allotted plots of her daughters in the prime sector No.44 of NOIDA in violation of the laid down conversion guidelines of the NOIDA and thereby caused pecuniary advantage to herself and also to her two daughters.

45. The above said facts and circumstances constitute offence punishable u/s 13 (2) r/w section 13 (1) (d) of the Prevention of Corruption Act, 1988, against Smt. Neera Yadav, IAS, the then Chairman-cum-Chief Executive Officer of NOIDA."

46. From a careful reading of these four charge sheets, offences under Section 13 (1)(d) and (2) of Act of 1988 read with Section 120-B, I.P.C. are prima facie made out in charge sheets 1,2 & 3. The fourth charge sheet no. 4/02 prima facie makes out an offence under Section 13 (1)(d) and (2) of the Act of 1988.

47. The petitioners being aggrieved after submission of the aforesaid charge sheet, filed separate Criminal Misc. Applications under Section 482, Cr.P.C. before this Court seeking quashing of the charge sheets filed against them. They also filed applications before Special Judge, C.B.I. stating since no sanction of the appropriate Government, i.e., Government of U.P., under Section 197 Cr.P.C. has been obtained, they cannot be prosecuted, and hence they are entitled for discharge.

48. The Special Judge, C.B.I. rejected their applications and held that prima facie case is made out in the charge sheets, and therefore, the accused are to be charged.

49. Challenging the orders of the Special Judge, C.B.I., the petitioners have filed criminal revisions.

50. The various charge sheets and further proceedings in various cases may be shown in the form of a chart, as under:

Sl. No.	Name of accused	Charge sheet No.	Special case number registered before the Special Judge	Criminal Revision No.	Criminal Misc. Application under Section 482 Cr.P.C.
1.	Neera Yadav, I.A.S.	01/2002	19/2002	2284/2004	11018/2002
2.	Neera Yadav, I.A.S.	2/2002	20/2002	2282/2004	11017/2002
3.	Neera Yadav, I.A.S.	3/2002	21/2002	2300/2004	11019/2002
4.	Neera Yadav, I.A.S.	4/2002	28/2002	2283/2004	11187/2002
5.	Rajeev Kumar, I.A.S.	1/2002	19/2002	3216/2004	10978/2002
6.	Ashok Chaturvedi	3/2002 3/2002	21/2002 21/2002	1892/2002 2191/2004	
7.	Dr. Mahesh Sharma	2/2002 2/2002	20/2002 20/2002	2161/2004 1859/2004	

51. A Division Bench heard all the aforesaid matters but could not come to a consensus decision. The Hon'ble Judges recorded their separate opinions and on the question of applicability of sanction under Section 197 Cr.P.C. and its effect. They formulated two questions, which have been referred to us. Learned counsel for the parties while addressing this Court at the outset submitted that in view of the facts involved as well as two opinions rendered by the Hon'ble Judges, the questions referred by the Division Bench needs reformulation. We found their submission to be correct and accordingly the questions were reframed vide our order dated 20.12.2005, as under:

1. **Whether in the case of public servant which can be removed only by the Central Government and sanction under section 19 of the Prevention of Corruption Act, 1988 is also given, further sanction**

under section 197 of the Criminal Procedure Code is also required because at the relevant time the said public servant was also employed in connection with the affairs of the State Government.

2. **Whether public servant who is charged under section 13 of the Prevention of Corruption Act as also under section 120-B IPC and the sanction u/s 19 of the Prevention of Corruption Act is already given by the Central Government, yet the sanction by the State Government under section 197 of the Code of Criminal Procedure is necessary since he is being charged under section 120-B IPC also.**
3. **If the answer to the above two questions is in affirmative, then, whether the alleged act or omission for which the petitioner are being charged had reasonable connection to the discharge of their official duty calling for applicability of section 197 of the Code of Criminal Procedure.**

52. We heard Shri Daya Shankar Misra, Advocate, appearing for Smt. Neera Yadav in Criminal Revision Nos. 2282/2004, 2283/2004, 2284/2004, 2300/2004 and Criminal Misc. Application Nos.11017/2002, 11018/2002, 11019/2002 and 11187/2002; Shri Sushil Kumar, Senior Advocate for Shri Rajeev Kumar in Criminal Revision No.3216/2004 and Criminal Misc. Application No.10978/2002; Shri U.N. Sharma, Senior Advocate for Dr. Mahesh Sharma in Criminal Revision Nos.2161/2004 & 1859/2002, Shri V.P. Srivastava, Advocate for Shri Ashok Chaturvedi in Criminal Revision No.1892/2002 and 2191/2004, and Shri G.S. Hajela, Advocate for C.B.I.

53. Before adverting to answer the questions, learned counsels for the petitioners made an attempt to argue that there is no valid evidence against the petitioners and thus the charges have no ground to stand. We did not permit them to re-agitate the issue, as it has been decided by consensus of the Division Bench, holding that no case is made out to discharge the applicants at this stage. The Special Judge was right in proceeding with the matter after rejecting the application of the petitioners for discharge. The Hon'ble Chief Justice in his opinion while rejecting the contention of the petitioners held, as under;

"We have to ask ourselves this simple question that on the basis of the above facts, are they being harassed and only being harassed by these proceedings? The simple answer is quite clearly and categorically in the negative. On the basis of preliminary facts therefore the applications must all fail."

Hon'ble Ashok Bhushan, J. in his opinion has taken the same view, as under;

"I am in full agreement with the opinion expressed by Hon'ble the Chief Justice while discussing this part of the judgment and I am of the same view that no case was made out to discharge the applicants at that stage."

The issue has been decided against the petitioners and is not a matter referred to us.

RIVAL SUBMISSIONS:

54. Shri D.S. Misra, learned counsel submits if a prosecution is to be launched for offences under different enactments, sanction may be required under all such enactments separately and more than one sanction is not only permissible but would also be necessary. In support of the submission he has relied upon the Apex Court's judgment in **R.R. Chari Vs. State of U.P., AIR 1962 SC 1573**. He further submitted that the provisions pertaining to sanction is a jurisdictional issue. It is a protection available to a public servant and as such it has to be strictly construed as laid down by the Apex Court in **R. Balakrishna Pillai Vs. State of Kerala, (1996) 1 SCC 478, B. Saha Vs. M.S. Kochar, (1979) 4 SCC 177, Center for Public Interest Litigation Vs. Union of India, Judgment Today (2005) 12 SC 369, Abdul Wahab Ansari Vs. State of Bihar, 2001 SCC (Cr.) 18, Gauri Shanker Prasad Vs. State of Bihar, 2000 SCC (Cr.) 872, Shri Kantaiya Ramaia Munipalli Vs. State of Bombay, AIR 1955 SC 287 and Ravindra Kumar Sharma Vs. State, 2001 Alld. Criminal Reporting 7.**

55. He further submits that the actions of the petitioner Smt. Neera Yadav, subject matter of the various charge sheets were performed in discharge of her official duties and therefore, Section 197 Cr.P.C. is attracted. The mere fact that sanction under Section 19 of the Act of 1988, has been granted by the Government of India is sufficient to fortify his contention that she has acted in discharge of her official duties. He placed reliance on **MPSPE Vs. State of Madhya Pradesh, AIR 2005 SC 325, P.C. Vajpayee Vs. Rehman, 1986 ALJ 81, Kailash Sethi Vs. State, (1978) 15 ACC 192,** to support the submission.

56. Shri Misra submitted that prosecution under Section 120-B IPC cannot proceed in the absence of sanction under Section 197 Cr.P.C. He submits that since all the acts were in discharge of her official duties, even for prosecution under Section 13 of the Act of 1988, sanction under Section 197 Cr.P.C. is necessary and merely on the basis of sanction granted under Section 19 of Act of 1988by the Government of India, cognizance cannot be taken in these matters.

57. He also argued that Smt. Neera Yadav is a public servant and all the acts were in discharge of official duty. She was at the time of alleged commission of offence employed in connection with the affairs of State. Thus without sanction of State Government under Section 197 Cr.P.C., the cognizance taken by the Special Judge is evidently illegal. The observations made in **Kali Charan Mohapatra Versus State of Orissa, AIR 1998 SC 2595** as relied by Hon'ble Ashok Bhushan, J., according to him are not correct and are per incurium in view of law laid down in **State of Punjab Versus Baldev Singh, AIR 1999 SC 2378 (Paras 41 & 42), Lala Shri Bhagwan Versus Ramchandra, AIR 1965 SC 1767 & A.R.Antulay Versus R.S.Nayakk and another, AIR 1988 SC 1531.**

58. He urges that though the appointing and dismissal authority of the petitioner, Smt.Neera Yadav is Government of India as she is a member of the Indian Administrative Service, but since she belongs to the State cadre of

U.P., for all practical purposes her cadre controlling authority is State of U.P. and once it has taken a positive decision that no case is made out for her prosecution, it was sufficient restrain for other respondents to proceed in the matter. The C.B.I. acted illegally in filing charge sheets after obtaining sanction only from the Government of India under Section 19 of the the Act of 1988. Thus he submits that the entire proceedings are vitiated in law.

59. Shri Sushil Kumar, learned counsel on behalf of Shri Rajiv Kumar submitted that whatever action has been taken by Shri Rajiv Kumar as Deputy Chief Executive Officer of Noida, was taken with the approval of the Board, constituted for NOIDA, and in the absence of sanction under Section 197 Cr.P.C. no prosecution can be launched against Shri Rajiv Kumar either under Section 120-B IPC or under any provision of the Act of 1988. He argued that the question of sanction is a matter of jurisdiction of the trial court and even if ex facie the petitioner has committed an offence, he cannot be prosecuted unless and until sanction under Section 197 Cr.P.C. is obtained from the State Government. He also submits that the Central Government is not the competent authority to grant sanction in the present case. The order of the Central Government under Section 19 of the Act of 1988 is not in accordance with the law as the competent authority is State of U.P., which is the cadre controlling authority of Shri Rajiv Kumar. He submits that where the actions are in discharge of official duty, a public servant cannot be prosecuted under any provision of Act of 1988or under IPC, unless sanction under Section 197 Cr.P.C. is taken from the State Government. In the absence thereof the entire proceedings are without jurisdiction.

60. Shri Sushil Kumar, learned counsel submitted that Section 19 of Act of 1988 in so far as it authorizes such authority, who is competent to remove public servant, as a authority competent to sanction, means the authority which shifts and transfers such public servant and not termination of service. He submits that for the purpose of Section 19 (1) (c) of the Act of 1988, the competent authority to grant sanction is State Government and not the Central Government. He also submitted that Section 19 has no overriding effect over Section 197 Cr.P.C. and if an officer of State Cadre is involved, the sanction of State Government under Section 197 Cr.P.C. is mandatory. He also submitted that the discretion of State Government in the matter of sanction is absolute and even if it refuses sanction for political reasons, the same would be final and binding. He relied upon the judgment of the Privy Council in the matter of **Gopal Chand Dwarka Das Morarka Vs. King, AIR 1948 Privy Council 82** followed in **Mansukh Lal Vitthal Das Vs. State, 1997 SCC (Cr.) 1120.**

61. He further submitted that initially the FIR was lodged by C.B.I. on 26.2.1998 only under Section 420 IPC and the letter dated 28.3.2002 sent by C.B.I. to Government of India also discloses offence under Section 420 read with 120-B, IPC. Pointing to the Government of India's letter dated 15.4.2002 he argued that the Government of India did not act independently, as it was stated in para 2 that if the charges under IPC require sanction from the State

Government, the same may be deleted. He further submitted that once the State Government refused sanction on 28.6.2002 it was not open to the Government of India to proceed further by granting sanction on 9.9.2002. The act of the respondents he alleges is not above board and shows some prejudice against the accused petitioners, Smt. Neera Yadav and Sri Rajiv Kumar. Lastly he submitted that the Government of India has not granted any sanction for prosecution under Section 120-B IPC and therefore, the entire proceedings are vitiated in law.

62. Shri U.N. Sharma, senior counsel appearing on behalf of Dr. Mahesh submitted that the petitioner Dr. Mahesh is not directly concerned with the questions required to be adjudicated by us, but since the continuance of the proceedings against Smt. Neera Yadav and Shri Rajeev Kumar, I.A.S. would also prejudice his case he is supporting the submissions advanced on their behalf. Referring to Section 3, 6 (f) and 19 of the U.P. Industrial Area Development Act, 1976 as well as Section 13 of the Act of 1988, Shri Sharma contended that a person can be charged under Section 13 of the Act of 1988, either for violation of any provision of 1976 Act or Regulations framed thereunder. In the present case he submitted that the entire alleged action of Smt. Neera Yadav and Shri Rajiv Kumar was discharged in their official capacity, and as per the decision taken by the NOIDA Board, which was competent to take any decision under law. They did not violate any provisions of 1976 Act or the Regulation framed thereunder. He contended that sanction under Section 197 Cr.P.C. is not only required for prosecution under Section 120-B IPC against a public servant, a separate sanction under Section 197 Cr.P.C. is also necessary for prosecuting him under the the Act of 1988.

63. Shri V.P. Srivastava, learned counsel for Sri Ashok Chaturvedi, tried to place before the Court, various documents in order to show that the allotment made in favour of M/s Flex Industries and Flex Engineering was in accordance with law, and thus, the prosecution against Sri Ashok Chaturvedi is without any basis.

64. Shri G.S. Hajela, learned counsel appearing for CBI contended that Section 40 IPC shows that Section 120-B is neither independent nor can operate on its own but takes colour from other offences, which, the accused has entered into agreement, to commit. He submitted that a criminal conspiracy to benefit certain individuals and to himself cannot be said to be in discharge of official duties and that no sanction is required against such a public servant, when he is sought to be prosecuted under Act of 1988 read with 120-B IPC. In support of his submissions he placed reliance on **State of U.P. Vs. Daya Narain, 2000 ACC 123 (para 5,) State of Orissa Vs. Devendra Nath Padhi, 2005 (1) Crime 1 (para 8) and (18) and State of Himachal Pradesh Vs. M.P. Gupta, (2004) 2 SCC 349 (para 8.)**

65. Shri Hajela further submitted that while working as Chairman and Chief Executive Officer, Smt. Neera Yadav was not a public servant and same is the case of Shri Rajiv Kumar. They were on deputation with the NOIDA, which is a statutory, independent and autonomous body. In support thereof Shri Hajela relied upon **(2005) 1 Crime 54, N.K. Sharma Vs. Abhimanyu and (1998) 5 SCC 91, Mohd. Hadi Raza Vs. State of Bihar.**

Relevant Statutory Provisions:

66. Before adverting to the rival submissions it would be useful to have a glance over the necessary statutory provisions referred to by the learned counsel for the parties as well as in the two opinions of the Hon'ble Judges, as contained in the statutes relevant in the present set of cases.

Indian Penal Code, 1860:

Section 40-"Offence"*- Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.*

In Chapter IV, ***Chapter V-A*** *and in the following sections, namely, Sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445,* ***the word "offence"*** *denotes a thing punishable under this Code, or* ***under any special*** *or local* ***law*** *as hereinafter defined.*

And in Sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine."

Section 120-A- Definition of criminal conspiracy-

When two or more persons agree to do, or cause to be done-

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

120-B- Punishment of criminal conspiracy- *(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall,* ***where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.***

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

Code of criminal procedure,1973:

Section 2 (n)- *"offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871 (1 of 1871).*

Section 197- *(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-*

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

[Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[(3-A) Notwithstanding anything contained in sub-section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3-B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

Prevention of Corruption Act, 1947

***"6. Previous sanction necessary for prosecution**.(1) No court shall take cognizance of an offence punishable under Sec. 161 or Sec.164 or Sec. 165 of the Indian Penal Code (45 of 1860) or under sub-section (2)[or sub-section (3)] of Sec. 5 of this Act, alleged to have been committed by a public servant except with the previous sanction-*

*(a) in the case of a person who is **employed** in connection with the affairs of the Union **and is not removable fromhis office** save by or with the sanction of the Central Government, of the Central Government;*
*(b) in the case of a person who is **employed** in connection with the affairs of a State and is **not removable from his office** save by or with the sanction of the State Government, of the State Government.*
*(c) In the case of **any other person,** of the authority **competent to remove him from his office**.*

(2) Where for any reason whatsoever any doubt arises whether the previous sanction as required under sub-section (1) should be given by the Central or State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed."

Prevention of Corruption Act, 1988

***Section 3-Power to appoint Special Judges**- (1) The Central Government or the State Government may, by notification in the Official Gazette, appoint as many Special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely:-*

(a) any offence punishable under this Act; and
(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

(2) A person shall not be qualified for appointment as a Special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973 (2 of 1974).

***Section 4- Cases triable by Special Judges**- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of Section 3 shall be tried by Special Judges only.*

(2) Every offence specified in sub-section (1) of Section 3 shall be tried by the Special Judge for the area within which it was committed, or, as the case

may be, by the Special Judge appointed for the case, or where there are more Special Judges than one for such area, by such one of them as maybe specified in this behalf by the Central Government.

(3) When trying any case, a Special Judge may also try any offence, other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), a Special Judge shall, as far as practicable, hold the trial of an offence on day-to-day basis.

Section 5- Procedure and powers of Special Judge*- (1) A Special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 (2 of 1974), for the trial of warrant cases by Magistrates.*

(2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall, for the purposes of sub-sections (1) to (5) of Section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under Section 307 of that Code.

(3) Save as provided in sub-section (1) or sub-section (2), ***the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a Special Judge****; and for the purposes of the said provisions, the Court of the Special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Judge shall be deemed to be a public prosecutor.*

(4) In particular and without prejudice to the generality of the provisions contained in sub-section (3), the provisions of Sections 326 and 475 of the Code of Criminal Procedure 1973 (2 of 1974), shall, so far as may be, apply to the proceedings before a Special Judge and for the purposes of the said provisions, a Special Judge shall be deemed to be a Magistrate.

(5) A Special Judge may pass upon any person convicted by him any sentence authorized by law for the punishment of the offence of which such person is convicted.

(6) A Special Judge, while trying an offence punishable under this Act, shall exercise all the powers and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944 (Ordinance 38 of 1944).

Section 13- Criminal misconduct by a public servant*- (1) A public servant is said to commit the offence of criminal misconduct,-*

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in Section 7; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so as to do; or

(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

Explanation-For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.

***Section 19- Previous sanction necessary for prosecution**- (1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-*

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or

with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) no finding, sentence or ***order passed by a Special Judge*** *shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the* ***absence of,*** *or* ***any error, omission*** *or* ***irregularity*** *in,* ***the sanction*** *required under sub-section (1), unless in the opinion of that court, a* ***failure of justice has in fact been occasioned thereby;***

(b) no court shall stay the proceedings under this Act on the ground or any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of , or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation- For the purposes of this section,-

(a) ***error includes competency of the authority to grant sanction****;*

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.

Section 22- The Code of Criminal Procedure, 1973 to apply subject to certain modifications*- The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall in their application to any proceeding in relation to an offence punishable under this Act have effect as if,-*

(a) in sub-section (1) of Section 243 for the words "The accused shall then be called upon", the words "The accused shall then be required to give in writing at once or within such time as the Court may allow, a list of the persons (if any) whom he proposes to examine as his witnesses and of the documents (if any) on which he proposes to rely and he shall then be called upon" had been substituted;

(b) in sub-section (2) of Section 309, after the third proviso, the following proviso had been inserted, namely:- "Provided also that the proceeding shall not be adjourned or postponed merely on the ground that an application under Section 397 has been made by a party to the proceeding";

(c) after sub-section (2) of Section 317, the following sub-section had been inserted, namely;-

"(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the Judge may, if he thinks fit and for reasons to be recorded by him, proceed with inquiry or trial in the absence of the accused or his pleader and record the evidence of any witness subject to the right of the accused to recall the witness for cross-examination";

(d) in sub-section (1) of Section 397, before the Explanation, the following proviso had been inserted, namely:-

"Provided that where the powers under this section are exercised by a Court on an application made by a party to such proceedings, the Court shall not ordinarily call for the record of the proceedings:-

(a) without giving the other party an opportunity of showing cause why the record should not becalled for; or

(b) if it is satisfied that an examination of the record of the proceedings may be made from the certified copies."

***Section 28- Act to be in addition to any other law**- The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this Act, be instituted against him.*

Uttar Pradesh Industrial Area Development Act, 1976:

Section 3- Constitution of the Authority- (1) The State Government may, by notification, constitute for the purposes of this Act, an Authority to be called "(Name of the area) Industrial Development Authority", for any industrial development area.

(2) The Authority shall be a body corporate.

(3) The Authority shall consist of the following:

(a)	*The **Secretary to the Government**, Uttar Pradesh, **Industries Department** or his nominee not below the rank of Joint Secretary- ex officio*	*Member-Chairman*
(b)	*The Secretary to the Government, Uttar Pradesh, Public Works Department or his nominee not below the rank of Joint Secretary- ex officio*	*Member*
(c)	*The Secretary to the Government, Uttar Pradesh, Local Self-Government Department or his nominee not below the rank of Joint Secretary-*	*Member*

	ex officio	
(d)	*The Secretary to the Government, Uttar Pradesh, Finance Department or his nominee not below the rank of Joint Secretary-ex officio*	*Member*
(e)	*The Managing Director, U.P. State Industrial Development Corporation-ex officio*	*Member*
(f)	*Five members to be nominated by the State Government by notification*	*Member*
(g)	*Chief Executive Officer*	*Member, Secretary.*

(4) The headquarters of the Authority shall be at such place as may be notified by the State Government.
(5) The procedure for the conduct of the meetings for the Authority shall be such as may be prescribed.

(6) No act or proceedings of the Authority shall be invalid by reason of the existence of any vacancy in or defect in the constitution of the Authority.

Section 6- Functions of the Authority-
(1) The object of the Authority shall be to secure the planned development of the industrial development areas.

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

(a) to acquire land in the industrial development area, by agreement or through proceedings under the Land Acquisition Act, 1894 for the purposes of this Act;
(b) to prepare a plan for the development of the industrial development area;
(c) to demarcate and develop sites for industrial, commercial and residential purposes according to the plan;
(d) to provide infra-structure for industrial, commercial and residential purposes;
(e) to provide amenities;
(f) to allocate and transfer either by way of sale or lease or otherwise plots of land for industrial, commercial or residential purposes;
(g) to regulate the erection of buildings and setting up of industries; and
(h) to lay down the purpose for which a particular site or plot of land shall be used, namely for industrial or commercial or residential purpose or any other specified purpose in such area.

Section 19- Power to make regulations-
(1) The Authority may with the previous approval of the State Government, make regulation not inconsistent with the provisions of this Act or the rules made thereunder for the administration of the affairs of the Authority.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulation may provide for all or any of the following maters, namely,-

(a) the summoning and holding of meetings of the Authority the time and place where such meetings are to be held, the conduct of business at such meetings, and the number of

members necessary to form a quorum thereat;

(b) the powers and duties of the Chief Executive Officer;

(c) the form of register of application for permission to erect a building;

(d) the management of properties of the Authority;

(e) fees to be levied in the discharge of its functions;

(f) such other matters as are to be provided for in regulation.

Prevention of Corruption Act, 1947 & 1988--Their Objective & Purpose

67. Section 197 of Code of Criminal Procedure, 1898, required sanction for prosecution of a public servant to be given by the respective Government for prosecution, if the charges relate to an act, which is in discharge of official duty. At the relevant time the offences of corruption were contained in Section 161 to 165 IPC.

It appears that in post Second World War period, the legislature apprehended that the war conditions had tremendously increased the scope for bribery and corruption of public servants and though the war was over in 1946, opportunities for corrupt practices are likely to remain for considerable time to come. Large amounts of Government surplus stores were to be disposed of, in respect to certain kinds of items, shortage was likely to continue for sufficiently long time requiring imposition of controls etc, and extensive schemes of post war reconstruction, were to be launched involving disbursement of large sums of government money. All these activities were apprehended to offer wide scope of corrupt practices. Seriousness of the evil and possibility of its continuance or extension in future required immediate and drastic action to stamp it out (Gazette of India dated 23.11.1946 Part 5 page 374).

68. In these circumstances, the Prevention of Corruption Act, 1947 (in short Act of 1947) was enacted for more effective prevention of bribery and corruption. While considering the provisions of Act of 1947, the Hon'ble Apex Court in **S.A. Venkataraman Versus State, AIR 1958 SC 107** observed as under:

"These provisions of the Act indicate that it was the intention of the legislature to treat more severely than hitherto corruption on the part of a public servant and not to condone it in any manner whatsoever."

69. Again in **M. Narayanan Nambiar Versus State of Kerala, AIR 1963 SC 1116** the Hon'ble Apex Court held as under:

"The preamble indicates that the Act was passed as it was expedient to make more effective provision for the prevention of bribery and corruption. The long title as well as the preamble indicate that the Act was passed to put down the said social evil i.e. bribery and corruption by public servant. Bribery is a form of corruption. The fact that in addition to the word "bribery' the word "corruption' is used shows that the legislation was intended to combat also other evils in addition to bribery. The existing law i.e. Penal Code was found insufficient to eradicate or even to control the growing evil of bribery and corruption corroding the public service of our country. The

provisions broadly include the existing offences under Sections 161 and 165 of the Indian Penal Code committed by public servants and enact a new rule of presumptive evidence against the accused. The Act also creates a new offence of criminal misconduct by public servants though to some extent it overlaps on the pre-existing offences and enacts a rebuttable presumption contrary to the well known principles of criminal jurisprudence. It also aims to protect honest public servants from harassment by prescribing that the investigation against them could be made only by police officials of particular status and by making the sanction of the government or other appropriate officer a precondition for their prosecution. As it is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object i.e. to prevent corruption among pubic servants and to prevent harassment of the honest among them." (Emphasis added)

70. The Hon'ble Apex Court in the **State of Madhya Pradesh Verses M.B. Nariman, AIR 1975 Supreme Court 1835** observed as under:

"*The Act must be read as supplemental to the Penal Code....."*

"Further the Prevention of Corruption Act being a social legislation its provision must be liberally construed so as to advance the object of the Act."

The salient feature of the Act of 1947 qua the Cr.P.C. 1898 and I.P.C. were as follows:

(1) Sections 161-165 were made separately triable under Act of 1947,
(2) Definition of public servant in I.P.C. was made applicable,
(3) Sanction under Section 6 was unexceptional and was to apply strictly,
(4) Protection to wide range of public servants, which was not available under, Section 197 Cr.P.C. was extended to all of them.

71. The provisions were amended with wider implication in the new Code of Criminal Procedure, 1973 and the Act of 1988, quoted above. The major development was insertion of Section 465 in Cr.P.C., 1973, and wider definition of public servant, deletion of Sections 161 to 165 I.P.C. from I.P.C., and addition of sub-section (3) & (4) of Section 19 in the Act of 1988.

72. Act of 1988 was enacted as a complete Code with regard to corrupt practices of public servants. The important development, however, was that the rigour of any irregularity or illegality in sanction order, stood diluted to a large extent.

73. Following the earlier judgments in respect to Act of 1947, a Constitution Bench in **K. Veeraswami Versus Union of India, 1991 (3) SCC655 in paras 28 and 44** observed as under:

"The Act was intended to suppress bribery and corruption in public administration and it contains ***stringent provision****.. .....That does not mean that the Act was intended to condone the offence of bribery and corruption by pubic servant. Nor it was meant to afford protection to public servant from criminal prosecution for such offences. It is only to protect the honest public servants from frivolous and vexatious prosecution. The competent authority has to examine*

independently and impartially the material on record to form his own opinion whether the offence alleged is frivolous or vexatious."

"The apparent policy of the legislation is to ensure a clean public administration by weeding out corrupt officials. The Preamble of the Act indicates that the Act was intended to prevent more effectively the bribery and corruption by public servants."(Emphasis added)

74. The object and purpose for enacting the Prevention of Corruption Act was to curb corruption in public services and to deal with corrupt public servants in a more effective and expeditious manner.

Sanction for criminal prosecution-purpose and objective:

75. The provisions pertaining to sanction are on statute books for last more than a century now. We propose to refer the observations made by various High Courts and Apex Court on this aspect.

76. The Bombay High Court considering section 197 Cr.P.C., 1898, as long back as in 1929 in **Hanumant Shrinivas Kulkarni Versus Emperor, 31 Crl.L.J. 1930 (353)** pertaining to sanction, held "the object of the sanction is to guard against vexatious proceedings against public servants and to secure the well considered opinion of a superior authority before their prosecution."

77. The Madras High Court in **E Versus G. Sadagopan, 1953 Crl.L.J.1929** said that the object of sanction is nothing more than to ensure the discouragement of frivolous, doubtful and impolite prosecution.

78. The Calcutta High Court in **Indu Bhushan Chatterjee Versus State, AIR 1955 Cal.430** said, "the provision for sanction is a most salutary safeguard. The sanctioning authority is placed somewhat in the position of a sentinel at the door of Criminal Courts in order that no irresponsible or malicious prosecution can pass the portals of the Court of Justice.'

79. In **Gurbachan Singh Versus State, AIR 1970 Delhi 102** the Delhi Bench of Punjab High Court said "the intention of the legislature in providing for a sanction in respect of the offences covered by Section 6 of the Prevention of Corruption Act is merely to afford a reasonable protection to the public servants in the discharge of their official functions. **It is not the object of the section that a public servant who is guilty of the particular offence mentioned in that section should escape the consequences of his criminal act by raising the technical plea of invalidity of sanction. The sanction is a safeguard for innocent and is not a shield for the guilty." (**Emphasis Added)

80. In **1973 Madras Law Journal (Criminal) 660 Air Commodore Kailash Chand Versus State**, the Andhra Pradesh High Court referring to Section 6 of 1947 Act said "that to safeguard the public servants from any harassment or vexatious proceedings on the one hand and to protect the interests of the State as it affects the morale of the public services when the honesty and integrity of one of its servants is questioned, the Act provides for an impartial scrutiny of the allegations by a competent authority to satisfy itself that there is a prima facie case against the persons charged with."

In **R.S. Nayak Versus A.R. Antulay, 1984 (2) SCC 183** a Constitution Bench observed as under:

"The policy underlying Section 6 and similar sections, is that there should not be unnecessary harassment of public servant." ***(para 19).***

81. The Apex Court in the case of **R. Bala Krishna Pillai Vs. State of Kerala, (1996) 1 SCC 478** while referring to the Law Commission's 41st report with respect to Section 197 quoted the following observations of the Law Commission:

"The protection afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint. The ***ultimate justification for the protection*** *conferred by section 197* ***is the public interest in seeking that official acts do not lead to needless or vexatious prosecutions."*** *(Emphasis added)*

In the case of **P.V. Narsimha Rao Versus The State, AIR 1998 Supreme Court 2120** the Hon'ble Apex Court held as under:

"The requirement of sanction under Section 19(1) is intended as a ***safeguard against criminal prosecution*** *of a public* ***servant on the basis of malicious or frivolous alleging by interested persons****. The object underlying the said requirement is* ***not to condone the commission of an offence by a public servant****." (Para-92) (Emphasis added)*

82. In the case of **Gauri Shankar Prasad Vs. State of Bihar, 2000 SCC (Cri) 872** the Apex Court has held:

"The object of the section is ***to save officials from vexatious proceedings*** *against Judges, magistrates and public servants but it is no part of the policy to set an official above the common law. If he commits an offence not connected with his official duty he has no privilege. But if one of his official acts is alleged to be an offence, the State will not allow him to be prosecuted without its sanction. Section 197 embodies one of the exceptions to the general rules laid down in Section 190 Cr.P.C., that any offence may be taken cognizance of by the Magistrates enumerated therein. Before this section can be invoked in the case of a public servant two conditions must be satisfied i.e.(1) that the accused was a public servant who was removable from his office only with the sanction of the State Government or the Central Government; and (2) he must be accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty." (Emphasis added)*

83. In **State of Himachal Pradesh Vs. M.P. Gupta, 2004(2) SCC 349** it was held as under:

"The protection given under Section 197 is ***to protect responsible public servants against the institution of possible vexatious criminal proceedings*** *for offence alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for*

anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution." (Emphasis added)

84. In **State of Orissa and others Vs. Ganesh Chandra Jew, AIR 2004 SC2179** it was held as under:

"The protection given under Section 197 is ***to protect responsible public servants*** *against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution."* ***(Para-8)*** *(Emphasis added)*

85. Very recently, the Hon'ble Apex Court has again reiterated in **JT 2006 (1) SC 1 Rakesh Kumar Mishra Versus State of Bihar** as under:

"The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings...."

86. The object of the legislature for making provision pertaining to sanction seems to be clear. Where a public servant is prosecuted for an offence, which challenges his honesty and integrity, the issue in such a case is not only between the prosecutor and the offender but the State is also vitally concerned in it as it affects the morale of the public servants and also the administrative interests of the State. For these reasons, the discretion to prosecute appears to be taken away from the prosecuting agency and is vested in departmental authorities, i.e., the employer probably with the view that they may assess and weigh the accusation in a far more dispassionate and responsible manner. The ultimate justification is public interest. It, however, does not condone the commission of an offence by a public servant or to use it as shield to escape from legal proceedings on mere technicalities.

87. **Whether the Cadre Controlling Authority is Government of India or the State of Uttar Pradesh?**

Sri D.S. Mishra and Sri Sushil Kumar, the learned counsel for the petitioners vehemently argued that two petitioners being in U.P. Cadre, it was the main concern of the State Government to see whether they are functioning honestly or not and whether the allegations made against them required any trial or not. The Central Government merely because it has power to remove, has no role and should have abided the view taken by State Government vide its letter dated 28.6.2002. This leads us to consider in the present case as to who can be said to be actual Cadre Controlling Authority in respect to the petitioners, who are members of the Indian Administrative Service.

88. The two petitioners, Smt. Neera Yadav and Sri Rajiv Kumar, admittedly, are the Members of the Indian Administrative Service belonging to 1971 and 1983 batches respectively. Article

312 of the Constitution of India makes provision for All India Services if the Council of States by resolution supported by not less than two-third of the Members present and voting so resolves, requiring the Parliament to enact law to provide for creation of one or more All-India Services, common to the Union and States, and regulate the recruitment and the conditions of service of persons appointed, to any such service subject to other provisions of Chapter-4 of the Constitution of India. List-I Schedule-VII, Entry 70 also reads as under:

"Union Public Services; All-India Services; Union Public Service Commission."

Accordingly, the Parliament enacted All India Services Act, 1951. Section 2 defines All India Services, as under:

***"(2) Definition:-** In this Act, the expression "an **All-India Service" means** the service known as the **Indian Administrative Service** or the service known as the Indian Police Service [or any other service specified in Section 2-A]*

89. Section 3 of 1951 Act empowers the Central Government in consultation with the Government of States concerned to make rules for the regulation of recruitment and the condition of service of persons appointed, to an All India Service. In exercise of powers under Section 3 Rules have been framed by Government of India governing recruitment and conditions of service of the members of Indian Administration Service.

90. It is not disputed that a Member of Indian Administrative Service is appointed by the Central Government. Thereafter, he is posted to a particular State Cadre in accordance with the Scheme contained in the Rules. The pervasive control over the member of an Indian Administrative Service throughout his service remains with the Central Government. When he discharge his functions in the State Cadre, where he is posted, the day to day administrative control vests with the concerned State Government. However, if on any aspect, the view of the Central Government and the State Government comes into conflict, the rules provide that the opinion of the Central Government shall prevail. For example, Rule-3 of India All India Service Discipline Rules, 1969 empowers the concerned Government to suspend a Member of Indian Administrative Service, the proviso provides that where there is a difference of opinion between the State Government and the Central Government, the opinion of the Central Government shall prevail. Similarly, where the administrative orders are passed by the concerned State Government against the Member of All India Services, the appellate powers vest in the Government of India.

91. In respect to a member of Indian Administrative Service the Cadre controlling authority is Government of India. We are of the view that whereas conduct of a member of All India Service is of concern of both the Governments, namely, State Government and Central Government, the ultimate prevailing authority is the Central Government and not the State Government. This, however, would not have much relevance in order to determine the authority competent to grant sanction.

In the aforesaid background, we would, now, consider three questions (supra) formulated above.

Question No. 1

92. Shri Sushil Kumar, learned counsel appearing for the petitioners while addressing on question no.1 argued with vehemence that no sanction under Section 120-B, I.P.C. was granted by the Government of India. To appreciate the contention it would be relevant to have a look to the order dated 9.9.2002 of the Government of India granting sanction to the petitioners. A perusal thereof clearly indicates that the sanction under Section 19 includes not only the offences under Section 13(1)(d) and (2) of the Act of 1988 but also under Section 120-B, I.P.C. as well as any other offences punishable under other provisions of law in respect of the alleged acts of the petitioners. The relevant portion of the order granting sanction in respect to Smt. Neera Yadav is reproduced below:

"10. AND WHEREAS, the above facts and circumstances constitute offences punishable u/s 120-B of the Indian Penal Code and u/s 13(2) r/w 13 (1)(d) of the Prevention of Corruption Act, 1988 against the aforesaid Smt.Neera Yadav, IAS and Shri Ashok Chaturvedi, Chairman and Managing Director of the Flex Group of Industries, NOIDA.

11. AND WHEREAS, the Central Government, being the authority competent to remove said Smt. Neera Yadav from service, after fully and carefully examining all the facts and circumstances of the case as well as the documents and statements of witnesses placed before it in regard to the said allegations considers that Smt. Neera Yadav should be prosecuted in the Court of Law for the said offences.

12. NOW, THEREFORE, the Central Government doth, hereby accords sanction u/s 19(1) of the Prevention of Corruption Act, 1988 for prosecution of Smt. Neera Yadav for the said offence or for any other offences punishable under the other provisions of law in respect of the aforesaid acts and for taking cognizance of the said offences by the Court of Competent jurisdiction."

93. The order in respect to Sri Rajiv Kumar is similarly worded and, therefore, need not be repeated. Thus, the above contention is factually incorrect, hence rejected.

94. The Central Government, as an employer, has applied its mind and has considered as to whether the proceeding be launched against the aforesaid members of All India Service, are vexatious or genuine. It has also examined whether charges are serious and whether the prosecution is based on valid grounds. It is now to be examined whether the law requires similar scrutiny at another level, i.e., by more than one authority and whether any such authority has the power to veto the satisfaction of other authority, if more than one authorities are required to consider it.

95. The question of more than one authority to consider the question of sanction would not arise in the case of prosecution under Acts 1947 or 1988, for the reason that, as compared to Section 197 Cr.P.C., the scope of protection to public servants under Section 6 of the Act of 1947 and Section 19 of Act of 1988 is very wide. Section 197 of Cr.P.C. read with Section 21 I.P.C. may not cover all

the public servants. Sections 6 and 19 of Acts 1947 and 1988 respectively however include a wider range of public servants, i.e., all public servants as defined under Section 21 I.P.C., in case of Section 6 of Act of 1947 & even wider under Section 19 of Act of 1988. The definition of public servants under Act of 1988 is much wider than Section 21 I.P.C. This is by virtue of Clause (c) of Section 6 (1) & 19 (1) of Acts 1947 & 1988 respectively.

96. There are two requirements to attract Clause (c) of Section 6 (1) of the Act of 1947 and Section 19 (1) of the Act of 1988, i.e., the incumbent is a public servant and there is an authority competent to remove him. Interpreting Section 6 of the Act of 1947 in **K. Veeraswami (Supra)** the Hon'ble Apex Court observed as under:

"Section 6 may now be analysed. Clause (a) of Section 6 (1) covers public servants employed in connection with the affairs of the Union. The prescribed authority for giving prior sanction for such persons would be the Central Government. Clause (b) of Section 6(1) covers public servants employed in connection with the affairs of the State. The authority competent to give prior sanction for prosecution for such persons would be the State Government. Clauses (a) and (b)would thus cover the cases of public servants who are employed in connection with the affairs of the Union or State and are not removable from their office save by or with the sanction of the Central Government or the State Government. That is not the end. The section goes further in clause (c) to cover the remaining categories of public servants. Clause (c) states that in the case of any other person the sanction would be of the authority competent to remove him from his office. Section 6 is thus all embracing bringing within its fold all the categories of public servants as defined under Section 21 of the I.P.C."

97. Further as to who may consider the question of sanction, the Hon'ble Apex Court in **K. Veeraswami (Supra)** observed as under:

"The provisions of clauses (a) and (b) of Section 6(1) of the Act covers certain categories of public servants and the "other' which means remaining categories are brought within the scope of clause(c). Clause (c) is independent of and separate from the preceding two clauses." ***(Para-31)***

"There are, however, two requirements for the applicability of clause(c) of Section 6(1) to a Judge of the higher judiciary. First, the Judge must be a public servant. Second, there must be an authority competent to remove the Judge from his office. If these two requirements are complied with, a Judge cannot escape from the operation of the Act." ***(Para-32)***

98. Once the authority competent to remove a public servant, has recorded its satisfaction and has granted the sanction, the requirement of any further sanction may create substantive obstruction in the way of prosecution of such public servant. There is no reason or compulsion to assume a similar scrutiny by a different authority particularly when the appointing authority itself has analyzed the matter and has recorded its satisfaction. It would not only be superfluous but may frustrate the very object of grant of sanction. A member of Indian Administrative Services working in State cadre may

develop, with the passage of time, and in discharge of his duties, cordial relations with the politicians and others, who matter in the concerned State. It may happen, and the judicial notice can be taken of the fact that the Government at the Centre and the State may have different political affinities. In such case a situation may arise, where the Central Government finds a trial into alleged offence by a court of law against such public servant as genuine and desirable and grants sanction, the State Government for political reasons takes a different view. It may be vice versa. In our view, the decision of authority competent to remove such public servant must prevail over the view of any other authority. We may fortify our aforesaid view with the following additional reasons:

Firstly, Section 197 of the Criminal Procedure Code nowhere suggests that the sanction required under the said provision is over and above and in addition to a sanction already provided under a Special Act.

Secondly, the contention of the learned counsel is self-contradictory with reference to interpretation of Section 19 of the Act of 1988. Section 19 specifically requires previous sanction before cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 of Act of 1988 is taken. It does not talk of any further sanction under any other provision. Sub-section (3) of Section 19 of the said Act provides that in respect to certain irregularities etc. in the matter of sanction, no court shall interfere in certain circumstances affecting the proceedings under the Act of 1988. Taking an illustration, under Sections 7, 10, 11, 13 and 15 of the Act of 1988, any irregularity in sanction would not by itself vitiate the prosecution, by virtue of sub-section (3), irrespective of anything contained in the Code of Criminal Procedure 1973, yet can it be said that the aforesaid provision shall be rendered ineffective by application of Section 197 Cr.P.C. In our view, apparently, the answer would be in negative. Thus, the argument that, where the act is in discharge of official duties, for prosecution under the provisions of the Act of 1988, sanction Section 197 Cr.P.C. will also be required, is clearly fallacious. Any other interpretation would amount to adding certain words in Section 19 of Act of 1988 and making the Special Act subservient to Section 197 Cr.P.C., which is not permissible. When the provisions of statute are clear, categorical and unambiguous, the Court is not required to read anything more, or make an addition to it.

99. In **2005(6) SCC 281- Sushil Kumar Sharma Versus Union of India** the Hon'ble Apex Court held as under:

"While interpreting a provision, the Court only interprets the law and cannot legislate it."

Thirdly, the Code of Criminal Procedure, 1973 is a procedural law while Act of 1988 is a special enactment and substantive law, having its own independent procedural provisions. Section 40 I.P.C. makes conspiracy an offence under the Special Act, i.e., the Act of 1988. If there is no specific provision under Special Act and the reading of the statute so permits, the general provision of procedural law, like Cr.P.C. would be read in the special Act but not otherwise. For illustration in the Act of 1947, specific provisions

pertaining to appeal and revision were absent and thus, the appeal and revision were governed by the provisions of the Cr.P.C. Now under Section 19 of the Act of 1988, special provisions regarding appeal and revision are made in Section 27, and thus, the earlier position stands modified. It cannot be argued now that ignoring the language of Section 27 of Act of 1988 the matter would still continue to be governed in its entirety by Cr.P.C. Now the power of appeal and revision is subject to provisions of the Act of 1988, which includes various restrictions, imposed by the Act of 1988. This has been noticed and explained by the Hon'ble Apex Court in the case of **Central Bureau of Investigation Versus V.K.Sehgal, AIR 1999 Supreme Court 3706** (paras 15,16 and 17). The relevant observations are as under:

"It is noticeable that no specific provision was incorporated in the 1947 Act regarding appeal and revision and hence the appeal and revision were entirely governed by the provisions of the Code of Criminal Procedure. However, under the Act of 1988there is a special provision regarding appeal and revision which is incorporated in S.27." ***(Para-15)***

*"Thus the powers of appeal and revision of the High Court conferred by the Code of Criminal Procedure shall be "subject to the provisions of" the the Act of 1988. It is worthwhile to notice that a trammel has been imposed on a Court of appeal and revision under Section 19(3) (a) of the the Act of 1988****."(Para-16)***

"It is a further inroad into the powers of the appellate Court over and above the trammel contained in S.465 of the Code which has been dealt with supra. Under S.19 (3) (a) no order of conviction and sentence can be reversed or altered by a Court of appeal or revision even "on the ground of the absence of sanction" unless in the opinion of that Court a failure of justice has been occasioned thereby. By adding the Explanation the said embargo is further widened to the effect that even if the sanction was granted by an authority who was not strictly competent to accord such sanction, then also the appellate as well as revisional Courts are debarred from interfering with the conviction and sentence merely on that ground." ***(Para-17)***

100. A Constitution Bench of the Hon'ble Apex Court in the case of **R.S. Nayak Versus A.R. Antulay, 1984 (2) SCC500** while considering the provisions of Cr.P.C. and the Act of 1947 and interrelationship of the provisions under the aforesaid enactments clearly observed as under:

"In the absence of a specific provision made in the statute *indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Code of Criminal Procedure. In other words, Code of Criminal Procedure is the parent statute, which provides for investigation, inquiring into the trial of cases by criminal courts of various designations."* ***(Para-16)****(Emphasis added)*

101. In the Act of 1988, specific provision has been made for sanction with reference to the offences under the said Act and thus, it would neither be correct nor is otherwise permissible to import the provisions of Cr.P.C. unless it is

specifically provided in the special enactment.

102. In **K. Veeraswami (Supra)** quoting Craies on Statute Law, the Hon'ble Apex Court held "the construction which would promote the general legislative purpose underlying the provision in question, is to be preferred to a construction which would not. If the literal meaning of the legislative language used would lead to results which would defeat the purpose of the Act the court would be justified in disregarding the literal meaning and adopt a liberal construction which effectuates the object of the legislature."

103. Further while considering Section 6 of the Act of 1947 and Section 197 Cr.P.C. the Hon'ble Apex Court in **S.A. Venkataraman Versus State (Supra) observed "Section 6 of the Act must be considered with reference to the words used in the Section independent of any construction which may have been placed by the decisions on the words used in Section 197 Cr.P.C.**

104. In this regard reference may be made to a very recent observation of Hon'ble Apex Court in **Criminal Appeals No.982-983 of 2003, Dilawar Singh Versus Parvinder Singh @ Iqbal Singh & another, decided on 8.11.2005:**

*"**The Prevention of Corruption Act is a special statute** and as the preamble shows this Act has been enacted to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith. Here, the principle expressed in the maxim Generalia specialibus non derogant would apply which means that if a special provision has been made on a certain matter, that matter is excluded from the general provisions.(See Venkateshwar Rao V. Govt. of Andhra Pradesh, AIR 1966 Supreme Court 828, State of Bihar Vs. Yogendra Singh AIR 1982 Supreme Court 882 and Maharashtra State Board of Secondary Education V. Paritosh Bhupesh Kumar Sheth AIR 1984 Supreme Court 1543. **Therefore, the provisions of Section 19 of the Act will have an overriding effect over the general provisions contained in Section190 or 319 Cr.P.C.** A Special Judge while trying an offence under the Provisions of Corruption Act, 1988, cannot summon another person and proceed against him in the purported exercise of power under Section 319 Cr.P.C. if no sanction has been granted by the appropriate authority for prosecution of such a person as the existence of a sanction is sine quo non for taking cognizance of the offence qua that person." (Emphasis added)*

105. **Fourthly**, we notice that the rigour of sanction, as it was initially conceived, has been considerably mellowed down by the legislature, particularly in the Special Acts and the subsequent enactments, laying emphasis on the genuine and bona fide prosecution, and to prevent a mischievous public servant from escaping judicial trial in respect to offences committed by him, on sheer technicalities. In the case of **Kalpnath Rai Versus State (through CBI) AIR 1998 Supreme Court 201** the Hon'ble Apex Court while considering under Section 465 Cr.P.C., held as under:

"Sub-section (2) of S. 465 of the Code is not a carte blanche for rendering all trials vitiated on the ground of the

irregularity of sanction if objection thereto was raised at the first instance itself. The sub-section only says that "the Court shall have regard to the fact' that objection has been raised at the earlier stage in the proceedings. ***It is only one of the considerations to be weighed but it does not mean that if objection was raised at the earlier stage, for that very reason the irregularity in the sanction would spoil the prosecution and transmute the proceedings into a void trial."****(Para-29) (Emphasis added)*

106. The same view was taken by the Hon'ble Apex Court in the case of **V.K. Sehgal (Supra)** in para-10 of the judgment, which is as under:

"Even if he had raised any such objection at the early stage it is hardly sufficient to conclude that there was failure of justice."

107. In the same case the Hon'ble Apex Court also observed that since the purpose and object of sanction is to prevent a frivolous or vindictive prosecution and once the prosecution has concluded in conviction, it cannot be said that the prosecution was frivolous or vindictive. Since the provisions pertaining to sanction are in public interest and that stand satisfied, any objection with respect to sanction would not vitiate the trial. The Hon'ble Apex Court in **V.K. Sehgal and another (Supra)** held in para-11 as under:

"If that case ends in conviction there is no question of failure of justice on the mere premise that no valid sanction was accorded for prosecuting that public servant*, because the very purpose of providing such a filtering check is to safeguard public servants from frivolous or mala fide or vindictive prosecution on the allegation that they have committed offence in the discharge of their official duties. But once the judicial filtering process is over on completion of the trial the purpose of providing for the initial sanction would bog down to a sur-plusage. This could be the reason for providing a bridle upon the appellate and revisional forums as envisaged in S.465 of the Code of Criminal Procedure." (Emphasis added)*

108. We are conscious of the fact that in the present case the petitioners have raised the issue of sanction at the beginning of the proceeding. However, it is not a case where no sanction has been accorded. The employer, who is the authority competent to remove, has considered and applied its mind and thereafter granted sanction in no uncertain terms permitting prosecution under Section 13(1)(d) and (2) in Act of 1988 as well as Section 120-B, I.P.C. and other provisions of other enactments. The public interest has been served and the probability and possibility of vexatious prosecution stands excluded. Now, with the assistance of legal brains raising threadbare and hair splitting arguments, the petitioners are making an attempt to foil the entire prosecution so as to prevent trial of senior members of Indian Administrative Services, i.e., Country's Principal Civil Service and other important persons. Such an attempt would certainly be against larger public interest.

Fifthly, in our view, in the facts and circumstances of the present case, we find there is no authority, which could have granted sanction under Section 197 Cr.P.C. The two petitioners are not

covered by either sub-section (1) (a) or (b) of Section 197 Cr.P.C.

109. It is not disputed that at the time of commission of alleged offence the two petitioners, Smt. Neera Yadav and Rajeev Kumar were employed in the service of NOIDA, which is a statutory autonomous body. The appointment and posting letter of one of the petitioners, Smt. Neera Yadav, is on record, which is annexed as Annexure-S.R.A.5-Cha in Criminal Revision No.2300 of 2004 which reads as under:

"उत्तर प्रदेश शासन
नियुक्ति अनुभाग - १
संख्या-४४/दो-१-४/१ ;११७द्ध/८०
लखनउ : दिनांक - ७ मार्च, १९९४

कार्य्यालय ज्ञाप

अधोहस्ताक्षरी को यह कहने का निर्देश हुआ है कि राज्यपाल महोदय महोदय ने वित्तीय नियम संग्रह खण्ड-२, भाग-२ से ४ के मूल नियम -११० के अधीन श्रीमती नीरा यादव, आई० ए० एस० - १९७१ की सेवायें नवीन ओखला औद्योगिक विकास प्राधिकरण, गाजियाबाद के साथ वाहय सेवा पर उक्त प्राधिकरण के अध्यक्ष एवं मुख्य कार्यपालक अधिकारी के पद पर नियुक्ति हेतु दिनॉक १०-१-९४ के पूर्वान्ह से तीन वर्ष तक, बशर्ते कि उन्हें इसके पूर्व ही वापस न बुला लिया जाय या उसके स्थान पर दूसरे अधिकारी की नियुक्ति न कर दी जाय, स्थानान्तरित किये जाने की स्वीकृति प्रदान की है।

२- राज्यपाल महोदय ने भारतीय प्रशासनिक सेवा ;वेतनद्ध नियमावली - १९५४ के नियम ९ ;३द्ध के अधीन यह आदेश भी दिया है कि श्रीमती नीरा यादव द्वारा कार्यभार ग्रहण करने की तिथि से अध्यक्ष एवं मुख्य कार्यपालक अधिकारी, नवीन ओखला औद्योगिक विकास प्राधिकरण, गाजियाबाद का पद भार और उत्तरदायित्व में उक्त नियमों के शिड्यूल-३ में उल्लिखित निदेशक, उद्योग, उ० प्र०, कानपुर के पद के समक्ष माना जायेगा और उक्त नियमों के नियम-९ के उप नियम-;२द्ध के अधीन श्रीमती नीरा यादव को आई० ए० एस० के सुपरटाइम वेतनमान रू०५९०० - ६७०० में समय समय पर देय प्राप्त होगा।

३- श्रीमती नीरा यादव के वेतन इत्यादि पर होनेवाला सम्पूर्ण व्यय उक्त प्राधिकरण द्वारा वहन किया जायेगा। श्रीमती नीरा यादव की उक्त पद पर नियुक्ति की अन्य शर्तें इस कार्यालय ज्ञाप के संलग्नक में उल्लिखित है।

कृष्ण कुमार जग्गी
उप सचिव
सेवा में,
प्रमुख सचिव,
उ० प्र० शासन,
भारी उद्योग विभाग,
लखनउ।

संख्या-४४५ १/दो-१-९४, तद्दिनांक -
प्रतिलिपि संलग्नक की प्रति सहित निम्न को सूचनार्थ एवं आवश्यक कार्यवाही हेत प्रेषितः-
१- उप सचिव, इरला चेक ;वे० प० प्र०द्ध, लखनउ।
२- अध्यक्ष एवं मुख्य कार्यपालन अधिकारी, नवीन ओखला औद्योगिक विकास प्राधिकरण, गाजियाबाद।
३- सम्बन्धित अधिकारी
४- अपर निदेशक, उ० प्र० राज्य कर्मचारी सामू० बीमा एवं नामित अधिकारी, नियुक्ति अनुभाग-५/प्रशिक्षक सेल।

आज्ञा से
ह/०
कृष्ण कुमार जग्गी
उप सचिव"

110. The pay scale of petitioner, Smt. Neera Yadav, was determined and fixed under Rule-9(2)of the IAS(Pay) Rules, 1954. Sub-Rule (1)(2) and (3) of Rule 9 relevant for the purpose of the present case are quoted as under:

"9. Pay of Members of the Service appointed to posts not included in Schedule III- *(1)No members of the Service shall be appointed to a post other than a post specified in Schedule III, unless the State Government concerned in respect of posts under its control, or the Central Government in respect of posts under its control as the case may be, make a declaration that the said post is equivalent in status and responsibility to a post specified in the said Schedule.*

(2) The pay of a member of the Service on appointment to a post specified

in Schedule III shall be the same as he would have been entitled to, had he been appointed in the post to which the said post is declared equivalent.

(3) For the purposes of this rule "post other than a post specified in Schedule III' includes, a post under a body (incorporated or not which is wholly or substantially owned or controlled by the Government."

111. Schedule III of the Indian Administrative Service (Pay) Rules, 1954 contains the following posts:

"Uttar Pradesh Chief Secretary to Government
Chairman, Board of Revenue and Adviser, Land Reforms
Member, Board of Revenue
Agriculture Production Commissioner
Chairman, Administrative Tribunal-I and
Chairman, Vigilance Commissioner
Principal Secretary to Government
Commissioner of Divisions (Agra, Varanasi, Meerut & Lucknow)
Chairman, Administrative Tribunal
Commissioner of Division
Secretary to Government
Commissioner for Consolidation
Commissioner of Rural Development
Secretary to Chief Minister
Secretary to Governor
Sales Tax Commissioner
Transport Commissioner
Registrar, Cooperative Societies
[Director, Uttar Pradesh Academy of Administration
Director of Industries
Excise Commissioner
Cane Commissioner
Secretary, Board of Revenue
Labour Commissioner
[Inspector- General of Prisons
Inspector -General of Registrar-cum-Chief
Inspector of Stamps-cum-Addl. Secretary Board of Revenue
Director of Tourism
Director Handlooms"

112. Smt. Neera Yadav was not posted as Secretary, Industry Department. She did not function as ex officio Chairman of NOIDA under Section 3 of 1976 Act by virtue of her holding the office of Secretary, Industry Department or being nominee of such Secretary. She was appointed by the State Government as Chairman-cum-Chief Executive Officer, NOIDA by means of the said order. It was not a post included in Schedule III of 1954 Rules and thus, a declaration was made under Rule 9(2) of the aforesaid Rules. She was sent on deputation to NOIDA. As Chairman-cum-Chief Executive Officer, NOIDA Smt. Neera Yadav did not discharge duties in the affairs of the State Govt. She discharged her duties on deputation in the affairs of a statutory autonomous body, namely, NOIDA. We made specific enquiry and it was not disputed by the petitioners that same was the position in respect to Sri Rajeev Kumar, who was also posted as Deputy Chief Executive Officer, in Foreign Service, i.e., on deputation. These petitioners are public servants, but they, on deputation to NOIDA, were not working in connection with the affairs of the State, i.e., the State Government. The contention of Sri Hajela that while working in NOIDA, they were not public servants is not correct since the definition of public servant in Act of 1988 clearly includes the Officers of NOIDA also. However, that by itself is not sufficient to attract Section 197 Cr.P.C. That being so, the case of two petitioners

is not covered by Clause (a) & (b) of sub-section (1) of Section 197 Cr.P.C. and, therefore, no sanction was required under these provisions.

113. In the case of **R.R. Chari Versus State of Uttar Pradesh, AIR 1962 SC 1573** the Hon'ble Apex Court held with reference to Section 197 Cr.P.C. that where a public servant is loaned to another Government, for Section 197, it would mean that the public servant is employed in connection with the affairs of such Government, who has taken such person on loan. In the present case, applying the said dictum, the two petitioners were discharging duties in the affairs of NOIDA, which is a statutory autonomous body. Such an authority is not one of the competent authorities to grant sanction under Section 197 Cr.P.C.

114. Learned counsel for the petitioners, however, submitted that since the case of the two petitioners would not be covered by any of the clauses of sub-section (1) of Section 19 of the Act of 1988, the same is not applicable, and unless sanction under sub-section (1) (b) of Section 197 Cr.P.C. is granted by the State Government, the entire prosecution is vitiated in law. It was urged that the two petitioners, as public servants, were employed in connection with the affairs of the State are not removable from his office by the State Government and thus, section 19 (1) (a) & (b) of the Act of 1988 are not applicable to them. It was further contended that Clause(c) of sub-Section (1) of Section 19 of the Act of 1988 is applicable only to those cases where a person is neither employed in the affairs of the Union of India nor in the affairs of the State, although removable by either of these authorities and, therefore, sub-clause(c) of sub-section (1) of 19 of the Act of 1988 is not also applicable. It is submitted that Section 19 (1)(c) of the Act of 1988 is applicable to public servants, other than those, who are removable by Central Government or State Government. In our view, even if this submission is accepted, cognizance can be taken without sanction under Section 197 Cr.P.C. In the case of **P.V. Narsimha Rao Versus The State (Supra)**, (para-92), the Hon'ble Apex Court held has under:

"This means that when there is an authority competent to remove a public servant and to grant sanction for his prosecution under Section 19(1) of the Act of 1988the requirement of sanction precludes a Court from taking cognizance of the offences mentioned in Section 19(1) against him in the absence of such sanction, ***but if there is no authority competent to remove a public servant and to grant sanction for his prosecution under Section 19(1) there is no limitation on the power of the Court to take cognizance under Section 190, Cr.P.C. of the offences mentioned in Section 19(1) of the the Act of 1988."***

"The inapplicability of the provisions of Section 19(1)to a public servant would only mean that the intended safeguard was not intended to be made available to him." (Emphasis added)

115. Thus, in view of the law laid down by the Hon'ble Apex Court in **P.V. Narsimha Rao Versus The State (Supra),** Section 197 Cr.P.C. will not come in way, since the limitation on the power of the Court as contemplated under the aforesaid provision disappear. It would mean that the intended safeguard is not available to the public servant. The

court can proceed without any limitation provided under the aforesaid provision, namely, Section 197 of the Cr.P.C. The submission advanced with reference to Section 19 of the Act of 1988 in fact applies to Section 197 Cr.P.C. and goes against petitioners.

116. There is another angle to judge the correctness of the submission. In case for an offence under the Act of 1988 where sanction under Section 19 is granted, Section 197 Cr.P.C. is also applied, the object and purpose with which the provision of sanction has been made, will be rendered futile. It will lead to an exercise in futility. We fail to understand as to why separate sanction under both the enactments would be necessary. Learned counsel for the petitioners could not explain the purpose of requiring sanction under Section 197 Cr.P.C., except that if the law requires, the provisions of sanction has to be observed strictly as it is jurisdictional issue. The Act of 1988 is a Special Act. The statement of objects and reasons for the Act shows that the Parliament was concerned to consolidate and amend law relating to the prevention of corruption and matters connected therewith. It reads as under:

"1. The Bill is intended to make the existing anti-corruption laws more effective by widening their coverage and by strengthening the provisions.

2. The Prevention of Corruption Act, 1947, was amended in 1964 based on the recommendations of the Santhanam Committee. There are provisions in Chapter IX of the Indian Penal Code to deal with public servants and those who abet them by way of criminal misconduct. There are also provisions in the Criminal Law Amendment Ordinance, 1944, to enable attachment of ill-gotton wealth obtained through corrupt means, including from transferees of such wealth. The Bill seeks to incorporate all these provisions with modifications so as to make the provisions more effective in combating corruption among public servants.

3.The Bill, inter alia, envisages widening the scope of the definition of the expression "public servant", incorporation of offences under Sections 161 to 165-A of the Indian Penal Code, enhancement of penalties provided for these offences and incorporation of a provision that the order of the trial court upholding the grant of sanction for prosecution would be final if it has not already been challenged and the trial has commenced. In order to expedite the proceedings, provisions for day-to-day trial of cases and prohibitory provisions with regard to grant of stay and exercise of powers of revision on interlocutory orders have also been included.

1. Since the provisions of Sections 161 to 165-A are incorporated in the proposed legislation with an enhanced punishment, it is not necessary to retain those sections in the Indian Penal Code. Consequently, it is proposed to delete those sections with the necessary saving provision."

117. Sub-section (3) of Section 5 of the Act of 1988 applies the provisions of Cr.P.C. only in so far as they are not in-consistent with the Act in the matter of procedure and power of Special Judge. The same intention is evident from Sections 4 (1), (3) and (4), 6 (2), 17, 19 (3), 22 and 23 of the Act of 1988. There is a marked difference in the language of Sections 197 Cr.P.C. and Section 19 of

the Act of 1988. The two provisions are not pari-materia. In brief the distinction may be summarized as under:

(i) Section 197 Cr.P.C. is applicable to a serving public servant and also to those who are no more in service, on account of retirement, termination, dismissal or otherwise, whereas Section 19 of Act of 1988 provides protection only to a public servant who is in service.

(ii) Section 197 Cr.P.C. provides sanction of such authority under whom the public servant at the time of commission of the alleged offence is employed and is restricted only to the affairs of the Union or State and not to any other authority. For example, a public servant neither employed in connection with the affairs of the Union or with the affairs of the State, at the time of commission of alleged offence, would not be entitled to claim any protection under Section 197 Cr.P.C. Section 19 of Act of 1988 extends the protection not only with reference to the employment of the concerned public servant in the affairs of the Union or the State, but also with reference to the power of removal from office by the concerned Government, may be the Central Government or the State Government. It further provides protection to a third category, i.e. all the remaining public servants with reference to the power of removal. For example, in the matter of statutory bodies, local authorities etc. where the power of removal is not exercisable either by the Central Government or the State Government, the sanction of the authority having power of removal is required by 19(1) (c) of the Act of 1988 vide **K. Veeraswami (Supra)**.

118. This find support from the similar view taken by a three Judge Bench of the Hon'ble Apex Court in **S.A. Venkataraman Versus State, 1958 SCR 1040** wherein it was held " it was suggested that Clause-(c) in Section 6(1) refers to persons other than those mentioned in Clause (a) & (b). The words "employed" are absent in this clause which would, therefore, apply to a person who had ceased to be public servant though he was so at the time of commission of the offence. Clause(c) cannot be construed in this way. The expression " in the case of a person" and "in the case of any other person" must refer to a public servant having regard to the first paragraph of the sub-section. Clauses (a) & (b), therefore, would cover the case of a public servant, who is employed in connection with the affairs of the Union or the State and is not removable from his office save by or with the sanction of the Central Government or the State Government and Clause(c) would cover the case of any other public servant, whom a competent authority could remove from his office.....".

The same view has been followed and adopted by the Hon'ble Apex Court in **C.R. Wazir Versus State of Maharashtra, AIR 1971 SC 789, State of West Bengal Versus Man Mal Bhutoria and others, AIR 1977(3) SCC 440, K.Veeraswami Versus (Supra) and Kali Charan Mahapatra Versus State of Orissa, AIR 1998 SC 2595.**

In order to restrict the arbitrary and uncontrolled power or possible veto by such authorities (other than the Central Government and State Government), the State Legislature of Uttar Pradesh has

inserted the following provision under Section 19 (1) after Clause (c).:

"(d) Notwithstanding anything contained in clause (c, the State Government may, where it considers necessary so to do, require the authority referred to in clause (c), to give previous sanction within the period specified in this behalf and if the said authority fails to give the previous sanction within such period, the previous sanction may be given by the State Government.

Explanation.- (1) For the purpose of this clause "authority" does not include any authority under the control of the Central Government.

(2) For removal of doubts it is hereby declared that the power of the State Government under this clause may be exercised also in a case where the authority referred to in clause (c)has earlier refused to give the previous sanction."

119. The authorities contemplated under Section 19 of Act of 1988 are more than those provided under Section 197 Cr.P.C. Even in those cases where protection under Section 197 Cr.P.C. may not be claimed by a public servant it may come to his rescue when cognizance is to be taken under the Act of 1988. This difference with reference to sanctioning authority has been considered and explained by the Hon'ble Apex Court in **R.R. Chari Versus State of Uttar Pradesh (Supra).**

(iii) Section 197 Cr.P.C. is applicable only when the public servant has committed offence while acting or purporting to an Act in discharge of his official duty. Sanction under Section 19 of the Act of 1988 is much wider and do not impose any such restriction.

(iv) Lastly, we also find that although prosecution has been launched under Section 13 of Act of 1988 with respect to criminal misconduct, on the part of the aforesaid two persons in discharge of their official duties, the involvement of these two petitioners in criminal conspiracy to benefit themselves or others can not be construed as an act in discharge of their official duties. Learned counsel for the petitioners addressed us at length to demonstrate that the entire allegations against the petitioners show that their action is in discharge of their official duties and, therefore, without sanction under Section 197 Cr.P.C., no prosecution either under the Act of 1988 or I.P.C. is permissible, and in particular, prosecution under Section 120-B, I.P.C. cannot be allowed to proceed further at all. However, we propose to deal with this aspect in detail while considering question no.2.

120. Before adverting to question no.2, we intend to deal here with one more vehemently advanced submission, namely that the State Government has absolute discretion to grant or refuse sanction. It is submitted that once the State Government refused sanction the matter should have been taken as closed. Relying on **Gopal Chand Dwarika Das Morarka (Supra)** it was argued that the sanction could be denied on political reasons as well and, therefore, the Government of India should not have proceeded further in the matter.

121. We are afraid that the argument is not constitutionally permissible. The preamble of our Constitution provides Justice-Social, Economic and Political, and equality of status and opportunity for all. A person guilty of serious offences

cannot be allowed to escape trial only on account of political reasons. In our view, it would defeat the very purpose for which the Acts of 1947 & 1988 were enacted. Indian Administrative Services is the backbone of the executive wing under the Constitution. It is expected to work without fear, favour and obviously, without indulging itself in corrupt practices and unlawful activities. The Apex Court, sounding a word of caution, in **Narendra Madivalapa Kheni V. Manikrao Patil and others, AIR1977 SC 2171** observed as under:

"We hope that the civil services in charge of electoral processes which are of grave concern for the survival of our democracy ***will remember that their masters in statutory matters are the law and law alone, not political superiors*** *if they direct deviance from the dictates of the law. It is never to be forgotten that our country is committed to the rule of law and therefore functionaries working under statutes, even though they be government servants, must be defiantly dedicated to the law and the Constitution and, subject to them, to policies, projects and directions of the political government....."(Emphasis added)*

*"Be you ever so high, the law is above you"---this applies to our Constitutional order."****(Para-13)***

"The civil services have a high commitment to the rule of law, regardless of covert commands and indirect importunities of bosses inside and outside government. Lord Chesham said in the House of Lords in 1958: "He is answerable to law alone and not to any public authority." A suppliant, obsequious, satellite public service--or one that responds to allurements, promotional or pecuniary--is a danger to a democratic polity and to the supremacy of the rule of law. The courage and probity of the hierarchical election machinery and its engineers, even when handsome temptation entices or huffy higher power browbeats, is the guarantee of electoral purity. Ton conclude, we are unhappy that such aspersions against pubic servants affect the integrity and morale of the services but where the easy virtue of an election official or political power-wielder has distorted the assembly-line operations, he will suffer one day." ***(Para 29)***

122. If the State Government is allowed to obstruct an otherwise valid prosecution on the ground of political expediency, it would be ex facie, arbitrary and discriminatory and violative of Article 14 of the Constitution of India. It may expose the provisions pertaining to sanction to the risk of unconstitutionality. In **Gopal Chand's case** the Privy Council justified refusal of sanction even for political reasons also. We should, however, not forget that Part III of the Constitution of India was not available when in 1948 the Privy Council decided the said case. Further, the Privy Council was considering a matter in a pre-independence era, when such considerations could be valid. After independence, our Constitution mandates rule of law to be supreme governing principle of the land.

In the case of **Registered Society Vs. Union of India and Others (1996) 6 SCC 530**, the Apex Court has said as under:

"No public servant can say "you may set aside an order on the ground of mala fide but you cannot hold me personally

liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary."

In the case of **Shiv Sagar Tiwari Vs. Union of India (1996) 6 SCC** the Apex Court has held as follows.

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

In the case of **Delhi Development Authority Vs. Skipper Construction and another AIR 1996 SC 175** the court held as follows:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not meant to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

123. In our view, this reasoning in **Gopal Chand's case** is no more available after the Constitution Bench of Apex Court has held that sanction cannot be refused at will and is obligatory to be granted if credible material is available. In **K. Veeraswami (Supra)**, the majority view of Hon'ble Shetty , held as under:

"The competent authority may refuse sanction for prosecution if the offence alleged has no material to support or it is frivolous or intended to harass the honest officer. ***But he cannot refuse to grant sanction if the material collected has made out the commission of the offence alleged against the public servant. Indeed he is duty bound to grant sanction if the material collected lend credence to the offence complained of."*** *(Emphasis added)*

124. Even earlier, a Constitution Bench in **Matajog Dobey Versus H.C. Bhari, AIR 1956 SC 44** applied Article 14 to the exercise of power of sanction by the competent authority, it was held in para-15 as under:

"If the Government gives sanction against one public servant but declines to do so against another, then the government servant against whom sanction is given may possibly complain of discrimination..."

125. Thus, answering question no.1, we are not agreeable with the contention of the learned counsel for the petitioners that sanction, under both the Acts, i.e., the Act of 1988 & Cr.P.C., is necessary, for prosecution under Section 13 or any other provision of the Act of 1988.

Question No.1 is, thus, answered in negative.

Question No.2

126. This issue was argued from two angles:

First; Section 120-B, I.P.C. is an independent and substantive provision and, thus, where Special Judge takes cognizance in a prosecution under the Act of 1988, in a matter where the allegation constitute acts in discharge of official duties, sanction under Section 197 Cr.P.C. would be mandatory failing which the prosecution under Section 120-B, I.P.C.

cannot proceed. In order to elaborate the submission, learned counsel for the petitioners relied upon cases to show as to what is the meaning of the official acts in discharge of official duty.

127. In the case of **Shreekantiah Ramayya Munipalli & another Versus State of Bombay, AIR 1955 Supreme Court 287** the Hon'ble Apex Court has observed as under:

*"Now it is obvious that if S.197, Cr.P.C. is construed too narrowly it can never be applied, for of course it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to examine to such as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it."**(Para-18)***

128. In the case of **Amrik Singh Versus State of Pepsu, AIR 1955 Supreme Court 309** the Hon'ble Apex Court has observed as under:

*"It is not every offence committed by a public servant that requires sanction for prosecution under S.197 (1), Criminal P.C.; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained or is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really a matter defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution." **(Para-8)***

129. In the case of **B. Saha and others Versus M.S. Kochar, 1979 (4) SCC 177** quoting the aforesaid judgments, the Hon'ble Apex Court observed as under:

*"The words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the sanction will be rendered altogether sterile, for, "it is no part of an official duty to commit an offence, and never can be". In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same sanction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty which is entitled to the protection of Section 197(1), an act constituting an offence, **directly and reasonably** connected with his official duty will require sanction for prosecution under the said provision. As pointed out by Ramaswami,J. in **Baijnath v. State of M.P**, it is quality of the act that is important, and if it falls within the scope and range of his official duties, the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted." (Para-17)*

"In sum, the sine qua non for the applicability of this section is that the offence charged, be it one of commission

or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him." (Para-18) (Emphasis added)

130. In the case of **Abdul Wahab Ansari Versus State of Bihar and another, AIR 2000 SC 3187**, the Hon'ble Apex Court held as under:

"There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty. In the said case it had been further held that where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution, because it is a rule that when the law commands a thing to be done, it authorizes the performance of whatever may be necessary for executing its command."

131. In the case of **State of H.P. Versus M.P. Gupta (Supra)** the Hon'ble Apex Court held as under:

"Use of the expression "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty." ***(Para-11)***

"It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which, further, must have been official in nature. The section has, thus, to be construed strictly, while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in the course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far as its official nature is concerned. For instance, a public servant is not entitled to indulge in criminal activities. To that extent the section has to be construed narrowly and in a restricted manner. But once it is established that that act or omission was done by the public servant while discharging his duty then the scope of is being official should be construed so as to advance the objective of the section in favour of the public servant. Otherwise, the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance, a police officer in discharge of duty may have to use force, which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in course of service but not in discharge of his duty then the bar under

Section 197 of the Code is not attracted." ***(Para-12)***

132. Learned counsel for the petitioners spent hours to demonstrate that the acts alleged were committed by two petitioners in discharge of their official capacity or official duty, and therefore, unless sanction under Section 197 Cr.P.C. is obtained, cognizance under Section 120-B, I.P.C. cannot be taken. In order to show that double sanction is contemplated in a given case, Sri D.S. Mishra, Advocate referred to the Hon'ble Apex Court judgment of **R.R. Chari (Supra)**.

Sri Hajela, learned counsel, however, submitted that this issue can be raised during trial after the respondents had an opportunity to place full evidence before Trial Court. He relied upon the case of **P.K. Pradhan Versus The State of Sikkim, AIR 2001 Supreme Court 2547** where after considering the entire case laws the Hon'ble Apex Court held as under:

"It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits."

133. We have given our considerable thought to the submission. We find that any observation or discussion by us in detail on the question touching the offences/allegations against the two petitioners may prejudice the trial before Special Judge. We thus propose to deal with this issue with circumspection and without going into the merits of the allegations in the charge sheets.

134. In the case of **Kali Charan Mahapatra Versus State of Orissa (Supra)** the Hon'ble Apex Court held as under:

"It must be remembered that in spite of bringing such a significant change to Section 197 of the Code in 1973, Parliament was circumspect enough not to change the wording in Section 19 of the Act which deals with sanction. The reason is obvious. The sanction contemplated in Section 197 of the Code concerns a public servant who "is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty", ***whereas the offences contemplated in PC Act are those which cannot be treated as acts either directly or even purportedly done in the discharge of his official duties****. Parliament must have desired to maintain the distinction and hence the wording in the corresponding provision in the former PC Act was materially imported in the new PC Act, 1988 without any change in spite of the change made in Section 197 of the Code". (Emphasis added)*

135. It was held by the Hon'ble Apex Court that the offence contemplated under Act of 1988, are those which cannot be treated as acts either directly or even purportedly done in the discharge of official duty. That being so, the arguments raised with vehemence by the learned counsel for the petitioners that mere fact that the sanction has been granted by the Government of India under Section 19 of Act of 1988 shows that all the acts of two petitioners were in discharge of their official duties stands rejected.

136. This leaves us to consider another angle the aspect whether an offence of conspiracy alleged to have been committed under Section 120-B,

I.P.C. i.e, conspiracy, would it constitute acts in discharge of official duties, particularly where the narration of events is with reference to the acts constituting offence under the Act of 1988, and will at all attract Section 197 Cr.P.C.

137. Privy Council in **AIR 1948 PC 128 (H.H.B.Gill and another Versus The King)** held that the prosecution under Section 161 Cr.P.C. read with Section 120-B, I.P.C. does not require any sanction under Section 197 Cr.P.C. since the act of bribe cannot be said to be an act in discharge of official duty.

In **AIR (36) 1949 PC 117 Phanindra Chandra Neogy Versus The King**, the Privy Council held as under:

*"Applying this reasoning to the case of Gill, a public servant, who had been charged together with one, Lahiri, with being a party to a criminal conspiracy to cheat the Government, whereby offences under S 120B read with S. 420, Penal Code were alleged to have been committed and had also been charged with offences under S. 161 of the Code, their Lordships held that no sanction under S. 197, Criminal P. C. was necessary."**(para 4)***

138. A Constitution Bench of the Hon'ble Apex Court in the case of **Ronald Wood Mathams and others Versus State of West Bengal, AIR 1954 SC 455** following the aforesaid two judgments clearly approved the dicta laid down in the aforesaid two judgments that sanction under Section 197 Cr.P.C. was not necessary for proceeding against a public servant on **charges of conspiracy and bribery.**

139. Similar view has been taken in respect to prosecution under different provisions of the Indian Penal Code including Section 120-B, I.P.C. as detailed hereinbelow:

(A) In **Hori Ram Singh Versus Emperor, AIR 1939 PC 43** it was held that sanction under Section 270 of the Government of India Act, 1935, which is similar to Section 197 (1) of the Code of Criminal Procedure, no sanction was required for prosecution under Section 409 I.P.C.

(B) The same view was followed in **AIR 1948 PC 156 Albert West Medas Versus The King.**

(C) For offence under Section 409 I.P.C. no sanction under Section 197 Cr.P.C. was necessary, has been held in the following: **(I) AIR 1957 SC 458 Om Prakash Gupta Versus State of U.P. (II) AIR 1960 SC 266 Satwant Singh Versus State of Punjab (III) AIR 1966 SC 220 Baijnath Gupta Versus State of Madhya Pradesh (V) AIR 1967 SC 776 P.Arulswami Versus State of Madras, (VI) 1972 (3) SCC 89 Harihar Prasad Versus State of Bihar, (VII) AIR 1999 SC 2405 State of Kerala Versus V.Padmanabhan Nair (VIII) AIR 2004 SC 2317 (IX) AIR 1996 SC 901 R. Balakrishna Pillai Versus State of Kerala (X) 2004 (2) SCC 349.**

(D) With respect to Section 120-B, I.P.C. the Hon'ble Apex Court in **Harihar Prasad Versus State of Bihar(Supra)** considering the question of applicability of Section 197 Cr.P.C. has observed as under:

*"As far as the **offences of criminal conspiracy** punishable under S.120B read with S.409 I.P.C. and **also S.5 (2) of the Prevention of Corruption Act are***

concerned they cannot be said to be of the nature mentioned in Section 197 of the Code of Criminal Procedure." *(Emphasis added)*

140. This paragraph has been quoted with approval recently in **2005 (36) AIC 108(Supreme Court) Romesh Lal Jain Vs. Naginer Singh Rana & others** (paras 23 & 38)

(E) In **State of Kerala Versus V.Padmanabhan Nair (Supra)** the Hon'ble Apex Court held as under:

"That apart, the contention of the respondent that for offences under Ss.406 and 409 read with S.120-B of the I.P.C. sanction under S.197 of the Code is a condition precedent for launching the prosecution is equally fallacious....."

"It is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct." (Para-7) *(Emphasis added)*

(F) In **State (NCT of Delhi) Versus Nabjot Saddhu @ Afsan Guru 122 (2005) DLT 194 (SC)** the Hon'ble Apex Court observed as under:

"The other submission that the addition of the offence under Section 120-B, I.P.C. which does not require sanction, reveals total non-application of mind, does not appeal to us. Though the ***conspiracy to the commit offences punishable by Section 121-B, I.P.C. is covered by Section 121-A, probably Section 120-B was also referred to by way of abandon caution though the prosecution for the said offence does not require sanction."*** *(Emphasis added)*

141. To put it more clearly, it is no part of the duty of a public servant, while discharging official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct and thus the absence of sanction under Section 197 Cr.P.C. not a bar to proceed with the trial.

142. Moreover, there is an apparent fallacy in the contention of the learned counsel for the petitioners that just because the petitioners have been charge sheeted under Section 120-B, I.P.C., this itself is sufficient to attract Section 197 Cr.P.C. The entire allegations against the petitioners constitute offence under various provisions of Act of 1988, which is a Special Act. Section 40, I.P.C. clarifies that where conspiracy is an offence under the Special Act, Section 120-B would be referable to the offence under the said special Act. Section 120-B, I.P.C. in the present case cannot be read in isolation and has to be read along with the provisions of the Special Act, i.e., the Act of 1988. Since the sanction under Section 19 of the special Act has been obtained from the competent authority, in our view, Section 197, Cr.P.C. is not attracted, as Section 120-B, I.P.C. is referable to the offences committed under the Special Act.

143. In the present case, three charge sheets contain offence under Section 13 (1)(d) and (2) of Act of 1988 read with Section 120-B, I.P.C. and one charge sheet is only under Section 13(1) (d) & (2) of the Act of 1988. The offences under Act of 1988 as has been held by the Hon'ble Apex Court in **Harihar Prasad (Supra), Kalicharan Mahapatra (Supra),** which still holds field, does not come within the purview of word "in discharge of the official duty". Thus, the

offence of criminal conspiracy under Section 120-B, I.P.C., would also not be within the term "in discharge of official duty" and, therefore, Section 197 Cr.P.C. has no application at all.

144. The second question, accordingly, is also replied in negative.

QUESTION No.3.

In view of the discussions and the findings with reference to the aforesaid two questions, which have been answered in negative, the question no.3 is also replied in negative. The reasons already given above are not thus being repeated.

In view of the aforesaid, answers to the aforesaid three questions are as follows:

(I) For prosecution under Prevention of Corruption Act, 1988, once sanction under Section 19 of the said Act is granted, there is no necessity for obtaining further sanction under Section 197 of the Code of Criminal Procedure.

(II) Where a public servant is sought to be prosecuted under the provisions of Prevention of Corruption Act read with Section 120-B, I.P.C., and sanction under Section 19 of Act of 1988 has been granted, it is not at all required to obtain sanction under Section 197 Cr.P.C. from the State Government or any other authority merely because the public servant is also charged under Section 120-B, I.P.C.

(III) The offences under the Prevention of Corruption Act, 1988 as well as charge of criminal conspiracy, cannot be said to constitute "acts in discharge of official duty."

145. The record of all these cases shall be placed before the Division Bench for necessary orders.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2006

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 48409 of 2004

Smt. Nisha Keserwani ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri Siddharth Pandey
Sri M.P. Yadav
Sri Sanjay Kumar Singh
Sri Pradeep Kumar

Counsel for the Respondent:
S.C.

Indian Stamp Act 1899–Section 47-A-Limitation for exercising the power by D.M.–Sale deed executed on 4.5.96–Notice by D.M. issued on 4.7.2000–e.g. beyond the period of 4 years–under proviso–the proceeding can be initiated–even after 8 years–provided prior permission from the government obtained–held–impugned notice itself–issued in contravention of the provision of section 47-A–entire exercise held illegal.

Held: Para 4

In such view of the matter, as the notice itself was issued to the petitioner after more than four years, which was in clear contravention of the provisions of Section 47-A of the Indian Stamp Act, no proceedings could have been initiated

against the petitioner in pursuance of the said notice. As such, the orders impugned in this writ petition, which had been passed in pursuance of the aforesaid notice, are both liable to be quashed.

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

1. A sale deed was executed in favour of the petitioner on 4.5.1996 on which requisite duty on the sale consideration had been paid. It has been submitted that after a gap of more than four years, a notice dated 4.7.2000 was issued by the District Magistrate, Allahabad to show cause why the said document be not impounded for being deficiently stamped and penalty be not imposed on the petitioner. According to the petitioner, the said notice was never served on him. However, by order dated 20.3.2003 the respondent no. 2, Deputy Commissioner (Stamps), Allahabad held that the valuation of the property in question was Rs.20,00,000/- on which the stamp duty of Rs.2,98,000/- ought to have been paid and thus after deducting the stamp duty already paid at the time of registration of the sale deed. It was held that the document was deficiently stamped by Rs.2,64,624/-, on which a penalty of Rs.376/- was also imposed and accordingly a sum of Rs.2,65,000/- was found to be payable by the petitioner. The appeal filed by the petitioner against the said order was dismissed by the Commissioner, Allahabad Division, Allahabad, respondent no. 3 by order dated 28.9.2004 on the ground that the same was filed beyond the period of limitation. Aggrieved by the said orders, the petitioner has filed this writ petition.

2. I have heard Sri Sanjay Kumar Singh, learned counsel appearing for the petitioner as well as learned Standing Counsel appearing for the State-respondents. Counter and rejoinder affidavits have been exchanged and with the consent of learned counsel for the parties, this writ petition is being disposed of at the admission stage itself.

3. The specific case of the petitioner is that it is only under Section 47-A of the Indian Stamp Act, 1899 that the Collector could have called for and examined the instrument for the purpose of satisfying himself as to the correctness of the market value of the property and the duty payable thereon. Under Section 47-A (3) the same could have been done only within four years from the date of registration of such instrument on which the duty was to be charged on the market value of the property. The petitioner had raised such specific objections with regard to limitation before the authorities below. Admittedly the sale deed was executed on 4.5.1996 and the notice was issued for the first time on 4.7.2000, which was beyond the period of four years. The proviso may confer power to initiate action even after the period of four years and within a period of eight years, but only with the prior permission of the State Government. It is not the case of the respondents that such permission had been obtained from the State Government. In the counter affidavit the respondents have not denied this fact that the notice was for the first time issued only on 4.7.2000 and as such the action against the petitioner was taken for the first time after four years of the registration of the sale deed. Learned Standing Counsel has not placed before me any provisions of law under which the said notice could have been issued after the period of four years, when no prior

permission of the State Government had been taken.

4. In such view of the matter, as the notice itself was issued to the petitioner after more than four years, which was in clear contravention of the provisions of Section 47-A of the Indian Stamp Act, no proceedings could have been initiated against the petitioner in pursuance of the said notice. As such, the orders impugned in this writ petition, which had been passed in pursuance of the aforesaid notice, are both liable to be quashed.

5. Accordingly, this writ petition stands allowed. The impugned order dated 20.3.2003 passed by the respondent no. 2, the Deputy Commissioner (Stamps), Allahabad and the order dated 28.9.2004 passed by the respondent no. 3, the Commissioner, Allahabad Division, Allahabad are quashed. There shall be no order as to costs.

6. The amount deposited in terms of the interim order granted by this Court shall be refunded to the petitioner within two months from the date of filing of an application by the petitioner before the respondent no. 2, alongwith a certified copy of this order. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2006

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No.27915 of 2002

Smt. Sudesh and others ...Petitioners
Versus
Addl. District Judge, Kanpur Dehat and others ...Respondents

Counsel for the Petitioners:
Sri Faujdar Rai
Sri Chandra Kr. Rai

Counsel for the Respondents:
Sri M.A. Siddiqui
Sri I.M. Khan

Code of Civil Procedure 1808 Order 9 rule 13-setting aside the ex-parte decree-suit for cancellation of sale deed and permanent injection-petitioners claiming possession over the disputed plat for the last 20 years from the date of execution of sale seed-Notice send through ordinary Post-service through advocate commission-both the witnesses mentioned in the report and found emical to petitioner-held-view taken by the courts below highly technical-court should decide the case on merit rather technical basis-without sending the Notice through registered post-publication in news paper-held-service not sufficient-direction issued decide the case on merit as expeditiously as possible without granting unnecessary adjournments.

Held: Para 4

From a perusal of the record it is clear that notices were actually never served on the petitioners. The notices were only sent by ordinary process and not even by registered process. It was thereafter that notices were sent through Advocate

Commissioner who reported that in presence of two witnesses the petitioners refused to accept the same. It is the clear case of the petitioners that the two witnesses who had been shown in the report of the Advocate Commissioner were inimical towards the petitioners as there was litigation going on with them and as such no reliance could have been placed on the report of the Advocate Commissioner. It is also improbable that even on coming to know of a suit for cancellation of their sale deed, the petitioners would not contest the suit, especially when the possession of the property in dispute had been handed over to the petitioners on which, as claimed by the petitioners, they have already made constructions. The endeavour of the courts of law should be to decide the case on merits after giving sufficient opportunity to the parties and hearing them. In the present case, although technically it had been recorded that the service of notices on the petitioners was deemed sufficient but actually, from the facts, it does not appear that the petitioners had ever been served with the notices in the suit. Merely because in some other case filed against the husband of one of the petitioners, some mention of the pendency of the present suit was made in a written statement, the same would not amount to be sufficient service of notices on the petitioners. The trial court as well as the appellate court have taken a very technical view of the matter. In my opinion, in the circumstances of the case, without the trial court having sent notices by registered post or if still not served, directing publication of notices in the newspaper, the order of deeming sufficiency of services was not appropriate. The endeavour of the courts should be to give the parties sufficient opportunity to contest the case on merits, rather than to decide the same exparte. In such cases, the courts of law are to take a more liberal view while dealing with such issues and make every effort to decide the lis between the parties on merits, as passing of an exparte decree, may at times, as in the present case, amount to causing grave injustice to a party.

Case law discussed:

2001 (92) R.D. 809
AIR 1987 SC-1353
AIR 1997 SC-1919
AIR 1996 orissa-29

Limitation Act-Section-5-Condonation of Delay-courts should adopt liberal approach while dealing with application for condonation of delay.

Held: Para 5

As regards the application for condonation of delay in filing the application for setting aside the exparte decree, it may be observed that in case of exparte decree, the limitation would begin from the date of knowledge of the passing of the exparte decree, which in the present is 20.1.1998 and the application was filed within four days of the same. The Apex Court in the case of Collector, Land Acquisition v. Mst. Katiji A.I.R.1987 S.C. 1353 has held that "The Legislature has conferred the power to condone delay by enacting S.5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on "merits'." While laying down the guidelines for deciding such application, it was held that the Courts should adopt a liberal approach in the matter while dealing with application for condonation of delay.

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

1. Original suit no. 729 of 1995 was filed on 12.10.1995 by Respondent no.3 Jamin Raja Khan against the petitioners for a decree of permanent injunction and cancellation of sale deed dated 29.12.1994 passed in favour of the petitioners. An exparte decree dated 1.5.1997 was passed by the trial court

decreeing the suit of the plaintiff. Then on 24.1.1998, the petitioners (defendants) filed an application under order 9 Rule 13 C.P.C. for setting aside the exparte decree alongwith application under section 5 of the Indian Limitation Act. The application for condonation of delay, as well as the application for setting aside the exparte decree, were both rejected by the Civil Judge vide his order dated 8.3.2001. Misc. Appeal No.25 of 2001 filed by the petitioners against the said order has also been dismissed by the Additional District Judge vide his order dated 16.5.2002. Aggrieved by the aforesaid orders, this writ petition has thus been filed with the prayer for quashing the orders dated 16.5.2002 and 8.3.2001 passed by Respondent nos. 1 and 2 respectively, as well as the exparte Judgment and Decree dated 1.5.1997 passed by the Respondent no.2.

2. I have heard Sri Chandra Kumar Rai on behalf of the petitioners and Sri M.A.Siddiqui on behalf of the contesting respondent no.3 and have perused the record. Counter and rejoinder affidavits have been exchanged and with the consent of the learned counsel for the parties, this writ petition is being disposed of at the admission stage itself.

3. In the application filed under Order 9 Rule 13 C.P.C., the petitioners have categorically stated that they had no knowledge of the exparte decree till 20.1.1998 when the Respondent no.3 had, for the first time, come to disturb the possession of the petitioners over the property in dispute. Immediately thereafter on 22.1.1998, the petitioners contend, they got the file inspected and on 24.1.1998 filed the application for setting aside the exparte decree on 24.1.1998. The case of the petitioners is that after the execution of the sale deed dated 29.12.1994, they had come in possession of the property in dispute and that the plaintiff-respondent no.3 is basing his claim solely on the basis of some agreement executed in his favour in the year 1975, which was nearly 20 years prior to the execution of the sale deed in favour of the petitioners. The Civil Judge rejected the applications primarily on the ground that service of notice was deemed to be found sufficient. Although the notices were never actually served on the petitioners, but since allegedly the petitioners refused to accept the notices, the same were deemed to have been served on the petitioners. It was also mentioned by the trial court that in a written statement filed in some other suit, in which the husband of one of the petitioners was a party, a mention of the suit for cancellation of the sale deed had been made and thus also it would be deemed that the petitioners had knowledge of the pendency of the suit. As such, the trial court refused to condone the delay in filing the application under Order 9 Rule 13 C.P.C. and thus rejected both the applications. The appeal filed by the petitioners against the order of the trial court has also been dismissed on similar grounds.

4. From a perusal of the record it is clear that notices were actually never served on the petitioners. The notices were only sent by ordinary process and not even by registered process. It was thereafter that notices were sent through Advocate Commissioner who reported that in presence of two witnesses the petitioners refused to accept the same. It is the clear case of the petitioners that the two witnesses who had been shown in the

report of the Advocate Commissioner were inimical towards the petitioners as there was litigation going on with them and as such no reliance could have been placed on the report of the Advocate Commissioner. It is also improbable that even on coming to know of a suit for cancellation of their sale deed, the petitioners would not contest the suit, especially when the possession of the property in dispute had been handed over to the petitioners on which, as claimed by the petitioners, they have already made constructions. The endeavour of the courts of law should be to decide the case on merits after giving sufficient opportunity to the parties and hearing them. In the present case, although technically it had been recorded that the service of notices on the petitioners was deemed sufficient but actually, from the facts, it does not appear that the petitioners had ever been served with the notices in the suit. Merely because in some other case filed against the husband of one of the petitioners, some mention of the pendency of the present suit was made in a written statement, the same would not amount to be sufficient service of notices on the petitioners. The trial court as well as the appellate court have taken a very technical view of the matter. In my opinion, in the circumstances of the case, without the trial court having sent notices by registered post or if still not served, directing publication of notices in the newspaper, the order of deeming sufficiency of services was not appropriate. The endeavour of the courts should be to give the parties sufficient opportunity to contest the case on merits, rather than to decide the same exparte. In such cases, the courts of law are to take a more liberal view while dealing with such issues and make every effort to decide the lis between the parties on merits, as passing of an exparte decree, may at times, as in the present case, amount to causing grave injustice to a party. In the case of **Bhagwan Pandey v. III Additional District Judge Ballia** 2001 (92) Revenue Decisions 809, (which is based on similar facts as in the present case) where the application under Order 9 Rule 13 C.P.C. was rejected by the trial court and the appeal against the said order was also dismissed, this Court had set aside the said two orders, as also the exparte decree and directed the trial court to proceed with the suit on merits.

5. As regards the application for condonation of delay in filing the application for setting aside the exparte decree, it may be observed that in case of exparte decree, the limitation would begin from the date of knowledge of the passing of the exparte decree, which in the present is 20.1.1998 and the application was filed within four days of the same. The Apex Court in the case of **Collector, Land Acquisition v. Mst. Katiji** A.I.R.1987 S.C. 1353 has held that "The Legislature has conferred the power to condone delay by enacting S.5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on "merits'." While laying down the guidelines for deciding such application, it was held that the Courts should adopt a liberal approach in the matter while dealing with application for condonation of delay.

6. The cases of **Mst. Bhabia Devi v. Permanand Pd. Yadav** A.I.R. 1997 SC 1919 and **Sidheswar Sahu v. Arakhita Jena** A.I.R. 1996 Orissa 29 as have been relied upon by the learned counsel for the Respondent no.3 are distinguishable on

facts and would have no application in the present case.

7. In view of the aforesaid discussion, in my view, the orders impugned in this writ petition are liable to be quashed. Accordingly, this writ petition succeeds and is allowed. The impugned orders dated 8.3.2001 and 16.5.2002 passed by the trial court as well as the appellate court and the exparte decree dated 1.5.1997 passed by the trial court are all quashed. Original suit no. 729 of 1995 shall stand revived. Since the suit is of the year 1995, it would be desirable that the same be decided on merits, as expeditiously as possible, without granting any unnecessary adjournment to either of the parties.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.01.2006

BEFORE
THE HON'BLE V.M. SAHAI,J.
THE HON'BLE SHIV SHANKER, J.

Criminal Contempt Petition No. 11 of 2001

State of Uttar Pradesh ...Appellant
Versus
Nepal Singh ...Respondent

Counsel for the Appellant:
Sri Sudhir Mehrotra
Sri A.K. Tripathi
Sri Vijai Shanker Misra
A.G.A.

Counsel for the Respondent:
Sri R.K. Vaish
Sri Abhay Raj Singh

Contempt of Courts Act 1972-Section-15-Criminal Contempt-Forged and fabricate copy of F.I.R.-filed before High Court-intentionally-for obtaining the bail order-court found all the four ingredients of crime-against the accused contemner-held-the word firing in FIR deleted to obtain the bail/order-amounts to criminal contempt and concealing material facts from this Court-liable to be punished.

Held: Para 13 & 16

It is worthwhile to mention here that the F.I.R. is an important document upon which the whole prosecution case stands if the role of firing of the accused is not mention in the F.I.R. and subsequently the role of accused is shown in the statement of the prosecution witnesses therefore, it can be deemed to be a development of the case and in such circumstances the benefit must to in favour of the accused. It is further worthwhile to mention that there are four ingredients of crime firstly intention, secondly preparation, thirdly attempt and fourthly commission. In the present case all the four ingredients are available against the accused contemner. Therefore, it is liable to be deemed that the word of firing from the F.I.R. was deleted from the copy of the F.I.R. in order to obtain bail order from this Court after deceiving and concealing the true and real facts.

Considering the facts and circumstances of the case as mentioned above, we are of the view that the contemnor has deliberately filed incomplete copy of the F.I.R. in Criminal Misc. Bail Application No.5756 of 2001, Mohan Lal vs. State of U.P. by concealing the true and real facts whereby he obstructed in the administration of justice and is liable to be punished for committing criminal contempt under Section 12 of the Contempt of Courts Act, 1971. In view of this, the charge leveled against the contemner is fully proved and he is liable to be punished for the same.

Case law discussed:
AIR 2003 SC-3469
AIR 2003 SC-2723

(Delivered by Hon'ble Shiv Shanker, J.)

1. This case was initiated upon a show cause notice issued in Criminal Misc. Bail Application NO. 5756 of 2001, Mohan Lal Vs. State of U.P., by this Court against the contemner Nepal Singh son of Ram Charan.

2. Brief facts, arising out of this case, are that Chhotey Lal son of Jawahar Lal lodged an F.I.R. on 13.2.1998 at 11.25 A.M., at Police Station Bisharatganj, district Bareilly wherein it was stated that his younger brother Net Ram had kept the wife of Har Prasad, who was murdered by his brother Mohan Lal one year ago of the present occurrence. Therefore, due to keeping the wife of Har Prasad, Mohan Lal harboured ill-will. On 12.12.1998, at about 7.30 P.M.,. Mohan Lal accused reached near Net Ram, who was warning under a tree at his house along with companion, his nephew Prem Pal and others. Mohan Lal and his companion surrounded Net Ram who stood and run away towards his house where Mohan Lal fired two shots upon Net Ram in his court-yard and his companions attacked him with sword. Net Ram consequently died on the spot. Whereafter Smt. Surajmukhi, wife of Net Ram deceased, was taken towards the jungle of the village. Thereafter the case under sections 302/366IPC was registered against the accused.

3. During the course of investigation, the name of accused Bhagwan Das was also come into light on the basis of the criminal conspiracy. The name of Nanhey was disclosed by the prosecution witnesses in this occurrence.

4. Later on the bail application of Nanhey son of Lakhan was allowed by the Sessions Judge granting bail to him. Thereafter bail application was moved by Mohan Lal in the sessions court Bareilly on the ground of parity but the same was rejected by the Sessions Judge, Bareilly finding no case of parity. Thereafter bail application of Mohan Lal was moved before this Court wherein all the facts are mentioned in the bail application. Copy of the F.I.R. was also annexed and the affidavit was sworn by contemner Nepal Singh by filing his affidavit. At the time of hearing the argument in the bail application in this Court, learned A.G.A. has pointed out that the copy of F.I.R. (annexure-1) filed on behalf of accused in support of the bail application is fabricated and incomplete copy of the F.I.R.. There is no clear averment that Mohan Lal accused made two fires in the court-yard of the house of deceased which portion of the F.I.R. has been left out deliberately in the copy of F.I.R. (annexure-1). Thereafter the following order was passed by this Court after rejecting the bail application of Mohan Lal accused:-

"*Let a notice be issued against him fixing 13.4.2001 to show cause why he be not punished for filing false affidavit before the court.*

List on 13.4.2001 as part-heard before this court. Office is further directed to keep the record of Criminal Misc. Bail Application No. 5756 of 2001 in a sealed cover."

5. The objection alongwith the affidavit of contemner was filed werein it was stated that he was Pairokar on behalf of accused Mohan Lal. He contacted the local counsel Sri Raj Kumar Verma,

Advocate, bareilly was doing the necessary Pairvi of the case. And some time in the month of January, 2001, gave him a sum of Rs.500/- for obtaining copy of the F.I.R., copy of the post mortem report of deceased besides other evidence collected by he Investigating Officer in connection with said criminal case, for the purpose of preparing/moving bail application on behalf of said Mohan Lal.

6. Sri Raj Kumar Verma, Advocate Bareilly obtained all the relevant papers in connection with the case including the copy of the F.I.R. in question dated 13.12.98 and moved a bail application on behalf of Mohan Lal, accused in the court of Magistrate which was rejected then and before the Sessions Judge, Bareilly who rejected the same on 23.2.2001.

7. Since he had no personal contact or communication of his own with any learned counsel ate Allahabad for the purpose of moving a bail application on behalf of Mohan Lal before this Court. The relevant documents were given to Sri A.B. Maurya, Advocate. Thereafter, bail application no.5756 of 2001 was moved by the said Advocate of this Court. The original and written copy of the prosecution documents were still lying with him and he has assured to produce the same before this Court at the time of hearing of the criminal contempt. He is an illiterate and uneducated person and even cannot write his name. Sri A.B. Maurya, Advocate prepared and moved the bail application of Mohan Lal accused before this Court on the basis of the said hand written copies of the prosecution documents which were obtained by Raj Kumar Verma, Advocate, Bareilly. He had only put the thumb marks upon the affidavits and other blank papers. It is further stated that Photostat copy of the F.I.R. available in the record of the case of Mohan Lal before the court below was not visible and, therefore, some part of the F.I.R. was not left out deliberately by the clerk of the above Advocate of the Bareilly. The possibility of inadvertence and unintentional copying/writing mistake having taken place on the part of Sri Raj Kumar Verma, Advocate while copying the said prosecution documents particularly the F.I.R. dated 13.12.1998, can also not be ruled out. In these circumstances, he has not committed any criminal contempt. The only fault of the contemner is that he applied for some documents including the copy of F.I.R. which were obtained from Sri Raj Kumar Verma without ascertaining its genuineness, correctness and authenticity. It is stated that had the deponant been an educated person, he would have definitely checked and verified the genuiness of the said prosecution documents and as such in any view of the matter the contemnor cannot be said to have deliberately filed the incomplete copy of the F.I.R. date 13.12.1998 but he regrets for the same and tenders unconditional apology before this Court. Therefore, it is prayed that he may be exonerated of the charge dated 9.5.2005 framed against him by this Court for deliberately filing of the incomplete copy of the F.I.R. in connection with bail application and the contempt proceedings may also be dropped.

8. The contemner was charged by a division Bench of this Court on 9.5.2005 in the following manner:-

"why you Nepal Singh, son of Ram Charan residence of village Dhanaiti Kharagpur, Police Station Aliganj, District Bareilly be not punished for

having committed criminal contempt of this Court for deliberately filing incomplete copy of the F.I.R. along with affidavit in Misc. Bail Application No. 5756 of 2001, Mohan Lal vs. State of U.P. before this Court."

9. Charge was accordingly translated in Hindi and read over to the contemnor who is allowed three weeks time to give reply to the aforesaid charge.

Counter and rejoinder affidavits have been exchanged.

10. Heard learned counsel for the contemner and learned A.G.A.. We have also perused the whole record.

11. It is contended on behalf of the contemner that he is illiterate and uneducated person. He is also brother-in-law of the accused Mohan Lal and, therefore, he was doing the parvi of the case on his behalf. He met Sri Raj Kumar Verma, Advocate, Bareilly for doing the parvi of the case on behalf of accused Mohan Lal. He had also given necessary expenses to Sri Raj Kumar Verma, Advocate to obtain the copy of the F.I.R. and other relevant papers for the purpose of moving the bail application and for obtaining relevant documents including the copy of F.I.R. in question. Thereafter, his bail application was moved which was rejected by the Magistrate concerned. Thereafter, the bail application was moved before the Sessions Judge, Bareilly, which was also rejected. Thereafter, he reached at Allahabad and met Sri A.B. Maurya, Advocate, High Court, Allahabad on the recommendation of Sri Raj Kumar Verma, Advocate, Bareilly, all the necessary documents including the copy of the F.I.R. were handed over to Sri A.B. Maurya, Advocate. Thereafter, he has obtained the thumb impression upon several papers and he could not understand as to what was written in it, subsequently the portion of firing by accused Mohan Lal was deleted from the copy of the F.I.R.. It is further contended that the copy of the statements of the prosecution witnesses had been filed along with the bail application before this Court. If the intention of the contemnor was to deceive the Court in filing of the incomplete copy of the F.I.R., the same portion would be deleted from the statement of prosecution witnesses meaning thereby the role of firing made upon the deceased have been mentioned in the statement of the prosecution witnesses. In these circumstances, the deliberate deletion of portion of firing upon the deceased by Mohan Lal was not deliberate in the copy of the F.I.R. by the contemner or by anyone as the copy of the F.I.R. was obtained by the Advocate of Bareilly from the copy of the court and not from the original F.I.R.. In these circumstances the contemner is liable to be exonerated from the said charge.

12. There is no dispute that the affidavit of contemnor along with copy of the F.I.R. was also filed in the above bail application before this Court. There is no dispute that the rule of the accused Mohan Lal had been given in the F.I.R. of making two fires upon the deceased. It has been specifically mentioned in the F.I.R. that the said Mohan Lal along with his companion committed the murder of deceased by causing injuries with their respective weapons. The post mortem report of the deceased reveals that on fire arm injury was found on the thigh of the deceased. After receiving such injuries

and falling down of the deceased, the other accused inflicted sharp edged injury on the deceased by which the accused inflicted sharp edged injury on the deceased by which the deceased sustained eight incised wounds and one abraded contusion.

13. It is worthwhile to mention here that the F.I.R. is an important document upon which the whole prosecution case stands if the role of firing of the accused is not mention in the F.I.R. and subsequently the role of accused is shown in the statement of the prosecution witnesses therefore, it can be deemed to be a development of the case and in such circumstances the benefit must to in favour of the accused. It is further worthwhile to mention that there are four ingredients of crime firstly intention, secondly preparation, thirdly attempt and fourthly commission. In the present case all the four ingredients are available against the accused contemner. Therefore, it is liable to be deemed that the word of firing from the F.I.R. was deleted from the copy of the F.I.R. in order to obtain bail order from this Court after deceiving and concealing the true and real facts.

14. It is also important to note hear that the affidavit was filed on behalf of the contemner wherein no name of the Advocate of Bareilly was mentioned and no reason was disclosed. Thereafter, it in the counter affidavit the name of Advocate mentioned by the contemner then the names of Advocate of Bareilly has been disclosed in the reply. This all reveals the malafidy intention of the contemner to deceive the Court. In these circumstances, there is no force in the contention and in the reply that he did not omit some portion of F.I.R. deliberately or intentionally.

15. In the case of M.C. Mehata vs. Union of India, AIR, 2003, SC, 3469 it has held that if a false affidavit or statement is filed, it amounts to criminal contempt. More recently the Apex Court has restated the same position in the case of U.P. Residence Employees Cooperative House Building Society vs. NOIDA reported in AIR, 2003, SC, 2723. In the present case the contemnor filed a false affidavits in order to obtain bail of his relative accused Mohan Lal by deceiving and concealing the real facts before this Court in creating obstructions in the administration of justice. In the circumstance of the case, the above pronouncement of the Apex Court is fully applicable in the present case.

16. Considering the facts and circumstances of the case as mentioned above, we are of the view that the contemnor has deliberately filed incomplete copy of the F.I.R. in Criminal Misc. Bail Application No.5756 of 2001, Mohan Lal vs. State of U.P. by concealing the true and real facts whereby he obstructed in the administration of justice and is liable to be punished for committing criminal contempt under Section 12 of the Contempt of Courts Act, 1971. In view of this, the charge leveled against the contemner is fully proved and he is liable to be punished for the same.

Let a notice be issued to the contemner to address the Court on the quantum of sentence requiring the contemner to be present in Court in person.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2006

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

Civil Misc. Writ Petition No. 885 of 1983

Swami Prasad ...Petitioner
Versus
The Additional District Judge, Hamirpur and others ...Respondents

Counsel for the Petitioner:
Sri V.B. Singh
Sri P.S. Baghel
Sri U.P. Singh

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

Imposition of Ceiling on Land Holdings Act 1961-Section 13-A-Re-deteremination-ivation of Surplus land-land declared surplus-upheld by the appellate authority-thereafter application under Section 13-A on pretext during consolidation operation the area of land reduced-prescribed authority can not sit order the appellate authority-No material irregularly disclosed-claim rightly rejected.

Held: Para 7 and 8

Thus prescribed authority cannot be permitted to go into merits and into validity of the order passed by appellate authority in respect to the extent of land which was declared as surplus. The extent of land which was declared/varied either by appellate authority himself or by this Court being higher forum but in no case by the prescribed authority.

The scope of correction as permitted the prescribed authority under referred provision cannot be extended to the extent to sit over the judgment of appellate authority and if it can be so then it can be further stretched to the confirmed order of appellate authority even from this Court which if is permitted, then that may lead to a very unhealthy situation. If there is some apparent error or there is such error which can be corrected in the forum of review, in a final judgment given by a court on merits, then it has to reviewed/correct by that very court or in the superior forum but in no case it can be in a reverse gear. Interference and variance by a lower court in a final judgment given on merits by a higher court, in law, cannot be corrected.

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

1. By means of this writ petition, challenge is to the judgment of appellate authority and that of the prescribed authority dated 14.10.82 and 11.6.1981 (Annexures 3 and 2) respectively.

2. Proceedings are under section 10 (2) of U.P. Imposition of Ceiling on Land Holdings Act, 1961 (hereinafter referred to as the Act). Pursuant to the notice under section 10 (2) of the Act, objection came from the side of petitioner challenging correctness of the statement as appeared in the notice. After the objection and evidence, prescribed authority by its order dated 23.6.1976 declared an area of 8.23 acres of land as surplus, upon which the petitioner filed appeal in which by the judgment of the appellate authority dated 25.7.1977, surplus area was reduced and an area of 4.37 acres was declared as surplus. The petitioner came to this Court by filing writ petition No.3564 of 1977 which was allowed and the matter was remanded by order of this Court dated 12.1.1979 for a fresh decision by appellate court. After

the remand, appellate court by its judgment dated 14.7.1980 declared an area of 3.71 acres of land as surplus and an option was given to the petitioner to give his choice. Instead of giving choice, petitioner appears to have moved application before the prescribed authority purported to be under section 13-A of the Act with the prayer that declaration of land as surplus be reviewed and recalled as there has been some reduction in the consolidation operation. The prescribed authority rejected petitioner's application by order dated 11.6.1981 and thereafter, appeal filed by petitioner also failed as the appeal was dismissed by appellate authority by its order dated 14.10.1982 and thus against both judgments, this writ petition is before this Court.

3. The only submission which has been advanced by learned counsel during course of argument is that the prescribed authority in rejecting petitioner's application for re-considering the declaration of surplus land on the ground that it will amount to review of earlier order, has committed an error as according to the argument, Section 13-A of the Act gives wide powers to the prescribed authority for rectification of any kind of mistake and thus application of petitioner was liable to be dealt on merits. In support of the aforesaid submission, reliance has been placed on the decision given in the case of Ompal Singh reported in 1996 (2) AWC 2.103 (Summary of cases).

4. In response to the aforesaid, learned state counsel submits that in view of judgment of appellate authority dated 14.7.1980 the only option left with the petitioner was to give his choice and in the event, he was aggrieved with the declaration of land as surplus, his remedy was to file writ petition before this Court and to get required relief and therefore, if prescribed authority and appellate authority have rejected petitioner's application, then no exception can be taken to it.

5. In view of aforesaid, this Court has examined the matter.

There is no dispute about the fact that declaration of the land having traveled up to this Court at first inning became final, in view of judgment of appellate authority dated 14.7.1980 was given by him pursuant to the remand from this Court as directed in the writ petition No. 3564 of 1977. There is also no dispute about the fact that the petitioner did not challenge the judgment of appellate authority dated 14.7.1980 either before appellate court by filing review petition or before this Court by filing writ petition. There is also no dispute about the fact that by judgment of appellate authority dated 14.7.1980, an area of 3.71 acres of land was declared as surplus. In view of aforesaid, there cannot be any quarrel to the fact that in due course from stage to stage, land so declared as surplus was reduced and it has come down from 8.23 to 3.71 acres now.

6. Reliance on the decision as given in the case of Ompal Singh (supra) on having been read by the Court is found to be of no help to the petitioner. In that case, it was found that plots which were declared finally as surplus were found that they do not belong to the tenure holder and therefore that mistake was permitted to be rectified by reopening the matter, in view of Section 13-A of the Act and it has been further held that even if no such

provision could have been there, that could have been corrected under implied powers of the Court. Here is the case where petitioner's land has been finally declared as surplus to the extent of 3.71 acres by the judgment of appellate authority dated 14.7.1980 and it is not a case that the petitioner is not left with the land with him for being parted towards the final declaration of the land as surplus. The option was given to the petitioner for giving the land which he wants to part for implementation of declaration of land as surplus. If the contention of petitioner that in spite of judgment of appellate authority declaring the land as surplus, the prescribed authority is to be given power to reopen the matter on merits for varying extent of land as surplus, is accepted to be correct, then it will be against judicial discipline and thus the decision on which reliance has been placed has no application to the facts of present case.

Section 13-A of the Act reads as under:

13-A Re-determination of surplus land in certain cases-(1) *The prescribed authority may at any time, within a period of two years from the date of notification under sub-section (4) of Section 14, rectify any mistake apparent on the fact of record:*

Provided that no such rectification which has the effect of increasing the surplus land shall be made, unless the prescribed authority has given notice to the tenure-holder of its intention to do so and has given him a reasonable opportunity of being heard.

7. Thus prescribed authority cannot be permitted to go into merits and into validity of the order passed by appellate authority in respect to the extent of land which was declared as surplus. The extent of land which was declared/varied either by appellate authority himself or by this Court being higher forum but in no case by the prescribed authority. The contention of petitioner can only be stretched to a case where there can be error apparent on record or such kind of error which is not to reopen declaration of land as surplus at the level of appellate authority or further higher forum. As the appellate authority has already reduced declaration of land as surplus which was made from 8.23 Acres to 3.71 acres, if on merit for any reason, as argued, the judgment was faulty and land was not to be declared as surplus, remedy of petitioner if any, was to file application before the appellate authority or he would have challenged the order of appellate authority before this Court by filing writ petition as it was earlier done by him and thus, this Court is of the considered view that rejection of petitioner's application for review, by both courts which was moved in the garb of moving application under Section 13-A of the Act is legally sound.

8. The scope of correction as permitted the prescribed authority under referred provision cannot be extended to the extent to sit over the judgment of appellate authority and if it can be so then it can be further stretched to the confirmed order of appellate authority even from this Court which if is permitted, then that may lead to a very unhealthy situation. If there is some apparent error or there is such error which can be corrected in the forum of review, in a final judgment given by a court on merits, then it has to reviewed/correct by that very court or in the superior forum

but in no case it can be in a reverse gear. Interference and variance by a lower court in a final judgment given on merits by a higher court, in law, cannot be corrected.

9. For the reasons recorded above, this Court is not satisfied that the courts below in rejecting petitioner's application have committed any error calling for any interference in exercise of jurisdiction under Article 226 of the Constitution.

10. Writ petition accordingly fails and is dismissed. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2005

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 33258 of 1992

Uma Shanker Mishra ...Petitioner
Versus
The General Manager, N.E.R. Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri I.R. Singh
Sri Siddharth Shukla
Sri Alok Dwivedi
Sri J.P. Pandey

Counsel for the Respondents:
Sri Lal Ji Sinha

Constitution of India, Art. 226-Penal Rent- recovery from gratuity-petitioner retained Railway Quarter-unauthorised way-even on transfer from Gorakhpur to Varanasi on 8.9.99-house rent allowance drawn during this period-by notice dated 14.8.90 petitioner was required to vacate the premises-denial by petitioners on the ground that after reposting at Gorakhpur-allotment stored in his faour-No statutory Rule, executive instruction or G.O.-placed by which penal rent not chargeable-recovery-held proper-dispite of notice neither vacated the premises nor, nor refused the draw the H.R.A. for 12 months-not entitled to seek eqvaitable-discretionary relief.

Held: Para 8 & 9

In Jarnail Singh Vs. Secy., Ministry of Home Affairs, (1993) 1 SCC 47, wherein interpreting the provisions of the Central Civil Services (Pension) Rules, 1972, it was held that definition of "pension" included gratuity under Rule 3. Rule 9 conferred on the President right to withhold or withdraw pension in certain circumstances. The order was passed against the employee withholding pension and the entire amount of death-cum-retirement gratuity otherwise admissible to him. The direction was given on serious irregularities found to have been committed by him. The Apex Court held that the power to withhold gratuity was conferred on the President under the relevant rules and hence, such action could not be said to be illegal. According to the Court, there could be adjustment of government dues against the amount of death-cum-retirement gratuity payable to government servant.

In Wazir Chand Vs. Union of India & Ors. (2001) 6 SCC 596, the Apex Court held that unauthorised occupancy of the government quarters by an employee amounts to misconduct, therefore, the employee who retains the residential accommodation, is liable to pay the penal rent in accordance with the rules, and there can be no illegality in those dues being adjusted against the death-cum-retiral dues of the employee.

Case law discussed:
AIR 1985 SC-356
(1994) 6 SCC-589
AIR 2001 CSC-2433
(1993) 1 SCC-47

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

1. This writ petition has been filed for quashing the orders dated 14th August, 1990 and 15.04.1992 for making the recovery of penal rent in respect of Quarter No. 92-B, Type-III, Dehri Railway Colony, Gorakhpur.

2. The facts and circumstances giving rise to this case are that the petitioner was posted as Divisional Public Prosecutor, R.P.F., North Eastern Railway, Varanasi Division. During his posting at Gorakhpur, he was allotted the aforesaid Quarter vide order dated 22.01.1983. The petitioner was transferred from Gorakhpur to Varanasi vide order dated 08.09.1988. He joined the services at Varanasi but he did not vacate the said Quarter at Gorakhpur. Petitioner after serving five years, was transferred back to Gorakhpur 28.05.1993. However, as the petitioner did not vacate the accommodation at Gorakhpur, during the period he was posted at Varanasi, penal rent is being recovered. During the pendency of the writ petition, the petitioner stood retired on 31.07.1996, however, his gratuity has been withheld. Hence this petition.

3. Shri I.R. Singh, learned counsel for the petitioner has submitted that the question of withholding the gratuity does not arise in such a case as the petitioner was not allotted any residential accommodation at Varanasi after being transferred from Gorakhpur and as he had again been transferred to Gorakhpur on 28.05.1993 and continued to reside in the same accommodation, the orders impugned are liable to be quashed. More so, the petitioner had already retired on 31.07.1996, therefore, withholding the gratuity that too to a sum of Rs.1,35,850/- has caused great injustice to him. Petition deserves to be allowed.

4. On the other hand, Shri Lalji Sinha, learned counsel for the respondents has vehemently opposed the writ petition contending that after being transferred from Gorakhpur to Varanasi, the petitioner had withdrawn the House Rent allowance at the rate of Rs.450/- per month throughout the year 1989 and unauthorizedly occupied the accommodation at Gorakhpur. He had been served a notice in writing that the penal rent shall be charged and had been asked several times to vacate the same but petitioner did not pay any heed. It is not a case where this Court should exercise its discretionary equitable jurisdiction. Therefore, no interference is called for and the petition is liable to be dismissed.

We have considered the rival submissions made by learned counsel for the parties and perused the record.

5. The issue involved herein is as to whether the gratuity or other retiral benefits of an employee can be withheld, or deduction can be made from the same in case of unauthorised occupation of residential accommodation by the employee after transfer or retirement?

6. The issue involved herein is no more res integra. The Courts have considered the issue time and again.

7. In State of Kerala & Ors. Vs. M. Padmanabhan Nair, AIR 1985 SC 356; R. Kapoor Vs. Director of Inspection (Painting and Publication) Income Tax & Anr., (1994) 6 SCC 589; and Gorakhpur University Vs. Dr. Shitla Prasad

Nagendra, AIR 2001 SC 2433, the Hon'ble Supreme Court had taken the view that the pension or other retiral benefit cannot be withheld or adjusted or appropriated for the satisfaction of any other dues outstanding against the retired employee.

8. In Jarnail Singh Vs. Secy., Ministry of Home Affairs, (1993) 1 SCC 47, wherein interpreting the provisions of the Central Civil Services (Pension) Rules, 1972, it was held that definition of "pension" included gratuity under Rule 3. Rule 9 conferred on the President right to withhold or withdraw pension in certain circumstances. The order was passed against the employee withholding pension and the entire amount of death-cum-retirement gratuity otherwise admissible to him. The direction was given on serious irregularities found to have been committed by him. The Apex Court held that the power to withhold gratuity was conferred on the President under the relevant rules and hence, such action could not be said to be illegal. According to the Court, there could be adjustment of government dues against the amount of death-cum-retirement gratuity payable to government servant.

9. In Wazir Chand Vs. Union of India & Ors. (2001) 6 SCC 596, the Apex Court held that unauthorised occupancy of the government quarters by an employee amounts to misconduct, therefore, the employee who retains the residential accommodation, is liable to pay the penal rent in accordance with the rules, and there can be no illegality in those dues being adjusted against the death-cum-retiral dues of the employee.

10. In Secretary, ONGC Ltd. & Anr. Vs. V.U. Warrier, (2005) 5 SCC 245. the facts involved had been similar to the case in hand. The employee was allotted a Quarter and after retirement, he did not vacate the same and continued to reside. His request for further retention was rejected with a notice that he was liable to pay the penal rent. The amount of penal rent was deducted from the gratuity payable to the said employee. The employee challenged the same on the ground that such deduction was not permissible from the gratuity. The Hon'ble Apex Court repelled the said submission of the employee and held that the said deduction can be made from the gratuity payable to the said employee.

11. While deciding the said case, the Hon'ble Supreme Court has taken into consideration its earlier judgments and held that if rules so permit, such adjustment is permissible. More so, the Court must examine the facts of each case and in case it is found that the employee was at fault and there is no unreasonableness or arbitrariness on the part of the employer, the Court should not interfere as the writ is a discretionary relief.

12. The question of paying the penal rent by the employee was also considered by the Hon'ble Supreme Court in Grid Corporation of Orissa Vs. Rasananda Das, 2003 AIR SCW 5390, holding that an employee is bound to pay the rent/penal rent in accordance with the Rules applicable for overstaying in the accommodation after transfer/retirement. Thus, the petitioner cannot take the plea that he is not bound to pay the penal rent.

13. Writ jurisdiction is discretionary. Writ is not issued merely because it is lawful to do so. The purpose of the writ Court is not only to protect a person from being subjected for violation of law but also to advance justice and not to thwart it. The Constitution does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the Court. However, being the relief equitable and discretionary, the Court has to balance competing interest, keeping in mind that interest of justice and public interest can coalesce in certain circumstances. Court should not exercise such powers unless substantial injustice has ensued or is likely to ensue. Petition can be entertained only after being fully satisfied about the factual statements and not in a casual and cavalier manner. (Vide G. Veerappa Pillai Vs. Raman and Raman Ltd., AIR 1952 SC 192; Sanghram Singh Vs. Electron Tribunal, Kotah & Anr., AIR 1955 SC 425; Champalal Binani Vs. The Commissioner of Income-tax, West Bengal & Ors., AIR 1970 SC 645; Ramniklal N. Bhutta & Anr. Vs. State of Maharastra & Ors., (1997) 1 SCC 134; Chimajirao Kanhojirao Shrike & Anr. Vs. Oriental Fire and General Insurance Co. Ltd., AIR 2000 SC 2532; Shama Prashant Raje Vs. Ganpatrao & Ors., AIR 2000 SC 3094; LIC of India Vs. Asha Goel, AIR 2001 SC 549; Roshan Deen Vs. Preeti Lal, AIR 2002 SC 33; S.D.S. Shipping Pvt. Ltd. Vs. Jay Container Services Co. Pvt. Ltd. & Ors., AIR 2003 SC 2186; and Chandra Singh Vs. State of Rajasthan & Anr., AIR 2003 SC 2889.

14. In view of the above, law can be summarised on this issue that there is no prohibition of adjusting or deducting the penal rent from the retiral dues, including gratuity, if the rule so permits, and the employee has unauthorisedly occupied the accommodation, however, there should not be arbitrariness or unreasonableness on the part of the employer. In case there is an acquiescence of the employer tactitly and in case there has been precedent taken by the employer asking the employee to vacate the accommodation or a notice that he would be liable to pay the penal rent, even if the rule does not permit such deduction, adjustment or recovery, the writ Court can refuse granting any indulgence whatsoever, for the reason that writ should be issued only where injustice is ensued, otherwise not. There may be a case where the employee after transfer or retirement has requested the employer for permission to retain the accommodation and when granting such a permission, the rent is being accepted, employee cannot be held responsible for such a misconduct. No rule of universal application can be formulated. The Court is required to examine the facts of each case and consider the same in the light of the statutory rules applicable therein.

15. The case in hand is required to be examined in the light of the aforesaid settled legal proposition.

16. It is evident from the records, particularly the counter affidavit to the amendment application filed on behalf of respondents no. 1 to 3, that after the petitioner was transferred from Gorakhpur to Varanasi on 08.09.1988, he continued to draw the House Rent Allowance from January, 1989 to December, 1989 at the rate of Rs.550/- per month, though he had unauthorizedly occupied the railway Quarter at Gorakhpur. He had been asked vide letter dated 14.08.1990 to vacate the said premises failing which necessary action would be initiated against him.

Petitioner replied the same vide letter dated 15.01.1991 that no penal rent/damages could be charged from him as the allotment of the said Quarter stood in his favour. After being re-transferred from Varanasi to Gorakhpur, the petitioner did not apply for allotment of the said Quarter and continued to enjoy the possession.

17. The ratio of law laid down by the Hon'ble Apex Court in the aforesaid judgment, i.e. Secretary, ONGC Ltd. (supra) is fully attracted in the facts of the present case.

18. No Statutory Rule, Executive Instructions, Government Orders or Circular has been placed before us showing that the petitioner could retain the accommodation in Gorakhpur after being transferred to Varanasi in spite of the fact that the respondents had given him the notice to vacate the same and intimated that the penal rent shall be chargeable from him. The petitioner did not consider it proper to vacate the same. The plea raised by the learned counsel for the petitioner that for making recovery of the penal rent, gratuity cannot be withheld is not tenable in view of the judgment of the Hon'ble Supreme Court, referred to hereinabove.

19. As the petitioner did not vacate the accommodation in spite of notice and had drawn the HRA for complete 12 months, even after being transferred from Gorakhpur to Varanasi, he is not entitled to seek any equitable and discretionary relief. Petition does not represent the special features, warranting any interference in limited scope of judicial review.

The Petition is devoid of any merit and is accordingly dismissed.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2005

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No. 52 Of 2003

Vaibhav Singh ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Avanish Mishra

Counsel for the Respondents:
S.C.

U.P. Recruitment of Dependent of Government Servant Dying in Harness Rules 1974-Compassionate appointment-father of petitioner died in harness on 19.11.94 working as sub-Inspector in civil Police-on 28.2.95 mother of the petitioner applied for compassionate appointment as the petitioners was 16 years old-in the mean time mother also expired-hence on 25.8.99 petitioner applied for compassionate appointment-rejection on ground the petitioner is below than 21 years-admittedly on the date of application petitioner was more than 18 years-the date on which claim rejected-petitioner had already attained 21 years age-held-rejection illegal.

Held: Para 7

The only ground for refusing appointment as Sub Inspector is that the petitioner was less than 21 years of age but it is apparent that he was in fact more than 18 years of age when he applied for compassionate appointment. In any event, on the date when the claim

of the petitioner was rejected, he had already attained the age of 21 years.

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard learned counsel for the parties.

This petition is directed against an order dated 4th December, 2002 rejecting the application of the petitioner for compassionate appointment as time barred under the U.P. Recruitment of Dependent of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as the Rules).

2. The father of the petitioner was a Sub-Inspector in the civil police when he died in harness on 19.11.1994. As the family was in great financial distress, his mother moved an application dated 28.2.1995 for appointment of the petitioner on any post. The respondent no.4 vide his letter dated 6.10.1995 informed her that the petitioner was only 16 years old and, therefore, without attaining the age of 18 years, he could not be appointed, but offered appointment to his mother, but in the meantime, his mother also expired. After completing his Bachelor's degree the petitioner applied on 24/25.8.1999 for compassionate appointment, as his family continued to be in financial distress and was burdened with a unmarried sister. On the basis of his application, the office of Deputy Inspector General of Police (Establishment) sought a report from the Superintendent of Police with regard to compassionate appointment of the petitioner. The Superintendent of Police vide his letter dated 8.11.1999 forwarded the entire relevant documents and report with his recommendation for appointment of the petitioner as Sub-Inspector in the Civil Police on compassionate grounds. However, he was informed vide letter dated 7.12.2000 that he had yet not completed 21 years of age and as such he could not be appointed as Sub-Inspector, Civil Police though he was offered appointment as Sub-Inspector (Ministerial), but vide his letter dated 6.1.2001 the petitioner informed the respondents that he is awaiting action from the office of the Chief Minister, where he had submitted his case for consideration. By order dated 17.10.2001 the claim of the petitioner was rejected on the ground that it was raised after five years and in view of the Rules, no relaxation could be granted in his case. This information was conveyed to the petitioner through a covering letter dated 20th December, 2001. The petitioner challenged the aforesaid decision through Writ Petition No.44477 of 2001 and this Court vide order dated 3.1.2002 directed the respondents to reconsider the case of the petitioner with regard to grant of relaxation in accordance with the Rules. In pursuance thereof, the present impugned order has been passed.

3. Learned counsel for the petitioner has urged that firstly, his mother in 1995 itself and secondly, the petitioner himself in August, 1999 had made the application for compassionate appointment, therefore, there was no question of grant of any relaxation in the 5 years period fixed in the Rules. The argument appears to be correct.

4. There is no denial either in the counter affidavit or in the impugned order that for the first time the mother of the petitioner had made an application on 28.2.1995 for grant of compassionate

appointment to the petitioner but as he was a minor he could not be appointed, however, having attained majority, the petitioner himself had moved an application on 24/25th. August, 1999 and this application was duly processed but the claim for appointment as Sub-Inspector in Civil Police was rejected as he was only twenty years old and the offer of appointment to the post of Sub-Inspector (Ministerial) was made. It is not denied that the date of birth of the petitioner is 6.10.1979 and when his claim for appointment was rejected on 7.12.2000 he had already attained the age of 21 years.

5. Let us examine the validity of the impugned order, vis a vis, the Rules. The object of the Rules is to provide compassionate appointment to one member of the family whose sole bread earner dies in harness. It is in the nature of beneficial legislation and its validity has been upheld at the altar of Articles 14 and 16 of the Constitution of India. While interpreting its provisions the object of the legislation has to be kept in mind. Section 4 mandates that the Rules would have over riding effect on the regular recruitment rules. For ready reference Rule 4 is quoted herein below:

"4. Overriding effect of these rules.
_ These rules and any orders issued thereunder shall have effect notwithstanding anything to the contrary contained in any rules, regulations or orders in force at the commencement of these rules."

6. Rules 5 and 8 clearly provides for relaxation of the normal Recruitment Rules and for relaxation from age. For ready reference Rules 5 (1) and 8 are quoted below:

"5. Recruitment of a member of the family of the deceased.
(1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person -
(i) fulfils the educational qualifications prescribed for the post,
(ii) is otherwise qualified for Government service, and,
(iii) makes the application for employment within five years from the date of the death of the Government servant:
Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

"8. Relaxation from age and other requirements.

(1) The candidate seeking appointment under these rules must not be less than 18 years at the time of appointment.

(2) The procedural requirements for selection; such as written test or interview by a selection committee or any other authority, shall be dispensed with, but it shall be open to the appointing authority to interview the candidate in order to satisfy itself that the candidate will be able to maintain the minimum standards of work and efficiency expected on the post.

7. A joint reading of the three rules leads to the only conclusion, relevant for the present facts, that the incumbent ought to be more than 18 years old and the minimum age for recruitment in the normal recruitment rules would stand relaxed and the incumbent would be entitled for compassionate appointment. It need not be emphasized that the rules are an exception to the normal recruitment rules. Applying the effect of the aforesaid rules to the case at hand, it would be apparent that the impugned order cannot be sustained. The only ground for refusing appointment as Sub Inspector is that the petitioner was less than 21 years of age but it is apparent that he was in fact more than 18 years of age when he applied for compassionate appointment. In any event, on the date when the claim of the petitioner was rejected, he had already attained the age of 21 years.

8. Thus, examining the impugned order from either of the two angles, it cannot be sustained.

9. For the reasons given hereinabove, this petition succeeds and is allowed and the impugned order dated 4.12.2002 is hereby quashed. The respondents are directed to reconsider the claim of the petitioner in the light of the observations made hereinabove within a period of two months and grant him appointment as Sub Inspector. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2006

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No. 25396 of 2002

Yogesh Verma ...Petitioner
Versus
District Judge, Aligarh. ...Respondent

Counsel for the Petitioner:
Sri Vikas Budhwar
Sri Dileep Kumar
Sri Rajeev Gupta

Counsel for the Respondent:
Sri Amit Sthalekar
Sri K.R. Sirohi
S.C.

Constitution of India Art.-226-Principle of Natural Justice-Termination Order-passed on the ground-appointment of illegal without advertisement-without calling the name from employment exchange-held-appointment being irregular temporary appointment-opportunity of hearing not required.

Held: Para 4

It is also well settled that a temporary employee does not have any right to the post and that too one whose appointment itself is hit by the principles

enshrined in Articles 14 and 16 of the Constitution. Therefore, the contention of the learned counsel for the petitioner cannot be accepted.

Case law discussed:
2004 (1) A.W.C.-81
2004 (4) ESC-2190

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard learned counsel for the parties.

This petition is directed against a termination order dated 31.5.2002 by which the services of the petitioner from the post of watchman in the subordinate courts at Aligarh have been ceased.

2. On an application moved by the petitioner, he was appointed as watchman by an order dated 18.1.2002 in pursuance whereof he joined at Aligarh on 25.1.2002. The impugned order has been passed on the ground that his services were temporary and for not performing his duties diligently.

3. Learned counsel for the petitioner has urged that the order is stigmatic and, therefore, opportunity was necessary.

4. A perusal of the appointment letter shows that the petitioner was given appointment on purely temporary basis which was terminable without any notice. It is not denied that the said vacancy was neither widely advertised in daily newspapers nor names were sought from the Employment Exchange and merely on an application moved by the petitioner, he was granted appointment. A learned Single Judge of this court in the case of **Sachin Kumar and others v. State of U.P. and others (Writ Petition No. 24665 of 2003 decided on 22.8.2005)** has held "…….. *Where the District Judge does not advertise the vacancy and follow any procedure, muchless a fair and reasonable procedure for selection, having due regard to the eligibility and to follow the rules of reservation, the appointments cannot be sustained*." The learned Single Judge has considered that even though the appointment was at the sole discretion of the District Judge but the recruitment procedure should be fair, transparent and reasonable and should conform to the tests of equality, non-arbitrariness as guaranteed to all the citizens under Articles 14 and 16 of the Constitution of India. In yet another cause, in the case of **Shiv Murti Chandra Mishra & 5 others v. State of U.P. and 17 others (writ Petition No. 57323 of 2005 decided on 25.8.2005)** another learned Single Judge has held that even on the post of watchman the recruitment has to be made through a procedure which is in conformity with Article 14 of the Constitution. In the present case, it is not denied by the counsel for the petitioner that no procedure at all was followed for filling up the vacancy, therefore, it is apparent that the appointment itself was in violation of Articles 14 and 16 of the Constitution. A Division Bench of our Court in the case of **Executive Officer, Nagar Palika, Firozabad and others v. Rajendra Singh Yadav [2004 (4) E.S.C. 2190** and in the case of **Chief Engineer and others v. Pancham Ram and others [2004 (1) A.W.C. 81**] has held that where the appointment is totally irregular no opportunity is required while dispensing with his service. No doubt, it is mentioned in the impugned order that the working of the petitioner was not upto the mark, but that is not the foundation of the order. The foundation of the order is that the

appointment was temporary which was terminable without notice and thus in accordance with the condition of appointment letter, the order has been passed and in this particular case the petitioner was not entitled to any opportunity as the order cannot be termed as stigmatic. It is also well settled that a temporary employee does not have any right to the post and that too one whose appointment itself is hit by the principles enshrined in Articles 14 and 16 of the Constitution. Therefore, the contention of the learned counsel for the petitioner cannot be accepted.

No other point has been urged.

5. For the reasons given above, I do not find that this is a fit case for interference under Article 226 of the Constitution of India. Rejected.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2006

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

Civil Misc. Writ Petition No. 57044 of 2005

Bihangesh Nandan Sharan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
V.M. Zaidi

Counsel for the Respondents:
Sri Q.H. Siddiqui
S.C.

U.P. Jal Nigam Engineers (Public Health Branch) Service Regulation 1978 Regulation 31-readwith Fundamental Rules-Rule 56 (a)-age of Superannation of Assistant Engineers and the executive Engineer-decision of the Jal Nigam retiring the petitioner ate the age of 58 years-held-not sustainable-They shall retire at the age of 60 years. Consequential directions issued by the court.

Held: Para 12 and 14

Amendment made in Rule 56 (a) of Fundamental Rules referred herein before shall equally apply to the employees of Nigam covered by aforesaid Regulations by virtue of Regulation 31, and the petitioners would be entitled to be superannuated on attaining their age of 60 years.

In the result, the petitioners are entitled to be continued in service on their respective posts till attaining 60 years age of their superannuation. In case the petitioners were permitted to continue in service after attaining their age of 58 years at the strength of any interim order passed by this Court and they have also been paid their salary, the respondents are directed to continue them in service till attaining their age of 60 years and pay their salary admissible to their respective posts by treating their age of retirement 60 years. If any of the petitioner has not been permitted to continue in service in absence of any interim order and has not been paid his salary without his fault, the Nigam is directed to reinstate him on his post for remaining period till attaining his age of 60 years and pay his salary alongwith arrears of remaining period within a period of three months from the date of production of certified copy of the order passed by this Court before the Nigam. The Nigam is further directed to finalize post retiral benefits of the petitioners by treating their age of retirement 60 years. With the aforesaid directions, the writ petition succeeds and allowed.

Case law discussed:
AIR 1982 SC 917

J.T. 2005 (10) SC-32

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

1. The only question that arises for our consideration in these batch of cases is as to whether amendment made in Rule 56 (a) of Uttar Pradesh Fundamental Rules (in short "the Rules') by Notification dated June 27, 2002 enhancing age of superannuation of government servants from 58 years to 60 years would be applicable to the employees of Uttar Pradesh Jal Nigam (hereinafter referred to as "the Nigam').

2. The petitioners of these batch of writ petitions while working on the posts of Assistant Engineers/Executive Engineers in the Nigam have been retired from service on attaining 58 years of their age of superannuation. Since identical question in controversy based on similar facts are involved in this batch of writ petitions, therefore, the writ petitions are taken up together for hearing and disposal.

3. The brief facts having material bearing with the question in controversy involved in the case are that the petitioners were initially employed in the Local Self Government, Engineering Department of Government of Uttar Pradesh. In the year 1975, the State Legislature enacted an Act, viz., Uttar Pradesh Water Supply & Sewerage Act, 1975 (hereinafter referred to as "the Act'), under Section 3 whereof, the State Government was empowered to issue notification to constitute a corporation by the name of the Uttar Pradesh Jal Nigam pursuant to which a notification was issued establishing the same with effect from 18th June, 1975. From the date of the establishment of the Nigam, which is the appointed date as enumerated in Section 31 of the Act, all properties and assets which immediately before the appointed date were vested in the State Government for the purposes of Local Self Government Engineering Department were vested in and stood transferred to the Nigam and all rights, liabilities and obligations of the state Government pertaining to the said Department became the rights, liabilities and obligations of the Nigam. Under Section 37 of the Act, every person who was employed in the Local Self Government Engineering Department of the State of Uttar Pradesh shall on and from the appointed date, i.e., 18th June, 1975 would become employee of the Nigam and shall hold his office or service therein by the same tenure, at the same remuneration and upon same other terms and conditions and with the same rights and privileges as to pension, gratuity and other matters as he would have held the same on the appointed date if this Act had not come into force and shall continue to do so until his remuneration or other terms and conditions of service are revised or altered by the Nigam under or in pursuance of any law or in accordance with any provision which for the time being governed his service. Before the appointed date i.e. 18th June, 1975, the age of superannuation of these employees under Rule 56(a) of the rules was 58 years which could be extended in exceptional circumstances up to the age of 60 years. Thereafter, the State Government issued order to the Nigam under its letter dated October 31, 1975 wherein it was clearly stated that in accordance with Section 37 of the Act the service conditions of such employees of the Nigam would continue to remain the same so long the same are

not altered by the Nigam in accordance with law. Thereupon, Nigam took a decision on 4th April, 1977 in conformity with the provisions of Section 37 of the Act wherein specifically it was mentioned that the rights and responsibilities as were enjoyed by the officers of the then Local Self Government Engineering Department under the Financial Hand Book, PWD Manuals, Manual of Government Orders, Civil Services Regulations, Government Conduct Rules and other Manuals of Government Orders that have been passed or shall be passed by the Government from time to time shall be deemed to be applicable to the officers of the Nigam provided any other order in this regard is not passed by the Nigam.

4. Section 97 (2) (c) confers power upon the Nigam to make regulations with the previous approval of the State Government on matters, inter alia, the salaries and allowances and other conditions of service of employees of the Nigam. In exercise of the aforesaid powers under Section 97 of the Act, regulations were framed by the Nigam on 1st September, 1978 as Uttar Pradesh Jal Nigam Engineers (Public Health Branch) Service Regulations, 1978 (hereinafter referred to as "the Regulations') which came into force with immediate effect and Regulation 31 thereof laid down that the pay, allowances, pension, leave, imposition of penalty and other terms and conditions of service of the employees of the Nigam shall be governed by such rules, regulations and orders which are equally applicable to other serving government servants functioning in the State. On 17th July, 1985, the State Government issued a general order under its Memo No. 665/44-1/85 directing thereunder that the public sector undertakings should not give the benefit of extension of age as provided to the government servants under Rule 56 (a) of the Rules without the permission of the State Government.

5. On 28th November, 2001, the State Government issued a notification notifying thereunder approval of the Governor for increasing the age of superannuation of government servants from 58 years to 60 years in public interest and steps were required to be taken for making suitable amendment in Rule 56(a) of the Rules, pursuant to which rules were amended by Uttar Pradesh Fundamental (Amendment) Rules, 2002 by notification dated 27th June, 2002 which came into force with effect from 28th November, 2001 and thereunder the age of retirement of government servants was enhanced from 58 years to 60 years. In the meantime, after the issuance of notification dated 28th November, 2001, on behalf of Nigam a letter was written to the State Government on 31st December, 2001 making inquiry thereunder as to whether enhancement in the age of superannuation from 58 years to 60 years would be applicable to the employees of Nigam and in reply thereto, on 22nd January, 2002, Special Secretary to the Government in the Department of Local Self Government communicated that the employees of the Nigam shall not be entitled to enhancement of superannuation age from 58 years to 60 years as the same would be applicable only to the government servants. On receipt of the said order, the Nigam resolved on 11th July, 2002 that enhancement in the age of superannuation from 58 years to 60 years would not be applicable to the employees of the Nigam. Thereupon orders were issued to the petitioners in the writ

petitions to the effect that they would retire upon completing the age of 58 years.

6. Counter and rejoinder affidavits have been exchanged between the parties and the case is ripped for final disposal, therefore, with the consent of learned counsel for the parties the petitions were heard for final disposal.

7. We have heard learned counsel for the petitioners and Sri Q.H. Siddiqui appearing for the Nigam as well as learned Standing Counsel for the State Government and also perused the records.

8. It is necessary to point out that it is not in dispute that the petitioners were initially employed in the Local Self Government, Engineering Department of the Government of U.P.. On establishment of Nigam their services stood transferred from the aforesaid department of Government to the Nigam by virtue of section 37 of the Act from the appointed date, consequently they became employee of the Nigam and since then they were continuously working on the posts of Assistant Engineers and/or Executive Engineers. It is also not in dispute that the petitioners were working on their respective posts on the date of commencement of the amended Fundamental Rules 56 (a), which came into force on 28th November 2001 but they were retired from service after the aforesaid cut of date on attaining 58 years of their age, without permitting them to continue in service till attaining 60 years age of superannuation.

9. To appreciate the point in issue, it would be necessary to refer to the relevant provisions of Sections 15, 31(1), 37, 89 and 97 of the Act and Regulation 31 of the Regulations which read thus:-

"15. Powers of the Jal Nigam. *(1) The Nigam shall, subject to the provisions of this Act have power to do anything which may be necessary or expedient for carrying out its functions under this Act.*

(2) Without prejudice to the generality of the foregoing provision, such power shall include the power:

(i) to inspect all water supply and sewerage facilities in the State by whomsoever they are operated;

(ii) to obtain such periodic or specific information from any local body and operating agency as it may deem necessary;

(iii) to provide training for its own personnel as well as employees of the local bodies;

(iv) to prepare and carry out schemes for water supply and sewerage;

(v) to lay down the schedule of fees for all services rendered by the Nigam to the State Government, local bodies, institutions or individuals;

(vi) to enter into contract or agreement with any person, firm or institution, as the Nigam may deem necessary, for performing its functions under this Act;

(vii) to adopt its own budget annually;

(viii) to approve tariffs for water supply and sewerage services applicable to respective local areas comprised within the jurisdiction of Jal Sansthans and such local bodies as have entered into an agreement with the Nigam under Section 46;

(ix) to borrow money, issue debentures to obtain subventions and grants and manage its own funds;

(x) to disburse loans to local bodies for their water supply and sewerage schemes;

(xi) to incur expenditure and to grant loans and advances to such persons or authorities as the Nigam may deem necessary for performing the functions under this Act.

31. Vesting and transfer of property to Nigam. *(1) As from June, 18, 1975, the date of establishment of the Nigam hereinafter in this Chapter referred to as "the appointed date",*

(a) all properties and assets (including water, work, building, laboratories, stores, vehicles, furnitures and other furnishing) which immediately before the appointed date were vested in the State Government for the purposes of the Local Self Government Engineering Department shall vest in and stand transferred to the Nigam; and

(b) all the rights, liabilities and obligations of the State Government whether arising out of any contract or otherwise pertaining to the said departments shall be the rights, liabilities and obligations of the Nigam.

37. Transfer of employees to Nigam. *(1) Save as otherwise provided in this section every person, who was employed in the Local Self Government Engineering Department of the State Government shall on and from the appointed date become employee of the Nigam and shall hold his office or service therein by the same tenure, at the same remuneration and upon same other terms and conditions, and with the same rights and privileges as to pension, gratuity and other matters as he would have held the same on the appointed date if this Act has not come into force, and shall continue to do so until his employment in the Nigam is terminated or until his remuneration or other terms and conditions of services are revised or altered by the Nigam under or in pursuance of any law or in accordance with any provision which for the time being governs his service.*

89. Directions to the Nigam on questions of policy. *(1) In the discharge of its functions, the Nigam shall be guided by such directions on questions of policy as may be given it by the State Government.*

(2) If any question arises whether any matter is or is not a matter as respects which the State Government may issue a direction under sub-section (1), the decision of the State Government shall be final.

97. ***Regulations****. (1) The Nigam and a jal Sansthan may, with the previous approval of the State Government, make regulations, not inconsistent with this Act and the rules made thereunder, for the administration of the affairs of the Nigam or a Jal Sansthan.*

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely;

a) xxxx xxxx xxxx xxxx

b) xxxx xxxx xxxx xxxx

c) the salaries and allowances and other conditions of service of employees of the Nigam or a Jal Sansthan other than employees employed on contract basis.

Regulation 31*. Besides the provision made under these regulations, the pay and allowances, pension, leave, imposition of penalty and other terms and conditions of service shall be governed by*

such rules, regulations and orders which are equally applicable to other serving government servants concerned functioning in the State".

10. At this juncture it would also be useful to extract the text of Notification dated 27th June 2002 whereby the amendment in Uttar Pradesh Fundamental Rules have been enforced as under:-

1. Short title and commencement.- *(1) These rules may be called the* ***Uttar Pradesh Fundamental (Amendment) Rules, 2002.***

(2) They shall be deemed to have come into force on November 28, 2001.

2. Amendment of Fundamental Rule 56.- *In the Uttar Pradesh Fundamental Rules, contained in the Financial Handbook, Volume-II, Parts II-IV in Rule 56.-*

(a) For clause (a) the following clauses shall be substituted, namely:-

"56.(a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Government servant, whose date of birth is the first day of a month, shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided further that a Government servant, who has attained the age of fifty-eight years on or before the first day of November, 2001 and is on extension in service, shall retire from service on expiry of his extended period of service.

(a-1) No Government servant shall be granted extension in service beyond the age of retirement of sixty years:

Provided that a Government servant dealing with budget work or working as a full time member of a committee which is to be wound up within a short period of time may be granted, by the Government, extension of service for a period not exceeding three months in public interest:

Provided further that the Government shall have the right to terminate the extension of service before the expiry of such extension by giving a notice in writing of not less than three months in the case of a permanent or, of one month in the case of a temporary Government servant, or pay and allowances in lieu of such notice."

(b) Note 3 shall be omitted."

11. At this juncture it is necessary to point out that the aforesaid provision of Act inasmuch as Regulations have been considered by Hon'ble Apex Court in a decision rendered in **Harwindra Kumar Vs. Chief Engineer, Karmik & others, JT 2005 (10) SC 32**, wherein Hon'ble Apex Court while dealing with the aforesaid provisions of the Act of Regulations referred herein before has held that so long as regulation 31 of the Regulations is not amended, 60 years, which is age of superannuation of Government Servant employed under State of Uttar Pradesh shall be applicable to the employees of Nigam. The observations of Hon'ble Apex Court made in para 8 to 12 of the decision are as under:

8. From the aforesaid provisions, it would be clear that the appointed date for the purposes of the Act was 18th June, 1975 when the Nigam was established and under Section 37 of the Act, conditions of service of the appellants/petitioners who were employed in the Local Self Engineering Department of the Government of Uttar Pradesh before the appointed date, were continued

to remain the same as they were before the appointed date unless and until the same are altered by the Nigam under the provisions of the Act. Section 97 confers power upon the Nigam with the previous approval of the State Government to frame regulations in relation to service conditions of employees of the Nigam and acting thereunder, Regulations were framed by the Nigam in the year 1978, Regulation 31 whereof provides that service conditions of the employees of the Nigam shall be governed by such rules, regulations and orders which are applicable to other serving government servants functioning in the State of Uttar Pradesh. Thus, from a bare reading of Section 37 and Regulation 31, it would be clear that the service conditions of the employees of the Nigam would be the same as are applicable to the employees of the State Government under the Rules, Regulations and Orders applicable to such government servants so long the same are not altered by the Nigam in accordance with the provisions of the Act. If Regulations, would not have been framed, the Nigam had residuary power under Section 15(1) of the Act whereby under general power it could change the service conditions and the same could remain operative so long regulations were not framed but in the present case, regulations were already framed in the year 1978 specifically providing in Regulation 31 that the conditions of service of the employees of the Nigam shall be governed by the Rules, Regulations and Orders governing the conditions of service of government servants which would not only mean Rules then in existence but any amendment made therein as neither in Section 37 nor in Regulation 31, it has been mentioned that the Rules then in existence shall only apply. After the amendment made in Rule 56 (a) of the Rules by the State Government and thereby enhancing the age of superannuation of government servants from 58 years to 60 years, the same would equally apply to the employees of the Nigam and in case the State Government as well as the Nigam intended that the same would not be applicable, the only option with it was to make suitable amendment in Regulation 31 of the Regulations after taking previous approval of the State Government and by simply issuing direction by the State Government purporting to act under Section 89 of the Act and thereupon taking administrative decision by the Nigam under Section 15 of the Act in relation to age of the employees which would not tantamount to amending Regulation 31 of the Regulations.

9. Reference in this connection may be made to a decision of this Court in the case of ***V.K. Khanzode and others Vs. Reserve Bank of India and another, AIR 1982 S.C. 917****. In that case, under Section 58(1) of the Reserve Bank of India Act, powers were conferred upon the Central Board of Directors of the bank to make regulations in order to provide for all matters for which provision was necessary or convenient for the purpose of giving effect to the provisions of the Act which section in the opinion of their Lordships included the power to frame regulation in relation to service conditions of the bank staff. In that case, instead of framing regulations, the bank issued administrative circulars in relation to service conditions of the staff acting under Section 7(2) of the Reserve Bank of India Act which was a general power conferred upon the bank like Section 15*

(1) of the present Act. It was laid down that "there is no doubt that a statutory corporation can do only such acts as are authorized by the statute creating it and that, the powers of such a corporation cannot extend beyond what the statute provides expressly or by necessary implication." It was further laid down that "so long as staff regulations are not framed under Section 58(1), it is open to the Central Board to issue administrative circulars regulating the service conditions of the staff, in the exercise of power conferred by Section 7(2) of the Act." As in the said case, no regulation was at all framed under Section 58 of the Reserve Bank of India Act, as such, the administrative circulars issued by the Central Board of Directors of the Bank under Section 7(2) of the Reserve Bank of India Act in relation to service conditions were held to be in consonance with law and not invalid.

10. In the present case, as Regulations have been framed by the Nigam specifically enumerating in Regulation 31 thereof that the Rules governing the service conditions of government servants shall equally apply to the employees of the Nigam, it was not possible for the Nigam to take an administrative decision acting under Section 15(1) of the Act pursuant to direction of the State Government in the matter of policy issued under Section 89 of the Act and directing that the enhanced age of superannuation of 60 years applicable to the government servants shall not apply to the employees of the Nigam. In our view, the only option for the Nigam was to make suitable amendment in Regulation 31 with the previous approval of the State Government providing thereunder age of superannuation of its employees to be 58 years, in case, it intended that 60 years which was the enhanced age of superannuation of the State Government employees should not be made applicable to employees of the Nigam. It was also not possible for the State Government to give a direction purporting to act under Section 89 of the Act to the effect that the enhanced age of 60 years would not be applicable to the employees of the Nigam treating the same to be a matter of policy nor it was permissible for the Nigam on the basis of such a direction of the State Government in policy matter of the Nigam to take an administrative decision acting under Section 15(1) of the Act as the same would be inconsistent with Regulation 31 which was framed by the Nigam in the exercise of powers conferred upon it under Section 97 (2) (c) of the Act.

11. For the foregoing reasons, we are of the view that so long Regulation 31 of the Regulations is not amended, 60 years which is the age of superannuation of government servants employed under the State of Uttar Pradesh shall be applicable to the employees of the Nigam. However, it would be open to the Nigam with the previous approval of the State Government to make suitable amendment in Regulation 31 and alter service conditions of employees of the Nigam, including their age of superannuation. It is needless to say that if it is so done, the same shall be prospective.

12. For the foregoing reasons, the appeals as well as writ petitions are allowed, orders passed by the High Court dismissing the writ petitions as well as those by the Nigam directing that the appellants of the civil appeals and petitioners of the writ petitions would

superannuate upon completion of the age of 58 years are set aside and it is directed that in case the employees have been allowed to continue upto the age of 60 years by virtue of some interim order, no recovery shall be made from them but in case, however, they have not been allowed to continue after completing the age of 58 years by virtue of erroneous decision taken by the Nigam for no fault of theirs, they would be entitled to payment of salary for the remaining period upto the age of 60 years which must be paid to them within a period of three months from the date of receipt of copy of this order by the Nigam. There shall be no order as to costs.

12. Thus in given facts and circumstances of the case, we are of the considered opinion that the law laid down by the Hon'ble Apex Court is fully applicable and squarely covers the case of petitioners, therefore, we have no hesitation to hold that the amendment made in Rule 56 (a) of Fundamental Rules referred herein before shall equally apply to the employees of Nigam covered by aforesaid Regulations by virtue of Regulation 31, and the petitioners would be entitled to be superannuated on attaining their age of 60 years. The decision of Nigam dated 11.7.2002 resolving not to apply 60 years enhanced age of superannuation to the petitioners and pursuant impugned order passed by Nigam retiring the petitioners earlier to attaining the age of 60 years i.e. on attaining the age of 58 years only are not sustainable being contrary to law and decision rendered by Hon'ble Apex Court. Accordingly, the decision of Nigam dated 11.7.2002 and orders passed by Nigam retiring the petitioners from service on attaining their age 58 years are hereby quashed.

13. However, it is made clear that since we have interpreted the provisions of Regulation 31 of Regulations in context of provisions of Act and in connection of applicability of amendment made in Rule-56 (a) of U.P. Fundamental Rules by Notification dated 27.6.2002, which have retrospective operation with effect from 28th November 2001, therefore, the observations made in our decision should be understood in context of only those provisions meaning thereby it shall apply to only those employees of the Nigam who are governed by Regulations referred herein before and were in service of the Nigam till the date of commencement of amended provisions of aforesaid Fundamental Rules and have been superannuated on or after 28th November 2001 but in view of the proviso second of amended Rule-56(a) if a Government servant who has attained the age of 58 years on or before the first day of November 2001 and is on extension in service shall be retired from service on expiry of his extended period of service. Thus he would not be entitled to take benefits of amended fundamental Rules.

14. In the result, the petitioners are entitled to be continued in service on their respective posts till attaining 60 years age of their superannuation. In case the petitioners were permitted to continue in service after attaining their age of 58 years at the strength of any interim order passed by this Court and they have also been paid their salary, the respondents are directed to continue them in service till attaining their age of 60 years and pay their salary admissible to their respective

posts by treating their age of retirement 60 years. If any of the petitioner has not been permitted to continue in service in absence of any interim order and has not been paid his salary without his fault, the Nigam is directed to reinstate him on his post for remaining period till attaining his age of 60 years and pay his salary alongwith arrears of remaining period within a period of three months from the date of production of certified copy of the order passed by this Court before the Nigam. The Nigam is further directed to finalize post retiral benefits of the petitioners by treating their age of retirement 60 years. With the aforesaid directions, the writ petition succeeds and allowed.

There shall be no order as to costs.

Let a copy of this order be placed on the records of writ petition nos. 58576/2005, 58580/2005, 58578/2005, 45495/2005, 44813/2005, 63752/2005, 61031/2005, 60374/2005, 58584/2005 and 58582/2005. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2005

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

Civil Misc. Writ Petition No. 3538 of 2004

Dr. Vinay Kumar ...Petitioner
Versus
The Director of Education (Higher), Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri P.S. Baghel

Counsel for the Respondents:
Sri S.M.A. Kazmi, Addl. A.G.
S.C.

U.P. Higher Education Service Commission (Procedure for Selection of Teachers) Regulation, 1983 as amended by U.P. Act No. 2 of 1992-Section 13 (3) Power of direction-whether the ad-hoc continuance of principal or Teacher in a particular college to be given some weightage? Held- 'No'-except merit position of the candidate u/s 13 (1)-and the preference of given-discretion can not be exercised.

Held: Para 34,37, 39

We are of the opinion that the Director cannot give any weight at all to the preference of the management in the selection of a particular candidate as their Principal or their Teacher.

In our opinion, the Director at the time of making intimation is to take into account only two things, in regard to every candidate, namely, the candidate's merit position as determined under Section 13(1), and the preferential list of colleges or institutions given by the candidate himself.

In our opinion the Director does not use a discretionary power in making intimations under sub-section (3) of Section 13. Instead of the Director, any other person with an equally logical mind as the Director will also be able to perform the same act but the Director has been given the authority, so as to carry conviction and to make it safe for the colleges to follow the recommendations and intimations coming under his signature.

2003 (2) ESC 944, 2003 (1) AWC-142, 1978 (2) SCC-213, 1978 (1) SCC-405,
1991 (3) SCC-67, AIR 1992 SC-2219, AIR 1991 SC-672, AIR 1965 SC-834,
1981 (Supply) SCC-87, 1990 (2) SCC-378, 2001 (7) SCC-71, 2005 J.T. (6) 160, 1949 (2)

All.E.R.-155, AIR 1978 SC-851, 1989 (2) SCC-754, AIR 1959 SC-459,
2001 (7) SCC-71, AIR 1971 Mad. 245, 1995 (supp.) (1) SCC ?

(B) Constitution of India Art 141-view taken by D.B. in Alka Rani case in para 10 and 11-held-contrary to provision of Section 13 of the Act-do not lay down correct law.

Held: Para 44

The law laid down by the Division Bench of this Court in Alka Rani's case (supra) in paragraph 10 (Second Part of paragraph 10) and paragraph 11 do not lay down the law correctly and are contrary to provisions of Section 13 of the Act and Regulation, 1983. The Division Bench judgment in Dr. Prakash Chandra's case (supra) do not lay down any such ratio as was relied on by the Division Bench in Alka Rani's case. The observations in paragraph 10 of the judgment in Dr. Prakash Chandra's case were on the facts of the said case and were not the reasons for issuing direction for placement in the said case.

(c) Practice of Procedure-interpretation of statutes-whether is permissible the court for interpretation ?

Held: Para 45

It is permissible for a Court to interpret statutory provisions but not to amend or add to it.

(Delivered byHon'ble Ajoy Nath Ray, CJ.)

1. This is a reference made by a Division Bench in Civil Misc. Writ Petition No. 3538 of 2004 (Dr. Vinay Kumar Vs. the Director of Education (Higher), Allahabad and others).

2. The three questions referred by the Hon'ble Division Bench will be found at the end of the judgement at internal Page 16.

3. The said three questions are set out below:-

"1. Whether law laid down in Dr. Prakash Chandra Srivastava Vs. Director of Higher Education, Allahabad and Anr, 2003 (1) AWC 142 by this Court and followed in Alak Rani Gupta (Km.) Vs. Director of Education (Higher) & Anr, 2003 (2) ESC 944, is contrary to and in violation of the letter and intent of the express language used by the legislature in Section 13 of the Act, 1980 read with Regulation 5 of Regulations, 1983?

2. Whether it is permissible for the Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution to either add or amend a statutory provision by enunciating an interpretation, which in its opinion, is just and proper?

3. Whether there is a direct conflict between the ratio of the two cases Dr. Prakash Chandra Srivastava (supra) and Km. Alka Rani Gupta (supra) on one hand, and that of in Dr. Ranjana Tiwari Vs. Director, Higher Education of U.P. & Ors, (2003) 3 E.S.C. (All) 1489 on the other, which deserves to be resolved by an authoritative pronouncement?"

4. Brief facts of the case giving rise to this reference need to be noted for appreciating the questions referred to this Bench. The U.P. Higher Education

Service Commission established under Section 3 of the U. P. U.P. Higher Education Service Commission Act, 1980 issued advertisement No. 32 of 2002 advertising several vacancies of lecturers in different subjects in various non Government Colleges. The petitioner applied for the post of Lecturer Mathematics, while applying he also gave first preference to a college, namely, K. K. College, Etawah. Under the Government order dated 7.4.1998 the petitioner was appointed to teach Mathematics in K.K. College, Etawah on honorarium basis with the approval of the Director of Education dated 7.2.2004. The Commission made selection and declared merit list against thirty eight posts of lecturers Mathematics in which list the name of the petitioner was also included as against other backward category candidates. The Committee of Management claimed to have given no objection dated 30th November, 2004 for appointment of the petitioner in K.K. College, Etawah. Petitioner made a representation to the Director of Education praying for his placement in K.K. College, Etawah. Petitioner filed the present writ petition praying for a writ of mandamus commanding the respondent No. 1, the Director of Education (Higher) U.P. Allahabad to make placement of the petitioner as Lecturer Mathematics in K.K. College, Etawah in accordance with law laid down by this Court in case of **Alka Rani Gupta (Km.) Versus Director of Education (Higher) & another**, 2003 (2) ESC 944. The Division Bench before whom the writ petition came for hearing finding itself unable to agree with the law laid down in the above mentioned judgement of **Allka Rani Gutpa (Km.) Versus Director of Education (Higher) & another** (supra) referred the above noted three questions for consideration by this Bench.

5. Sri P. S. Baghel learned counsel appearing for the petitioner submitted that the law laid down by the Division Bench of this Court in **Allka Rani Gutpa (Km.) Versus Director of Education (Higher) & another** (supra) correctly interprets the provisions of Sections 12 and 13 of the Act as amended by U.P. Act No. 2 of 1992. He further submits that the view taken in **Allka Rani Gutpa (Km.) Versus Director of Education (Higher) & another** ((supra)) find support from an earlier Division Bench judgement of this Court, **Dr. Prakash Chandra Srivastava Versus Director of Higher Education, Allahabad and another**, 2003 (1) A.W.C. 142. The petitioner who has been appointed to teach Mathematics on honorarium basis with the approval of the Director of Education in accordance with the Government order dated 7.4.1998 is also entitled for the benefit of ratio laid down in **Allka Rani Gutpa (Km.) Versus Director of Education (Higher) & another** (supra) (Paragraph 10). Sri Baghel submits that the provisions of Sections 12 and 13 of the Act have been consciously amended in 1992 providing for giving of preference of the college by a candidate and further by Section 13 sub clause (3) it was mandated that due regard be given to the order of preference indicated by a candidate. Sri Baghel submits that Regulations framed under the Act, namely, the U.P. Higher Education Service Commission (Procedure for Selection of Teachers) Regulations, 1983 having not been amended, the Regulations will give way to the provisions of Sections 12 and 13 as amended in 1992 and the preference given by a candidate cannot be ignored. He further contends

that a teacher or Principal working in particular college on ad hoc basis/ honorarium basis has right to placement in the same College as per his preference where the committee of management agrees to such placement. Sri Baghel while interpreting Sections 12 and 13 as amended in 1992 submits that the Court has to interpret the same in a manner so that preference given by a candidate be given primacy which according to him is the intention of the Legislature in amending Sections 12 and 13 of the Act. He submits that the Court should consciously mould the law so as to serve the needs of time. Reliance has been placed on various judgements of the apex Court laying down various principles of statutory interpretation, namely, (1978) 2 Supreme Court Cases 213 **Bangalore Water Supply & Sewerage Board Vs. A. Rajjappa and others**; (1978) 1 Supreme Court Cases 405 **Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others**; (1991) 3 Supreme Court Cases 67 **Rattan Chand Hira Chand Vs. ASKAR Nawazjung (Dead) by LRS and others**; A.I.R. 1992 Supreme Court 2219 **Mrs. Sarojini Ramaswami Vs. Union of India and others**; A.I.R.1991 Supreme Court 672 **M/s. Orient Paper and Industries Ltd. & another, etc. etc. Vs. State of Orissa and others** and A.I.R. 1965 Supreme Court 834 **Laxmi Devi Vs. Mukand Kanwar and others**.

6. Sri S. M. A. Kazmi, learned Additional Advocate General submitted that the Division Bench judgement in **Alka Rani's case** (supra) in so far as it carves out an exception with regard to ad hoc teacher working in the same college does not lay down the correct law. He submits that the selection by Commission is merit based and the preferences given by a candidate are taking into consideration according to merits of the candidates. He submits that the proposition of law as laid down in paragraph 9 of the said judgement clearly spells out the scheme under the Act and the Regulations. Sri Kazmi submits that the Court while interpreting the statute cannot add a word to a provision or subtract a word from the provision. He submits that the Court while interpreting the provision can only interpret the law and cannot legislate. He submitted that the amended provisions of Sections 12 and 13 of the Act do not provide that the placement of the candidate be made in different college only on the basis of preference given go by to the merit of the candidate. Sri Kazmi also placed reliance on various judgements of the apex Court on statutory interpretation namely, A.I.R. 1959 Supreme Court 459 **Sri Ram Ram Narain Medhi & others Versus The State of Bombay;** 1981 (Supp) Supreme Court Cases 87 **S.P. Gupta Vs. Union of India and another**; (1990) 2 Supreme Court Cases 378 **P. K. Unni Vs. Nirmlala Industries and others**; 2001 (7) Supreme Court Cases 71 **Dadi Jagannadham Vs. Jammulu Rammulu and others** and 2005 J. T. Volume (6) 160 **State of Kerala and another Vs. P. V. Neelakandan Nair and others**.

7. Before we proceed to consider the submissions of both the parties it is necessary to look the relevant statutory provisions on the subject. The U.P. Higher Education Service Commission has been established for the selection of teachers for appointment to the colleges affiliated to or recognised by the University. Section 11 of the Act provides for powers and duties of the Commission

which includes power and duties to frame proper guide lines on matters relating to method of recruitment of teachers of college, to make recommendation to the management regarding the appointment of selected candidates. Section 12 provides that the management shall make appointment only on the recommendation of the Commission. The management shall notify vacancy to the Commission. The manner of selection of persons for appointment to the post of teachers to a college shall be such as may be determined by the regulation. Section 13 provides for; recommendation by the Commission after holding the interview with or without examination of the candidates. Section 12 and 13 of the Act as it originally stood is extracted below:-

"12. Management to make appointments etc. only on the recommendations of Commission,___ *(1) Notwithstanding anything to the contrary contained in the Uttar Pradesh State Universities Act, 1973 or in the Statutes made thereunder, every appointment as a teacher of any college shall, after the date notified under sub-section (1) of Section3, be made by the management only on the recommendation of the Commission.*

(2) For the purpose of making appointment of a teacher under sub-section (1), the management shall notify the vacancy to the Commission.

(3) The manner of selection of persons for appointment to the posts of teachers of a college shall be such as may be determined by regulations;

Provided that the Commission shall, with a view to inviting talented persons give wide publicity in the State to the vacancies notified under sub-section (2).

(4) The provisions of this Section shall not apply to the appointment of a teacher, vacancy in respect whereof has been advertised in accordance with sub-section (10) of Section 31 of the Uttar Pradesh State Universities Act, 1973 at any time before the commencement of this Act.

(5) Every appointment made in contravention of the provisions of this section shall be void."

"13. Recommendation of the Commission.-*(1) The Commission shall as soon as possible, after the notification of vacancy under sub-section (2) of Section 12, hold interview (with or without examination) of the candidates, and recommend the names of not more than three candidates for appointment to every post of a teacher. Such names shall be arranged in order of preference.*

(2) Where candidates referred to in sub-section (1) fail to join the post or where they are otherwise not available for appointment, the commission may, on the request of the management recommend up to two more names of persons found suitable on the basis of the examination or interview held under the said sub-section.

(3) Every recommendation of the Commission under sub-section (1) or sub-section (92) shall be valid for a period of one year from the date of such recommendation."

8. Section 31 empowers the Commission to make regulations with the previous approval of the Government.

Regulations were framed by the Commission namely, the U.P. Higher Education Service Commission (Procedure for Selection of Teachers) Regulations, 1983. Regulation 4 deals with determination and intimation of vacancies. Regulation 5 provides for notification of vacancies, submission of application and indication of preference. Regulation 6 deals with the procedure for selection. Regulation 6 (4) provides for preparation of list in order of merit which provided that the names shall not be more than three times the number of vacancies or the number of vacancies plus four whichever is more. Regulation 7 sub regulation (3) provides for offering the post of Principal "Degree College in order of merit with due regard to the preference given by the candidates. Regulation 5, Regulation 6 sub regulation (4) and Regulation 7 are extracted below :-

"5. Notification of vacancies submission of application and indication of preference.- *The Commission shall advertise the vacancies in three issues of at least three newspapers. The Commission shall send a copy of advertisement to the Director and may, if it considers proper, also send a copy thereof to the District Inspector of Schools and to the Colleges. Such advertisement shall, inter alia, indicate the total number of vacancies as also the number of vacancies in women's colleges and other colleges separately, the names of the college (s) and where they are situate and shall require the candidates to apply in prescribed form and to give if he so desires, the choice of not more than five colleges in order of preference. Where a candidate wishes to be considered for a particular college or colleges only, and for no other, he shall mention the fact in his application;*

Provided that where the number of colleges is large or for any other reason the Commission considers it inexpedient, it may, instead of mentioning the names and particulars of the colleges in the advertisement, send the copy thereof to the colleges and to the District Inspector of Schools and mention in the advertisement that particulars of the colleges may be seen in the office of the Commission, the office of the District Inspector of Schools or in the Colleges;

Provided also that the Commission shall not be bound by the Choice given by the candidate and may, in its discretion, recommend him for appointment in a college other than indicated by him."

6. Procedure for selection,____
(1).....
(2).....
(3).....
(4) The Commission shall prepare two separate lists of selected candidates, one of the women candidates only and the other a 'general list' of all the candidates (including women candidates included in the first list). The names of women candidates who specifically opt not to be posted in women's colleges shall not be included in the list of women candidates. The names of the candidates in the two lists shall be arranged in order of merit and the number of names shall not be more than three times the number of vacancies or the number of vacancies plus four whichever is more.

7. Recommendation for appointment,___

(1) The Commission may recommend the names of upto three candidates, in order of merit, for each post.

(2) The post of Principal shall—

(a) in the case of women's colleges, be offered to the candidates in the list of women candidates, and

(b) in the other colleges, be offered to the candidates in the general list after striking out the names of the women candidates who have been offered posts under Clause (a).

(3) The posts of the Principal of degree colleges in the higher grade shall be offered in order of merit with due regard to the preference given by the candidates and the posts in the lower grade shall similarly be offered to the candidates standing next in order of merit.

(4) The procedure, mentioned in sub regulations (2) and (2) shall, mutatis mutandis, be followed in respect of the posts of teachers, other than principal."

9. The provisions of the Act were amended by the U.P. Act No. 2 of 1992 by which Sections 12 to 14 of the Act were substituted. Section 12 sub clause (4) second proviso provided that the candidates shall be required to indicate their order of preference for the various colleges vacancies wherein have been advertised. Section 13 sub clause (1) provides for Commission to send a list to the Director recommending the names of the candidates found most suitable. The names are required to be arranged in order of merit. Section 13 sub clause (3) provides that the Director shall having due regard in the prescribed manner, to the order of preference, if any indicated by the candidates intimate to the management the name of the candidate from the list. Sections 12 and 13 of the Act as amended in 1992 are extracted below :-

"12. Procedure for appointment of teachers,_____

(1) Every appointment as a teacher of any college shall be made by the management in accordance with the provisions of this Act and every appointment made in contravention thereof shall be void.

(2) The management shall intimate the existing vacancies and the vacancies, likely to be caused during the course of the ensuing academic year, to the Director at lsuch time and in such manner, as may be prescribed.

Explanation,_____ The expression "academic year" means the period of 12 months commencing on July 1.

(3) The Director shall notify to the Commission at such time and in such manner as may be prescribed a subject-wise consolidated list of vacancies intimated to him from all colleges.

(4) The manner of selection of persons for appointment to the post of teachers of a college shall be such, as may be determined by regulations:

13. Recommendation of the Commission.-*(1) The Commissioner shall, as soon as possible, after the notification of vacancies to it under sub-*

section (3) of Section 12, hold interview (with or without examination) of the candidates, and send to the Director a list recommending such number of names of candidates found most suitable in each subject as may be, so far as practicable, twenty five per cent more than the number of vacancies in that subject. Such names shall be arranged in order of merit shown in the interview, or in the examination and interview if an examination is held.

(2) The list sent by the Commission shall be valid till the receipt of a new list from the Commission.

(3) The Director shall having due regard in the prescribed manner, to the order of preference if any indicated by the candidates under the second proviso to sub-section (4) of Section 12, intimate to the management the name of a candidate from the list referred to in sub-section (1) for being appointed in the vacancy intimated under sub-section (2) of Section 12.

(4) Where a vacancy occurs due to death, resignation or otherwise during the period of validity of the list referred to in sub-section (2) and such vacancy has not been notified to the commission under sub-section (2) and such vacancy has not been notified to the Commission under sub-section (3) of Section 12, the Director may intimate to the management the name of a candidate from such list for appointment in such vacancy.

(5) Notwithstanding anything in the preceding provisions, whereto abolition of any post of teacher in any college, services of the person substantively appointed to such post is terminated the State Government may make suitable order for his appointment in a suitable vacancy, whether notified under sub-section (3) of Section 12 or not in any other college, and thereupon the Director shall intimate to the management accordingly.

(6) The Director shall send a copy of the intimation made under sub-section (3) or sub-section (4) or sub-section (5) to the candidate concerned."

10. Another provision worth noticing is that Section 16 of the Act which provided for ad hoc appointment was omitted by the amending Act. After noticing the relevant statutory provisions, before we proceed to find out the legislative scheme as spelled out from the aforesaid provisions it is necessary to consider the submissions raised by counsel for both the parties for applying principles for interpretation of statutes as contended by both the parties. Sri Baghel for the proposition that the statute to be read and constructed with reference to the new provisions and not with reference to the provisions which originally existed, placed reliance on judgements of the apex Court in **M/s. Orient Paper and Industries Ltd. and another, etc. etc. Vs. State of Orissa and others** (supra) and **Laxmi Devi Versus Mukand Kanwar and others** (supra). **In M/s. Orient Paper and Industries Ltd. And another, etc. etc. Versus State of Orissa and others** (supra) the apex Court considered the amendment made by Act No. 15 of 1987 in Orissa Forest Produce (Control of Trade) Act, 1981 interpreted the provisions as stood after amendment. There cannot be any dispute with the preposition laid down by the apex Court in the above case. While interpreting the scheme of the Act the amendment has to

be looked into and given due consideration.

11. The judgement of the apex Court in **Bangalore Water Supply and Sewerage Versus A. Rajappa and others** (supra) which approved the observation of Lord Denning, L.J., in **Seaford Court Estates Ltd. v. Asher** (1949) 2 All. England Report 155 has been heavily relied. The relevant observation of the apex Court in paragraphs 147 and 148 are extracted below:-

"147. *My learned brother has relied on what was considered in England a somewhat unorthodox method of construction in Seaford Court Estates Ltd. v. Asher, where Lord Denning, L.J., said :*

"When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament____ and then he must supplement the written words so as to give ' force and life' to the intention of legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

When this case went up to the House of Lords it appears that the Law Lords disapproved of the bold effort of Lord Denning to make ambiguous legislation more comprehensible. Lord Simonds found it to be " a naked usurpation of the legislative function under the thin disguise of interpretation". Lord Morton (with whom Lord Goddard entirely agreed) observed: " These heroics are out of place" and Lord Tucker said " Your Lordships would be acting in a legislative rather than a judicial capacity if the view put forward by Denning, L.J., were to prevail."

148. *k Perhaps, with the passage of time, what may be described as the extension of a method resembling the "arm-chair rule" in the construction of wills, Judges can more frankly step into the shores of the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state. In M. Pentiah v. Muddala Veeramallappa, Sarkar, J., approved of the reasoning, set out above, adopted by Lord Denning. And, I mujst say that, in a case where the definition of "industry" is left in the state in which we find it, the situation perhaps calls for some judicial heroics to cope with the difficulties raised."*

12. Further strong reliance has been placed on paragraph 19 of the apex Court judgement in **Mohinder Singh Gill and another Versus The Chief Election Commissioner, New Delhi and others**, AIR 1978 Supreme Court 851 which is extracted below:-

"19*. The old articles of the supreme lex meet new challenges of life, the old legal pillars suffer new stresses. So we have to adapt the law and develop its latent capabilities if novel situations, as here, are encountered. That is why in the reasoning we have adopted and the perspective we have projected, no literal nor lexical but liberal and visional is our interpretation of the articles of the*

Constitution and the provisions of the Act. Lord Denning's words; are instructive:

"Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time, must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect__ thinking of the structure as a whole building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends."

The invulnerable barrier of Article 329(b)."

13. Further, the observations of the apex Court made in paragraph 7 in (1989) 2 Supreme Court Cases 754 **Union of India and another Versus Raghubir Singh (dead) by Lrs. Etc**, has been relied which are to the following effect :-

"7. India is governed by a judicial system identified by a hierarchy of courts, where the doctrine of binding precedent is cardinal feature of its jurisprudence. It used to be disputed that Judges make law. Today, it is no longer a matter of doubt that a substantial volume of the law governing the lives of citizens and regulating the functions of the State flows from the decisions of the superior courts. "There was a time" observed Lord Reid "When it was thought almost indecent to suggest; that Judges make law___ they only declare it..... But we do not believe in fairy tales any more". In countries such as the United Kingdom, where Parliament as the legislative organ is supreme and stands at the apex of the constitutional structure of the State, the role played by judicial law-making is limited. In the first place the function of the courts is restricted to the interpretation of laws made by Parliament, and the courts have no power to question the validity of Parliamentary statutes, the Diceyan dictum holding true that the British Parliament is paramount and all powerful. In the second place, the law enunciated in every decision of the courts in England can be superseded by an Act of Parliament. As Cockburn CJ observed in Ex parte Canon Selwyn : (1872) 36 JP 54):

"There is no judicial body in the country by which the validity of an Act of Parliament could be questioned. An act of the Legislature is superior in authority to any Court of Law."

And Ungoed 'Thomas J. in Cheney v. Conn (1968) 1 All. ER 779) referred to a Parlimentary statute as "the highest form of law... which prevails over every other form of law". The position is substantially different under a written Constitution such as the one which governs us. The Constitution of India, which represents the Supreme Law of land, envisages three distinct organs of the State, each with its own distinctive functions, each a pillar of the State. Broadly, while Parliament and the State Legislature in India enact the law and the Executive government implements it, the Judiciary sits in judgment not only on the implementation of the law by the Executive but also on the validity of the legislation sought to be implemented. One of the functions of the superior judiciary in India is to examine the competence and validity of legislation, both in point of legislative competence as well as its consistency with the

Fundamental Rights. In this regard, the courts in India possess a power not known to the English Courts. Were a statute is declared invalid in India it cannot be reinstated unless constitutional sanction is obtained therefor by a constitutional amendment or an appropriately modified version of the statute is enacted which accords with constitutional prescription. The range of judicial review recognised in the superior judiciary of India is perhaps the widest and the most extensive known to the world of law. The power extends to examining the validity of even an amendment to the Constitution, for a now it has been repeatedly held that no constitutional amendment can be sustained which violates the basic structure of the Constitution. (See Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225; Indira Nehru Gandhi v. Raj Narain (1975) Supp. SCC 1; Minerva Mills Ltd. v. Union of India (1980) 2 SCC 591 and recently in S.P. Sampath Kumar v. Union of India (1987) 1 SCC 124. With this impressive expanse of judicial power, it is only right that the superior courts in India should be conscious of the enormous responsibility which rest on them. This is specially true of the Supreme Court, for as the highest Court in the entire judicial system the law declared by it is, by Article 141 of the Constitution, binding on all courts within the territory of India."

14. On the other hand, the reliance has been placed on apex Court judgement in A.I.R. 1959 Supreme Court 459 **Sri Ram Ram Narain Medhi Versus The State of Bombay** and paragraph 38 has been referred which has been extracted below:-

"38..... If the language of the enactment is clear and unambiguous it would not be legitimate for the Courts to add any words thereto and evolve therefrom some sense which may be said to carry out the supposed intentions of the legislature. The intention of the Legislature is to be gathered only from the words used by it and no such liberties can be taken by the Courts for effectuating a supposed intention of the Legislature. There is no warrant at all, in our opinion, for adding these words to the plain terms of Art. 31A (1)(a) and the words "extinguishment or modification of any such rights" must be understood in their plain grammatical sense, without any limitation of the type suggested by the petitioners".

15. The apex Court in 1981 (Supp.) Supreme Court Cases 87 **S.P. Gupta Versus Union of India and another** has again considered and said the entire law on the subject. The seven Judges Bench of the apex Court had considered the principle of statutory interpretation and after considering several earlier cases on statutory interpretation following was laid down in paragraphs 273, 274 and 275 :-

***"273**. Thus, on a full and complete consideration of the decisions classified under the various categories, the propositions that emerge from the decided cases of this Court and other foreign courts are as follows:-*

(1) Where the language of a statute is clear and unambiguous, there is no room for the application either of the doctrine of casus omissus or of pressing into service external aids, for in such a case the words used by the Constitution or the statute speak for themselves and it is not

the function of the court to add words or expressions merely to suit what the courts think is the supposed intention of the legislature.

(2) Where, l; however, the words or expressions used in the constitutional or statutory provisions are shrouded in mystery, clouded with ambiguity and are unclear and unintelligible so that the dominant object and spirit of the legislature cannot be spelt out from the language, external aids in the nature of parliamentary debates, immediately preceding the passing of the statute, the report of the Select Committees or its Chairman, the Statement of Objects and Reasons of the statute, if any, or any statement made by the sponsor of the statute which is in close proximity to the actual introduction or insertion of the statutory provision so as to become, as it were, a result of the statement made, can be pressed into service in order to ascertain the real purport, intent and will of the legislature to make the constitutional provision workable.

We might make it clear that such aids may neither be decisive nor conclusive but they would certainly assist the courts in interpreting the statute in order to determine the avowed object of the Act or the Constitution as the case may be.

(3) Except in the aforesaid cases, a mere speech of Member made on the floor of the House during the course of a parliamentary or legislative debate would not be admissible at all because the views expressed by the speaker may be his individual views which may or may not be accepted by the majority of the Members present in the House.

(4) Legislative history of a constitutional prevision though not directly germane for the purpose of construing a statue may, however, be used in exceptional cases to denote the beginning of the legislative process which result in the logical end and the finale of the statutory provision but in no case can the legislative history take the place of or be a substitute for an interpretation which is in direct contravention of the statutory provision concerned.

(5) Where the scheme of a statute clearly shows that certain words or phrases were deliberately omitted by the legislature for a particular purpose or motive, it is not open to the court to add those words either by conforming to the supposed intention of the legislature or because the insertion or the omission suits the ideology of the Judges deciding the case. Such a course of action would amount not to interpretation but to interpolation of the statutory or constitutional provisions, as the case may be, and is against all the well-established cannons of interpretation of statutes.

274. *The main reason behind the principles enunciated above is that the legislature must be presumed to be aware of the expanding needs of the nation, the requirements of the people and above all, the dominant object which the legislation; seeks to subserve.*

275. *Thus, where the language is plain and unambiguous the court is not entitled to go behind the language so as to add or supply omissions and thus play the role of a political reformer or of a wise counsel to the legislature."*

16. Again another Constitution Bench of Supreme Court in (2001) 7 Supreme Court Cases 71 : **Dadi Jagannadham Versus Jammulu Ramulu and others** laid down following in paragraph 13 :-

*"**13**. We have considered the submissions made by the parties. The settled principles of interpretation are that the court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the court would not go to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."*

17. From the pronouncement of the apex Court as noted above, it is clear that for interpreting a statute intention of the legislature has to be ascertained. While interpreting a statute the court adopts an interpretation which carry forward the object of the legislature and advances the legislative scheme. The Court could not add word to the statutes or read words in the statute which are not there, Moreso when the literal reading produces an intelligible result. True, the law is not static and the Court is to adopt an interpretation which advances the legislative object, remedies the defect.

18. In the present case we have to look the legislative scheme to find out as to what legislative intent is spelled out from the amended provisions of Sections 12 and 13 on which much emphasis has been laid by Sri Baghel.

19. It is relevant to note that the amended Section 12 (4) still provides that the manner of selection of persons for appointment to the post of teachers of the College shall be such as may be determined by regulation. For manner of selection of persons for appointment we have to revert to the regulation and the regulations have not been given a go-by with regard to manner of selection. As noted above under unamended provision it was the Commission's power to send the list to the management for appointment against a post but by amendment made under Section 13 now the Director has been empowered to forward the list. The provision of giving choice by a candidate of not more than five colleges in order of preference was very much there in Regulation 5 which has now been provided for in amended Section 12 (4) second proviso. Prior to amendment in Sections 12 and 13 the regulation did provide for placement in order of merit with due regard to the preference given by the candidates. Regulations 7 clearly spells out the scheme. The selection of teachers is merit base selection and in placement of the candidate merit has to play role. Section 12 (3) of amended Section provides "the Director shall having due regard in the prescribed manner, to the order of preference". The emphasis of the counsel for the petitioner is that the word "due regard" used in Section 13 (3) spells out a shift in intention of the legislature for giving more emphasis in preference of a candidate.

20. As noted above the word "due regard" was mentioned in regulation 7 which has now been mentioned in Sections 12 and 13.

21. The word "due regard" has been defined in **Black's Law Dictionary Sixth Edition** in following manner "Due regard" Consideration in a degree appropriate to demands of the particular case."

22. The word "due regard" came for consideration before the Madras High Court in **T.P. Sundaralingam Versus The State of Madras and others** AIR 1971 Madras 245. The Division Bench while considering the word " due regard" in context of Rice Milling Industry (Regulation) Act (1958) made following observation:-

".....All that is meant by the expression "due regard" in Section 5(4) is that the licensing authority must pay proper attention to the several circumstances mentioned by the sub-section in balancing the considerations for grant or refusal of a permit, that is to say, in balancing the facts and circumstances to form an opinion that in order to ensure adequate supply of rice , it is necessary to grant the permit....."

23. The apex Court had occasion to consider the word "due regard" in context of Criteria for promotion- Selection-Merit-cum-suitability with due regard to seniority" in 1995 Supp (1) Supreme Court Cases, **Sarat Kumar Dash and others Versus Biswajit Patnaik and others**. Following was observed by the apex Court in paragraphs 7 and 8 :-

"7. In Capoor Case (1973) 2 SCC 836) this Court has stated with regard to the principle thus: (SCC P.856, para 37)

"When Regulation 5 (2) says that the selection for inclusion in the list shall be based on merit and suitability in all respects with due regard to seniority, what it means is that for inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale. But, to say, as the High Court has done, that seniority is the determining factor and that it is only if the senior is found unfit that the junior can be thought of for inclusion in the list is, with respect, not a correct reading of Regulation 5(2). I do not know what the High Court would have said had Regulation 5 (2) said; "Selection for inclusion in the select list shall be based on seniority with due regard to merit and suitability".

Would it have said that the interpretation to be put upon the hypothetical sub-regulation (2) is the same as it put upon the actual sub-regulation".

***8.** In case of merit-cum-suitability, the seniority should have no role to play when the candidates were found to be meritorious and suitable for higher posts. Even a juniormost man may steal a march over his seniors and jump the queue for accelerated promotion. This principle inculcates dedicated service, and accelerates ability and encourages merit*

to improve excellence. The seniority would have its due place only where the merit and ability are approximately equal or where it is not possible to assess inter se merit and the suitability of two equally eligible competing candidates who come very close in the order of merit and ability. Under those circumstances, the seniority will play its due role and calls it in aid for consideration. But in case where the relative merit and suitability or ability have been considered and evaluated, and found to be superior, then the seniority has no role to play. In our view the PSC has evolved correct procedure in grading the officers and the marks have been awarded according to the grading. It is seen that the four officers have come in the grading of 'B'. In consequence, the PSC had adopted the seniority of the appellants and Panda in the lower cadre in recommending their cases for appointment in the order of merit".

24. From the definition of word "due regard" as noted above given in Black's Law Dictionary and the observations of the apex Court as quoted above it is clear that "due regard" means regard to a factor which is due according to the statutory scheme. It is also to be noted that Section 13 (3) refers to "due regard" in the prescribed manner. Thus "due regard" used in Section 13 (3) cannot be interpreted as only regard as sought to be canvassed by the counsel for the petitioner. In case the interpretation suggested by the counsel for the petitioner is accepted the placement of the candidate shall only depend on preference indicated by a candidate that will give a go by to the entire merit scheme. The above interpretation cannot be accepted which can be explained by giving a simple illustration. In merit list ten candidates have given their first preference of a particular college. For recommending the name of the candidate for the particular vacancy in a college, the preference of the candidate higher in merit has to be accepted. The amendment made in Sections 12 and 13 does not indicate that merit base scheme of recommendation of names against the particular vacancy has been given a go by. The merit is pivotal factor and the preference of the candidate has to be given effect to as far as possible. In the event for a particular college no one has given preference person lower in merit may get placement in that college when his chance comes for consideration. The interpretation sought to be canvassed by the counsel for the petitioner does not fall along with the legislative scheme as indicated by amended provision of Sections 12 and 13 of the Act and the Regulations. It is true that those provisions of the regulation which can not stand along with the amended provisions of Sections 12 and 13 has to be treated as not operative but those part of the regulation which is not in conflict with any provisions of the Act, has still to be followed. This view of ours is re-enforced with express provisions of Sections 12 (4) of the amended provision which still refers to and relies the regulation for the manner of selection of persons for appointment.

25. In the case of Alka Rani Gupa (supra), a Division Bench of this Court said as follows in paragraph 9, which is set out below:-

"9. *Thus the legal position which emerges from the above provisions in the Act and Regulations is as follows:*

(i) Where a large number of candidates are selected for various institutions by the Commission, the Commission has to prepare a select list in accordance with the merit determined by the Commission.

(ii) The candidate who is on the top of the select list will be given his first preference.

(iii) Then the candidate who is at serial position No.2 in the select list will be considered by the Director. If his first choice has already been filled by the candidate at the top of the select list then this candidate will be given his second choice, otherwise he will get his first choice.

(iv) Then we come to the candidate who is on the third position in the select list. If the choice of his first preference has not been already allotted to a candidate higher than him in the select list he will be given that institution, otherwise he will be given his second choice, unless that too has been allotted to the candidate above him, in which case he will be allotted the institution of his third choice. In this way the Director will do the placement."

26. However, in the very said same case the Bench went on to carve out exceptions from the said Rule in the very next two paragraphs, namely, paragraphs 10 and 11. Those two paragraphs are also set out below:-

***"10.** In our opinion this is the only logical and reasonable method for making placement of a candidate selected by the Commission, and if this is not followed there is bound to be chaos, corruption, arbitrariness, casteism etc. There shall be only one exception to the above method and procedure for making placement, namely that if there is an ad hoc Principal already working in the College, or Lecturer working in the said College who has been selected by the Commission for the post of Principal, then the ad hoc Principal/Lecturer should be given placement in the same College as Principal provided that the management has no objection.*

*11. We are laying down this exception in view of the division bench decision of this Court in Dr. Prakash Chandra Srivastava v. Director of Higher Education, Allahabad and another, **2003(1) AWC 142**. In paragraph 10 of the said decision it has been observed that problems and disputes arise between the Principal and the management when the management is forced to issue an appointment order in favour of a person against its wishes. Thrusting an unwilling Principal on an unwilling management is not in the interest of the institution. This is the only exception to the method and procedure of placement, which we have laid down in this judgment."*

27. **Dr. Prakash Chandra's** case, which is mentioned in the referring questions and also in paragraph 11 of **Alka Rani's** case (supra), was about the appointment of a Principal in a College where persons higher in the merit list had indicated that very same college in their order of preference, although such preferences were at Item Nos. 4 or 5.

28. The material paragraphs of **Dr. Prakash Chandra's** case (supra) are paragraphs 4, 5, 9 and 10. Those

paragraphs from the said judgment are set out below:-

*"**4.** In the counter-affidavit filed by Dr. R.K. Baslas, Director of Higher Education, U.P., it is stated that appointment on the post of Lecturer and Principal in an affiliated college (other than a Government college) is made in accordance with Higher Education Services Commission Act and the procedure for making appointment is given in Section 12 of the said Act. It is averred that the Director of Higher Education, U.P., is no bound to make a placement order according to the choice of the candidate and the same has to be done in a prescribed manner by taking into consideration the roster made in accordance with U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Backward Classes) Act, 1994. It is admitted that the petitioner has been selected for the post of Principal and his name finds place at Sl. No.28 in the merit list of the selected candidates of general category. It is also admitted that the petitioner had given his first preference for placement in the institution in question, namely, Lala Laxmi Narain Degree College, Sirsa, Allahabad. However, the stand taken is that another candidate, namely, Dr. Sadhu Singh Chauhan, whose name finds place at Sl. No.13 in the list prepared on the basis of roster had also given his preference for the same institution. The specific plea taken in paragraph 3 (h) of the counter-affidavit is that as another candidate, whose name happens to be higher than the petitioner in the list prepared according to the roster, has already given preference for the institution in question, it is not possible to recommend the name of the petitioner for his appointment as Principal of the institution as his position in the merit list is lower.*

***5.** In the rejoinder-affidavit filed by the petitioner, it is averred that institution in question was the fourth choice of Dr. Sadhu Singh Chauhan in order of preference. A placement order had been passed in his favour by the Director of Higher Education, U.P., for his appointment as Principal of Sahkari Snatakottar Mahavidyalaya, Mehrawan, Jaunpur and he has already joined there. It is further averred that most of the selected candidates had already been given placement orders and even amongst those who have been left, no one had given his first preference for the institution in question.*

***9.** It is not in dispute that Dr. Sadhu Singh Chauhan had given his fourth preference for the institution in question while it is the first preference of the petitioner. A placement order was issued in favour of Dr. Sadhu Singh Chauhan for his appointment as Principal of Sahkari Snatakottar Mahavidyalaya, Jaunpur and he has already joined there. The result of selection made by the Higher Education Service Commission was declared nearly one and half years back on 18.4.2001. Placement orders have already been passed for most of the selected candidates. None of the selected candidates who have not yet been given a placement order, have indicated their choice for the institution in question. The petitioner has given his first preference for the institution. In these circumstances, we see no justification why a placement order should not be made in favour of the petitioner for his appointment as Principal of the college in question.*

10. *Sirsa is a small town and is situate at a distance of about 60 Kms. From Allahabad city. It is not even a tehsil headquarters. Not many selected candidates would be keen for their placement in the institution in question. The petitioner is working in the institution since October, 1971, when the same was established. He was promoted as reader in August, 1998 and, thereafter, he is officiating as Principal since March, 1994. The material on record shows that it is during this period, when the petitioner became the officiating Principal, that B.Sc. (Biology and Mathematics groups) and B.Ed. Classes have started in the college. Having put in 31 years in the institution, he must be fully familiar with the teaching and other staff working there. The Manager of the college has also written to the Director of Higher Education that a placement order be issued for appointing the petitioner as Principal of the institution as during his tenure, the institution has made considerable progress. It is apparent that the management wants the petitioner to be appointed as regular Principal of the institution and his appointment there would not create any kind of problem or dispute between the Principal land the management, which sometimes takes; place when the management is forced to issue an appointment order in favour of a person against its wishes. The post of Principal is not transferable and one has to spend his entire career in the institution where he has joined. Not many are, therefore, keen to join in an institution which is in rural area and those from far off places are quite reluctant to do so. Thrusting an unwilling Principal on an unwilling management is not in the interest of the institution. On overall consideration of the matter, the appointment of the petitioner as Principal of the institution will be eminently just and proper."*

29. From the above paragraphs, it will be clear that although the higher merit list candidate Chauhan was still not appointed when the writ petition had been filed and thus Dr. Prakash Chandra had a contrestant on the scene who was higher in merit, by the time the writ petition came to be disposed of, Chauhan has already got appointment in some other college. Thus the writ matter could be disposed of only in one way, i.e. by placing Dr. Prakash Chandra in his college of preference as the seat of Principal there was then empty.

30. However, the Division Bench went on to make observations giving a lot of weight to the management preference. This management preference in case of ad hoc Principals has been also given a lot of weight in **Alak Rani's** case (supra) in paragraphs 10 and 11.

31. The Division Bench in the case of **Dr. Ranjana Tiwari** (supra) took a different view. This view can be basically found in paragraph 34 of the judgment, which is set out below:-

"34. *Thus in view of the above, if the discretion is to be exercised judicially and if the provisions of the Act and the Regulations are read together we find no scope of discretion of the statutory authority in making the placement, as it is to be made exclusively on merit. A candidate higher in the merit list has to be offered the place of his first choice, if available, without making any adjustment in favour of a person working therein on ad hoc basis. The matter requires to be*

considered in the light of the provisions of Section 13(20) of the First Statute of the University of Gorakhpur which provides that a senior teacher can be appointed as an officiating Principal till a regular Principal is appointed. The said provision does not create any right in favour of a person working on ad hoc basis to continue if he is so selected regularly and not vacating the post for duly selected candidate over and above him in merit list who had given choice for the said college. Officiating for a long period of time should not create a premium for him as the duly selected candidate over and above him in merit cannot be held responsible for the inaction of the Commission for not making the appointment in time or for college in notifying the vacancy expeditiously."

32. According to the view in **Dr. Ranjana Tiwari's** case (supra), the continuance of an ad hoc Principal in a particular college does not have any value at all. There is a direct conflict between **Dr. Ranjana Tiwari's** case (supra) and the dicta in **Prakash Chandra's** case (supra) as affirmed and supported in **Alka Rani's** case (supra) in paragraph 11.

33. We are basically to answer the question whether the ad hoc continuance of a Principal or a Teacher in a college is to be given some weight or even any weight by the Director when he makes the intimation under Section 13 (3). We are also to answer the question whether the possibility of future conflict between them management and the Principal is to be considered by the Director when making that intimation.

34. We are of the opinion that the Director cannot give any weight at all to the preference of the management in the selection of a particular candidate as their Principal or their Teacher.

35. The Education Act of U.P. and the Rules and Regulations thereunder have been framed for various purposes, one of which is to see to it that the management does not staff its college only in the manner it likes, that the staff is selected with a view to proper education of the students and the children, and the best possible available candidates are put in the teaching jobs. The tendency of the management to favour its own candidates for extraneous reasons is negatived by the manner and procedure of the selection, which is given in these educational schemes and Acts. We find that in Section 13 there are only two factors for grading or selecting a candidate for a particular college. The first gradation is made as per Section 13 (1), on the basis of interview with or without examination and this gradation is called the merit list.

36. This merit list is not the only list. Though the management has no say in the matter, the employee, i.e., the prospective Principal or the prospective Teacher has a say of his own. He can make a preference for a college.

37. In our opinion, the Director at the time of making intimation is to take into account only two things, in regard to every candidate, namely, the candidate's merit position as determined under Section 13 (1), and the preferential list of colleges or institutions given by the candidate himself.

38. How the Director is to allot the candidates to the different colleges on the basis of these two items and these two

items only are, with respect, correctly laid down by the Division Bench in paragraph 9 in **Alka Rani's** case (supra) and we agree with that paragraph in toto.

39. In our opinion the Director does not use a discretionary power in making intimations under sub-section (3) of Section 13. Instead of the Director, any other person with an equally logical mind as the Director will also be able to perform the same act but the Director has been given the authority, so as to carry conviction and to make it safe for the colleges to follow the recommendations and intimations coming under his signature.

40. The working of sub-section (3) of Section 13 shows that Director's action is compulsorily prescribed by the said sub-section. Although the said sub-section does not refer to the merit list at all yet as laid down in paragraph 9 of **Dr. Alka Rani's** case (supra) the merit list must be considered by the Director and in this regard the Director cannot disregard sub-section (1) of Section 13 and the exercise performed under that sub-section. The exercise by the Director is performed thereafter and must be performed thereon.

41. Regarding long standing ad hoc Principals working in a particular college and a liking that the management might have developed for that Principal, we say simply this, that it is for the Principal to decide whether he wants to stay on in the same college or not. If the management has had the Principal for, say 20 years then the Principal has also worked under the management for 20 years. Under the scheme of the Act the management has no say but if the Principal prefers working on in the same college he can always indicate the college as his first preference and if his position in the merit list is good and proper he will get his college, and the college will also get him, although not because they want him, but because he want them.

42. About the possible difficulties of practical working, as apprehended in **Dr. Prakash Chandra's** case (supra) and in paragraphs 10 and 11 of **Dr. Alka Rani's** case (supra), we are of the opinion that these are in the realm of conjecture and hypothesis. Difficulties in practical working can arise at any point of time in any person's career. A mere long association with a particular place or a particular college does not necessarily mean that the employee wants to go on in the same way or that a new person will not be able to do his job even better than he was doing so far. Under the scheme of Section 13, the colleges and the candidates are paired by looking at the merit list and the candidate's preference; that pairing has to be accepted by the management and by the candidate. Without pressing the similarity too far, it is very much like what used to be, and still sometimes is, an arranged marriage. When a man and woman are brought together or a candidate and a college are brought together and a relationship is spelt out, there is no reason why the relationship should not go on as normally as in any other case. Divorces and employment disputes can occur whether the relationship is new or whether the relationship is old. Considering the language of Section 13 (3), we do not feel free to read into this sub-section an exception of the type spelt out in paragraphs 10 and 11 of **Dr. Alka Rani's** case (supra). In our opinion the practical necessities do not require such violent

interpretation and departure from the language of the sections of the Act or the regulations we have been able to find no manner in which the management choice can be given any weight, however slight like in the placement of a candidate.

43. In this view of the matter we abide by what was said in paragraphs 9 and 10 (first sentence only) of **Dr. Alka Rani's** case (supra) and respectfully disapprove what was said in that case in paragraphs 10 (rest) and 11. We make it clear that we approve of the first sentence in paragraph 10 of **Dr. Alka Rani's** case (supra) but disapprove only of the latter part of that paragraph where the exception is said to be spelt out.

44. We agree with the judgment in **Dr. Ranjana Tiwari's** case (supra) and we respectfully disapprove of these dicta given in **Dr. Alka Rani's** case (supra) which are mentioned above.

Thus the questions are answered as follows:-

45. Answer to the first question:-

The law laid down by the Division Bench of this Court in **Alka Rani's** case (supra) in paragraph 10 (Second Part of paragraph 10) and paragraph 11 do not lay down the law correctly and are contrary to provisions of Section 13 of the Act and Regulation, 1983. The Division Bench judgment in **Dr. Prakash Chandra's** case (supra) do not lay down any such ratio as was relied on by the Division Bench in **Alka Rani's** case. The observations in paragraph 10 of the judgment in Dr. Prakash Chandra's case were on the facts of the said case and were not the reasons for issuing direction for placement in the said case.

45. Answer to the second question:-

It is permissible for a Court to interpret statutory provisions but not to amend or add to it.

Answer to the third question:-

The conflict between **Dr. Prakash Chandra's** case (supra) and **Dr. Alka Rani's** case (supra) on the one hand and the case of **Dr. Ranjana Tiwari's** case (supra) on the other hand is resolved as set out in this judgment by preferring the view given in **Dr. Ranjana Tiwari's** case (supra). We add out of abundant caution that in **Dr. Prakash Chandra's** case no principle was acted upon or was necessary to be acted upon in giving the decision of the case and, therefore, paragraph 10 of the judgment is largely obiter and based only on the facts of that case.

46. The matter will now go back before the Division Bench for decision on merits.
