ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2007

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 32283 of 1994
Connected with
Civil Misc. Writ Petitions No. 37405, 37407, 37408, 37409, 37461, 37464, 37465, 37466, 37467, 37468, 37469 and 37472 of 1994

Lakhanpur Co-operative Housing Society limited and another ...Petitioner
Versus
Board of Revenue, Uttar Pradesh at Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri R.L. Singh
Sri Arun Kumar Singh
Sri V.K. Singh
Sri A.K. Singh
Sri Ashok Trivedi
Sri R.P. Gupta

Counsel for the Respondents:
Sri Lalji Sinha
Sri Sanjay Kumar Om

U.P. Zamindari and Land Reform Act– Section 166,167-Transfer of land– beyond ceiling limit made in 1968-69– suit filed in Dec. 1976–beyond 8 years- held-rightly dismissed as barred by limitation.

Held: Para 10

From the findings of fact recorded by trial court as well as lower appellate Court, it is clear that all the suits filed by respondent no. 4 in December 1976 with regard to sale deeds executed in favour of petitioner in the years 1967, 1968 and 1969 were apparently filed beyond the prescribed period of limitation of six years and thus were rightly dismissed as barred by limitation.

Case law discussed:
1979 RD-80

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

1. These are 13 connected writ petitions raising common question of law and facts and are directed against common judgement and order dated 2.9.1994 passed Board of Revenue deciding 13 Second Appeals.

2. Heard Sri Ashok Trivedi, learned counsel appearing for the petitioner, learned standing counsel and Sri Lalji Sinha assisted by Sri Sanjay Kumar Om appearing for respondent no. 7.

3. The petitioner a registered society purchased certain land on various dates in the years 1966, 1967 and 1968 from various tenure holders through different registered sale deeds. In December 1976, respondent no. 4 filed 13 suits under section 163 of U.P. Zamindari abolition & Land reforms Act (for short the 'Act') on the ground that petitioner-society has acquired more than 12.50 acres of land by means of various sale deeds without permission of the State Government and thus was liable to be ejected from the surplus land and the same was liable to be vested in the State. All the suits were consolidated. On the basis of pleadings between the parties Additional Collector 1st Class framed various issues. One of the issue, was whether the proceedings are barred by time. Respondent no. 3 finding that the proceedings were barred by time vide common order dated 29.5.1979 dismissed all the 13 cases. Respondent no.4 went up in appeals. Appellate court vide order dated 26.5.1981 dismissed all the appeals. Appellate order was

challenged by respondent no. 4 by filing 13 second appeals. Board of Revenue vide order dated 2.9.1994 allowed the same holding that sale deeds were void under section 166 of the Act and the surplus land was liable to be vested In the State under Section 167. Aggrieved, petitioner has approached this Court.

4. It has been urged by learned counsel for the petitioner that law as it stood at the time of execution of sale deeds would apply to the case and the Board of Revenue without considering the provisions of Section 163 as it then stood has wrongly and illegally allowed the second appeals holding that the suit would not be barred by limitation and wrongly relying upon Section 167 has held the transfers to be void.

5. In reply, it has been submitted that since there is a ceiling on holding more than 12.50 acres of land in the State of Uttar Pradesh and consequently any transfer made in violation of the said provision would be void in accordance with the provisions if contained in section 166 and it is immaterial whether the sale deed was executed before deletion of section 163 from the statue or thereafter.

6. I have considered the arguments advanced on behalf of learned counsel for the parties and perused the record.

Section 163 relevant for the purpose of the case as it stood originally reads as under,

"163. Transfer in contravention of this Act- Where a transfer of any holding or part thereof has been made in contravention of the provision of Section 154 or 157-A, the transferee and every person who may have thus obtained possession of the whole or part of the holding shall, notwithstanding anything in any law, be liable to ejectment from such holding or part on the suit of the Gaon Sabha, which shall thereupon become vacant land; but nothing in this section will prejudice the right of the transferor to realize the whole or portion of the price remaining unpaid or the rights of any other person other than the transferee to proceed against such holding or land in enforcement of any claim thereto.

(2) ……

(3) ……"

Section 154 as it stood at the relevant time reads as under;

"154. No bhumidhar shall have the right to transfer by sale or gift, any land other than tea gardens to any person (other than institution established for a charitable purpose) Where such person shall as a result of the sale or gift, become entitled to land which together with land, If any, held by himself or together with his family will, in the aggregate, exceed 12.50 acres in Uttar Pradesh.

Explanation 1.- For the purposes of this section a family shall include the transferee himself, his wife or husband, as the case may be, an his minor children."

7. Section 154 as it then stood in the statute only placed restriction on the transfers by the bhumidhar. The consequences of any transfer in breach of the restriction imposed was not specified in the said section rather it was contained in Section 163 quoted above which provided that where ever a transfer is made in contravention of the provision of Section 154, the transferee shall be liable to be ejectment on the suit at the instance

of Gaon Sabha to the extent of contravention that is to say to the extent of transfer made in excess of the prescribed limit.

8. By an amendment in Section 163 of the Act made by U. P. Act XXXV of 1976 it was provided for the first time that a transfer by Bhumidhar in contravention of Section 154 could be declared Void by an Assistant Collector, 1st Class either suo motu or on the application by any person, after an enquiry. The consequences were contained in Sub-section (2) which mainly provided that subject matter of transfer, with effect from the date of order made under Section (1) shall be deemed to be vested in State Government free from all encumbrances. Section 163 of the Act was later on deleted from the statute vide U.P. Land Laws (Amendment) Act (Act No. 20 of 1982) with effect from 3.6.1981 and a new Section 166 was introduced prescribing every transfer made In contravention of provisions of the Act to be automatically void and the consequences were contained in Section 167 amended to have been vested in the State Government free from all encumbrances.

9. From a reading of provisions of Section 154, Section 163, Section 166 and Section 167 together before and after the amendment clearly demonstrate that prior to amendment made under Section 163 vide amending Act XXXV of 1976 which came into force on 15.6.1976, any transfer made by a bhumidhar in excess of ceiling limit prescribed under Section 154 would entail ejectment of the transferee at the instance of Gaon Sabha and the ejectment from the excess land transferred in contravention of the prescribed limit in section 154 could have been directed only in a suit for ejectment filed by Gaon Sabha. The view taken by me finds support from the Judgement of Hon'ble Apex Court in the case of ***Kripashankar Vs. Director of Consolidation and Others 1979 RD 80*** wherein it has been held that under unamended Section 163 any transfer by a bhumidhar made in contravention of Section 154 is not void but voidable only at the instance of Gaon Sabha only to the extent of contravention that is to say only to the extent of excess transfer over and above the prescribed limit. The limitation for filing such a suit as provided in Appendix III was six years. In case where the Gaon Sabha failed to bring a suit within the prescribed period its claim would stand barred by limitation.

10. From the findings of fact recorded by trial court as well as lower appellate Court, it is clear that all the suits filed by respondent no. 4 in December 1976 with regard to sale deeds executed in favour of petitioner in the years 1967, 1968 and 1969 were apparently filed beyond the prescribed period of limitation of six years and thus were rightly dismissed as barred by limitation.

11. The Board of Revenue illegally failed to consider that in accordance with law prevailing at the time of execution of sale deeds, transfer made in excess of ceiling limit was not void but voidable at the instance of Gaon Sabha. Without considering that offending sale will attract the law as it stood on the date of sale, wrongly applying the amended provisions the Board of Revenue declared the sale deed to be void.

12. In view of the aforesaid discussions all the suits filed by respondent no. 4 were rightly dismissed

by the trial court as well as lower appellate court as barred by limitation and the Board of Revenue fell in error in allowing the second appeals. Thus, all the writ petitions succeed and are allowed. Common judgement and order dated 2.9.1994 passed by Board of Revenue deciding all the 13 second appeals stands quashed.

13. However, in the facts and circumstances, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2007

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 785 of 1992

Shri Mahendra Pratap Singh ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri B.P. Srivastava
Sri S.S. Tomar

Counsel for the Respondents:
Sri A.K. Mishra
Sri Subodh Kumar
S.C.

Uttar Pradesh Development Authorities Services Rules, 1985-Criation of Post-Public Relation Officer-petitioner initially appointed as care taker-Development Authority by resolution 21.1.85 directed to work as P.R.O.-disapproved by state Government-without disclosing any reason as to how the Development authority has no jurisdiction-impugned order Quashed-with direction to the State Government to create post-in case of selection preference be given-salary drawn by petitioner shall not be refunded-petitioner reverted to his original post.

Held: Para 8

The State Government, in the impugned order, has nowhere stated, as to why, the post of the Public Relation Officer could not be created in Ghaziabad Development Authority. The State Government has not addressed the matter on this aspect and based the impugned order on the sole ground that the Ghaziabad Development Authority had no right to make an appointment. The State Government has not passed any order for the creation of the post of Public Relation Officer.

Case law discussed:
2007 (1) SCC-4081
2006 (4) SCC-667
2006 (8) SCC-67

(Delivered by Hon1ble Tarun Agarwala, J.)

1. The petitioner was appointed as a Caretaker in Ghaziabad Development Authority on 9.8.1984. The Ghazlabad Development Authority in its meeting dated 21.1.1985 unanimously resolved to create a post of Public Relation Officer. This resolution was sent to the State Government for its approval, inasmuch as, the power to create and sanction a post lies with the State, Government. Pending consideration for the creation of the post before the State Government, the Ghaziabad Deve1opment Authority, by its order dated 3.4.1986 nominated the petitioner to work as an Assistant Public Relation Officer, in addition to the work of a Caretaker. Subsequently, by another order dated 2.9.1998, the petitioner was directed to work as a Public, Relation Officer till further orders, but was not entitled to be given the perks and benefits attached to the post of a-Public Relation

Officer. Eventually, by an order dated 25.8.1989, the Ghaziabad Development Authority appointed the petitioner as a Public Relation Officer in the pay scale of Rs.770-1600 in anticipation of the sanctioning of the post by the State Government. The appointment order further stipulated that the petitioner would be required to give an undertaking to the effect that, in the event, the State Government refused to sanction the post, the excess money earned by the petitioner would be refunded.

2. From the record, it further transpires that the Ghaziabad Development Authority issued a letter of reminder dated 9.3.1990 and 14.11.1991 requesting the State Government to pass orders on the creation of the post and also intimated the State Government that in anticipation of the creation of such post, the Ghaziabad Development Authority has already appointed the petitioner on the post of Public Relation Officer, whose performance was upto the mark and also recommended the State Government to appoint the "petitioner on the said post after sanctioning of the post. The State Government, by the impugned order dated 20.12.1991 intimated the Ghaziabad Development Authority that they had no jurisdiction to create the post of a Public Relation Officer nor had any business to appoint the petitioner on that post, and therefore, directed the Ghaziabad Development Authority to terminate the services of the petitioner forthwith. Against this order, the petitioner filed the present writ petition before this Court and by an interim order, the court directed the parties to maintain status quo. Based on the said interim order, the petitioner continued to work as a Public Relation Officer and is being paid his salary.

3. The State Government, as well as, the Ghaziabad Development Authority has filed a counter affidavit. The State Government contended that the authority to create and sanction a post lies with the State Government under the **Uttar Pradesh Development Authorities Centralised Services Rules, 1985** and that, the appointing authority of a Public Relation Officer is the State Government. Further, the post of Public Relation Officer is required to be filled up through the Public Service Commission, as is clear from the Rule 14 of the aforesaid Rules read with Schedule VIII annexed to the Rules. The State Government in its counter affidavit, submitted that the Ghaziabad Development Authority had no jurisdiction to create a post of a Public Relation Officer or appoint the petitioner on that post. The Ghaziabad Development Authority in its counter affidavit also reiterated the same stand and, further submitted that the petitioner was given the appointment on the post of Public Relation Officer on a pay scale payable to a Public Relation Officer on an undertaking given by him and that, in the event, the post was not sanctioned, he has required to refund the benefits. The authority contended that a back door entry was made by the petitioner on a post which was neither sanctioned nor created by the State Government. Consequently, the said appointment was illegal without jurisdiction and the petitioner was liable to be reverted to the post of Caretaker and was also liable to refund the execs amount.

4. In support of his submissions, the learned counsel for the respondent, Ghaziabad Development Authority placed reliance upon a large number of decisions, namely, **Indian Drugs &**

Pharmaceuticals Ltd. Vs. Workmen, 2007(1) SCC 408, Secretary, State of Karnataka and others Vs. Uma Devi (3) and others, 2006 (4) SCC 1, State of U.P. Vs. Neeraj Awasthi and others, 2006(1) SCC 667, State of M.P. and others Vs. Yogesh Chandra Dubey and others, 2006(8) SCC 67 and Punjab Water Supply and Sewerage Board Vs. Ranjodh Singh and others, 2007 (2) SCC 491 on the question that an appointment could not be made where the post was neither sanctioned or created and such an appointment made on a post which was non existent could not entitle an incumbent for the regularisation of the services on the ground that he had worked for a long period of time. These decisions primarily are on the question of the regularisation of the services. These decisions, in my opinion, are distinguishable and are not directly applicable to the facts and circumstances of the present case.

5. In the present case, the position is different. There is no question of a back door entry made by the petitioner. In this regard, there is nothing on record to indicate that the petitioner made a back door entry for an appointment on the post of Public Relation Officer. In fact, the record clearly indicates that the petitioner was appointed, as a Caretaker on 9.8.1984. The records further suggests that the Ghaziabad Development Authority nominated the petitioner to also work, as an Assistant Public Relation Officer in 1986 without any emoluments of the post of the Public Relation Officer and, since then, the petitioner was made to do the work of a Public Relation Officer. In.1989 the Ghaziabad Development Authority granted him the post and pay scale of a Public Relation Officer with the undertaking given by the petitioner that he would refund the benefits, in the event, the State Government refused to sanction the post. These orders of the Ghaziabad Development Authority indicate clearly beyond a reasonable doubt that the Ghaziabad Development Authority itself created the post and appointed the petitioner on the post of Public Relation Officer. The petitioner did not ask for that post. The mere fact that an undertaking was provided by the petitioner did not mean that he was keen for the job of the Public Relation Officer. It did not mean that he was given the post and pay scale of a Public Relation Officer at his instance. In fact, the order and the sequence of event indicates that the petitioner was required to furnish an undertaking because, the authority had asked him to do so. Consequently, it does not lie in the mouth to the Ghaziabad Development Authority to turn back and contend that the petitioner had made a back door entry and that his appointment was *void ab initio* and his services was required to be terminated. The stand taken by the Ghaziabad Development Authority in its counter affidavit is clearly an after thought and has been made in order to protect themselves of their illegal activities.

6. Admittedly, the Ghaziabad Development Authority resolved and passed a unanimous resolution on 21.1.1985 creating a post of a Public Relation Officer. This action itself was illegal and in violation of the **Uttar Pradesh Development Authorities Centralised Services Rules, 1985.** The Ghaziabad Development Authority could not have created a post of a Public Relation Officer. The authority, to appoint

a Public Relation Officer, was the State Government through the Public Service Commission. The Ghaziabad Development Authority had no power to create or appoint any person on the post of Public Relation Officer. The initial action made by the Ghaziabad Development Authority was wholly illegal and without jurisdiction and now, the Ghaziabad Development Authority is trying to cover up their illegal steps by asserting that the petitioner was appointed by a back door entry. This contention is patently erroneous. The judgments cited by the learned counsel are distinguishable.

7. Admittedly, the petitioner has worked as a Public Relation Officer from 3.4.1986 to 20.12.1991, i.e., for more than 5 years. The Ghaziabad Development Authority is responsible for allowing him to work as a Public Relation Officer. The letters of the recommendations written by the Ghaziabad Development Authority to the State Government, vide letters dated 9.3.1990 and 14.11.1991, indicates that the Ghaziabad Development Authority had highly recommended the petitioner for being appointed on the post of Public Relation Officer. Further, this petition was entertained and by an interim order dated 7.1.1992, the parties were directed to maintain status quo. Based on the interim order, it is admitted by the parties that the petitioner was allowed to work as a Public Relation Officer and, till date, he is working on the said post without any complaint from the authorities.

8. In such a scenario, the question is how the equities have to be balanced in the light of the fact that admittedly, there is no post existing as on date in the Ghaziabad Development Authority, namely, the post of Public Relation Officer. Admittedly, the State Government has not sanctioned any post of Public Relation Officer. It is also an admitted case that the Public Relation Officer can only be appointed by the State Government through the Public Service Commission. It is also on the record that the Ghaziabad Development Authority allowed the petitioner to work as a Public Relation Officer and also took an undertaking that, in the event, the post was not sanctioned by the State Government, he would be liable to refund the benefits accrued to him while working on the post of the Public Relation Officer. It has come on record that an adhoc appointment on the post of Public Relation Officer was made by the State Government for the Lucknow Development Authority without appointing the said person through the Public Service Commission. The State Government, in the impugned order, has nowhere stated, as to why, the post of the Public Relation Officer could not be created in Ghaziabad Development Authority. The State Government has not addressed the matter on this aspect and based the impugned order on the sole ground that the Ghaziabad Development Authority had no right to make an appointment. The State Government has not passed any order for the creation of the post of Public Relation Officer.

9. In view of the aforesaid, this court is constrained to pass the following directions:-

(1) The impugned order is quashed.
(2) The petitioner will be reverted to the post of Caretaker since there exists no post of a Public Relation Officer in the Ghuziabi1cl Development Authority.

(3) Since the petitioner has worked as a Public Relation Officer, the salary and the benefits drawn by him on the post of a Public Relation Officer shall not be refunded and he would be entitled to retain the said amount on the principle of having worked on that post inspite of the undertaking obtained by the Ghaziabad Development Authority.

(4) A mandamus is issued to the State Government to consider the proposal of the Ghaziabad Development Authority for the creation of the post of a Public Relation Officer within three months from today. If the State Government finds that there is a need for the creation of a post of a Public Relation Officer, then necessary orders would be passed for its creation and sanctioning of the post of Public Relation Officer within the aforesaid period.

(5) In the event, the post is sanctioned, the petitioner would be given the first preferential right for appointment on the post of the Public Relation Officer. The State Government will also issue an appointment letter on an adhoc basis within two weeks of the sanctioning of the post provided the petitioner is found to be qualified for the said post.

(6) The State Government and the Ghaziabad Development Authority, as the case may be, will forward the necessary papers r to the Public Service Commission for post facto approval of the appointment. This appointment would be subject to the conditions that the petitioner possesses the requisite qualifications.

(7) If for some reason, the State Government refuses or declines to sanction the post of a Public Relation Officer in Ghaziabad Development Authority, in that event, the Ghaziabad Development Authority will promote the petitioner or provide him with consequential fitment benefit on such post which is equivalent to the pay scale to which the petitioner is drawing as on date, so that does he does not suffer any further monetary loss.

The writ petition is allowed with the aforesaid directions.

Shri R.K. Chaubey, the learned Standing Counsel will sent a certified copy of the judgment to the State Government immediately for necessary action and compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.10.2007

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 50257 of 2007

Gyandhari Pal and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Atul Kumar

Counsel for the Respondents:
Sri H.P. Singh
S.C.

U.P. Re-orgnisation Act 2000-Transfer of Police constable from U.P. to State of Uttarakhand-approved by the advisory committee of both State-final list of transfer published-in the eye of law the petitioner will be deemed to be the employee of Uttrakhand-High Court Allahabad has no jurisdiction- even the

transfer is a policy matter-No interference called for.

Held: Para 8

Since final allocation has been made after inviting objections from the petitioners I am of the considered opinion that the Court should not interfere in the policy matter of allocation of employees to the two States under the statutory provisions of the Reorganization Act, 2000. Transfer is an exigency of service. The State of U.P. has been bifurcated under the U.P. Reorganization Act, 2000 and now the State of Uttaranchal has been carved out. The provision of allocation of experienced officers by way of transfer have been made in the Act for smooth functioning of the new State and also for reducing the burden of surplus manpower in the parent State of U.P.

Case law discussed:

1975 FLR Vol. 31, Page 248 relied on.

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

1. Heard learned counsel for the petitioner, the standing counsel for the respondents and perused the record.

2. The contention of the counsel for the petitioner is that the petitioners were appointed in U.P. Police on the post of Constables.

3. It is further submitted that respondent No.5 passed an order on 31.5.2007 directing the department of police in which 675 Constables have been transferred from U.P. to State of Uttrakhand.

4. It is next submitted that .the respondent No.8 published a list on 24.9.2007 of 182 Constables who has to be transferred from State of U.P. to Uttrakhand, the petitioners' name find place at Sl. No. 163, 167 and 168.

5. Thereafter the petitioners have approached to the Deputy Inspector General of Police, Police Head Quarter Allahabad, U.P by an application, which is still pending.

6. Aggrieved by the final allocation order of State of Uttaranchal the petitioners have come up in this writ petition.

7. According to the U.P. Reorganization Act, 2000 list of allocation and the transfer list of the employees have to be decided by State Advisory Committees of the two States and final list was to be decided by the Union of India. Now final allocation has taken place after consultation between the State Advisory Committees of the two States and the Union of India.

8. Since final allocation has been made after inviting objections from the petitioners I am of the considered opinion that the Court should not interfere in the policy matter of allocation of employees to the two States under the statutory provisions of the Reorganization Act, 2000. Transfer is an exigency of service. The State of U.P. has been bifurcated under the U.P. Reorganization Act, 2000 and now the State of Uttaranchal has been carved out. The provision of allocation of experienced officers by way of transfer have been made in the Act for smooth functioning of the new State and also for reducing the burden of surplus manpower in the parent State of U.P.

9. Moreover, this writ petition is without jurisdiction in view of the

decision rendered in **General Manager, N.E. Railway, Gorakhpur and others Vs. Jamait Ram Khatanani and others. 1975 IFLR Vol.31 page-246**. In that case the Court held that once an employee is transferred and posted to a particular place acceptance of the transfer order by that employee is immaterial. Even though he may not join his duties or physically may not go to the new place of posting he will continue to be posted there in the eye of law. His place of posting cannot be deemed to have changed merely because he disobeys the order of his transfer.

10. In this view of the matter the services of the petitioners having transferred to the State of Uttaranchal only the State of Uttaranchal has territorial jurisdiction in the matter.

11. The writ petition is accordingly dismissed. No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2007

BEFORE
THE HON'BLE SHIV CHARAN, J.

Crl. Misc. Application No. 26851 of 2007

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

Counsel for the Applicant:
Sri Mohit Singh

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

Code of Criminal Procedure-Section 482-Summoning order under Section 319-on the basis of statements examination in-chief of P.W. 1-Magistrate can not based in consideration upon the statement and material collected by investigating officer-but the satisfaction is paramount consideration-held-impugned order need no interference.

Held: Para 9

On the basis of the above, I am of the opinion the trial court based the order of summoning u/s 319 Cr.P.C. after being satisfied from the statement of Mohd. Asif P.W.1 after examination in chief and it all depends upon the satisfaction of the trial court in order to pass the order of summoning on the basis of the statement of this witness. Hence there is no illegality and irregularity in the order. The application u/s 482 Cr.P.C. deserves to be dismissed.

Case law discussed:
J.T. 2007 (5) SC-562
2007(4) SCC 773
2006 (1) SCC (Criminal) 568

(Delivered by Hon'ble Shiv Charan J.)

The present application has been moved u/s 482 Cr.P.C. for quashing the order dated 24.10.2007 passed by Addl. Sessions Judge Court no.4 Etawah in S.T. No.158/05 u/s 147,302 IPC.

2. A perusal of the documents shows that FIR was lodged by Mohd Asif on 20.5.2007 at about 9.45 pm against Mustkim applicant and four other accused persons registered at Crime no.71 of 2005 u/s 147,302 IPC P.S. Ekdil, District Etawah. The matter was investigated by the police and charge sheet was submitted against the accused persons except the applicant Mustkim. Afterwards the statement of Mohd. Asif P.W.1 was recorded and on the basis of the statement of examination in chief of this witness, application was moved for summoning the applicant Mustakim for the offence u/s

147 and 302 IPC u/s 319 Cr.P.C. and learned Sessions Judge being satisfied from the evidence of Mohd. Asif summoned the applicant to face trial for the offence and this order passed u/s 319Cr.P.C. is challenged by this application.

3. It has been argued by learned counsel for the applicant that learned Sessions Judge committed gross illegality in passing the order of summoning on the basis of the evidence recorded by the 10 in the case diary and also on the basis of the statement of the examination in chief of Mohd. Asif P.W.1. That learned Sessions Judge was not justified in considering the evidence recorded by the IO in the case diary for the purpose of passing the order u/s 319Cr.P.C. Learned Sessions Judge also committed illegality in passing the order of summoning only on the basis of the statement of examination in chief of Mohd. Asif . That in view of the judgement of Hon'ble Apex Court this was the most unjustified act and order is illegal hence the order is liable to be set aside.

4. Learned AGA opposed the argument of learned counsel for the applicant and argued that passing the order u/s319 Cr.P.C. the satisfaction of trial court is of prime importance and in the present case learned Sessions Judge after being satisfied from the statement of Mohd. Asif passed the order of summoning and there is no illegality in the order.

5. I have considered all the facts and circumstances of the case. In view of Section 319 Cr.P.C. learned Sessions Judge is fully competent to pass the order of summoning if the court is satisfied in course of any enquiry and trial for an offence that any person not being the accused had committed any offence for which such persons should be tried together with the accused and such person can be summoned on the basis of the evidence. I agree with this argument of learned counsel for the applicant that the evidence recorded by the IO in the case diary cannot be a basis for passing the order u/s 319 Cr.P.C. Although it is a fact that in the impugned order learned Sessions Judge considered the evidence recorded by the IO in the case diary during investigation. But learned Sessions Judge also considered the evidence of P.W.1 recorded in the court. If this part of the order in which the trial court placed reliance on the evidence recorded by the IO in the case diary for the purpose of passing the order u/s 319 Cr.P.C. is to be ignored then whether there is sufficient material before Sessions Judge to pass the order of summoning under this provision is to be considered. Because learned Sessions Judge has passed the order u/s319 Cr.P.C. after recording the statement of Mohd. Asif P.W. 1 and Sessions Judge has also relied upon the statement of P.W. 1 for the purpose of summoning the applicant. The legal matter involved in the present case is as to whether the learned Sessions Judge is satisfied in placing reliance on the statement of examination in chief of P.W.1. And whether it is the requirement of the law that the entire statement of a witness including cross examination should be recorded prior to passing the order u/s 319 Cr.P.C and in that circumstance the statement of such witness should be considered. In this context the learned counsel for the applicant cited judgement of Hon'ble Apex Court reported in Judgement Today

2007(5) SC page 562 Mohd. Shafi Vs. Mohd. Rafiq and
another. The Hon'ble Apex Court held as follows:

"12. The Trial Judge as noticed by us, in terms of Section 319 of the Code of Criminal Procedure was required to arrive at his satisfaction if he thought that the matter should receive his due consideration only after the cross-examination of the witnesses is over, no exception thereto could be taken far less at the instance of a witness and when the State was not aggrieved by the same. "

6. In view of this judgement of Hon'ble Apex Court it is the satisfaction of the Court concerned to pass the order u/s 319 Cr.P.C. and if the court is not satisfied for passing the order u/s 319 Cr.P.C. for summoning the accused then the Court can require that this application shall be considered after recording the evidence of witness. But Hon'ble Apex Court has not laid down that the order u/s 319Cr.P.C. shall be passed only after recording the entire statement of the witness including cross-examination also. It is evident from the facts of the case before Hon'ble Apex Court that learned Sessions Judge deferred the disposal of the application u/s 319 Cr.P.C. till the cross-examination of the witnesses was recorded and in this context the Hon'ble Apex Court held that it is satisfaction of the court concerned for passing the order u/s 319 Cr.P.C. and if the court considered that the matter is required received due consideration only after cross examination of the witness is over then it cannot be said that the court acted illegally. But if the position is that the learned Sessions Judge after being satisfied from the examination in chief of the witness for summoning the accused u/s 319 Cr.P.C. then it cannot be said that the learned Sessions Judge acted illegally in passing order without recording cross-examination. The main thing is the satisfaction of the court concerned and in the present case the Sessions Judge was satisfied with the examination in chief of the witness and hence the order was passed for summoning of the accused applicant to face trial.

7. Learned counsel for the applicant placed reliance on para 13 of the above judgement of Apex Court. It has been held in this para:

"13. From the decisions of this Court, as noticed above, it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence. We are, therefore, of the view that the High Court has committed an error in passing the impugned judgement "

8. And on the basis of this part of the judgement of Apex Court the applicant's counsel argued that while passing the order u/s 319 Cr.P.C. the trial Court must be satisfied that there exists a possibility that the accused so summoned in all likelihood will be convicted and such satisfaction can be arrived at inter alia of completion of the cross-examination of the said witness. Learned counsel for the applicant stated that

learned Sessions Judge has not stated in the order that on the basis of the statement of P.W.1 conviction can be based of the applicant and moreover for placing reliance on the statement of the witness for the purpose of conviction the entire statement including cross-examination must be recorded. Learned counsel also argued that in this connection Section 33 of the Evidence Act is also material. And if the person subsequently failed to appear in the Court due to any reason for cross-examination than no conviction is possible hence in all circumstances for summoning the applicant u/s 319Cr.P.C. The entire statement including cross-examination of the witness is to be recorded and the finding must be recorded. But in para 12 of the judgement Hon'ble Apex Court held that it is the satisfaction of the court concern for passing the order of summoning and if the court required that the order will be passed only after recording cross-examination also then it cannot be said that the Sessions Judge acted illegally. Because ultimately the satisfaction of the court is essential. But it has also been held that the cross-examination must be recorded of such a witness. In the present case the trial court was satisfied on the basis of examination in chief of the witness to pass the order of summoning. Learned counsel for the applicant also cited 2007(4) SCC page 773 Y.Saraba Reddy Vs. Puthur Rami Reddy and another. But in this judgement the Hon'ble Apex Court held that while passing an order u/s 319 Cr.P.C. the evidence recorded by the IO in case diary shall not be taken into consideration. In the present case the trial court besides placing reliance on the statement of Mohd. Asif recorded in the court also placed reliance on the statement recorded by the IO but I have stated above that this portion of the order is not to be looked into and it is to be seen whether ignoring this evidence the learned Sessions Judge was justified in passing the order of summoning on the statement of Mohd. Asif. Hence learned Sessions Judge was justified in placing reliance on the statement of Mohd. Asif. Learned counsel for the applicant also cited 2006(1) SCC(Cri) page 508 Palanisamy Gounder and another Vs. State represented by Inspector of Police. In this case also the Hon'ble Apex Court held that the court must be satisfied that there is reasonable prospect of case against such accused in his conviction and in the present case there is the statement of Mohd. Asif who is an eyewitness. Hence the solitary statement of one witness is sufficient to base conviction.

9. On the basis of the above, I am of the opinion the trial court based the order of summoning u/s 319 Cr.P.C. after being satisfied from the statement of Mohd. Asif P.W.1 after examination in chief and it all depends upon the satisfaction of the trial court in order to pass the order of summoning on the basis of the statement of this witness. Hence there is no illegality and irregularity in the order. The application u/s 482 Cr.P.C. deserves to be dismissed.

10. The application u/s 482 Cr.P.C. is dismissed accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2007

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Second Appeal No.492 of 1980

Brij Gopal Binnani (since deceased
...Plaintiff-Appellant
Versus
Smt. Rukmini Devi and others
...Defendants-Respondents

Counsel for the Appellant:
Sri Yasharth
Sri Pankaj Lal
Sri Gyan Prakash

Counsel for the Respondents:
Sri V.K.S. Chaudhary, Sri Ranjeet Saxena, Sri M.K. Gupta, Sri V.K. Goel, Sri Kundan Rai, Sri Deepak Chaudhary, Sri Ajai Kumar Singh, Sri Deepak Singh

Code of Civil Procedure-Section 100-Second Appeal-Suit for possession-on payment of Rs.2205/-towards cost of Construction-defendant denied and pleaded as co-owner and not as tenant-alternatively if the cost of construction of Rs.6505 and paid-dismissal of suit in 1940-can defendant claim adverse possession-'No'-plea of Res-judicata also denied-suit decreed on payment of Rs.6505 with 12% simple interest.

Held: Para 21

The-litigation initiated in the year 1927 has not ended as yet. Taking into account the admissions made by the defendant first set in Original Suit No.1 of 1949 decided on 11th August, 1952, the Court find that a sum of Rs.6505 and 7 ana 6 paisa with simple interest at the rate of 12% per annum would be the fair and reasonable cost with interest compensating the capital expenses. The Court is not taking into consideration any improvement as no such plea was taken by the defendant nor any evidence was led by the defendant to prove the same. The constructions must be old but then no such argument was advanced by learned counsel for the appellant to reduce the cost of constructions claimed by the defendant-respondent.

Case law discussed:
1977 Alld.-469, 1995 (4) SCC-496, 2004 (2) AWC-1685, 1977 AIR (All.) 458, 2004 (2) JCLR-755, 1993 PCJ (SC)-1198, 1997 ACJ (SC), 1990 (4) SCC-706, 1994 (6) SCC-591, 2006 (7) SCC-570

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

1. The order dated 4.8.2006 dismissing the second appeal for want of prosecution was recalled on 17.4.2007. On the same day the substitution application of Shri Satyendra son of Shri Sri Gopal Binnani, appellant No.l/l was allowed, and Shri Babu Gopal Binnani son of Late Shri Brij Gopal Binnani respondent No.4 was transposed as appellant on the ground, that he had succeeded to the estate of his father. The parties were heard and the judgment was reserved.

2. This second appeal arises out of judgment and decree dated 31.7.1978 decreeing the suit filed by late Shri Brij Gopal Binnani, the plaintiff-appellant for possession over the property in suit on payment of Rs.2054.13 towards costs of constructions or such amount as the Court determines. The Civil Appeal No.354 of 1978 filed by Smt. Rukmini Devi & others, the defendants against the decree was allowed by the District Judge, Azamgarh on 17.10.1979 with the findings that the defendant 1st set appellants have perfected their rights by adverse possession.

3. Shri Brij Gopal Binnani-the plaintiff appellant filed the suit for possession with the pleadings that the land in suit adjoins the Dharmshala and was acquired on lease by late Shri Gopi Krishna as Karta of the family from one Shri Mahadev Prasad. The deed of agreement was executed on 6.9.1902. Late Shri Brij Gopal Binnani and Late Shri Babu Gopal Binnani are descendants of Late Shri Gopi Krishna. The Dharmshala was constructed by Late Shri Gopi Krishna in the western portion of the land. He made some other constructions on the remaining land. Smt. Rukmini Devi and others, the defendant 1st set and respondents entered into possession of the 'Ahata and Bara' as tenants. In 1927 a Suit No.1102 was filed by Late Shri Brij Gopal Binnani against the defendants for ejectment in which. The predecessor of Smt. Rukmini Devi denied that they were tenants and asserted that they were in possession of the land with the permission of Late Shri Gopi Krishna, with the condition that whenever Late Shri Gopi Krishna wanted to take back the possession, he would pay the licensee the amount, which has been spent on the constructions. The suit was withdrawn Shri Suraj Karan Binnani-defendant No.2 filed another suit No.1 of 1949 against Rukmini Devi and others for possession and for arrears of rent, in which it was held that Smt. Rukmini Devi & others were merely licencees. This suit was dismissed. The appeal was dismissed by the High Court.

4. In the written statement it was stated that the land in suit adjoining Dharmshala, was a waqf (dedicated) property. Late Shri Gopi Krishna was Mutawalli and Manager of Dharmshala and after his death the plaintiff became the Mutawal1i and Manager. There was a family settlement, by which both Shri Brij Gopal Binnani and Shri Babu Gopal Binnani became Mutawallis and Managers. In the alternative it was pleaded that if the property is not found to be the Waqf property, the respondents were joint owners of it.

5. Shri Gopal Binnani, the plaintiff admitted that the Dharmshala was constructed by Late Shri Gopi Krishna and that defendants had also made constructions as licencee. The filing of the suit in 1927 and 1949 was also admitted. The parties to the suit then joined issues on the question whether the property in suit was waqf property dedicated to 'Shri Laxminarain Ji Shankar Ji' and if so whether the suit could only be filed in the name or the deity and not by the Mutawalli in their personal capacity: whether the constructions were made after getting permission, and in view of Section 60 of the Easement Act the license could no longer be revoked; the suit filed in 1927 was withdrawn with liberty to file a fresh suit on the condition that respondent No.1 would pay the costs, which were not paid and thus suit is not maintainable. The defendants then contended that they have perfected their title by adverse possession, and that the suit could be filed within three years of October 20th, 1949 when in the proceedings under Section 145 CrPC, the defendants were found to be in possession. The suit was barred by Art. 47 of the Limitation Act.

6. The Trial Court decreed the suit with the finding that the Dharmshala was never dedicated to Shri Laxminarain Ji Shankar Ji. The license granted to the defendant could be revoked and that suit was not barred by limitation. The

appellate Court relied upon Ex.A-20, a registered deed of agreement dated 10.5.1913, amongst the members of the family of Shri Gopi Kishan. In para 7 of this document it is mentioned that the Dharmshala and some other property is waqf in the name of Shri Thakurji, and that whatever property, if any, belongs to Dharmshala is also waqf property, and that waqf is in favour of Shri Tahkurji, which is an idol and jurisdic person. The Ex.12 is an award of an Arbitrator given in Suit No.32 1945 dated 21st August, 1952. In this award it is mentioned that the property belongs to Thakurji. The appellate Court thus set aside the findings of the Trial Court that the property was owned by the plaintiff, and found that Thakurji, the deity was the owner. The suit as such should have been filed by the deity, and not by the plaintiff in individual capacity. On the issue whether the suit could be filed by one of the co-sharers after revoking the license, the appellate Court relied upon **Hafiz Ali Khan Vs. Mohammad Ishaq, AIR 1977 Alld. 469** in which it was held that license should be revoked by all the co-sharers but that anyone of them can revoke it if he acted for himself, and for all others.

7. The appellate Court found that though the notice was given only on behalf of Shri Brij Gopal Binnani, the institution of the suit amounts to revocation of license and that the suit was for the benefit of both the co-sharers. On the plea of limitation, after the order in 1942 under Section 145 CrPC, the appellate Court observed that proceedings under Section 145 CrPC were in favour of Durga Prasad, predecessor in interest of the defendant. These proceedings were in respect of property situate in north of the Dharmshala whereas suit property is situate in north-east of the Dharmshala. The suit in respect of entire property as such cannot be held to be barred by Section 47 of the Limitation Act. It was then held that dismissal of the earlier suit could not have started the period of adverse possession as in earlier suit the occupants were treated as tenants. The appellate Court allowed the appeal with findings that license has come to an end. The license was revoked with the filing of the suit. It was firstly revoked in 1927 by filing a suit and thereafter in 1949. There is no license in favour of Durga Prasad. The possession of Durga Prasad from that date must necessarily be adverse to the interest of the plaintiff-respondents, and consequently the appellate Court found that the defendant-appellant had perfected their right of adverse possession much before the suit was instituted.

8. Shri V.K. Gael learned counsel for the plaintiff-appellant submits that once license was admitted, no further defence with regard to ownership could be accepted. The appellate Court has not considered the documents relied upon by the trial Court. He submits that the licensee cannot claim adverse possession. Shri Goel has relied upon the judgment in (1) **Ramsewak and ors. V s. Smt. Raj Pati & Ors. (2004) 2 AWC 1685** that the findings recorded without considering the relevant evidence have to be treated as perverse; (2) **Ram Prasad Pandey Vs. Jagmohan Lal Shukla. (1977) AIR (All) 458** that the licensee cannot defend the suit on the ground that some one else is owner of the property: (3) **Chandra Pal & Ors. Vs. Ram Lal. (2004) 2 JCLR 755 (All)** that when the defendant was in permissive possession, the suit would not be barred by limitation; (4) **State of Punjab Vs. Brig Sukhjit Singh, (1993)**

ACJ (SC) 1198 for the proposition that possession of the licensee, however, long remains permissive possession and can never be treated as adverse possession and (5) **A.S. Vidyasagar Vs. S. Karunanandam, (1997) ACJ (SC) 1491** for the same proposition.

9. Shri M.K. Gupta on the other hand submits that the license was firstly revoked by filing a suit in 1927 and then in 1949 and thereafter since no suit was filed for ejectment, the limitation would be confined to 12 years under Section 47 of the Limitation Act and that the suit was barred by time. He has further relied upon the finding of the appellate Court that the property was endowed property and suit was not maintainable at the instance of the plaintiff alone.

The second appeal was admitted on 19.3.1980 without framing any question of law.

Having heard learned counsel for the parties, the following substantial question of law arise for consideration in this second appeal:-

1. Whether the plaintiff could have filed the suit in an individual capacity in respect of the property, which was held to be a property dedicated to the Idol?
2. Whether the license was revoked in 1927, and in any case in 1947, by filing a suit for eviction and that the limitation of perfecting ownership rights by adverse possession began from the date when the suits were dismissed?

10. The suit giving rise to this second appeal was filed by Late Shri Brij Gopal Binnani both in individual capacity and Mutawalli of Dharmshala Vaka Mauja Palhani Muttasil Railway Station, Azamgarh with allegation that Babu Gopi Kishan had acquired the property from Shri Mahadeo Prasad Athavaria by registered document dated 6th September, 1902. He constructed Dharmshala on the western portion of the land and in the remaining land he made some constructions on the eastern and northern portion, which was in the shape of courtyard of Dharmshala. Late Durga Prasad occupied the land as tenant. In Suit No.110 of 1927 for his eviction Shri Durga Prasad denied the tenancy and further license with the condition that whenever Babu Gopi Kishan require the land, he would vacate the same after receiving the cost of construction made by him. The suit was withdrawn. Thereafter Babu Suraj Karan Binnani, the grand son of Babu Gopi Kishan filed Suit No.1 of 1949 for eviction and arrears of rent in which Shri Durga Prasad again denied his tenancy and stated that he is licensee and had made his own constructions. This suit was dismissed on the ground that the plaintiff had not claimed possession over the constructions. The appeal against the judgment was dismissed by the High Court on 3.9.1962. The findings that the defendant late Durga Prasad was licensee and as condition of license he could be evicted after paying cost of construction made by him have thus become final and operate as resjudicata between them. In the present suit the petitioner prayed for decree for eviction on the building and land and Bara after payment of Rs.2064 and 13 Ana and 9 Pai or whatever the cost of construction is determined by the Court. By an amendment para 7A and 7B were added to the effect that the property in dispute is Dharmshala of which Late

Shri Gopi Kishan was founder. There was a settlement in the family by arbitration by which the property fell to the share of plaintiff. In case the property is in dispute or found as non waqf property as was decided in Suit No. 1 of 1949 the plaintiff is along with defendant No.3 is the owner of the property in dispute.

11. The defendant did not file any deed of endowment nor the date of which the properties were dedicated to Shri Laxmi Narain Ji and Shri Shanker Ji has been given. The mere fact that land pertains to Dharmshala could not be a ground to hold the property to be dedicated to Shri Laxmi Narain Ji and Shri Shanker .Ii. The existence of Dharmshala does not prove endowment. There has to be a dedication to the deity proved by evidence. The Trial Court and the Appellate Court rightly found that the Dharmshala and the property in dispute were not dedicated to Shri Laxmi Narain Ji and Shri Shanker Ji and that late Shri Brij Gopal Binnani could file suit for eviction of defendant Nos.1 and 2.

12. The defendant Nos.1 and 2 in the suit were admitted to the land as licensee with conditions attached to their license. The suit filed in the year 1927 for eviction was withdrawn and that the suit filed in the year 1949 was dismissed on the ground that the plaintiff did not offer to pay the cost of constructions and was thus not entitled to decree of possession. The Trial Court found that once the possession was permissive, the defendant will not perfect any right by adverse possession and were entitled to a decree on payment of Rs.2064 and 13 anas 9 pai, which was cost of construction. This amount was worked out on the basis of demand by the defendant in the written statement filed in Suit No.110 of 1927 in which it has alleged that he has spent a sum of Rs.2064 only. His demand of Rs.50,000/- for cost of construct ion was not found to be justified. The first appellate court allowed the Civil Appeal No.354 of 1978 with the findings that late Shri Gopal Das Binnani was not the only co-sharer and could not have given notice for revocation of license. The proceedings under Section 145 CrPC were in respect of the property situate in the north of Dharmshala whereas the suit property is situate in north-east of the Dharmshala and thus the suit in respect of entire property is barred by Section 47 of the Limitation Act. The license had come to an end on its revocation as made in the suit filed in the year 1927 and thereafter in 1949 and after which there was no licence in favour of Shri Durga Prasad and that his possession, thereafter, was adverse to the plaintiff-respondents. The defendants had perfected their rights by adverse possession much before the suit was instituted.

13. In order to appreciate the plea that the defendant Shri Durga Prasad did not perfect his rights by adverse possession it is necessary to refer to the previous litigation between the parties. The Suit No.110 filed in the year 1927 was withdrawn. In the second suit namely Original Suit No.1 of 1949 filed in the Court of Addl. Civil Judge, Azamgarh the plaintiff alleged that the defendant was tenant at the rate of Rs.60 per month. The defendant first set took up the plea that the suit property was endowed property of the family of the plaintiff and the defendant second set forming a joint Hindu family was Mutawalli of the suit property and that the suit filed by the defendant second set in the year 1927 was

dismissed as withdrawn. The defendant first set pleaded that the house and Bara has been raised at the cost of Rs.6505 and 7 ana 6 paisa. The constructions were raised without any objections from the plaintiff. It was also alleged that if assuming that plaint allegations are correct the plaintiffs were not entitled to possession without payment of Rs.6505 and 7 ana 6 paisa with interest at 12% per annum. The Addl. Civil Judge, Azamgarh in his judgment dated 11th August, 1952 while dismissing the suit with costs held that the suit property was not endowed property. The adjacent constructions of Dharmshala and some other properties in suit are endowed property. The bhumidhari land in village Birauli is dedicated for the upkeep of the endowed property. The suit was filed by Babu Suraj Karan Binnani after attaining majority within limitation and that he had right to sue. It was then held that the property in suit was not let out and there was no tenancy as alleged of the suit property on the rent of Rs.60 per month. The Court found that the truth appeared from the defendant evidence, who firstly alleged that he is owner of the property and then in his statement Durga Prasad stated that he had raised constructions with the permission of Late Shri Gopi Krishan, the ancestor of the plaintiff with the stipulation that if he leaves the house he will be paid market value of the house. It will be relevant to quote the findings with regard to raising of construction and the cost of construction, as well as plea taken in the suit that the license has become irrevocable under Section 60 of the Easement Act. The Addl. Civil Judge, Azamgarh in his judgment dated 11th August, 1963 held as follows:-

"In his statement Durga Prasad stated the house in suit to have been raised by him with the permission of Gopi Kishan an ancestor of the plaintiff. He further added that the house and the ahata in suit were raised by him with the permission of Gopi Kishan with a stipulation that if he left the house in suit the same could be had on payment of the then market value of the house and Bara in suit. Even this to me appears to be an improvement. The contesting defendant in the earlier case in 1927 had set up this theory in a modified from. He therein had pleaded the house in suit to have been raised with the permission of Gopi Kishan with the stipulation that whenever he liked to have the house in suit it would be vacated by Durga Prasad and he would get only the then price of the house in suit. Then the choice for eviction lay with Gopi Kishan or his descendants. Now it lay up on the sweet will of Durga Prasad. This improvement has been actuated by after thought and perhaps on better legal advice....."..

"I feel satisfied that the house and Bara in suit were raised by the contesting defendant with the permission of Babu Gopi Kishan and it is in his occupation since then on that basis, the same was never let out to the contesting defendant by the plaintiffs' father..... "

"According to the allegations in the WS of the case in 1927 the plaintiffs' ancestors could have the house vacated at his choice on payment of the amount spent in these constructions. The ownership of the house in suit would hence pass to the plaintiff only after he had paid the amount spent by the defendant in constructing the house and Ahata in suit. By no stretch of imagination

the plaintiff could call himself owner of the house in suit before that. The contesting defendant wants to deprive the plaintiff of that right as well. He says that the choice to vacate lay with him only then if the plaintiff desires to have the house in suit the plaintiff could get the same on payment of the market price. I have already observed above that this plea cannot be countenanced. In the same way the defendants' contention that the license had become irrevocable under Section 60 of the Easement Act is devoid of merit. ***The present case does not fall within the ambit of Section 60 of the Easement Act. The license from the very outset was hedged with a contract. The contesting defendant was given permission to raise the construction over the site in suit with stipulation and limitation that whenever the licensee wanted to take possession of the site and the constructions thereon he would do so on payment of the market value of the constructions. The constructions in suit were thus raised knowingfull with the terms and the limitation. Section 60 of the Easement Act does not at all apply to such cases.***"

The suit was then dismissed on the findings as follows:-

"The learned counsel for the plaintiff contends that inasmuch as the contesting defendant had admitted the plaintiff to be the owner of the site in suit and had impliedly accepted the position that he was liable to ejectment on payment of the value of the house so the value he determines and the plaintiff be given possession on payment of the amount found due. In my opinion the plaintiff cannot adopt such a course. The plaintiff's case for possession is not based on any such allegation. He sought possession over the house in suit alleging himself to be the absolute owner of the house. He went on to say that the same had been let out to the defendant but the defendant was not willing to vacate hence the suit for possession. He sought an accounting as well but that was in reply to defendant's contention that he had invested money for repair and constructions. The case for the plaintiff was not substantiated on those allegations and has rather been found to be false. Possession is now sought on an entirely different ground. It is sought in the light of the defence version. I think in law the plaintiff cannot change his case and seek relief on an entire different ground upon which he had not based his case. I, therefore, held that the plaintiff is not even entitled to claim any accounts in the present case. ."

14. Babu Suraj Karan Binnani filed First Appeal No.392 of 1952 in the High Court at Allahabad. The short judgment given by Hon'ble Mr. Justice Mithan Lal is relevant and is reproduced as follows:-

"In this first appeal filed by the plaintiff Sri Yashodanandan learned counsel for the appel1ant has withdrawn all the grounds of appeal and has pressed his appeal only on the question of adjustment of the equities of the parties. His argument is that he accepts the finding of the Court below that the constructions on the land in dispute had been made by the defendant 1st set with the consent of the plaintiff's father and has those defendants had claimed a sum of Rs.6,505/7/6 as the value of the constructions the plaintiff's suit for possession may be decreed on payment of that amount.

In this case the respondents are unrepresented. *The equities between the parties cannot be adjusted in this first appeal because there is no sufficient material to adjust the same, for example it is not clear when the constructions were made. There is also no finding of the court below nor anything on the record to show whether the defendants were or were not entitled to any interest of this amount and whether the plaintiff was or was not entitled to any rent for the ground on which the constructions were made. It is also not clear from the finding as to on what date value of the constructions was to be assessed, whether it was to be assessed on the date the possession was to be given to the plaintiff, or on the date the constructions were made. There are a number of difficulties in adjusting the equities and consequently there being not sufficient material on the record for the purpose of adjustment of enquiries the prayer of the learned counsel for the appellant cannot be accepted. Since other grounds of appeal are not pressed the appeal is dismissed but no order is made as to costs."*

15. In **Achal Reddy Vs. Rama Krishna Reddiar. (l990) 4 SCC 706** the Supreme Court on acknowledgment and recognition of the title of the vendor excludes the theory of adverse possession. It was held that if a person is in actual possession and has right to possess under title involving due recognition of the owners title, his possession will not be recorded as adverse in law even though he claims under another title having regard to the well recognised policy of law that possession is never considered adverse, if it is referable to lawful title. In the conception of adverse possession there is an essential and basic difference between a case in which the other party is to be in possession of property by an outright transfer. Both parties stipulating for total divestiture of all the rights of transferor in the property and in cases in which there is mere executory agreement of transfer both parties contemplating a deed of transfer to be executed at a later point of time transferee is stopped from contending that his possession while the contract remained executory in stage, was in his own right and adversity against the transferor. Adverse possession implies that it commence in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper, referable to a contract, it cannot be adverse.

In **Thakur Kishan Singh Vs. Arvind Kumar, (1994) 6 SCC 591** in a suit for possession of a land on which a brick kiln was permitted to be set up, lease deed was alleged to be void under Section (6) of the Madhya Pradesh Abolition of Proprietary Rights Act, 1950 and in the alternative plea of adverse possession was raised. The suit was dismissed. In appeal the order was set aside and the suit was decreed. The High Court did not interfere. The Supreme Court while dismissing the appeal held that the appellant had entered into possession over the land in dispute under the license. The possession thus initially being permissive, burden was heavy on the appellant to establish that it became adverse. The possession of a co-owner or of a license or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for length of time does not result in

converting permissible possession into adverse possession. The appeal was consequently, dismissed.

In **Vidya Devi Vs. Prem Prakash & Ors.. (1995) 4 SCC 496** the Supreme Court held in para 22 and 23 as follows:-

"22. Adverse possession" means hostile possession, that is, a possession which is expressly in denial of the title of the true owner. (See: Gaya Parasad Dikshit Vs. (Dr) Nirmal Chander, (1984) 2 SCC 286). The denial of title of the true owner is a sign of adverse possession. In Ejas Ali Qidwai Vs. Special Manager, Court of Wards, AIR 1935 PC 53 it was observed:-

"The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed."

23. Dr Markby in his treatise Elements of Law (2nd Edn.) has observed that possession "to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. (See also: Munnalal Vs. Kashibai, AIR 1947 PC 15).

In **T. Anjanappa and ors. Vs. Somalingappa & Anr., (2006) 7 SCC 570** the Supreme Court held as under:-

"Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of any person to whom the land rightfully belongs and tends to extinguish that person's title, which provides that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twelve years next after the time when the right first accrued, and does away with the doctrine of adverse possession, except in the cases provided for by Section 15. Possession is not held to be adverse if it can be referred to a lawful title.

According to Pollock, "In common speech a man is said to be in possession of anything of which he has the apparent control or from the use of which he has the apparent powers of excluding others".

It is the basic principle of law of adverse possession that (a) it is the temporary and abnormal separation of the property from the title of it when a man holds property innocently against all the world but wrongfully against the true owner; (b) it is possession inconsistent with the title of the true owner.

In Halsbury's Laws of England, 1953 Edn., Vol.1 it has been stated as follows:-

"At the determination of the statutory period limited to any person for making an entry or bringing an action, the right or title of such person to the land, rent or advowson, for the recovery of which such entry or action might have been made or brought within such period is extinguished and such title cannot afterwards be reviewed either by re-entry or by subsequent acknowledgment. The operation of the statute is merely negative, it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of the others to eject him."

It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly

in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity. in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

16. The appellate Court fell in patent error in holding that filing of the suit in 1927 and thereafter in 1949 amounted to revocation of license and thereafter there was no license in favour of Durga Prasad and his possession must necessarily be adverse to the interest of the respondents. The appellate Court further erred in holding that appellant perfected their right by adverse possession much before the institution of the suit in 1974.

17. The suit filed in the year 1927 was withdrawn and in the suit filed in the year 1949 it was clearly found on the admission of Shri Durga Prasad that he entered into possession with permission of late Babu Gopi Kishan, the grand uncle of the appellant. Once it was established that the property was not endowed property and that the suit property adjacent to Dharmshala was not dedicated to Shri Laxmi Narain Ji Shri Shanker Ji, and that the constructions were raised with the permission, and further that there was contract hedged in condition that whenever owner would require, licensee would vacate the property after receiving the cost of constructions, the decree of possession could not be denied on the ground that Shri Durga Prasad or his heirs have perfected their rights by adverse possession as no suit was filed within the year of 12 years of the dismissal of the second suit. The findings recorded in the suit filed in 1949 in which the predecessor of both the appellants and respondents were parties have become final and will operate as resjudicata between the persons claiming through them. The suit of 1949 was not dismissed on the ground that Shri Durga Prasad has perfected his right by adverse possession. The possession of Shri Durga Prasad was not inconsistent with the title of true owner and his long possession did not necessary mean that it was adverse to the plaintiff or his predecessors. The possession of Shri Durga Prasad and his heirs was not denial of the title of true owner nor did true owner sit quiet and was peaceful with his possession. The suit filed in the year 1927 was withdrawn on the ground that the possession of construction was not claimed in the suit and that the suit filed in 1949 was dismissed on the ground that the plaintiffs claim was inconsistent with the relief's claimed in the suit. The first appeal was dismissed as equities could not be adjusted unless the defendants were served. The judgment and decree as such in the suit of 1927 and 1949 did not mature the title nor started the adverse possession of Shri Durga Prasad or his heirs, which was hostile and bore animus with the plaintiff's title. The findings of the appellate Court that defendants matured the title by adverse possession cannot be sustained. The substantial question of law is decided in favour of the appellant.

18. This again leaves the Court with a question about the reasonable cost of constructions, which are required to be paid to the defendant-respondent to claim possession over the land and the constructions. In the judgment dated 11th August 1952 the Addl. Civil Judge, Azamgarh in Suit No.1 of 1949 found an admission on the part of Shri Durga Prasad-the defendant that he had raised constructions of house and Bara at a cost of Rs.6505 and 7 anas 6 paisa and this was the amount offered by learned counsel for the appellant to the defendant-respondent in First Appeal No.394 of 1952. The High Court at that stage did not comment upon the adequacy of the officer as the respondents were not represented and there was nothing to show that the defendants were entitle get any interest on the amount.

19. In this suit the plaintiff claimed the defendant to be licensee and has prayed for decree of eviction on payment of Rs.2064·and 13 ana 9 pai or any amount, which the Court may deem fit after accounting.

20. By registered notice dated 1.3.1971 the license was revoked and that under the contract the defendant-respondents are entitled to cost of construction for eviction from the premises.

21. The-litigation initiated in the year 1927 has not ended as yet. Taking into account the admissions made by the defendant first set in Original Suit No.1 of 1949 decided on 11th August, 1952, the Court find that a sum of Rs.6505 and 7 ana 6 paisa with simple interest at the rate of 12% per annum would be the fair and reasonable cost with interest compensating the capital expenses. The Court is not taking into consideration any improvement as no such plea was taken by the defendant nor any evidence was led by the defendant to prove the same. The constructions must be old but then no such argument was advanced by learned counsel for the appellant to reduce the cost of constructions claimed by the defendant-respondent.

22. The second appeal is consequently allowed. The judgment and decree of the District Judge, Azamgarh dated 17.10.1979 is set aside and the judgment and decree dated 31.7.1978 passed in Suit No.15 of 1974 is restored with modification that the defendant first set shall vacate the property in dispute after the plaintiff-appellant deposits in trial Court a sum of Rs.6506 with 12% simple interest per annum, with effect from 11th August 1952 to the benefit of the defendant-respondent and on payment of the Court fees on Rs.6506/- with 12% simple interest per annum in Court calculating the same upto the date of filing of the suit.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2007

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.48622 of 2004

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

Counsel for the Petitioner:
Sri B.S. Pandey

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

Constitution of India, Art. 226-Compassionate appointment-petitioner's father a civil constable died in harness-after getting majority-applied and was given appointment-on class 4th post-petitioner refused to join and put further claim on the post of Constable (M) ignoring the physical standard of fitness-held-not entitled-when the petitioner has means to survive and continue the education for years together-financial cries over-can not be treated as reservation or another mode of recruitment.

Held: Para 16

It is thus apparent from the record that the petitioner did not feel necessary to join the employment and get wages so as to earn his livelihood. He was not at all interested to join the offered post on his own volition and was ready to wait till he is given a post of his choice. In view of the fact that the compassionate appointment is not the scheme for providing status to the person, in my view the petitioner has erred in refusing to accept the class-IV post and insisting for his recruitment to the post of Constable (M). The respondents have rightly considered the matter and in accordance with the rules. Admittedly, petitioner did not fulfil the qualification for the recruitment of constable and, therefore, he was rightly offered for the post of class IV but he failed to join the same.

Case law discussed:
1994 (68) FLR-1191 (SC), 1998 (5) SCC-192, 2000 (10) SC J.T.-156, 2002 LLJ-173, 2005 (107) FLR-153

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

1. Heard Sri B.S. Pandey, learned counsel for the petitioner and learned Standing Counsel.

2. Petitioner is aggrieved by order dated 12.10.2004 (Annexure 14 to the writ petition) whereby the Deputy Inspector General of Police (Establishment) U.P. Police Head Quarter Allahabad has rejected the representation of the petitioner for recruitment to the post of constable (M) as he did not fulfill the requisite physical standards prescribed under the Rules at the relevant time and also that he was already given benefit of appointment on compassionate basis on a Class IV post but he failed to join the said post.

3. The petitioner's father Panch Ram Verma was enrolled in Civil Police as a Constable and he died in harness on 15.6.1997 leaving his widow Smt. Shobha Devi, and minor children, i.e. the petitioner Akhilesh Kumar Verma, Krishna Kumar Verma, Km Rewati Raman Verma and Km. Anita Verma. Petitioner's date of birth is 1.7.1982 and he was minor at the time of death of his father. After attaining the age of majority, the petitioner made an application for the post of constable (M), which was recommended by the Superintendent of Police, Basti. After considering the case of the petitioner Deputy Inspector General of Police (Establishment) U.P. Police Head Quarter Allahabad issued an order on 29.8.2001 that the petitioner did not fulfill the requisite physical standard required for the appointment to the post of Constable (M) and, therefore, he should be appointed as Class-IV employee by Superintendent of Police, Basti. The petitioner filed a representation before respondent no.3 claiming that he should be considered for the post of Constable (M), in view of the fact that State Government by order dated 6th December, 2001 has clarified that for recruitment to

the post of police Constable (M) in the police establishment, the physical standards shall not be applied. His claim was recommended by Superintendent of Police, Bast vide letter later 4.7.2002 but since no action was taken by D.I.G., U.P. Police Headquarter, Allahabad, he filed writ petition no.3384 of 2003, which was disposed of by this Court, on 6.11.2003, with the following direction :-

"In view of the fact that after the Government order dated 6th December 2001, the petitioner has submitted his representation to Deputy Inspector General (Establishment) U.P. Police Head Quarter Allahabad and the Superintendent of Police, Basti has also recommended the case of the petitioner by letter dated 4th July 2002 for considering to Deputy Inspector General of Police U.P. Police Head Quarter, Allahabad. It is appropriate that claim of the petitioner as recommended by Superintendent of Police, Basti vide letter dated 4th July 2002, be considered by respondent no.2 expeditiously preferably, within a period of three months from the date of production of a certified copy of this order.

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

4. Pursuant to the aforesaid direction, respondent no.2, vide the impugned order has held that the State Government's letter dated 6th December, 2001 is prospective and would not be applicable to the petitioner, whose case was considered much earlier to the issuance of letter and he was offered appointment in accordance with eligibility and qualification as per Rules applicable on the said date and respondent no.2 consequently rejected claim of the petitioner for the post of Constable (M).

5. Learned counsel for the petitioner contended that eligibility condition of physical standard was relaxed by G.O. dated 6th December, 2001 and thus respondent no.2 was directed by this Court to reconsider his claim for the post of Constable (M) under the Rules, yet he has failed to consider the matter by applying G.O. dated 6.12.2001.

6. Having heard learned counsel for the petitioner and learned Standing Counsel and perusing the record, in my view, the writ petition deserves to be dismissed. I do not find any error in the order passed by respondent no.2. The recruitment/appointment on the basis of compassionate ground is exception and no person has any right to claim appointment on the post of a particular status. The intention is to provide immediate financial help to the bereaved family of the deceased employee who has demised in harness leaving the family in penury. The compassionate appointment is not a regular source of recruitment and the employee cannot claim that he should be conferred or is entitled as a matter of right, a particular post of a particular status.

7. The object and purpose of compassionate appointment is to provide assistance to the bereaved family of the deceased employee, who has suffered a shock and financial scarcity due to sudden demise of the sole bread-earner. Neither the provisions pertaining to compassionate appointment confers any status nor provides reservation of a vacancy as it is not a source of recruitment where under a person as and

when become eligible may apply and claim appointment.

8. In the case of **Umesh Kumar Nagpal Vs. State of Haryana and others, 1994 (68) FLR 1191 (SC)**, it was held that as a Rule, in public service, appointment should be made strictly on the basis of open invitation of applications on merit. The appointment on compassionate ground is not another source of recruitment, but merely an exception to the aforesaid recruitment taking into consideration the fact of the death of employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis. But such appointments on compassionate ground have to be made in accordance with the Rules, Regulations or Administrative instructions taking into consideration the financial condition of the family of the deceased.

9. Again in **Director of Education (Secondary) and another Vs. Pushpendra Kumar and others 1998 (5) SCC 192**, the Apex Court observed as under:

"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-earned 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 the ends meet, a provision is made for giving gainful appointment to one of the dependants 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 cannot subsume the main provision to which it is an exception and thereby nullify 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 general provision, 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 for the dependant of a deceased employee."

10. In **Sanjay Kumar Vs. State of Bihar and others, Judgment Today 2000 (10) SC 156,** the Apex Court reiterated that the compassionate appointment is provided only to enable the family of the deceased employee to tide over sudden crises resulting due to the death of sole bread-earner who had left family in penury without any means of livelihood but it cannot be treated to be a reserved vacancy for the dependants of the deceased Government servant who died in harness.

11. In the case **of Haryana State Electricity Board Vs. Krishna Devi, 2002 LLJ 773**, the Apex Court while reiterating the objective of compassionate appointment as laid down in the earlier cases further observed that the application made at a belated stage cannot be

entertained for the reason that by lapse of time, the purpose of making such appointment stands evaporated.

12. Recently in the case of **Commissioner public instructions and others Vs. K.R. Vishwanath 2005 (107) FLR 153**, the Apex Court has observed as under:

"The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread-earner in the family. Such appointments should, therefore, be provided immediately to redeem the family in distress. The fact that the ward was a minor at the time of death of his father is no ground, unless the scheme itself envisage specifically otherwise, to state that as and when such minor becomes a major he can be appointed without any time consciousness or limit."

13. If the family has sufficient means to survive for years together and can take care of the minors who have turned into major after undergoing educational qualification etc. that itself would be evident to show that now the family is not in financial crises as it could have at the time of sudden demise of the deceased necessitating compassionate appointment at a late stage i.e. after several years.

14. This Court cannot be oblivious of the fact that unemployment is a major problem in our country. Lacs and millions educated unemployed persons are wandering for employment and even for a single petty Class IV vacancy, hundreds and thousands apply which includes not only those who possesses the minimum qualification of secondary levels or less but even graduate and post-graduate. At times it has been seen that even persons having doctorate have applied for the lowest class of service i.e. Class IV. In such a situation, public employment must be available to eligible and suitable persons to be filled in by competition and all who are willing should be given an opportunity of consideration. Asking for a vacancy to be kept reserve so as to be filled-in future on the basis of notional extended distress to the family continuing for years together would amount to denial of such right of consideration to other similarly placed unemployed and destitute persons whose only fault is that their ancestors could not get the opportunity of employment and, therefore, they should also suffer the same misfortune. Compassionate appointment in fact has an element of an immediate help to the family of the deceased employee. The heirs in distress lacking sufficient and reasonable means to survive with some honour must request for such help immediately or within a reasonable time. To some extent, no doubt, it is a condition of service and the benefit available to employee in general but extension of such conditions of service to an unreasonable extent would or may erode the difference between valid and invalid and any such stretch may render the provisions of the compassionate appointment to be judged on the anvil of Article 16 of the Constitution of India which confers right of equal opportunity in public employment to all persons. The Court cannot shut its eyes to the fact that still majority of people are continuing to be tiny, poor, starving, little Indians and still are below poverty line. Their distress and penury appears to be ever lasting, as if they are bound to live in distress permanently. Their misery and destitute is not the result of sudden demise of the sole

bread-earner but is caused by their fate and for the reason of non availability of employment. They are not in a position, even though they are alive, to earn two times simple bread what to talk of bread and butter. The distress of such persons is neither negligible nor can be ignored. In a pragmatic society, efforts had to be made to read and apply law wherever permissible which will extend an opportunity of equal consideration for public employment to public at large irrespective of their lineage ancestral hierarchy etc.

15. It is not disputed that as long back as on 29th August 2001, the department issued an order for appointment of petitioner for class-IV post but he did not join the same. This fact has also been noticed by this Court in its earlier judgment where this Court has observed:-

"The counsel for the petitioner specifically stated that petitioner has not joined on Class IVth post nor is working."

16. It is thus apparent from the record that the petitioner did not feel necessary to join the employment and get wages so as to earn his livelihood. He was not at all interested to join the offered post on his own volition and was ready to wait till he is given a post of his choice. In view of the fact that the compassionate appointment is not the scheme for providing status to the person, in my view the petitioner has erred in refusing to accept the class-IV post and insisting for his recruitment to the post of Constable (M). The respondents have rightly considered the matter and in accordance with the rules. Admittedly, petitioner did not fulfil the qualification for the recruitment of constable and, therefore, he was rightly offered for the post of class IV but he failed to join the same.

17. Therefore, in the aforementioned circumstances, this writ petition lacks merit and is dismissed. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2007

BEFORE
THE HON'BLE H.L. GOKHALE, C.J.
THE HON'BLE RAKESH TIWARI, J.

Special Appeal No.[910] of 2007
Along with:
Special Appeal No.[911] of 2007,
and
Special Appeal No.[927] of 2007
and
Special Appeal No.1368 of 2007
and
Special Appeal No.[951] of 2007

Ashwani Kumar Tiwari and others
...Appellants
Versus
State of U.P. and others ...Respondents

Counsel for the Appellants:
Sri Udai Shankar Mishra,
Sri Irshad Ali,
Sri Manoj Gautam,
Sri A.K. Malviya,
Sri P.K. Ganguli

Counsel for the Respondents:
Sri Abhinav Upadhya
S.C.

Constitution of India, Art. 226-Admission in Special B.T.C. course-appellant obtained B.Ed. Degree from the university/College prior to equivalence from N.C.T.E.-held not eligible as per

terms of advertisement requirement of U.P. Government-it is for employer to fix the criteria-main requirement B.Ed. Degree from the institution having recognition from N.C.T.E.-not fulfilled-view taken by learned Single Judge-held-proper.

Held: Para 14

There is no difficulty in saying that the appellants do have the B.Ed. degrees, which could be said to be valid degree for other purposes. However, as far as the present advertisement is concerned, the State Government clearly laid down that they want candidates with B.Ed. degree from the institutions, which have N.C.T.E. recognition. They are very clear in their advertisement. We are not shown that the institutions had the N.C.T.E. approval for the course at the time the degrees were obtained and, therefore, the appellants cannot get the benefit of the judgment, which was rendered by the Division Bench in Special Appeal No.1271 of 2007.

Case law discussed:
20006(4) ESC 2573, 2003(3) SCC 548, JT 2006(4) SC 201, 2008(8) SCC 228

(Delivered by Hon'ble. H.L. Gokhale, C.J.)

1. The appellants in all these five appeals seek admission to the Special B.T.C. Course-2007. They are all students, who have obtained their B.Ed. degrees by the Distant Education Mode, and it is contended by them that in view of a judgement rendered by a Division Bench of this Court, to which one of us (Justice H.L. Gokhale, C.J.) was a party, in Special Appeal No.1271 of 2007 and others, on 03.10.2007, they are also entitled to the admission to the Special B.T.C. Course-2007.

2. Those appeals arose from a judgment rendered by a learned Single Judge in a group of matters, bearing Writ Petition No. 33987 of 2007, Renu Sharma vs. State of U.P. and others along with other connected petitions on 24.8.2007. The controversy in those matters was with respect to the advertisement given by the State Government for the Special B.T.C. Course 2007. The Government Order dated 10.7.2007 issued prior thereto had provided in Clause-II thereof with respect to the qualification as follows:-

"Only those students will be eligible for selection to Special B.T.C. Course-2007, who have the minimum educational qualification of graduation and they should also have the B.Ed. degree from the recognized colleges/post graduate colleges/training colleges run by the State Government/Central Government which are recognized by the National Council for Teachers Education. The candidates must be 'recognized institutional B.Ed. students'. (the words used in Hindi are "*Anumanya Sansthagat B.Ed. Uttirna Abhyarthi")*".

3. The controversy in those matters was with respect to the interpretation of the term *Sansthagat Abhyarthi*. The learned Single Judge had taken the view that it meant only those students who had taken B.Ed. degree by face-to- face mode of education and that those who had done it by distant education mode were excluded. The Division Bench has taken the view that the term *'Sansthagat Abhyarthi'* will mean institutional candidate and the term institutional candidate does not indicate any specific mode of education. The Division Bench also referred to a letter of N.C.T.E. dated 9th August 2007, addressed to the Principal Secretary (Basic Education)

State of Uttrar Pradesh. The relevant part of it reads as follows:-

"You may kindly recall that while giving approval to Government of Uttar Pradesh for conduct of Special B.T.C. we have allowed all B.Eds. to be eligible for the above course as requested by Government of U.P. No difference was made regarding B.Ed. (face-to-face) and B.Ed. (distance mode). As such the degree awarded by IGNOU, a Central University and Institution/University recognized by the N.C.T.E. cannot be treated as inferior to other B.Eds."

4. The N.C.T.E. had clearly stated in that letter that it was not making any difference between face-to-face and distant mode and that the degrees awarded by Indira Gandhi National Open University (a Central University) constituted under the Act of 1985, cannot be treated as inferior to other B.Eds. Similar letter was written concerning U.P. Rajarshi Tandon Open University.

5. That apart, the Division Bench noted that this was a scheme to enhance the teaching facility for primary education under *Sarva Shiksha Abhiyan*. The Special B.T.C. Course was a crash course of six months to impart necessary education to the B.Ed. graduates so that they can qualify to teach the primary students (for which they are not otherwise qualified). Some 60,000 teachers were needed. Many others who had done training course even in Physical Education were also permitted to participate and, therefore, there was no justification to exclude the students who had done their B.Ed from these two Universities.

6. Most of the appeals were from the students of these two Universities and particularly in view of the aforesaid letter of N.C.T.E. dated 9th August 2007, which was addressed well in time to the authorities of the State Government, the Division Bench held that the students of these two Universities will be eligible for admission to the Special B.T.C. Course 2007. Inasmuch as the last date for admission was getting expired, the date was extended till 31.10.2007.

7. Now the present group of appeals arise out of petitions that had been filed by students coming from different institutions/universities, which provide B.Ed. degree by distant education. It must be stated that all these appeals except Special Appeal No. [951] of 2007 arise out of the petitions which were heard and decided by the common judgment rendered by the learned Single Judge, which was considered in Special Appeal No.1271 of 2007 by the Division Bench, as stated above. Special Appeal No. [910] of 2007 is filed by the students of Mahatma Gandhi Gramodaya Vishwavidyalaya, Chitrakoot, Madhya Pradesh. As far as this institution is concerned, there is a specific letter from the N.C.T.E. dated 22.6.2004, that their B.Ed. course is recognized from the year 1996-1997. In the counter affidavit filed by the State, it is submitted, amongst others, that in view of the provisions of the IGNOU Act, 1985, the distant education course of that very University ought to have the recognition from the Distance Education Council constituted under the IGNOU Act. This submission is made on the basis of the preamble of the Act read with Section 4 and Section 16 (7) as well as Section 24 (j) of the said Act.

8. As far as the recognition from the Distance Education Council is concerned, there is no difficulty and this University does have it. But out of the four appellants, who have filed this appeal, Appellants No. 1 and 4 have their B.Ed. degrees of the year 1994-95 and the Appellants No.2 and 3 have their B.Ed. degrees of the year 1995-96, i.e., all prior to the recognition by NCTE from 1996-97.

9. Mr. Misra, learned counsel for the appellants, submits that inasmuch the concerned University has been given the recognition by NCTE in 1996-97 and since the NCTE itself was not in existence prior to 1st July, 1995, these students cannot be denied the benefit of equivalence. Mr. Misra, learned counsel for the appellant relied upon a judgment of learned Single Judge of Uttranchal High Court in **Anita Khati vs. State of Uttranchal and another**, reported at 2006(4) ESC 2573 (Utt.), to submit that since the NCTE itself was not in existence earlier, the prior degree of B.Ed. ought to be considered for B.T.C. subject to conditions imposed by the NCTE.

10. Mr. Upadhyay, learned Standing Counsel appearing for the State, on the other hand, submitted that as far as this judgment is concerned, it was with respect to the Shiksha Visharad degree obtained in the year 1993, and the question was as to whether it could be considered as equivalent to the B.Ed. degree for the Special B.T.C. Course in Uttranchal. That apart, he submitted that the judgment of the Apex Court particularly in **Yogesh Kumar and others vs. Government of NCT, Delhi and others**, reported at 2003 (3) SCC 548 was not placed for consideration before the learned Single Judge. Mr. Upadhyay submits that it may be, at the highest, that these degrees by correspondence course are equivalent to B.Ed. degree. The advertisement, which the State Government had issued, laid down the requirement of recognition by the NCTE for the particular degree. The clause quoted above clearly records that the candidate has to have the degree from a University recognized by the University Grants Commission and that it must also be recognized by NCTE and that the persons must be institutional candidates. He submits that it is for the employer to decide as to from what source and with what qualifications the candidate should be drawn. If the U.P. Basic Shiksha Parishad lays down that they want the candidates who have degrees from the institutions which are recognized by the NCTE, the candidates ought to have those qualification. He submits that there is a justification for this approach. Under the Norms and standards for B.Ed. (open and distance learning system) laid down by NCTE when it comes to a candidate who is seeking admission to a distant education course, he has to be a teacher serving in a recognized school with Bachelor degree having at least two years experience at the time of admission. The person concerned has to be currently employed. Now whether these requirements were satisfied at the relevant time, by the candidate concerned when obtaining B.Ed. degree, cannot be verified. It is true that their degrees may be considered as equivalent to the B.Ed., but as far as the present advertisement is concerned, in his submission, the U.P. Government had decided not to take those, who did not have B.Ed. degree recognized by the NCTE and, this

decision is for the employer concerned to take.

11. Reliance is placed upon **Yogesh Kumar's case (Supra)** particularly on paragraph 8 of the judgment. The relevant portion of that paragraph reads as follows:-

"This last argument advanced also does not impress us at all. Recruitment to public services should be held strictly in accordance with the terms of the advertisement and the recruitment rules, if any. Deviation from the rules allows entry to ineligible persons and deprives many others who could have competed for the post. Merely because in the past some deviation and departure was made in considering the B.Ed. candidates and we are told that was so done because of the paucity of T.T.C. Candidates, we cannot allow a patent illegality to continue. The recruitment authorities were well aware that candidates with qualification of T.T.C. and B.Ed. are available yet they chose to restrict entry for appointment only to T.T.C. pass candidates. It is open to the recruiting authorities to evolve a policy of recruitment and to decide the source from which the recruitment is to be made. So far as B.Ed. qualification is concerned, in the connected appeals (CAs. Nos. 1726-28 of 2001) arising from Kerala which are heard with this appeal, we have already taken the view that B.Ed. qualification cannot be treated as a qualification higher than T.T.C. because the nature of the training imparted for grant of certificate and for degree is totally different and between them there is no parity whatsoever. It is projected before us that presently more candidates available for recruitment to primary school are from B.Ed. category and very few from T.T.C. category."

(*Underlining supplied*)

12. Mr. Upadhyay, then drew our attention to other judgements. Firstly, he referred to the judgment in **State of Maharashtra vs. Sant Dnyaneshwar Shikshan Shatra Mahavidyalaya and others,** reported at JT 2006 (4) S.C. 201 and particularly in paragraphs 47 and 48 thereof. The Apex Court has emphasized the necessity for the N.C.T.E. recognition for the concerned educational institutions. He also drew our attention to paragraphs 8 and 9 of the judgment of **Union of India and others vs. Shah Goverdhan L. Kabra Teachers' College**, reported at 2002 (8) S.C.C. 228, wherein reference is made to Section 17 (4) of the National Council for Teacher Education Act. This Section reads as follows:

"17. (4) - If an institution offers any course or training in teacher education after the coming into force of the order withdrawing recognition under sub-section (1), or where an institution offering a course or training in teacher education immediately before the appointed day fails or neglects to obtain recognition or permission under this Act, the qualification in teacher education obtained pursuant to such course or training or after undertaking a course or training in such institution, shall not be treated as a valid qualification for the purposes of employment under the Central Government, any State Government or University, or in any school, college or other educational body aided by the Central Government or any State Government."

Emphasis was laid that the institution concerned must obtain the N.C.T.E. permission after the Act comes into force and degrees, which are given before or after the permission is withdrawn, are not valid.

13. Mr. Upadhyay, therefore, submits that the *dicta* in **Yogesh Kumar's** case (Supra) will have to be followed and though these candidates may be considered as having B.Ed. degrees, inasmuch as at the relevant time, the institution did not have the N.C.T.E. recognition and since the Government is insisting on that as a necessary requirement, such students cannot be imposed on the government.

14. We have considered the submissions of all the learned counsels. In our view, there is much force in the submission of Mr. Upadhyay. There is no difficulty in saying that the appellants do have the B.Ed. degrees, which could be said to be valid degree for other purposes. However, as far as the present advertisement is concerned, the State Government clearly laid down that they want candidates with B.Ed. degree from the institutions, which have N.C.T.E. recognition. They are very clear in their advertisement. We are not shown that the institutions had the N.C.T.E. approval for the course at the time the degrees were obtained and, therefore, the appellants cannot get the benefit of the judgment, which was rendered by the Division Bench in Special Appeal No.1271 of 2007.

15. Similar is the position in Special Appeal No. [911] of 2007. The appellants claim to be the students of Barkatullah Vishwavidyalaya, Bhopal (M.P.). They have not produced any document that the University concerned had recognition from the N.C.T.E. at the time they got their degrees in the year 1994-95 and 1995-96.

16. Same is the position in Special Appeal No. [927] of 2007, which has been filed by a student of Awadhesh Pratap Singh University, Riwa (M.P.). The appellant has not placed on record as to whether the University concerned had N.C.T.E. recognition when he obtained degree in the year 1996. For this reason, this appellant cannot get the benefit of the above judgment rendered by the Division Bench. Consequently, the Special Appeals No. [910], [911] and [927] all of 2007 are hereby dismissed.

17. The facts of Special Appeal No. 1368 of 2007 are different. Their students are from Jamia Millia Islamia University. The University did have the N.C.T.E. recognition way back in November 2003. The University also has the recognition of the Distance Education Council. The students concerned have obtained their degrees subsequent to this approval from the N.C.T.E. These appellants, therefore, cannot be denied the benefit of the above judgment rendered by the Division Bench. This appeal is, therefore, allowed. We, however, make it clear that the benefit will be available only to these appellants since they were already in court and were following their applications and litigation vigilantly. Although we allow Special Appeal No. 1368 of 2007, we make it clear that the benefit will be confined only to the appellants and none others.

18. Lastly, we come to Special Appeal No. [951] of 2007. The appellants are the students, who have done their

B.Ed. in Special Education meant for the specially challenged students. The appellants have produced the document of 19th January 2005, which shows that the NCTE has entered into a Memorandum of Understanding with Rehabilitation Council of India on 19.1.2005 recognizing that the Rehabilitation Council of India will decide the minimum standard for offering teachers' education for specific disability specialization. Madhya Pradesh Bhoj (Open) University, Bhopal from where the appellants had studied, has the recognition from this Rehabilitation Council of India. The fact, however, remains that they have obtained their degrees in the year 2003, which is prior to this equivalence being granted by NCTE. That being so, at the relevant time, they had not obtained the degrees from the institution, which could be said to be recognized by the NCTE or by any equivalent body. For this reason, this appeal cannot succeed and, therefore, stands dismissed.

19. All these appeals stand disposed of with this order. There will not be any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2007

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 55192 of 2007

Ramesh Chandra Sharma ...Petitioner
Versus
District Judge, Farrukhabad and another ...Respondents

Counsel for the Petitioner:
Sri J.P. Singh

Counsel for the Respondents:
Sri Amit Sthalekar

Constitution of India Art. 226- Disciplinary proceeding-initiated after 12 years-challenged on ground of delay-held-initiation of belated enquiry not fetal but once enquiry initiated but not conclude–direction issued to conclude the same within specific period.

Held: Para 6

The submission that delay of about 12 years is fatal for inquiry is thoroughly misconceived. There is no principle of law that an inquiry would stand vitiated merely for the reason that it has been initiated after a long time.

Case law discussed:
1995 (2) SCC-570, 1999 SCC (L&R)-646, AIR 2006 SC-2064, W.P. No. 6095 (S/S) decided on 9.8.07

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

1. Heard learned counsel for the petitioner.

2. The petitioner, an employee of the District Judgeship, Farrukhabad, has filed this petition challenging the order dated 05.09.2007 passed by the District Judge, Farrukhabad conducting regular inquiry against the petitioner and appointing inquiry officer for the said purpose and against the order dated 15.10.2007 which is a consequential order since earlier inquiry officer was posted as A.D.J. III and now he is A.D.J. II.

3. Learned counsel for the petitioner submits that he has requested the District Judge to change the inquiry officer and since no action has been taken thereon, therefore, he is not able to participate in the inquiry.

4. Learned counsel for the petitioner also submitted that the charge levelled against the petitioner relates to an incident which is about 12 years old and, therefore, no inquiry now can be held after such a long time. In support of his contention, he placed reliance on Apex Court's judgement in **State of Madhya Pradesh Vs. Bani Singh and another 1990 (Supp.) SCC 738.**

5. I do not find any material making substantial allegations contained in the writ petition levelling mala fide against the respondent no. 2 and on the other hand it is evident that the petitioner is only delaying departmental inquiry by not cooperating therein and it appears that he has filed this petition only to further delay the proceedings.

6. The submission that delay of about 12 years is fatal for inquiry is thoroughly misconceived. There is no principle of law that an inquiry would stand vitiated merely for the reason that it has been initiated after a long time. On the contrary, whether delay in initiating inquiry would be fatal or not would depend on various facts and circumstances. Dealing this question and considering **Bani Singh (Supra)** the Apex court in **State of Punjab Vs. Chaman Lal Goel, 1995 (2) SCC 570** declined to set aside disciplinary proceeding initiated after a long time and said:-

"9. Now remains the question of delay. There is undoubtedly a delay of five and half years in serving the charges. The question is whether the said delay warranted the quashing of charges in this case. It is trite to say that such disciplinary proceeding must be conducted soon after the irregularities are committed or soon after discovering the irregularities. They cannot be initiated after lapse of considerable time. It would not be fair to the delinquent officer. Such delay also makes the task of proving the charges difficult and is thus not also in the interest of administration. Delayed initiation of proceedings is bound to give room for allegations of bias, mala fides and misuse of power. If the delay is too long and is unexplained the court may well interfere and quash the charges. But how long a delay is too long always depends upon the facts of the given case. Moreover, if such delay is likely to cause prejudice to the delinquent officer in defending himself, the enquiry has to be interdicted. Wherever such a plea is raised, the court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances. In other words, the court has to indulge in a process of balancing."

7. In **Additional Superintendent of Police Vs. T. Natrajan, 1999 SCC (L & S) 646** Apex Court held as under:-

"It is settled law that some delay in initiating proceedings would not vitiate the enquiry unless the delay results in prejudice to the delinquent officer."

8. The same view was reiterated in **P.D. Agarwal Vs. State Bank of India and others, AIR 2006 SC 2064**.

9. A Division Bench (in which I was also a Member) in **Writ Petition No. 6095 (S/S) of 1996 (State of U.P. & another Vs. S.P. Singh Pundhir and another**) decided on 09.08.2007, considering the aforesaid judgements of the Apex Court, has also held as under:-

"There is no hard and fast rule that disciplinary proceedings initiated after a long time would be per se improper or illegal merely for the reason that it has been initiated after long lapse of time but it depends upon the facts and circumstances of that case. For example, if the delinquent employee could show that after long lapse of time he has lost evidence or has no capacity to defend himself due to loss of memory etc. then indulgence can be granted on this ground but mere delay in the proceedings can not vitiate the same."

10. However, since disciplinary proceeding, once initiated, should not be allowed to continue for long time, in my view, it would be appropriate to direct the respondents to complete disciplinary inquiry against the petitioner within a period of three months from the date of production of certified copy of this order. It is made clear that in case the petitioner fails to cooperate, it is open to the authority concerned to proceed and complete inquiry in accordance with law without participation of the petitioner.

11. With the aforesaid direction, this writ petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2007

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

Second Appeal No. 955 of 1995

Tulsi ...Plaintiff-Appellant
Versus
Doodh Nath and others ...Defendant-Respondents

Counsel for the Appellant:
Sri H.C. Saxena
Sri O.P. Pandey

Counsel for the Respondents:
Sri A.K. Mishra

Code of Civil Procedure-Section-100-Second Appeal-suit for injunction–concurrent finding of facts-regarding possession of defendant-unless declaration sought of title suit before civil court not maintainable-Held-No scope for interference under Section 100 required.

Held: Para 9

The findings by the two courts below that the suit was not maintainable since the question of title and respective right was to be determined. In the circumstances, I do not find that the substantial question of law raised in the instant appeal worth consideration, the findings to the contrary by the two courts below do not call for interference and can not be interfered in exercise of jurisdiction under Section 100 C.P.C.

Case law discussed:
AIR 1972 SC-2299
1992 RD-429
1968 RD-410 (FB)

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

1. Heard Sri H.C. Saxena and Sri O.P. Pandey, learned counsels for the appellant and Sri A.K. Mishra Advocate for the contesting respondents

2. This is plaintiffs second appeal against the judgment and decree dated 31.8.1995 passed by the Additional District Judge, Varanasi, Maharajganh in Civil Appeal No. 1 of 1994 confirming the judgment and decree dated 15.12.1993 passed by Munsif Magistrate, Farenda,

District Mahrajganj in Original Suit No. 280 of 1991.

3. An Original Suit was preferred by the plaintiff claiming himself to son of Phaiku and owner in occupation. It was pleaded that the defendant respondents have started interfering with the peaceful possession of the appellant and injunction suit was instituted in respect of Plot No.1499 area 749 D situated in Village Bargahpur, Pargana and Tpsil Farenda, District Mahrajganj. The claim of the defendants was on basis of a Will executed by Phaiku. The defendants were nephew of Phaiku and it was contended that he died issueless. The trial court and lower appellate court were of the view that the dispute is in respect of agricultural land and, therefore, the civil suit is not maintainable and is barred by Section 331 of U.P. Zamindari Abolition & Land Reforms, Act. The substantial questions of law framed in this appeal, on which the appeal was admitted, are as under:-

1. Whether the plaintiff is the son of Phaiku ?
2. Whether Phaiku bequeathed the agricultural land in suit to the defendants by will as alleged by the defendants?

Therefore, the only question whether the plaintiffs suit is barred by section 331 of the U.P. Zamindari Abolition & Land Reforms Act arises for consideration in this appeal. The first question is factual and can not be reopened and reassessed in a second appeal.

4. The findings of the trial court on issue Nos. 1 and 2 have been emphatically challenged. The submission is that while deciding issue no. 2, the trial court recorded its finding that the suit is barred is per-se illegal.

5. In the circumstances, the short question involved in the present second appeal is, whether the suit was barred or not Learned counsel for the appellant has placed the plaint before me in support of this contention that the suit was simplicitor for relief of injunction and, therefore, this relief could not be given by the revenue courts and the suit maintainable.

6. I have perused the findings of the courts below on issue no. 2. It is evident that the name of the plaintiff is not recorded in the revenue records and therefore, perusal of paper No. Ga/49 and statement of PW-1, it is evident that the mutation proceedings are pending before the revenue courts and the question of ownership is yet to be decided. Issue No.1 relates to question whether the plaintiff is owner in occupation of plot No. 1499 (area 749). Since the question of injunction can only be considered, if the plaintiff establishes his title and thereby consequent possession. Since both the questions are inter linked, it can not be said that the suit instituted by the plaintiff was simplicitor for injunction. In fact the courts below were required to decide the question of title and possession on merits. Though this Court, while admitting the second appeal, framed question of law regarding the parentage of plaintiff and his relation with Faiku. Both the courts below have come to a definite conclusion and recorded a finding of fact that on the basis of documentary proof Paper No. Ga/15, Extract Khasra Paper No. Ga/16, Extract Khatauni Paper No. Ga/76 and Khasra Paper No. Ga/77 by the plaintiff failed to establish their prima facie right

to the disputed property, the defendants are recorded in the revenue records and if the plaintiff has any objection, it can only be challenged before the revenue court by instituting a suit for declaration. The name of plaintiff was not recorded in the revenue records and, therefore, the courts were of the view that the question as to whether the plaintiff is son of Faiku or not is to be decided first before any relief of injunction could be granted. I am in agreement with the findings arrived at by both the courts below that the suit was not maintainable and barred by Section 331 of U.P.
Zamindari Abolition & Land Reforms Act.

7. Counsel for the appellant has placed three decisions. The first case relied upon is, ***M. Kallappa Setty Vs. M.V. Lakshminarayana Rao, AIR 1972 Supreme Court, 2299.*** The Apex Court ruled that the plaintiff, on strength of his possession can very well resist interference from defendant who has no better title than himself and get injunction from disturbing his possession. In the circumstances, the ratio decided by the Apex Court is that in the event, the plaintiff is in an admitted possession of the property and the two courts recorded a finding conclusively in favour of the plaintiff that he is in possession then he is entitled for an injunction. This is not the position in the instant case. The trial court relied on the revenue entries while deciding the question of possession and has recorded a conclusive finding that since the entries are in the name of the defendants and unless and until contrary is established, the plaintiffs possession is not established. This finding is confirmed in the appeal, therefore, there is no applicability of the decision relied upon by the counsel for the appellant. There is no finding whatsoever that the plaintiff is in possession. No doubt it is settled that even an unauthorized occupant is found in possession, he can not be evicted otherwise than in accordance with law and is very much entitled for injunction but the facts, of the present case are absolutely different and, therefore, I hold that the question of possession having been decided against the plaintiff by the two courts, which is a finding of fact, the relief of injunction has rightly been refused by the courts below. The next decision relied upon by the counsel is, ***Badalu and another Vs. Ram Palat and others, 1992 R.D., 429***. This decision relates to the question of jurisdiction of the court. The bar of Section 331 of U.P.Z.A. & L.R. Act was held to be not applicable if the plaintiff is found in possession and relief for prohibitory injunction claimed in the suit. Paragraph 13 of this decision is quoted below:-

"*In the present case both the courts below have found that plaintiff were not entitled to the decree of prohibitory injunction since they had not been in possession over the land in dispute and their suit for the relief in respect of the plot Nos. 841 and 846 has been rightly dismissed. It may, however, be observed that since the finding on issue No. 2 framed by the trial court had not been challenged and the civil court had no jurisdiction to decide the question relating to the title in respect of plot Nos. 841 and 846 in dispute, the said question will remain open to be agitated by the parties if they so desired in afresh proceeding and it will not be open to the defendants or their representatives or successors to resist any suit of the plaintiff or their representatives or*

successors which may be brought in future for possession of the suit property comprised in plot Nos. 841 and 846 in dispute on the basis of their title either on the ground of res-judicata or Order II, Rule 2, C.P.C. I do not find any such infirmity in the impugned decree which may warrant any interference by this Court in the exercise of its jurisdiction under Sec. 100, C.P.C.

8. In the circumstances, the appellant do not get any help from this decision as well. The question of possession having once been decided against the plaintiff concurrently by the two courts, the relief for injunction was rightly refused. There is yet another Full Bench Decision of this Court which lays down clear guidelines regarding determination of jurisdiction of civil and revenue courts, in the case of ***Ram Awalamb and others Vs. Jata Shanker and others, 1968 R.D. 470 (F.B.)***. The extract of the said decision is quoted below:-

"In each and every case the cause of action of the suit shall have to be strictly scrutinized to determine whether the suit is solely cognizable by a revenue court or is impliedly cognizable only by a revenue court, or is cognizable by a civil court. Where in a suit, from a perusal only of the reliefs claimed, one or more of them are ostensibly cognizable only by civil court and at least one relief is cognizable only by the revenue court, further questions which arise are whether all the reliefs are based on the same cause of action and, if so, (a) whether the main relief asked for on the basis of that cause of action is such as can be granted only by a revenue court, or (b) whether any real or substantial relief (though it may not be identical with that claimed by the plaintiff) could be granted by the revenue court. There can be no doubt that in all cases contemplated under (a) and (b) above the jurisdiction shall vest in the revenue court and not in the civil court. In all other cases of a civil nature the jurisdiction must vest in the civil court.

The main point for consideration in all cases where on a definite cause of action two reliefs can be claimed is which of the two reliefs is the main relief and which relief or other reliefs are ancillary reliefs. Where from facts and circumstances of the case the relief for demolition and injunction is the main relief there could be no reason why the jurisdiction of the civil court should be barred. On the other hand, if it could be said that the main relief, that is to say, the real and substantial relief, could on that cause of action be of possession only then the suit will definitely lie in the revenue court.

A civil court will have the power to entertain the suit where the main relief sought by the plaintiff is that of injunction and demolition, a relief which could be granted by the civil court only. The relief of possession will be merely ancillary relief which the civil court could grant after having taken cognizance of the suit for inunction and demolition.

The determination of the question as to which out of the several reliefs arising from the same cause of action is the main relief will depend on the facts and circumstances of each case. Where, on the basis of a cause of action-

(a) the main relief is cognizable by a revenue court the suit would be cognizable by the revenue court only. The fact that the ancillary reliefs claimed are cognizable by civil court would be immaterial for determining the proper .to rum for the suit;

(b) the main relief is cognizable by the civil court the suit would be cognizable by the civil court the suit would be cognizable by the civil court only and the ancillary reliefs, which could be granted by the revenue court may also be granted by the civil court.

The above principle will apply also to a suit for injunction and demolition relating to agricultural land and brought against a trespasser. Where the revenue court was not competent to grant all the reliefs arising out of one and the same cause of action and the main relief was that of injunction and demolition the suit would lie in the civil court.

9. On analysis of Full Bench guidelines quoted above, it is evident that the two courts were of consistent view that the revenue records clearly establish the right and possession of the defendants and unless and until the plaintiff's right or even possession is not established, injunction could not be granted, therefore these questions could be adjudicated only in a suit for declaration. No doubt the relief of injunction was claimed in the suit but the main relief could not be ignored. In fact the injunction was only an ancillary relief which could be granted only by a revenue court. The findings by the two courts below that the suit was not maintainable since the question of title and respective right was to be determined. In the circumstances, I do not find that the substantial question of law raised in the instant appeal worth consideration, the findings to the contrary by the two courts below do not call for interference and can not be interfered in exercise of jurisdiction under Section 100 C.P.C.

The suit instituted for possession was held not maintainable by the civil court after recording its conclusion that since the plaintiff has not been able to establish possession and there is neither any document nor any material to hold title in favour of the plaintiff. These questions are to be adjudicated by the revenue courts which in fact is still pending. In view of what has been stated upon, there is no substance in the submissions made by the learned counsel. The appeal lacks merit and is accordingly dismissed. Cost on parties.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2007

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

Second Appeal No. 743 of 1997

New Okhla Industrial Development Authority ...Defendant/Appellant
Versus
Raja Ram Balmiki ...Plaintiff/Respondent

Counsel for the Appellant:
Sri. U.S. Awasthi

Counsel for the Respondent:
Sri. B.D. Mandhyan
Sri. S.C. Mandhyan
Sri. A.K. Singh
Sri. Badri Singh
Sri. Satish Mandhyan

Code of Civil Procedure Section 100- second appeal-substantial question of law-scope thereof explained-means debatable question of law-not previously settled or decided.

Held: Para 7

The question of law must be debatable, not previously settled by law of the land or a binding precedent and answer to the same will have material bearing as to the

rights of the parties before the court. The foundation is to be laid in the pleadings and the questions are emerged from sustaining findings of fact arrived at by the court after the appraisal of evidence

Case Law discussed:

2005(7) SCC-60
2005(2) SCC-500
2001(3) SCC-179

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

1. Heard Sri U.S. Awasthi, learned counsel for the appellant and Sri B. D. Mandhyan, Senior Advocate, Assisted by Sri S.C. Mandhyan, Sri A.K. Singh and Sri Badri Singh Advocates for the plaintiff-respondent.

2. The plaintiff-respondent instituted a suit No. 974 of 1991 against the defendant-appellant for injunction in respect of Plot No. 40 area Sq. yards situated in Khasra No. 16-M Village Mamura, Pargana and TehsiI Dadri, District Ghaziabad (hereinafter referred as disputed land). The plaintiff claimed his title on the basis of allotment made by Land Management Committee in the year 1974 to one Hukum Singh as he was a member of Scheduled Caste Community. Hukum Singh aforesaid executed a sale deed on 23.5.1995 for an amount of Rs.45,000/- in favour of the plaintiff and subsequent to the sale deed, the plaintiff is owner in occupation. Since the disputed land is in the vicinity. If Sector 59 of NOIDA authority (defendant-appellant), they are interfering in the plaintiffs construction over the disputed land and the employees of Noida have demolished the construction of a number of allottees, including plaintiff. NOIDA has given alternative plots to them but the plaintiff was the only allottee who has been singled out and in the circumstances, a relief was added by means of amendment application for allotment of an alternative plot. NOIDA filed its written statement and denied the plaint allegations. The plea taken by the defendant appellant was that the land was acquired by the State Government for NOIDA and it did not belong to Gaonsabha and, therefore, allotment to Hukum Singh can not be made, besides Gaonsabha and State Government have not been made as a necessary party. The suit was barred by Section 34 and 41 of the Specific Relief Act as well as Section 331 and 331A of the Zamindari Abolition & Land Reforms Act. As many as six issues were framed. The question of non joinder of party issue no. 3 which was decided against the appellant. Issue no. 4 was also decided in favour of the plaintiff that the suit is not barred by Section 34 and 41 of the Specific Relief Act. Issue no. 5 was decided against the defendant-appellant and the trial court came to a conclusion that the suit is not barred by Section 331 and 331A of the Zamindari Abolition & Land Reforms Act. Issue no. 1 was decided in favour of the plaintiff and the trial court recorded a categorical finding that the plaintiff is owner in occupation and finally the suit was decreed and NOIDA was injuncted from making any interference in the peaceful occupation and construction thereon. The appeal against the judgment and decree of the trial court was also dismissed. The appellate court affirmed the findings of all the issues and recorded its conclusion in favour of the plaintiff. However, the decree of the trial court was amended to the extent that mandatory injunction was granted against the defendant to allot an alternative plot in Sector 66 Noida along with other allottees and only thereafter

Noida will be entitled to use the disputed land of the plaintiff in accordance with his Master Plan. Substantial question of law raised in the instant appeal are as follows:

1. Whether a person can transfer a better title than he has?
2. Whether the suit is liable to be dismissed for non impleadment of proper and necessary parties?
3. Whether the relief of permanent injunction being the main relief can be granted in the alternative relief of mandatory injunction by way of amendment being barred of limitation and not paying the proper court fees taking the right of the appellant?
4. Whether the land has been properly identified and as such the suit is liable to be dismissed?

Sri U.S. Awasthi canvassed substantial question of law no. 1.

3. After hearing the respective counsels at length and going through two judgments, it is clear that the disputed land was never acquired nor any compensation has been paid to any of the allottees who were 18 in numbers including the plaintiff-respondent. The other 17 allottees have been given alternative plots in Sector 66 except the plaintiff. The courts below have arrived at a conclusive finding of fact that the plaintiff-respondent is owner in occupation. It was only because NOIDA came up with the plea that the land in question is creating hindrance in the development by the Development Authority, the lower appellate court amended the judgment and decree to the extent of permitting for an alternative plot. The other 17 allottees who were also allotted in Secto-66, were given alternative plots and therefore the plaintiff was also entitled to a similar relief. The question raised in this appeal that the plaintiff could not acquire any right by means of sale deed executed by Power of Attorney of Hukum Singh who was the original allottee, is without any substance. The courts below have recorded a categorical finding of fact that the land was allotted long back.

4. During the course of argument, Sri Awasthi raised another question of law that since the U.P.Z.A. & L.R. Act/Rules imposes a specific bar that in the event, construction within the stipulated period is not made, the disputed land can not be transferred to a third party. Rule 115 Q provides that whoever is allotted a land for building a house, if he fails to do so within three years from the date of allotment or uses it for a purpose other than it has allotted, his right shall be extinguished, the land will be taken over by the Land Management Committee. Rule 115 R provides that whenever a house is built on such land allotted by the Land Management Committee then it can only be transferred after lapse of ten years. For a ready reference, two Rules are quoted below:

*"**115-Q.** The person to whom the housing site is allotted shall be required to build a house and begin to reside in it or to use it for the purpose for which it was built within three years from the date of allotment: If he fails to do so or uses it at any time for a purpose other than that for which it was allotted his right shall be extinguished and the site may be taken over by the Land Management committee.*

Provided that in the case of a person belonging to Scheduled Caste or

Scheduled Tribe the aforesaid time limit for building of the house shall not apply.

115-R. *(1) Where any land or site is allotted in accordance with rules 115-L to 115-Q and house is built thereon, then subject to the provisions of sub-rule (2), the allottee shall have no right to transfer such land, site or house within a period of ten years from the date of the allotment:*

5. In the instant case, the plaintiff belongs to Scheduled Caste and therefore, the bar imposed by Rule 115Q will not be applicable in the case of the plaintiff. It is also to be noted that the pleadings of the plaintiff was specific that whenever he raised constriction, the defendant-appellant demolished the constructions and was not permitting the allottee to make any construction whatsoever. Besides, it is also to be noted that the allotment was in the year 1974 and the sale deed was executed in the year 1995 and therefore, the argument of the learned counsel for the appellant that the transfer made in favour of the plaintiff gives no right to him for the reason that the transferor could not transfer a better title than he himself had is devoid of substance.

6. In the facts and circumstances, I do not find any substantial question of law worth consideration in this second appeal. Besides, there is yet another fact which is not disputed. An application dated 11.11.1999 supported by an affidavit dated 29.10.1999 filed by Raja Ram Balmiki, respondent is brought to my notice by Mr. Mandhyan. It is stated in paragraph 4 that during pendency of the appeal, the Secretary NOIDA, as per his report dated 25.9.1996 has considered the case of the plaintiff-respondent and has approved the allotment of alternative plot No. 12 in Sector 66 having an area 150 Sq. meter as it has been done in the case of other 17 allottees similarly placed. Copy of the report of the Secretary dated 01.10.1996 is also annexed with the affidavit. The statement of DW-1Nathuram Lekhpal also clearly shows that the alternative plots to the 18 Scheduled Caste allottees have been allotted by NOIDA and, therefore, I do not see any reason why the decree of the two Courts below can not be given effect to by the NOIDA. The judgment of the two courts below do not suffer from any infirmity and raises any substantial question of law. The questions raised in this appeal do not exist and do not confirm and stand the test laid down by this Court as Well as the Apex Court in a series of decisions.

7. The Apex Court in the case of ***Rajeshwari Vs. Puran Indoria (2005) 7 SCC, 60***. has elucidated and explained the term "Substantial question of law" it was held that the proper test for determination whether question of law raised in a case is substantial and would affect rights of the parties, if so whether it is either an open question in the sense it was not finally settled by Hon'ble Supreme Court or Privy Council or federal court, or is not free from difficulty or calls for discussion or alternative views. Similar view was expressed by the Apex Court in the case of ***Govindaraju Vs. Mariamman (2005) 2 SCC page 500*** as well as ***Santosh Hazari Vs. Purushottam Tiwari (2001) 3 SCC page 179***. The question of law must be debatable, not previously settled by law of the land or a binding precedent and answer to the same will have material bearing as to the rights of the parties before the court. The foundation is to be laid in the pleadings and the questions are

emerged from sustaining findings of fact arrived at by the court after the appraisal of evidence.

8. In view of the above decisions, I am not inclined to interfere as no substantial question of law arises worth consideration in the instant appeal. The second appeal lacks merit and is accordingly dismissed. Cost on parties.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2007

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

First Appeal From Order No. 3110 of 2003

Smt. Sangeeta and another
...Defendant/Appellant
Versus
Mange Ram ...Respondent

Counsel for the Appellant:
Sri. B. Malik

Counsel for the Respondent:
Sri. A.K. Singh
Sri. V.K. Singh
Sri. K.C. Tripathi

Hindu Guardianship and Wards Act 1890-Section -7-custody of minor child-after disappearance of the father-mother remarried-since 12 years the minor residing with his maternal uncle-claim by grandfather-allowed by the trail Court considering largest party holdings-but ignored the welfare of the minor-the grandfather never given any financial assistance-or gift at any occasion-minor getting proper education in English medium-no allegation of negligence in his maintenance-cannot be uprooted-application for custody of minor by grandfather-rejected.

Held: Para 8

At this juncture it was rightly pointed out by the appellant's counsel that not a single shell was ever shed by the respondent towards the maintenance of the minor. The facts as they stood today there is no justification to grant the relief claimed by the respondent to have the custody of minor Ashu. The welfare of minor is with the appellant no. 2 presently wherein he is happily passing off his childhood and getting proper education, fooding and-lodging with no complaint.

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

1. This is an unfortunate litigation. The two parties are fighting for the custody of minor Ashu. The appellant No 1. is the mother; while the appellant No. 2. is the maternal uncle. The sole respondent is grandfather of the minor. The appellant No 1 was married with Brajveer Singh son of the sole respondent as per Hindu rites on 14th of March, 1994. The minor in question who is male child was born on 18th of April, 1995 out of this wedlock. For certain reasons the father and mother of the minor could not pull on well together and litigation started between them. Brajveer Singh, father of the minor is missing since 10th of June, 1998 and since then he has not returned home. A petition for divorce on the basis of cruelty being case No.787 of 1998 was instituted by Smt. Sangeeta, the appellant no.1 herein wherein an exparte decree dated 5th of March, 1999 has been passed. It has been stated that the minor is residing with his mother and the mother has been remarried on 18th of January, 1999 and the minor is residing with his maternal uncle, the appellant No.2 herein.

2. In the year 2000 an application under section 7/8 of Guardianship and Ward Act 1890 was presented by the grandfather (Mange Ram) before the District Judge, Baghpat claiming the custody of the minor. The said application after contest has been allowed by the order under appeal

3. Heard the counsel for the parties and perused the record. The court below has proceeded to decide the application on comparing the financial status of the respective parties. It was found that the respondent herein has got 30 bighas agricultural land, while the appellant no.2 has got only 15 bighas agricultural land. The family of the sole respondent consists of himself, his wife and two sons. The mother has left the minor as she has been remarried and there is every likelihood that the second husband will discriminate in between his own issues and the minor in question. The court below was of the view that welfare of the minor would be better served if his grandfather, the sole respondent herein, is appointed legal guardian and is given custody of the minor.

4. No doubt, in such matters welfare of a minor is the paramount consideration. It is Impossible to catalogue exhaustively the factors which may contribute to the welfare of the child. Capacity of the custodian to supply the daily necessities such as food, clothing and shelter is the primary consideration. To facilitate the child to receive education and to inspire him to go to the school is also not less important. It Is not in dispute that presently the minor is residing with the appellant No.2. Earlier, he was with his natural guardian i.e. mother, the appellant no.1, herein. It appears, that after remarriage, the minor is residing with the appellant no.2 who happens to be his maternal uncle. There is some dispute with regard to the exact date of birth of the minor. Either it is 28th of April, 1995 as per version of the respondent but according to the appellants the exact date of birth is 29th of May, 1996. Without entering into the controversy about the exact date of birth, the fact remains that the minor is living in the family members of his maternal uncle for the last 11-12 years. He must have been grown up by now. It has been also pointed out, which has not been denied by the respondent, that the minor is getting proper education. He is studying in English Medium School Rishikul Vidyapith and was in third standard in the year 2003 when the appeal was filed.

5. There is no material on record to show that during this period of about 11-12 years the grandfather of the minor in any manner has shown his concern with the welfare of the minor. The learned counsel for the respondent accepted that there is no material to show that the respondent has given any financial assistant or gift to the minor on the festivals or on any such occasions in any manner. The minor is residing with his parental uncle almost since birth and at this distance of time it is not appropriate to uproot him from there and to plant him at his grandfather's place. This may have negative impact on the health and mind of the minor specially when there is no such complaint that minor is not being looked after properly by the appellants.

6. The fact that the respondent no.1 happens to be grandfather of the minor is not in dispute but that fact alone will not tilt the balance in his favour in absence of

other overt act on the part of the grandfather to show his concern with the welfare of the minor.

7. While judging the welfare of the minor the court below was very much influenced by the fact that the sole respondent has larger agricultural holding than that of the appellant No 2. This fact itself is not such a weighty circumstance which may entitle the respondent to have the custody of the minor.

8. At this juncture it was rightly pointed out by the appellant's counsel that not a single shell was ever shed by the respondent towards the maintenance of the minor. The facts as they stood today there is no justification to grant the relief claimed by the respondent to have the custody of minor Ashu. The welfare of minor is with the appellant no. 2 presently wherein he is happily passing off his childhood and getting proper education, fooding and-lodging with no complaint.

9. Viewed as above, the judgment and order of the court below cannot be sustained and the court below was not right in reaching to the conclusion that the welfare of the minor is with the respondent.

10. In the result, the appeal succeeds and is allowed. The order under appeal is set aside and the application filed by the respondent in Misc. Case No.49 of 2000 stands rejected. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2007

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 43286 of 2007

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

Counsel for the Petitioner:
Miss. Anuradha Sundaram
Miss. Rashmi Tripathi

Counsel for the Respondents:
Sri Vivek Saran

Constitution of India Act 226-Alternative remedy-petitioner a skilled mechanic having I.T.I. certificate-denied the promotion-but promoted unskilled person-disputed of facts-requires adjudication by summoning the record as well as the witnesses-not feasible for writ court to examine the witness and record oral and documentary evidence-dismissed on alternative remedy.

Held: Para 12

In my opinion, the question whether the petitioner was unfit or not for promotion and whether respondent nos. 4,5 and 6 were qualified for being promoted or not, are disputed questions of fact which require adjudication on the basis of oral and documentary evidence by the Labour Court as it is not feasible for this Court to record oral and documentary evidence under Article 226 of the Constitution and give findings of facts thereafter.

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

1. Heard learned counsel for the petitioner, the Standing counsel for the respondents and perused the record.

2. The petitioner possesses I.T.I. diploma in Mechanical Diesel from State Institute of Training Board, Madhya Pradesh in 1986. He was appointed as cleaner in the UPSRTC in 1989 and was thereafter promoted to the post of Fitter in 1994 and since then he is continuously working on the said post at Regional Work-shop, Jhunsi.

3. It is alleged that a Trade test and Interview was held by the respondents Corporation for promotion on the various posts. The petitioner also appeared in the Trade test and interview held in the months of July/August, 2007.

4. After the result was declared by the order dated 4.8.2007 respondent nos.4,5 and 6 were declared successful whereas the petitioner was not declared successful. Aggrieved the petitioner has come up in this writ petition.

5. The counsel for the petitioner submits that the respondents authorities have adopted pick and choose policy in promoting the concerned employees of their choice as respondent nos. 4,5 and 6 have been declared successful even though they are not I.T.I. qualified in any trade of automobile.

6. It is urged that the petitioner has been wrongly declared unsuccessful though he is a skilled mechanic of automobile having qualification of I.T.I. Mechanic Diesel whereas respondent nos. 4,5 and 6 who have been declared successful and promoted are unskilled Body Mechanic and they are not having any Technical Training Certificate; that as per Service Regulation 1981 of the Uttar Pradesh Road Transport Corporation Employees (Other than Officers) promotion is to be made on the basis of rejection of Rule of unfit.

7. Sri Vivek Saran, counsel for the respondents submits that the petitioner has been awarded punishment vide order dated 13th March 2007 and that appeal preferred by him against the aforesaid order was rejected vide order dated 18th July, 2007 by the Appellate authority, hence the petitioner was not promoted having been found unfit for being promoted to next higher post.

8. Sri Vivek Saran, counsel for the respondents further submits that the petitioner has an efficacious and alternative remedy under the U.P. Industrial Dispute Act, 1947 in view of **Chandrama Singh Vs. Managing Director, U.P. Co-operative Union Lucknow and others, (1991) UPLBEC (2)-898.**

In rebuttal the counsel for the petitioner submit that in a similar matter i.e. Civil Misc. Writ Petition No. 9585 of 2006 Mangal Singh versus managing Director UPRSTC, Lucknow and others which was dismissed by this court vide order dated 16.2.2006 on the ground of availability of alternative remedy before the Labour Court. The aforesaid order dated 16.2.2006 was challenged in special Appeal no. 293 of 2006 before the Division Bench. The order dated 16.2.2006 was set aside vide order dated 30.3.2006 and the matter was remanded for a fresh consideration on merits.

The order dated 30.3.2006 is as under:-

"None for the respondents. The impugned order dated 16.2.2006 passed by Hon'ble Single Judge is set aside.

Since the writ petitioner was not approaching the Court in regard to deemed industrial Dispute **under Section 2-A of the U.P. Industrial Dispute Act, 1947**, sending him before the Labour Authorities was not an adequate alternative remedy. The complaint of the writ petitioner was against withholding of promotion. As such, the matter is remanded for a consideration on merits."

9. It appears that the Division Bench was mislead by the fact that the matter falls under Section 2-A of the U.P. Industrial Disputes Act, 1947 which pertains to which pertains to dismissal etc. of an individual workman to be deemed to be an Industrial dispute. Section 2-A of the Act is as under:- .

"2-A Dismissal etc, of an individual workman to be deemed to be an industrial dispute- Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman any dispute or difference between that workman and his employer connected with or arising out of such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial notwithstanding that no other workman nor any union of workman is a party to the dispute."

10. The matter in that case was not of dismissal from service falling under Section 2-A of the Act but was a case of promotion. That matter could be referred under Section 4-K of the Act.

11. It is clear from perusal of item 6 of the First Schedule and item no.7 of the Second Schedule appended to the U.P. Industrial Disputes Act, 1947 that U.P. Industrial Disputes Act, 1947 not only govern the dispute relating to dismissal, discharge or termination but also covers adjudication of dispute mentioned therein including promotion, classification of grade or promotion or payment of higher pay.

12. In my opinion, the question whether the petitioner was unfit or not for promotion and whether respondent nos. 4,5 and 6 were qualified for being promoted or not, are disputed questions of fact which require adjudication on the basis of oral and documentary evidence by the Labour Court as it is not feasible for this Court to record oral and documentary evidence under Article 226 of the Constitution and give findings of facts thereafter.

13. For the reasons stated above, the writ petition dismissed on the ground of availability of alternative remedy. No order as to cost.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2007

BEFORE
THE HON'BLE (MRS.) SAROJ BALA, J.

Criminal Revision No. 1105 of 2001

Mohammed Yusuf & others ...Applicants
Versus
State of U.P. & another ..Opposite Parties

Counsel for the Applicants:
Sri Akhtar Husain
Sri Rizwan Ali Akhtar

Counsel for the Opposite Parties:
Sri V.M. Zaidi
Sri A.M. Zaidi
A.G.A.

Code of Criminal Procedure Section 190 (1)(b)-Power of Magistrate-after receiving the final report-in the event of ignoring the report submitted by I.O.-can act only upon the statements recorded by the I.O. and material collected in case diary-but the consideration should not based upon protest application and affidavit filed by the prospective accused.

Held: Para 11

Where the Magistrate decides to take cognizance under Section 190 (1) (b) ignoring the conclusions reached at by the Investigating Officer and applying his mind independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not, permissible at that stage to consider any material other than that collected by the investigation Officer. In the instant case the cognizance was taken on the basis of the protest petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the complainant and the witnesses who had filed affidavits under Sections 200 and 202 Cr.P.C. The Magistrate could not take cognizance under Section 190 (1)(b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taken into account extraneous material i.e. protest petition and affidavits while taking cognizance under Section 190 (1) (b) Cr.P.C. the impugned order is vitiated.

AIR 1968 SC-117
1981 (18) ACC-146 (S.C.)
1989 (26) ACC (S.C.)-280
2001 (43) ACC-1096

(Delivered by Hon'ble (Mrs.) Saroj Bala. J.)

1. This criminal revision is directed against the order dated 28.2.2001 passed by the II Additional Civil Judge (Senior Division)/Additional Chief Judicial Magistrate, Bijnor, in case No. 76 of 2001 Zeeshan Vs. Yusuf & others whereby summoning the revisionists for the offences punishable under Sections 147, 323, 452, 504, 506 I.P.C.

The facts giving rise to the revision broadly stated are these:

2. An application under 156 (3) Cr.P.C. was moved by the Opposite Party No. 2 alleging that on 10.8.98 at about 1 P.M. the accused-revisionists came armed with lathi and sticks to the house of the complainant and using abusive language subjected him to assault with lathi, sticks, kicks and fists. The S.H.O., Chanadpur was directed by the A.C.J.M., II to register and investigate the allegations made in the application. The First Information Report was registered on 18.9.1998 as case Crime No. Nil of 1998 under Sections147, 323, 452,504, 506 I.P.C.. After investigation final report was submitted by the police. Notices were issued to the complainant. A protest petition alongwith affidavits of complainant and witnesses Mehaboob Raza and Naiyar was filed. By the impugned order the cognizance under Section 190 (1)(b) of Code of Criminal Procedure was taken on the basis of protest petition and affidavits filed in support thereof.

3. The contention of the revisionists is that the Magistrate committed illegality by summoning the revisionists without recording statements of the complainant and witnesses under Sections 200 and 202 Cr.P.C.

4. Heard Sri Akhtar Husain, learned counsel for the revisionists, Sri V.M. Zaidi and Sri A.M. Zaidi, learned counsel for the opposite party no. 2, the learned A.G.A. and have perused the record.

5. The learned counsel for the revisionists argued that on receipt of the protest petition with affidavits the Magistrate was empowered to take cognizance only under Section 190 (1) (a) of the Code of Criminal Procedure treating the protest petition as a complaint and adopting the procedure of complaint case as contained in Chapter XV of the Code of Criminal Procedure. The learned Magistrate having not taken cognizance straightaway on final report, the provisions of Section 190 (1) (b) were not applicable.

6. On the other hand the learned A.G.A. and learned counsel for the opposite party No. 2 contended that the Magistrate had jurisdiction to summon the revisionists after taking cognizance under Section 190 (1) (b) of the Code of Criminal Procedure.

7. The Apex Court in *Abhinandan Jha Vs. Dinesh Misra-AIR 1968 SC 117*, held that on receiving final report it was not within the powers of the Magistrate to direct the police to submit a charge-sheet but it is open to him to agree or disagree with the police report. If he agrees that there is no case made out for issuing process, he may accept the report and drop the proceedings. He may come to the conclusion that further investigation is necessary in that event he may pass an order to that effect. If ultimately the Magistrate is of the opinion that the facts set out in the police report constitute an offence, he can take cognizance of the offence, not withstanding the contrary opinion expressed in the police report. It was observed therein that the Magistrate in that event could take cognizance under Section 190 (1)(c) of the Code. The reference to Section 190 (1)(c) was a mistake for Section 190 (1)(b) as pointed out in a later decision of *H.S. Bains V. State, 1981 (18) ACC 146 (SC)*.

8. In *H.S. Bains* (Supra), it was held by the Apex Court that the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses expressed in the police report submitted to the Magistrate under Section 173 (2) Cr.P.C.. The Magistrate may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police.

9. In *Mis India Carat Pvt. Vs. State of Karnataka,- 1989 (26) ACC 280 (SC)* it was held as under:

"The position is, therefore, now well settled that upon receipt of a police report under Section 173 (2) a Magistrate is entitled to take cognizance of an offence under Section 190 (1) (b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190 (1)

(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusions arrived at by the investigation officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190 (1) (b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190 (1)(a) though it is open to him to act under Section 200 or-Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him."

10. In *Pakhando & others Vs. State of U.P. & another, 2001 (43) ACC 1096*, a Division Bench of this Court held that where the Magistrate receives final report the following four courses are open to him and he may adopt anyone of them:

(I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant; or

(II) He may take cognizance under Section 190 (1)(b) and issue process straightaway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or

(III) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190 (1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

11. Where the Magistrate decides to take cognizance under Section 190 (1) (b) ignoring the conclusions reached at by the Investigating Officer and applying his mind independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not, permissible at that stage to consider any material other than that collected by the investigation Officer. In the instant case the cognizance was taken on the basis of the protest petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the complainant and the witnesses who had filed affidavits under Sections 200 and 202 Cr.P.C. The Magistrate could not take cognizance under Section 190 (1)(b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taken into account extraneous material i.e. protest petition and affidavits while taking cognizance under Section

190 (1) (b) Cr.P.C. the impugned order is vitiated.

12. In view of the above discussion, the revision succeeds. The impugned order dated 28.2.2001 is set aside. The case is remanded to the Magistrate concern for a decision afresh in accordance with law.

Certify the judgment to the court below within two weeks.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.10.2007

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

Civil Misc. Writ Petition No. 55427 of 2007

Mohammad Asharaf and another
...Petitioners
Versus
Additional District Judge, Court No. 9, Varanasi and others ...Respondents

Counsel for the Petitioners:
Sri D.S.P. Singh
Sri Shailendra Kumar Singh

Counsel for the Respondents:
Sri Kripa Shanker Singh
Sri Ateeq Ahmad Khan
Sri R.K. Mishra
Sri Swapnil Kumar
Sri Ajay Kumar
Sri Ajeet Kumar
Sri Manu Saxena
S.C.

(A) U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act, 1972-Section 20 (4)-Date of first hearing-if the written statement is filed on first day or at the time allowed by Court-the adjourned date shall be treated as first date of hearing-held-petitioner entitled for benefit of Section 20 (4) of the Act.

Held: Para 5

That if written statement is filed within the time/extended time granted by the court then no date prior to the date of filing of written statement can be taken to be the date of first hearing. In the instant case on 4.9.2000 petitioners were permitted to file written statement by 19.10.2000 and on 19.10.2000 they filed written statement, hence 19.10.2000 was the date of first hearing. Accordingly, in my opinion the petitioners were fully entitled to the benefit of section 20 (4) of the Act.

Case law relied on.
2004 (2) ARC-659

(B) U.P. Urban buildings (Regulation of letting Rent and Eviction Act, 1972-Section 20 (2)(e)-Sub letting-whether the brother or the son of brother of chief tenant working in the same room without partition or rent can be treated as sub tenant?-held- 'No'.

Held: Para 10

The Supreme Court has clarified that in case tenant completely withdraws his possession from the entire tenanted building and allows it to be occupied by his brother, then it will amount to subletting. On the same principle, if petitioner No.1, the tenant allowed his real brother's son, i.e. petitioner No.2 to occupy a small portion of the shop in dispute and do independent business there from, then it cannot amount to subletting.

Case law discussed:
ADJ (2) ARC-64
AIR 2002 SC-676

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

1. Heard learned counsel for the petitioner.

2. This is tenants' writ petition. Landlord-respondent no. 3 Mohd. Shafeek Ahmad Siddiqui filed suit for eviction against the tenant petitioner in the form of S.C.C. Suit no.61 of 2000 on the ground of default and sub-letting. J.S.C.C. Varanasi decreed the suit through judgement and decree dated 29.1.2000. Against the said judgement and decree petitioner filed Civil Revision (ought to be S.C.C. Revision) No.7 of 2002. A.D.J. Court No.9 Varanasi dismissed the revision on 23.10.2003, hence this petition.

3. Rate of rent is Rs.75/- per month and the property in dispute is a shop situate in Varanasi.

4. In respect of default tenant-petitioner sought the benefit of section 20 (4) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. In order to avail the said benefit petitioners deposited Rs.2428/- on 4.8.2000 and Rs.2108/- on 19.10.2000. Date 04.08.2000 was the date fixed in the summons. On the said date petitioners sought adjournment on the ground of illness of their counsel, which was granted and 04.09.2000 was fixed. On 04.09.2000 also some more adjournment was sought by the tenants-petitioners which was allowed and 19.10.2000 was fixed. There is no serious dispute that if 19.10.2000 is taken to be the date of first hearing, then the petitioners' deposit was complete and they were entitled to the benefit of Section 20 (4) of the act. However, the courts below took 04.08.2000 as the date of first hearing.

5. After discussing five authorities of the Supreme court on the interpretation of first date of hearing used in section 20 (4) of the Act, I have held in **K.K. Gupta vs. A.D.J.2004 (2) A.R.C. 659**. That if written statement is filed within the time/extended time granted by the court then no date prior to the date of filing of written statement can be taken to be the date of first hearing. In the instant case on 4.9.2000 petitioners were permitted to file written statement by 19.10.2000 and on 19.10.2000 they filed written statement, hence 19.10.2000 was the date of first hearing. Accordingly, in my opinion the petitioners were fully entitled to the benefit of section 20 (4) of the Act.

6. In respect of sub-letting the allegation was that defendant-petitioner no. 1 had sublet the shop in dispute to defendant no. 2, Najmuz Zaman. Najmuz Zaman is son of real brother of the tenant. Issue no. 6 framed by the trial court and point no. 3 framed by revisional court related to sub-tenancy.

7. Revisional Court has categorically held that petitioner No.2 is son of real brother of petitioner No.1 and petitioner No.2 is having his P.C.O. in a portion of the shop in dispute. However, there is no finding that the portion in which petitioner No.2 is having his P.C.O. has been so completely separated from the main shop that it has become an independent shop having got no concern with the remaining portion. There is no allegation that walls etc. had been placed and the portion where petitioner No.2 is carrying on the business of P.C.O. has got independent opening.

8. Even though by virtue of Section 105 of Transfer of Property Act, there cannot be any tenancy or sub-tenancy without rent, however in case of sub-tenancy it is not necessary for the landlord

to prove that rent was paid by the sub-tenant to the chief tenant for the reason that it is almost impossible for the landlord to collect evidence in that regard, particularly when sub-tenancy is prohibited under law. Accordingly, it has been held in several authorities that mere exclusive possession of a person, other than tenant, may be sufficient to prove sub-tenancy vide **Bharat Sales Ltd., M/s. V. Life Insurance Corporation of India AIR 1998 S.C. 1240" and J.S. Sodhi Vs. A. Kaur 2005 (1) SCC 31**. It is also correct that neither real brother nor his son is included in the definition of family of the tenant as provided under Section 3(g) of the Act. However, in this regard, the case of a very close relation of tenant will have to be placed at a slightly different level, than the case of a total stranger.

9. Sub-letting: is a ground for eviction under Section 20 (2) (e) of the Act, which is quoted below:-

"20(2)(e) that the tenant has sub-let, in contravention of the provisions of Section 25, or as the case may be, of the old Act the whole or any part of the building"

Section 25 of the Act is quoted below:-

"25. ***Prohibition of Subletting -(1)*** *No tenant shall sub-let the whole of the building under his tenancy.*
(2) The tenant may with the permission in writing of the landlord and of the District Magistrate, sub-let a part of the building.

Explanation - For the purposes of this section-

(i) where the tenant ceases, within the meaning of clause (b) of sub-section (1) or sub-section (2) of Section 12, to occupy the building or any part thereof, he shall be deemed to have sub-let that building or part;
(ii) lodging a person in a hotel or a lodging house shall not amount to sub-letting."

Section 12(1) (b) is quoted below:-

"12. Deemed vacancy of building in certain cases.*-(1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if-*
(b) he has allowed it to be occupied by any person who is not a member of his family"

10. On a plain reading of the above provisions, one may get an impression that if tenant has allowed his brother or brother's son to reside with him in the tenanted accommodation or to do business from a portion of the tenanted shop, then sub-letting takes place. However, the Supreme Court in **AIR 2002 SC 676 "Ganesh Trivedi v. Sundar Devi"** has held that if the tenant of a residential building allows his brother to reside with him then it does not amount to vacancy or sub-letting. The Supreme Court has clarified that in case tenant completely withdraws his possession from the entire tenanted building and allows it to be occupied by his brother, then it will amount to subletting. On the same principle, if petitioner No.1, the tenant allowed his real brother's son, i.e. petitioner No.2 to occupy a small portion of the shop in dispute and do independent business there from, then it cannot amount to subletting.

11. Accordingly, I am of the opinion that findings of the courts below on both the points, i.e. Denial of benefit of Section 20(4) of the Act to the tenant and sub-letting are erroneous in law and liable to be set aside.

12. Accordingly, writ petition is allowed. Both the impugned judgments, decree of trial court and order of the revisional court are set aside. Suit of the landlord for eviction is dismissed. Decree for recover of rent/permission to the landlord to withdraw the amount deposited by the tenant shall stand.

13. I have held in **Khursheeda Vs. A.D.J., 2004 (2) ARC 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.

14. The shop in dispute is quite big in size and is situated in Varanasi. Accordingly, it is directed that w.e.f. October, 2007, onwards tenant petitioner shall pay rent to the landlord respondent @ Rs.1750/- per month inclusive of water tax etc. No further amount over and above Rs.1750/- per month shall be payable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2007

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

Civil Misc. Writ petition No 57671 of 2007

Smt. Lalita and another ...Petitioners
Versus
Union of India and others ...Respondents

Counsel for the Petitioners:
Sri Sanju Ram

Counsel for the Respondents:
Sri Govind Saran
S.C.

Constitution of India-Art. 226-Compassionate appointment-wife of deceased employee was 28 years at the time of death-never claimed for her appointment-after 18 years claimed appointment to her son (adopted) who was minor at that time-rejection of such belated claim-held-proper-not a right of succession of employee-or vested right of claimant but to provide immediate succor to the bereaved family-claim after such long time-contrary to very object of compassionate appointment.

Held: Para 18

We are, therefore, clearly of the view that the claim for compassionate appointment after a long time would be contrary to the very basis, purpose and objective of the scheme of compassionate appointment and cannot be considered at all. We do not find any fault in the judgment of the learned Tribunal dismissing the Original Application of the petitioners.

Case law discussed:
AIR 1989 SC 1976, 1994 (4) SCC-138, JT 1997 (8) SC 332, 1998 (5) SCC 192, JT 2000 (10)

SC 156, 2002 LLJ 773, 2003 (7) SCC 511, AIR 1996 SC 1936

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

1. We have heard Mr. Sajnu Ram, learned counsel for the petitioners and Sri Govind saran, learned Standing Counsel for the respondents- Railway and also perused the record.

2. The petitioner are aggrieved by the judgement/order dated 31.7.2007 passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad (in short the Tribunal) dismissing Original Application No 419 of 2004 (Smt. Lalita and another Vs. Union of India and another) whereby the petitioners have sought for mandamus commanding the respondents to provide compassionate appointment to petitioner no.2.

3. It is not disputed that Late Lilit Kumar Singh was the employee of the Railway Department, and died on 12th October, 1989. At that time petitioner no.2 was minor, who claims to be the adopted son of petitioner no.1 (deceased employee). Petitioner no.2 has disclosed his age as 28 years in the affidavit, he must have attained majority in the year 1998. It is not the case of petitioner no.1 that she had ever made any application claiming compassionate appointment for herself. It is on the contrary admitted that she requested the authority concerned to provide compassionate appointment to her son, who is petitioner no.2, which could not have been granted prior to 1998, since he was minor. Learned counsel for the respondents contends that petitioner no.2 could attain the age of majority in the year 1998 and after such a long lapse of time compassionate appointment could not have been given. Moreover after 18 years of the death of the husband of petitioner no. l, the request to provide compassionate appointment cannot be considered.

4. We have considered the rival submissions and are of the view that though the learned Tribunal has rejected the claim of the petitioner by disbelieving the theory of adoption of petitioner no.2, without entering into that controversy, even otherwise, the request of the petitioner for compassionate appointment should not be considered after such a long time and has rightly been rejected by the respondents. The moot point, which we have considered in this case is whether after more than a decade a person can claim compassionate appointment and whether such request can be considered only on the ground that earlier the child or children being minor could not have been considered for compassionate appointment but after attaining the majority they are entitled to be considered for such appointment.

5. The purpose and objective of compassionate appointment is to provide immediate succor to the bereaved family whose sole bread earner has died in harness. It is not a source of recruitment. It only enables the family to tide over the sudden crisis and not to give a member of such family a post much less a post held by the deceased. It is not a kind of right of succession in the service when the employee has died in harness. The compassionate appointment has always been considered to be an exception to the Rules made in favour of the family of the deceased employee in consideration of services rendered by him and legitimate expectations, change in status and affairs

of family endangered by the erstwhile employment which are suddenly upturned. It cannot be allowed as a matter of course. There is no question of reserving a vacancy for the Dependents of deceased employee so as to provide them as and when they claim the same after acquiring requisite qualification, age etc. If compassionate appointment is allowed after reasonably long time, it would defeat the very object of assisting the family of deceased employee to tide over the sudden crisis resulting due to the death of bread earner, leaving his/her family in penury and without any means of livelihood. The matter has been considered by the Apex Court as well as this Court time and again and it would be useful to have a bird's eye view on some of such authorities of Apex Court.

6. In the case of ***Sushma Gosain and others v. Union of India and others, AIR 1989 SC 1976***, the Apex Court while considering the object of granting appointment observed as under: -

"The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread-earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress,"

7. In the case of ***Umesh Kumar Nagpal v. State of Haryana and others, 1994 (4) SCC 138***, the Apex Court reiterating the said purpose further explained nature of right of legal heirs qua employment, as under: -

"The whole object of granting compassionate employment is, thus, to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, 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 a job is to be offered to the eligible member of the family.....The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz. relief against destitution. No other posts are 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 to 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 the status and affairs of the family engendered by the erstwhile employment, which are suddenly upturned..... Unmindful of this legal position, some Governments and public authorities have been offering compassionate employment sometimes as a matter of course irrespective of the financial condition of the family of the deceased.....The decision does not justify compassionate employment either as a matter of course.....The only ground which can justify compassionate employment is the penurious condition of the deceased's family..... The consideration for such employment is not a vested right..... The

object being to enable the family to get over the financial crisis."

8. In the case of ***Haryana state Electricity Board and another v. Hakim Singh, JT 1997 (8) SC 332***, the Apex Court cautioned that the object of providing compassionate employment is only to relieve the family from financial hardship. Therefore, an ameliorating relief should not be taken as opening of alternative mode of recruitment to public employment.

9. Again In ***Director of Education (Secondary) and another v. Pushpendra Kumar and others, 1998 (5) SCC 192*** the Apex Court observed as under: -

"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-earned 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 the ends meet, a provision is made for giving gainful appointment to one of the dependants 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 cannot subsume the main provision to which it is an exception and thereby nullify 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 provision, 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 for the dependent of a deceased employee." (emphasis added)

10. In Sanjay Kumar v. State of Bihar and others, JT 2000 (10) SC 156, the Apex Court reiterated that the compassionate appointment is provided only to enable the family of the deceased employee to tide over sudden crises resulting due to the death of sole bread-earner who had left the family in penury without any means of livelihood but it cannot be treated to be a reserved vacancy for the dependants of the deceased Government servant who died in harness.

11. In the case of ***Haryana State Electricity Board v. Krishna Devi, 2002 LLJ 773***, the Apex Court while reiterating the objective of compassionate appointment as laid down in the earlier cases further observed that the application made at a belated stage cannot be entertained for the reason that by lapse of time, the purpose of making such appointment stands evaporated.

12. If the family has sufficient means to survive for years together and can take care of the minors turned into major after undergoing educational qualification etc. that itself would be evident to show that now the family is not in financial crisis as it could have at the time of sudden demise of the deceased

necessitating compassionate appointment at a late stage i.e. after several years.

13. In ***State of Manipur v. Mohd. Rajaodin, 2003 (7) SCC 511***, the Apex Court reiterated that the purpose of giving compassionate appointment is only to mitigate hardship caused to the family of the deceased on account of his unexpected death in service, only to alleviate the distress of the family but at a belated stage as these grounds are no more in existence, therefore, the employment cannot be claimed or provided.

14. Thus, in view of catena of decisions in the matter of compassionate appointment, some of which have been discussed and referred above, it is clear that the compassionate appointment cannot be claimed as a 'vested right'. The term 'vested right' has been considered and described by the Apex Court in the case of ***Mosammat Bibi Sayeeda and others v. State of Bihar and others, AIR 1996 SC 1936*** wherein after referring to dictionary meaning in various dictionary, the Apex Court has observed as under:-

"Rights are vested when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest."

15. Thus, the vested right may arise from contract, statute or by operation of law. However, asking for compassionate appointment after attaining the majority by no stretch of imagination can be said to be a vested right.

16. This Court cannot be obvious of the fact that unemployment is a major problem in our country. Lacs and millions educated unemployed persons are wandering employment and even for a single petty Class IV vacancy, hundreds and thousands applied which includes not only those who possesses the minimum, qualification of secondary levels or less but even graduate and post-graduate. At times it has been seen that even persons having doctorate have applied for the lowest class of service i.e. Class IV. In such a situation, public employment must be available to eligible and suitable persons to be filled in by competition and all who are willing should be given an opportunity of consideration. Asking for a vacancy to be kept reserve so as to be filled-in future on the basis of notional extended distress to the family continuing for years together would amount to denial of such right of consideration to other similarly placed unemployed and destitute persons whose only faults is that their ancestors could not get the opportunity of employment and, therefore, they should also suffer the same misfortune. Compassionate appointment in fact has an element of an immediate help to the family of the deceased employee. The heirs in distress lacking sufficient and reasonable means to survive with some honour must request for such help immediately or within a reasonable time. To some extent, no doubt, it is a condition of service and the benefit available to employee in general but extension of such conditions of service to an unreasonable extent would or may erode the difference between valid and invalid and any such stretch may render the provisions of the compassionate appointment to be judged on the anvil of Article 16 of the Constitution of India which confers right of equal opportunity in public employment to all persons. The Court cannot shut its eyes, to the fact that still majority of people are continuing to be

tiny, poor starving little Indians and still are below poverty line. Their distress and penury appears to be everlasting, as if they are bound to live in distress permanently. Their misery and destitute is not the result of sudden demise of the sole bread-earner but is caused by their fate and for the reason of non-availability of employment. They are not in a position, even though they are alive, to earn two times simple bread what to talk of bread and butter. The distress of such persons is neither negligible nor can be ignored. In the pragmatic society, efforts had to be made to read and apply law wherever permissible which will extend an opportunity of equal consideration for public employment to public at large irrespective of their lineage, ancestral hierarchy etc.

17. In state of ***Jammu & Kashmir and others v. Sajad Ahmed Mir, AIR 2006 SC 2743*** similar facts were involved and considering the same, the Apex Court held that when the deceased employee died in 1987 and his son approached the authorities in 1999, i.e., more than a decade, the same itself disentitles him to claim any benefit of compassionate appointment and observed that the view taken by the High Court in favour of the dependant of the deceased employee amounts to misplaced sympathy. It reiterated the objective of compassionate appointment as under: -

"We may also observe that when the Division Bench of the High Court was considering the case of the applicant holding that he had sought 'compassion', the Bench ought to have considered the larger issue as well as it is that such an appointment is an exception to the general rule. Normally, an employment in Government or public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed except where compelling circumstances demand, such as, death of sole bread earner and likelihood of the family suffering because of the setback. Once it is proved that in spite of death of bread earner, the family survived and substantial period is over, there is no necessity to say 'goodbye' to normal rule of appointment and to show favour to one at the cost of interests of several others ignoring the mandate of Article 14 of the Constitution of India."

18. We are, therefore, clearly of the view that the claim for compassionate appointment after a long time would be contrary to the very basis, purpose and objective of the scheme of compassionate appointment and cannot be considered at all. We do not find any fault in the judgment of the learned Tribunal dismissing the Original Application of the petitioners.

19. The writ petition, accordingly, lacks merit and is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2007

BEFORE
THE HON'BLE K.S. RAKHRA, J.
THE HON'BLE S.K. JAIN, J.

Criminal Appeal No.1096 of 1982

Bira and others ...Appellants (In Jail)
Versus
State ...Respondent

Counsel for the Appellants:
Sri P.N. Misra
Sri Apul Misra
Sri Ram Babu Sharma

Counsel for the Respondents:
Km. Usha Kiran
A.G.A.

Indian Penal Code- Section 302/149-readwith U.P. Children Act-Section 27-Sentence of life imprisonment-at the time of occurrence the appellant was below than 16 years. No justification of sending reformatory school considering the age of appellant at present time as 27 years-Conviction of Appellant-Bira-set-a-side-conviction of other appellant confirmed.

Held: Para 31

In the instant case appellant Bira was a child within the meaning of section 2(4) of U.P. Children Act 1951 and now after 27 year of the incident there is absolutely no justification for sending him to a reformatory school. In similar situation the Apex court in Jayendra case (supra) upheld the conviction but the sentence of imprisonment imposed upon the accused who was a child on the date of delinquency but had become major by the time his appeal, was decided was set aside we are of the opinion that similar treatment can be given to the appellant Bira in this case.

Case law discussed:
AIR 1982 SC 685
AIR1998 (5) SCC697
AIR 1984 SC-237
J.T. 2005 (2) SC - 271

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

1. Seven persons aggrieved by the judgment and order dated 16.4.1982 passed by VII Addl. Sessions Judge, Aligarh in S.T. No. 277 of 1980 State Vs. Bira and others, preferred this appeal under section 374(2) Cr.P.C. Out of seven appellants three namely Omveer, Ahmad Saeed and Suresh have expired during pendency of appeal and their appeal has abated vide order dated 18.7.2007. The remaining appellants namely Bira son of Saudan, Tara son of Munshi. Onkar son of Hira Singh, all resident of Kidhara police station harduwaganj district Aligarh and Mohd.Shafi resident of Harduwa police station Harduwaganj have been sentenced by the trial court to life imprisonment under section 302/149 IPC and three years rigorous imprisonment under section 452 IPC. In addition to this, appellants Bira, Tara and Onkar have further been sentenced to seven years rigorous imprisonment under section 307 read with 149 IPC and one and half year's rigorous imprisonment under section 148 IPC. Similarly Mohd. Shafi has further been sentenced to five year's rigorous imprisonment under section 307 read with 149 IPC and one year's rigorous imprisonment under section 147 IPC. The case relates to police station Harduwaganj district Aligarh and has arisen out of crime case no.79 of 1980.

2. According to the prosecution, about 5 to 6 years prior to the date of occurrence, an attempt was made on the

life of Shishupal uncle of Jalsur. In that connection, appellant Tara, his brother Mahabir and father Munshi faced trial under section 307 IPC and were held guilty and sentenced to four years rigorous imprisonment by the court of Session. In appeal, the conviction was maintained but sentence was reduced to two years. It is said that since then Munshi is absconding Appellants Tara, Bira and Onkar are related to one and another.

Jalsur had also lodged a report under section 395 IPC against Tara and Mahabir but the said case ended in acquittal.

3. The prosecution case is that in the night of 22/23.3.1980 at about 12'O clock Jsalsur and his uncle Onkar Singh son of Sher Singh (the deceased) were sleeping on the roof of their 'Kotha' in village Kidhara In front of his house, on the chabutara, one Jagdish who runs a shop in outer room of informant's house was sleeping. This Jagdish heard sound of movement of certain persons and suspecting that some malefactors were reaching there to commit some crime. Jagdish raised alarm and took to his heals. Informant Jalsur and his uncle Onkar also woke up. While Onkar climbed down from Kotha towards Chabutara, Jalsur jumped in the adjoining house of his uncle Bahori and came out in the open and set fire to a 'Chappar' in front of his own house. In the light of fire made on account of burning of 'Chappar', he saw appellants Bira, Tara, Onkar and their companions scuffling with his uncle Onkar (the deceased). Bira was armed with gun. Tara and accused Onkar had country made pistol and their companions were also armed with lathi, ballam and fire arm. On the alarm being raised, villagers started collecting. Some of the companions of Bira, Tara and Onkar then climbed up the roof of the house and kept on firing indiscriminately in order to scare the witnesses. The informant also saw that during Bira, Tara and accused Onkar scuffling with the deceased, a shot was fired which struck in his chest. Some of their companions climbed down in to the house of informant. They tried to break open the door of the rooms but on their failure to do so they opened fire on the doors as well as in side the room through a ventilator. This firing caused injuries to informant's son Chandra Bose and daughter Tarawati. On seeing pressure mounting, the culprits pushed the deceased into the fire of 'Chappar' which was set ablaze by the informant. It is claimed that in this incident some of the culprits also received injuries of stray pellets from the shot fired by themselves. Informants uncle Onkar son of Sher Singh died on the spot.

4. A report of this incident was lodged by Jalsur (P.W.2) on the same day at 2.15 a.m. at the police station which was three miles away. In the FIR the above incident was narrated and motive of the crime was also indicated. It was further alleged that this crime was committed in connivance with Rati Ram. Thus Bira, Tara, Onkar Singh son of Hira Singh and Rati Ram were named in the FIR and it was mentioned that they were accompanied by 8-10 unknown male-factors whose faces had been seen and they could be identified by the witnesses. The incident was witnessed by informant Jalsur. PW-2 Shishu Pal P.W.3, Bani Singh P.W.4 besides others.

5. At the police station Harduwaganj, the case was registered by

constable clerk Karan Singh, P.W.9. He prepared chik report and the investigation of the crime was taken over by S.O. N.P.Singh J.W.6. He visited the place of occurrence and got an inquest of the dead body conducted through S.I. Sarnam Singh. After due formalities and preparation of relevant documents, dead body of Onkar son of Sher Singh was sent for autopsy. The Investigating Officer recorded the statements of the witnesses, made spot inspection and at the place of occurrence, he found seven empty shells of 12 bore cartridges fired by the culprits. He took them into possession and prepared recovery memo. A site plan was prepared and sample of bloodstained and plain earth was collected. He also collected from the place of occurrence sample of ash of burnt 'Chappar' and prepared memo thereof.

6. On 25.3.1980 at about 12 O clock in the noon in village Gur Sikaran, the Investigating Officer arrested appellant Mohd. Shafi alongwith Ahmad Saeed, Suresh etc. in connection with some other crime. Since they confessed their involvement in the present crime also he made them 'Baparda' on the spot and brought them to the police station. One of the culprits Mohd. Shafi was also found having some fire arm injuries on his body. He was therefore sent for medical examination.

7. Dr. D.P. Singh, P.W.1 of PHC Harduwaganj had examined the injuries of Tarawati daughter of Jalsur on 23.3.1980 at 1.15 p.m. and following injuries were found by him:-

1. Lacerated circular pellet wound 1/8" x 1/8" x muscle deep on the anterior aspect of scalp exactly in the mid line of head.

The injuries, in the opinion of the doctor, were simple and were caused by fire arm and it was half day old.

Similarly Chandra Bose was examined by this doctor on 23.3.1980 at 1.20 p.m. and the following injuries were found on him:-

1. Lacerated circular wound 1/8" x 1/8" x muscle deep (In the right side of face, 1 ½" in front of the lower angle of right mandible.
2. Lacerated circular wound 1/8" x 1/8" x muscle deep on the right side of scalp, 4 ½", above the base of right ear and 1 ½" away from mid line.
3. Lacerated circular wound 1/8" x 1/8" x muscle deep on the left side of scalp ½" away from mid line and 2 ½" above the left eye brow.
4. Lacerated circular wound 1/8" x 1/8" x muscle deep on the left side of scalp 1" behind the injury no.3.

All the injuries were simple in nature and were caused by fire arm and their duration was about half day old.

Similarly the same doctor examined the injuries of Mohd. Shafi on 26.3.1980 at 11.15 a.m. and the following injuries were found on his person:-

1. Circular wound 1/8" x 1/8" x muscle deep on the front aspect of right forearm 4" below the level of right elbow joint.
2. Multiple circular wound 1/8" x 1/8" x muscle deep on the front and lateral aspect of right upper arm 12 in numbers in an area 8" x 5" between the shoulder and elbow joint.
3. Three circular wounds 1/8" x 1/8" x muscle deep each in an area of 3 ½" x 2" on the top of the right shoulder joint.

4. Multiple circular wounds 1/8" x 1/8" x muscle deep, 5 in numbers.
extending in a linear fashion starting from 3 ½" above the right nipple to the lower part of 9th rib at a place 6 ½" away from mid line of back.

In the opinion of the doctor, all the injuries were simple and were caused by fire arm. Duration of these injuries was found to be 3 ½", days which is corresponding to the date of incident.

The post mortem examination of the dead body of Onkar Singh son of Sher Singh was conducted by Dr. Pradeep Kumar, P.W.7 on 23.3.1980 at about 5.15 a.m. Following ante mortem injuries were found on his person:

1. Gun shot wound of entry on left nipple 1" x 1" x chest cavity deep, margins inverted, blackening and tatooing present around the wound, part of lung coming out of the wound.
2. Abrasion 3" x 1" on the top of left shoulder.
3. Abrasion 1" x ½" on the right elbow.
4. Abrasion 2" x 1" on the right iliac spine region.
5. Abrasion 1 ½" x ½" on left iliac spine region.
6. Abrasion 3" x 1" x on upper part of right leg.
7. Abrasion ½" x ½" on middle part of left leg.
8. Abrasion 2" x 1" on the right side of back.
9. Superficial burn on left side of chest and abdomens.

8. On the internal examination, 3rd, 4th,5th,6th,7th, ribs on the left side were found fractured. In the right lung 800 ml. of dark blood and 12 pellets were recovered. Left lung was lacerated and 8 pieces of wadding were recovered. In large intestine gases and faecal matters were found. In the opinion of the doctor, death had occurred due to shock and haemorrhage due to ante mortem injuries and duration of death was 3/4 day to one day.

9. Four persons namely Omvir, Ahmad Saeed, Mohd. Shafi and Suresh who were arrested by the police on 25.3.1980 in connection with a crime u/s 307 IPC and confessed in the present crime, were subjected to test identification on 17.5.1980. The test identification was conducted by P.W.8 Fasiuddin. In the test identification informant Jalsur identified all the above four persons without committing any mistake. Similarly Bani Singh P.W.4 identified them without committing any mistake. Three other witnesses namely Roshan Singh. Shishu pal and Hukum Singh also participated in the test identification of the culprits. Out of them Roshan Singh rightly identified Omvir and Suresh and committed two mistakes, Sishupal rightly identified Omvir and Mohd. Shafi and committed one mistake. Hukum Singh could not identify any of the aforesaid four persons.Thus against appellant Mohd. Shafi the Investigating Officer found two good identifying witnesses besides two partly good witnesses.

10. On the basis of above evidence, S.O. N.P. Singh P.W.6 submitted charge sheet against Bira, Tara and Onkar whereas against Mohd. Safi and the deceased appellants, charge sheet was submitted by next officer S.I. Kusum Lata.

11. The defence taken by Bira, Tara and Onkar was that they had been falsely implicated by informant on account of enmity whereas the stand taken by Mohd.Shafi was that he has been falsely implicated by the police on account of enmity with him.

12. In order to bring home the charge, the prosecution examined 11 witnesses in all. Out of them Jalsur, P.W.2, Shishupal P.W.3 and Bani Singh P.W.4 are the alleged eye witnesses. Jalsur is the first informant while Shishupal is his real uncle and witness Bani Singh is his 'Khandani' uncle. All these witnesses had tried to support the prosecution version. Jalsur PW-2 narrated the entire Incident as mentioned in the FIR and claimed that he had seen Bira, Tara and Onkar alognwith his companions whom he did not recognise scuffling with the deceased Onkar son of Sher Singh who was also fired at on account of which he died on the spot. He stated that he had set fire to 'Chhappar' in front of his house, which made sufficient light. In the light of 'Chappar' fire he and the witnesses had identified Bira, Tara and Onkar. He also deposed before the trial court that some of the culprits climbed on the roof and opened fire on them while their companions jumped in side the house and opened fire with a view to get the doors of the house opened and they also made firing in the room through ventilator causing injuries to Tarawati and Chandra Bose. Before the trial court this witness also identified the appellant Mohd. Shafi as one of the culprits and stated that he had seen him in the incident and identified him at the time of test identification parade. He denied the fact that he knew Mohd.Shafi from before. He also clearly denied the fact that the incident was an abortive attempt of dacoity and clearly stated that neither any property was looted from his house nor culprits were looking for the property.

13. The statement of Jalsur P.W.2 is duly corroborated by the statement of P.W.4 Bani Singh whose house was at a space of three houses from the house of the informant. His presence on the spot is very natural and probable. There is no doubt that the incident had taken place in the night where firing was resorted to and Onkar son of Sher Singh was fired at whereas Chandra Bose and Tarawati received injuries. In such circumstance, gathering of villagers near the place of occurrence is very natural and probable. The Investigating Officer had also found ash of burnt 'Chappar' on the spot. There was sufficient light and the witnesses had opportunity to see the miscreants. He also stated unequivocally that amongst the miscreants he had identified Bira, Tara and Onkar who were duly armed with fire arm. He clearly stated that this incident was committed not with a view to make any loot but was intended to commit murder. He had also identified Mohd.Shafi and others in the court as persons who had participated in the crime. Nothing significant could be taken out from his testimony in the cross examination by the defence.

14. Similarly the statements of above two witnesses have been corroborated by the statement of P.W.3 Shishupal whose house is at the distance of four houses from the house of the informant. This witness is blind from one eye but can fully and properly see from second eye. He also reached the place of occurrence on hearing the alarm and had seen the same from near Chabutra of

Informant's house. He named Bira, Tara and Onkar who were armed with fire arm and stated that they were accompanied by their companions armed with lathi, Ballam and fire arm. He denied the suggestion that it was an incident of dacoity. He confirmed the fact that Onkar son of Sher Singh was done to death by the miscreants who were scuffling with him and also opened fire. This witness is real uncle of informant but the defence could not take out any significant statement from him which may render his testimony doubtful.

15. Testimony of these witnesses gets corroboration from the statement of P.W.1 Dr.D.P.Singh who had examined injuries of Chandra Bose and Tarawati on 23.3.1980 at PHC Harduwaganj. Subsequently on 26.3.1980 the witness had also examined Mohd. Shafi on whose person, three and half days old fire arm injuries, similar in nature as were found on the person of Chandra Bose and Tarawati, were found.

16. Statement of Dr. Pradeep Kumar P.W.6 who had conducted post mortem examination on the body of Onkar son of Sher Singh further corroborates, the above evidence. He had found a gun shot injury on the chest of the deceased with blackening and tattooing around it. Significantly there was also superficial burn injury on left Side of chest and abdomen. This fully corroborates the FIR that miscreants before leaving the place of occurrence had thrown Onkar son of Sher Singh in the fire of 'Chappar'.

17. Rest of the witnesses examined by the prosecution are P.W. 5 Bhagat Singh constable who had carried the dead body for autopsy. P.W.6 SI N.P. Singh, Investigating Officer, P.W.8 Sri Fasiuddin who had conducted test identification parade on 17.5.1980, P.W. 9 constable Karan Singh who had registered the case at the police station and deposed that Mohd. Shafi and other accused arrested on 25.3.1980 were kept Baparda in the police station. P.W 10 Kaptan Singh and P.W.11 Hukum Singh are also formal witnesses who had stated that Mohf.Shafi and others arrested on 25.3.1980 were kept and moved Baparda from one destination to the other.

18. N.P. Singh P.W.6 who is the investigating officer has stated that on 25.3.1980 he had apprehended Mohd. Shafi and three others in the case u/s 307 IPC and they confessed their involvement in the present crime and therefore they were kept Baparda. He also stated that he found from the place of occurrence seven empty shells of cartridges fired in the incident and collected ash of 'Chappar' which had been set to fire by the informant. He also stated that village Harduwa to which Mohd. Shafi belonged is four kilo meters away from village Kidhara. In his statement also the defence could not elicit out any thing material Sri Fasiuddin P.W.8 is the Executive Magistrate. He proved the test identification memo prepared by him.

19. On the basis of the aforesaid evidence the trial court found the charges proved and convicted the appellants in the manner stated in the beginning of the judgment. No oral evidence was led by the defence.

20. We have heard Sri P.N. Misra, Senior Advocate assisted by Sri Apul Misra and Sri Ram Babu Sharma, advocates appearing on behalf of the

appellants, the State has been represented by Ms. Usha Kiran, AGA. We have gone through the entire evidence on record.

21. The first argument raised by Sri Mishra was that it is an incident of abortive attempt of dacoity which has been given colour of murder and the persons inimical to the first informant have been implicated in this case. After carefully examining the entire evidence in the light of argument we find that there is absolutely no evidence to suggest that the miscreants had any intention to commit dacoity. Not a single article was stolen from the house of the informant. To the contrary it has come in the testimony of witnesses that miscreants were declaring that no one would be left alive and were exhorting one another to eliminate all. Sri Mishra drew attention of the court to a note recorded by P.W.8 Sri Fasiuddin in the identification memo wherein with reference to informant Jalsur it had been recorded that he stated to have gone for identifying the persons who had committed dacolty and murder. Jalsur has disclaimed this statement. The remaining four identifying witnesses had clearly stated before the magistrate that they had come to identify the persons who had killed Onkar son of Sher Singh. We are therefore of the opinion that endorsement made by Sri Fasiuddin P.W.8 with regard to Jalsur has no significance and it can not be inferred that miscreants intended to commit dacoity. To the, contrary circumstances showed the intention of miscreants to eliminate their target.

22. Admittedly there was enmity between the two sides and the prosecution evidence has clearly established motive for the commission of the crime in which Tara, Mahabir and their father Munshi had been convicted u/s 307 IPC for making an attempt on the life of P.W.3 Shishupal. Their appeal had also been dismissed by the High Court although the sentence was reduced to two years. This was immediate motive while evidence indicates that there was other incident also providing motive for commission of crime. Jalsur stated that Onkar, Bira and Tara are 'Khandani' of each other and in fact he claimed that even he himself belonged to their khandan From the evidence on record we find it established that there was sufficient.motive for the commission of crime.

23. FIR was promptly lodged within three hours. Bira, Tara and Onkar were named accused. FIR does not give any indication that miscreants had any intention to commit any dacoity. Thus prompt FIR containing the names of Bira, Tara and Onkar with specific role attributed to them is strong piece of corroborative evidence against them.

24. As mentioned earlier nothing could be elicited from the statements of the eye witnesses by the defence which could render their testimony unreliable. Bira, Tara and Onkar were named by all the witnesses. We therefore find that their conviction has been rightly recorded by the trial court.

25. So far as Mohd. Shafi is concerned, the evidence on record clearly shows that he was identified in the court as well as in the test identification parade by two good witnesses i.e. Bani Singh and Jalsur. These witnesses had not committed any mistake. Identification parade was held after 51 days. There was therefore no undue delay in conducting the same. There is nothing on record to

show that Bani Singh and Jalsur had known Mohd.Shafi from before or had any occasion to know him. Their testimony that they had seen them for the first time in the course of incident and second time in the jail can not be doubted. In addition to this involvement of Mohd.Shafi in the crime is also indicated from the circumstances that when he was apprehended by the police on 25.3.1980 he was carrying fire arm injuries on his person. He was sent for medical examination at PHC Harduwaganj where Dr. D.P. Singh P.W.l on 26.3.1980 found several injuries of the pellets of gun fire which are mentioned in Ex. ka-8 referred to earlier in this judgment. Significantly the circular fire arm wounds found on the person of Mohd.Shafi were similar in nature as were found on the persons of Tarawati and Chandra Bose who had been examined on 23.3.1980. The duration of injuries found on Mohd. Shafi also conformed to the time of incident. There is no credible evidence to show that he was shown to the witnesses before being subjected to test identification. We therefore hold that appellant Mohd. Shafi was also involved in this incident and the trial court rightly convicted him.

26. Sri Mishra then pointed out that appellant no.1 Bira was a minor at the time of alleged incident and in accordance with provision of U.P. Children Act of 1951 he can not be sentenced to imprisonment for the offence committed during his childhood. It has been argued that since now Bira has become major, the only course open to the court while maintaining conviction would be to set aside the sentence passed on him. In support of his argument, learned counsel has placed reliance on the case of **Jayendra and another Vs. State of Uttar Pradesh reported in AIR 1982 page 685**.

27. A perusal on record would show that appellate Bira had given his age in his statement under section 313 Cr.P.C. as 15 ½ years on 19.3.1982. The observation of trial Judge available as an endorsement made on the statement given by the accused was that accused Bira was above 17 years of age. No other material has been brought to our notice giving any indication of the age of accused Bira. In view of this even if we rely on the observation made by the Sessions Judge. Bira was less than 18 years on 19.3.1982. The present incident took place on 23.3.1980. Therefore on the date of incident he was less than 16 years of age.

28. Consistent view of Apex court expressed in the cases of **Santenu Mitra Vs. State of West Bengal, 1998(5) SCC 697, Bhola Bhagat Vs. State of Bihar, AIR 1998(1) SC 236 and Gopi Nath Ghosh Vs. State of West Bengal, AIR 1984 SC 237** is that hyper technical approach should not be adopted while considering the claim of accused that he is juvenile. The U.P. Children Act was a beneficial legislation and therefore liberal interpretation should be given to its provisions. The provisions of the Act are however mandatory.

29. Under section 2 (4) of U.P. Children Act 1951 a child has been defined as a person under the age of 16 years. The Apex court has already set at rest the controversy relating to relevant date for the purpose of considering the liability in the case of commission of offence. In **Pratap Singh Vs. State of Jharkhand, Judgment Today, 2005(2) SC 271** it has been held that for the

purpose of granting benefit to a juvenile accused, the relevant date for determination of age is the date of delinquency and not the date of trial or hearing of appeal.

30. Section 27 of U.P. Children Act provides that notwithstanding anything to the contrary in any law, no court shall sentence a child to imprisonment for life or to any term of imprisonment. Section 2 provides, in so far as it is material, that if a child. is found to have committed an offence punishable with imprisonment, the court may order him to be sent to an approved school for such period of stay as will not exceed the attainment by the child of the age of 18 years.

31. In the instant case appellant Bira was a child within the meaning of section 2(4) of U.P. Children Act 1951 and now after 27 year of the incident there is absolutely no justification for sending him to a reformatory school. In similar situation the Apex court in Jayendra case (supra) upheld the conviction but the sentence of imprisonment imposed upon the accused who was a child on the date of delinquency but had become major by the time his appeal, was decided was set aside we are of the opinion that similar treatment can be given to the appellant Bira in this case.

32. In view of the observations made above, the conviction of appellants Bira, Tara, Onkar and Mohd.Shafi as recorded by the trial of court is confirmed. The sentences passed on them except on Bira are also confirmed. With regard to Bira appellant, in view of discussion made above, the sentence of imprisonment passed on him is quashed while conviction remains intact. Bira's appeal to that extent is allowed and appeal of other appellants is dismissed. The appellants are on bail. Bail of Tara, Onkar and Mohd. Shafi is cancelled. They shall be taken into custody to serve out the sentence. Bira need not surrender. Let a copy of this judgment be certified to the trial court for necessary action.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2007

BEFORE
THE HON'BLE AMAR SARAN, J.

Misc. Application for suspension of conviction No. 192600
IN
Criminal Appeal No. 1365 of 2006

Daya Shanker Rai & another ...Appellants
Versus
State of U.P. ...Opposite party

Counsel for the Appellants:
Sri Shishi Tandon
Sri G.S. Chaturvedi
Sri Dharmendra Singhal
Sri Santosh Dwivedi

Counsel for the Opposite Party:
Sri Shailendra Sharma
Sri Kamal Krishna
A.G.A.

Code of Criminal Procedure-Section 389 (1)-Suspension of Conviction-and suspension of sentence-difference and Scope of interference explained-conviction of 7 years rigorous imprisonment for offence under Section 307 I.P.C.-applicant was working as clerk in school-only ground disclosed-if no stay order passed-he shall be ousted from service-whether amounts to moral turpitude? Held-such question is to be decided only by disciplinary authority-

keeping it open to agitate this question before the writ court itself.

Held: Para 24

However, whether the present offence involves a question of moral turpitude or not so as to dis-entitle the appellant-applicant from reinstatement is a question, which will have to be gone into and decided by the appropriate authority in the departmental proceedings and it would be open to the applicant-appellant Daya Shanker Rai to canvass the said issue in Civil Misc. Writ Petition No. 45958 of 2006 if he is so advised against the order passed by the District Inspector of Schools, Ghazipur whereby the initial approval of the suspension had been given by the DIOS although in the said case the appellant was not given any interim relief or in Writ Petition No. 46970 of 2006 whereby the withdrawal of the suspension order by the DIOS dated 19.8.2006 had been stayed by the learned Single Judge.

Case law discussed:

J.T. 1996 (6) SC-621, J.T. 2007 (2) SC-382, J.T. 2006 (1) SC-578, J.T. 1995 (6) SC-621, J.T. 2001 (6) SC-59, J.T. 2001 (8) SC-40, J.T. 2003 (10) SC-164

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

1. The applicants-appellants have moved this application, for suspension of conviction, in the criminal appeal, wherein the appellants and others were convicted and sentenced inter alia to seven years rigorous imprisonment and a fine of rupees ten thousand each under Section 307 IPC.

2. It may be pointed out that earlier the appellants were enlarged on bail by my order dated 22.3.2006. At that time the sentence of the appellants was suspended, but no order had been passed suspending the conviction.

3. I have heard Shri Dharmendra Singhal, learned counsel for the applicants-appellants, Shri Shailendra Sharma, learned counsel for the complainant and learned Additional Government Advocate.

4. The appellants are seeking suspension of their conviction because it is urged that appellant-applicant No. 1 Daya Shanker Rai is a government servant and the department is taking action against him in view of the fact that his conviction has not been suspended.

5. Learned counsel for the appellants contends that an order of suspension of the conviction should invariably be passed and there is inherent power to stay the order of conviction under Section 389(1) of the Code of Criminal Procedure (hereinafter referred to as the Code).

6. Learned counsel for the appellants has referred to some authorities of the Apex Court for setting up the proposition that except for cases under the Prevention of Corruption Act, in other matters, the conviction should invariably be suspended when an appeal is filed.

7. He has further argued that in view of the fact that the conviction of the appellant-Daya Shanker Rai was not suspended, hence an order had been passed by the Manager of Janta Janardan Inter College, Ghazipur on 13.3.2006 suspending the appellant-Daya Shanker Rai, who worked as Assistant Clerk in the college in view of his conviction in the present case. The District Inspector of Schools, Ghazipur had approved of the suspension as the appellant Daya Shanker Rai had been in jail for over 48 hours as a result of the judgement of conviction by

the trial court dated 9.3.2006. Thereafter on 19.8.2006 the DIOS, Ghazipur had reinstated the appellant Daya Shanker Rai on his job because the enquiry proceedings subsequent to his suspension had not been completed within four months.

8. However, as the Manager Rajesh Rai had filed a civil miscellaneous writ petition No. 46970 of 2006 against the order of reinstatement, the said order reinstating the petitioner was directed to remain stayed by an order dated 29.8.2006. It was against extended on 1.9.2006.

9. Learned counsel for the complainant and learned Additional Government Advocate, however, contended that in normal circumstances under Section389 (1) Cr.P.C. only execution of sentence awarded is suspended as a precondition for granting bail and it is only in extraordinary and exceptional circumstances that an order of conviction is directed to be suspended and no such order directing suspension of conviction can be passed in ordinary course and it needs to be specifically pointed out by the applicant-appellant-Daya Shanker Rai as to what are the disqualifications that would ensue if the conviction was not suspended for granting the extraordinary relief. The contention of the learned counsel for the appellants that it is only in matters involving offences under the Prevention of Corruption Act, the orders of conviction is not suspended is not correct.

10. Learned counsel for the complainant and learned Additional Government Advocate relied on certain decisions of the Apex Court in support of their contentions and I shall be considering the authorities furnished by both the sides in the course of this order.

At the outset, it would be appropriate to peruse Section 389(1) of the Code, which is as follows:

"389(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond."

11. On a mere perusal of the aforesaid provision, it appears that the section principally contemplates suspension of execution of the sentence or order appealed against as a pre-condition for release of the appellant on bail, but it does not directly speak of suspension of conviction. In paragraph 11 in K.C. Sareen Vs. CBI Chandigarh, 201 SCC (Cri)1186, it has been observed as follows:

"No doubt when the appellate court admits the appeal filed in challenge of the conviction and sentence for the offence under the Prevention of Corruption Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the prevention of Corruption Act, dehors the sentence of imprisonment as a sequel thereto, is a different matter.

But, it would be wrong to take the view that in no circumstance the conviction of the appellant can be suspended even if the appellant's counsel makes out proper conditions and indicates the serious disqualifications that an accused will have to under go if his conviction is not suspended."

12. The case which seems to have examined this controversy was *Rama Narang Vs. Ramesh Narang and others, 1995 JIC 889 (SC)*. The said case makes a distinction between an order imposing a sentence or an order awarding compensation or imposing a fine or releasing an accused on probation, which are capable of execution and which if not suspended would be required to be executed by the authorities from an order of conviction, where on mere filing of the appeal, there is no unavoidable necessity for suspension of the order of conviction nor does the conviction automatically disappear by filing of the appeal and as it was rightly put in Rama Narang's case in paragraph 15 that "if that be so why seek a stay or suspension of the order?"

13. However, the said authority clarifies in paragraph 16 that in certain circumstances the order of conviction can be executable as it may incur certain disqualifications. In such case, the power under Section 389(1) of the Code could be invoked provided that the attention of the appellate court is invited to the consequences that would ensue if the order of conviction was not stayed and for which the court is obliged to record its reasons in writing.

14. In this connection, the following lines in paragraph 16 of Rama Narang's case may be usefully read:

"In certain situations the order of conviction can be executable, in the sense, it may incur a disqualification as in the instant case. In such a case the power under Section 389(1) of the Code could be invoked. In such situations the attention of the Appellate Court must be specifically invited to the consequence that is likely to fall to enable it to apply its mind to the issue since under Section 389(1) it is under an obligation to support its order 'for reasons to be recorded by it in writing'. If the attention of the Court is not invited to this specific consequence, which is likely to fall upon conviction how can it be expected to assign reasons relevant thereto? No one can be allowed to play hide and seek with the Court; he cannot suppress the precise purpose for which he seeks suspension of the conviction and obtain a general order of stay and then contend that the disqualification has ceased to operate. In the instant case if we turn to the application by which interim' 'stay' to the operation of the impugned judgement was secured we do not find a single word to the effect that if the operation of the conviction is not stayed the consequence as indicated in Section 267 of the Companies Act will fall on the appellant. How could it then be said that the Delhi High Court had applied its mind to this precise question before granting stay? That is why the High Court order granting interim stay does not assign any reason having relevance to the said issue. By not making a specific reference to this aspect of the matter, how could the appellant has persuaded the Delhi High Court to stop the coming into operation of Section 267 of the Companies Act? And how could the Court have applied its mind to this question if its pointed attention was not drawn? As we said earlier the application

seeking interim stay is wholly silent on this point. That is why we feel that this is a case in which the appellant indulged in an exercise of hide and seek in obtaining the interim stay without drawing the pointed attention of the Delhi High Court that stay of conviction was essential to avoid the disqualification under Section 267 of the Companies Act. If such a precise request was made to the Court pointing out the consequences likely to fall on the continuance of the conviction order, the Court would have applied its mind to the specific question and if it thought that case was made out for grant of interim stay of the conviction order, with or without conditions attached thereto, it may have granted an order to that effect. There can be no doubt that the object of Section 267 of the Companies Act is wholesome and that is to ensure that the management of the company is not in solid hands. As we have pointed out earlier the Managing Director of the company holds a fiduciary position qua the company and its share-holders and, therefore, different consideration would flow if an order is sought from the Appellate Court for staying the operation of the disqualification that would result on the application of Section 267 of the Companies Act. Therefore, even on facts since the appellant had not sought any order from the Delhi High Court for stay of the disqualification he was likely to incur under Section 267 of the Companies Act on account of his conviction, it cannot be inferred that the High Court had applied its mind to this specific aspect of the matter and, therefore, granted a stay of the operation of the impugned judgement. It is for that reason that we do not find in the order of the High Court a single reason relevant to the consequence of the conviction under Section 267 of the Companies Act. The interim stay granted by the Delhi High Court must, therefore, be read in that context and cannot extend to stay the operation of Section 267 of the Companies Act."

For this reason, the learned Judges in Rama Narang's case held that the general order staying the operation of the order of the trial court by the High Court did not mean any stay of the order of conviction.

15. In the present case I also find that a general prayer for suspension of conviction has been made only by pointing out that the appellant being a government servant would be liable for departmental action unless the conviction was stayed and that as the appeal had been filed, the conviction should necessarily be stayed without indicating the specific disqualification that would ensue in the fact and circumstances of the present case unless the order of conviction was suspended.

16. In this context paragraphs 4 to 7 of the application of suspension of conviction may be usefully extracted:

"4. That since the appellant No. 1 is a Government Servant and Department is taking action against him on the score that the conviction was not suspended.

5. That the appeal is continuation of trial and appeal being a statutory remedy the guilt/conviction of the appellant is not yet finalized.

6. That in view of the matter and as per the decisions of the Hon'ble Supreme Court delivered in Rama Narang's case (1995)@ SCC 513 that the court has inherent power to suspend or grant

interim stay the order of conviction under Section 389(1) of the Code.
7. That in these circumstances the order of conviction may be stayed during the pendency of the appeal."

17. In *State of Tamil Nadu Vs. A Jaganathan, JT 1996(6) SC 621*, it was rightly clarified that as the moral conduct of the public servant comes in question when he is convicted of a criminal offence, which would affect the purpose of his duty, it would be wrong to stay the conviction because of some possible harm that an accused public servant could suffer if ultimately his revision or appeal was allowed as that would entail staying the conviction in every pending appeal or revision " by taking into consideration the trifling matters" and even when the harm could be undone by payment of arrears of salary, stipend etc. to the appellant in case of eventual acquittal.

18. In *A. Jaganathan (Supra)* the High Court's order suspending the conviction was set aside by the Apex Court because the High Court did not consider the moral conduct of the respondent, such as the fact that the respondent A. Jaganathan, who being attached as Inspector to a police station had eroded the confidence reposed in him and had been convicted under Sections 392/218/466 IPC, while the other public servants accused had been convicted under the provisions of Prevention of Corruption Act.

19. Thus, I think that the contention of learned counsel for the appellants that there could be a restraint on suspension of the conviction only in cases under the Prevention of Corruption Act is not correct. In other cases, which involve questions of moral turpitude, the order of conviction should not be stayed on the mere asking that they would entail some disqualifications for the accused.

20. In the present case I find that appellant No. 2, who is not said to be a public servant has even used a firearm and appellant No. 1 has also used a Lathi along with other accused and the other accused had been convicted under Section 307 IPC in the said incident. Five persons on the prosecution side have received a number of injuries including firearm injuries to the injured Arvind Rai.

21. The case *Navjot Singh Sidhu Vs. State of Punjab and another, JT 2007 (2) SC 382*, which has been relied upon by the learned counsel for the appellants-applicants is clearly distinguishable. In the said case the circumstances entailing the disqualification of the appellant Navjot Singh Sidhu unless the order of conviction was stayed, was clearly indicated. Thus, it was pointed out in the said case that when the High Court had set aside the judgement of acquittal by the trial court and sentenced Navjot Singh Sidhu and co-accused inter alia to three years RI and a fine under Section 304 part-II IPC on 6.12.2006 when Navjot Singh Sidhu was already a Member of Parliament, he could have avoided the disqualification mentioned in Section 8(3) of the Representation of People Act, 1951 for being chosen as a Member of Parliament for a period of six years, if after the conviction he had preferred an appeal within three months of the date of his conviction. Thereafter his disqualification would have been avoided until the appeal or application was disposed of by the Court. Sections 8(3)

and 8(4) of the Representation of People Act may be usefully perused:

"8(3) A person convicted of any offence and sentenced to imprisonment for not less than two years (other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

8 (4)Notwithstanding any in sub-section (1), sub-section (2) and sub-section (3) a disqualification under either sub-section shall not in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court."

22. However, on a moral ground the appellant Navjot Singh Sidhu had chosen to resign from his seat and thereafter he wished to seek fresh elections. It was in that background that the Apex Court had noted that it was a fit case for suspending the conviction although the Court observed that the power to stay convictions can only be exercised in exceptional circumstances. For the proposition that the said power is exercised in most exceptional circumstances, reliance was placed in *Navjot Singh Sidhu's case on the cases of Ravi Kant S. Patil Vs. Sarvabhouma S. Bagali, JT 2006 (1) SC 578, State of Tamil Nadu Vs. A. Jaganathan, JT 1996 (6) SC 621, K.C. Sareen Vs. CBI, Chandigarh, JT 2001 (6) SC 59, B.R. Kapur Vs. State of Tamil Nadu and another, JT 2001 (8) SC 40 and State of Maharashtra Vs. Gajanan and another, JT 2003(10) SC 164*. Whether failure to stay the conviction will lead to injustice and irreversible consequences is a question to be determined on the particular facts of the case. In *Navjot Singh Sidhu's* case observing how the incident had taken place, as a result of a sudden quarrel with the deceased and his companion over a minor road incident and where it was not even clear whether the solitary head injury on the deceased was the result of the fist blow of the appellant or due to fall and whether the deceased had died as a result of the abrasion sustained by him or because of his heart condition and whether on the circumstance, a case under Section 304 Part-II IPC was at all disclosed. It was after taking into account the overall conspectus of circumstances, that the Apex Court had stayed the conviction of the appellant Navjot Singh Sidhu.

23. In *Hikmat Ali Khan Vs. Ishwar Prasad Arya, AIR 1997 SC 864*, where an an advocate had been convicted in a case under Section 307 IPC for stabbing the opponent in court with a knife, it was described as an offence involved moral turpitude and the Supreme Court enhanced the punishment of removal from rolls of the Bar Council awarded by the U.P. Bar Council for three years for permanently removing the name of the said advocate from the rolls.

24. However, whether the present offence involves a question of moral turpitude or not so as to dis-entitle the appellant-applicant from reinstatement is a question, which will have to be gone into and decided by the appropriate

authority in the departmental proceedings and it would be open to the applicant-appellant Daya Shanker Rai to canvass the said issue in Civil Misc. Writ Petition No. 45958 of 2006 if he is so advised against the order passed by the District Inspector of Schools, Ghazipur whereby the initial approval of the suspension had been given by the DIOS although in the said case the appellant was not given any interim relief or in Writ Petition No. 46970 of 2006 whereby the withdrawal of the suspension order by the DIOS dated 19.8.2006 had been stayed by the learned Single Judge.

25. I, therefore, find that the applicant-appellant has not been able to make out any good ground for obtaining an order suspending his conviction by the judgement and order dated 9.3.2006. Of course, it would be open to the appellant-applicant to move an application for expediting the appeal.

26. With these observations, this application is rejected.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.11.2007

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Appeal No. 1840 of 1985

Balwant ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri R.P. Saxena
Sri K.K. Arora

Counsel for the Opposite Party:
Smt. Dr. Abida Sayed
A.G.A.

Code of Criminal Procedure-Section 313 (4)-readwith India Evidence Act-Section 106-Conviction without evidence-merely on the basis of confession if prosecution evidence vague-and insufficient-held-can not be supplemented by statement of accused.

Held: Para 13

We have given our thoughtful consideration to the above mentioned submissions made by learned amicus curia. We find force in these submissions. As mentioned earlier also, four witnesses namely P.W.1 Imrat,P.W.2 Phool Singh, P.W. 3 Umrao Singh and P.W. 4 Km. Shanti have been examined by the prosecution in this case as eye witnesses, but all these witnesses have stated in their statements that they did not see the accused Balwant committing murder of his wife. P.W.1 Imrat had lodged the FIR of this case. He has stated that the report was lodged by the village pradhan and on his saying, he had put his thumb impression on the report without hearing it. All these witnesses have been declared hostile. Barring the testimony of these witnesses, there is no other substantive incriminating evidence to establish the complicity of the appellant in the incident of murder of his wife. Therefore, in our considered view, in the absence of any substantive incriminating evidence to establish the complicity of the appellant Balwant in the incident of murder of his wife, he cannot be convicted merely on the basis of his confessional statement recorded in the examination under section 313 Cr. P. C. This Court has held in the case of *Omi @ Om Prakash vs. State of U.P. (supra)* that the statement by accused under section 313 Cr. P. C. is quite different from a confessional statement made under section 164 Cr. P. C. The expression

"may be taken into consideration" occurring in section 313 (4) Cr.P.C. means at all events that the statement made by the accused is not to have the force of sworn evidence and a conviction based on such statement alone cannot be maintained". It is further held that if the prosecution evidence is vague and insufficient, the Court cannot supplement it by such statement of accused by taking up passages from it.

Case law discussed:

1985 ACr.R. –481, AIR 2002 SC-3582, AIR 1953 SC-247, 2000 (41) ACC-1013

(Delivered by Hon'ble V.K. Verma, J.)

1. Whether an accused can be convicted without any evidence merely on the basis of his admissions/confession made in the examination under section 313 of the Code of Criminal Procedure, is the main question for consideration before us in this appeal, which has been preferred against the judgment and order dated 24.09.1984 passed by the Sessions Judge Moradabad, in S.T. No. 543 of 1983, whereby the appellant-accused Balwant has been convicted and sentenced to undergo imprisonment for life under section 302 IPC.

2. The appellant Balwant was put on trial for committing murder of his wife Smt. Ram Pyari in the intervening night of 6/7-05-1983 at about 4.00 a.m. First Information report was lodged at P.S. Asmauli by Imrat S/o Mokhi r/o Akbarpur Gahra on 07.05.1983. The case of prosecution, as per FIR (Ext. Ka 1), in brief, is that when on hearing the shriekes from the house of Balwant on 07.05.1983 at about 4.00 a.m., the first informant Imarat and Umrao S/o Moli along with Phool Singh S/o Chhuttan reached his house, flashing torch light, they saw that Balwant was throttling his wife Smt. Ram Pyari sitting on her chest and his children were dragging him with a view to save their mother. On reaching these witnesses, Balwant fled away from his house. His wife Ram Pyari died instantaneously on the cot. The first informant Imrat went to P.S. Asmauli and gave oral information about the aforesaid incident. The then constable clerk Natthu Lal Rastogi prepared chik FIR (Ext. Ka 1) and registered a case under section 302 IPC against the appellant Balwant at Crime No. 119/83 on 07.05.1983 at 8.30 A.M. and made entry in GD No. 19 (Ext. Ka 5).

3. On lodging the FIR, investigation was entrusted to S.I. Bharat Singh (P.W.6), who went to the place of incident and conducted inquest proceedings on the dead body of Smt. Ram Pyari, during which inquest report (Ext. Ka 7) and connected papers (Ext. Ka 8 to Ka 10) were prepared and thereafter, the dead body was sent in sealed condition for post-mortem examination, which was conducted by Dr. D.N. Khanna (P.W.5), on 09.05.1983 at 3.30 p.m.. According to the post-mortem report (Ext. Ka 4) the following ante-mortem injuries were found on the person of deceased:-

1. Ligature mark 6 cm. broad in the front of neck, below thyroid cartilage, Continuous on the back and circular. Bruises and abrasions present round about the ligature mark. Base is ecchymosed.
2. Contusion 2 x 2 cm. on the chin 3 cm. below the lower lip.
3. Bruises and abrasions present in an area of 3 x 4 cm. on the outer either side of front of neck. They are clustered together.

On internal examination, Brain & its Membrances, Larynx, Trachea & Bronchi, both lungs, pleura, Liver and Gall Bladder, both Kidneys and Spleen were found congested. Neck muscles and Neck Blood vessels were lacerated and congested. Clotted blood present in the neck muscles. Fracture of right hyoid bone and right 2-5 ribs was found.

The death was caused due to Asphyxia as a result of strangulation (manual & by ligature).

4. During investigation, site plan (Ext. Ka 14) was prepared by S.I. Bharat Singh, who also prepared Fard supurdaginama (Ext. Ka 2 and Ext. Ka 3) of torches. Rest investigation was carried out by S.O. Umesh Chandra Mishra, who after completion of the investigation submitted charge-sheet (Ext. Ka 16).

5. On the case being committed to the court of session for trial, the appellant was charged under section 302 IPC vide order dated 31.10.1983. He pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove its case has examined six witnesses in all in this case. P.W.1 Imrat, P.W.2 Phool Singh, P.W. 3 Umrao Singh and P.W. 4 Kumari Shanti were examined as eye witnesses of the incident of committing murder of Smt. Ram Pyari by the accused Balwant, but these witnesses have not supported the case of prosecution and they all have been declared hostile. P.W. 5 Dr. D.N. Khana has proved post-mortem report (Ext Ka 4). P.W.6 S.I. Bharat Singh has proved chik FIR Ext. Ka 1 and copy of G.D. of registration of the case Ext. Ka 5 by recognizing the hand writing and signature of the then constable clerk Nathu Lal. He has also proved inquest report Ext. Ka 7) and connected papers as mentioned above. Charge-sheet Ext. Ka 16 has also been proved by this witness by recognizing the hand writing and signature of S.O. Umesh Chandra Mishra.

7. In his statement recorded under section 313 Cr.P.C. the appellant has stated that he committed the murder of his wife Ram Pyari by pressing her neck sitting on her chest, due to which she died instantaneously. It is further stated by the accused that the witnesses did not see any incident and when Ram Pyari died, he fled away from the place of occurrence.

8. The learned Trial Court taking into consideration the confessional statement of the appellant recorded in the examination under section 313 Cr. P. C. and other evidence on record, convicted and sentenced him as mentioned in para 1 above. Hence this appeal.

9. Since the counsel for the appellant did not appear to argue, hence Dr. Abida Sayeed, Advocate, was appointed amicus curiae vide order dated 30.10.2007. We have heard learned amicus curiae for the appellant and learned AGA for the respondent and also perused the entire evidence on record including impugned judgment.

10. In this case, all the four alleged eye witnesses examined by the prosecution have turned hostile and no other substantive evidence to prove the complicity of the appellant in the incident of murder of his wife Smt. Ram Pyari has been produced. The appellant has been convicted and sentenced mainly on the basis of his confessional statement

recorded in the examination under section 313 Cr. P. C. Therefore, as mentioned in para 1 above also, the main point for consideration in this appeal is, whether in the absence of any substantive incriminating evidence against the accused, conviction can be based on his confessional statement recorded in the examination under section 313 Cr. P. C.

11. Placing reliance on the case of ***Omi @ Om Prakash vs. State of U.P. 1985 A.Cr.R. 481***, it was vehemently contended by learned amicus curiae that conviction of the appellant on the basis of his confessional statement recorded in the examination under section 313 Cr. P. C. is bad in law, because all the four alleged eye witnesses namely Imrat, Phool Singh, Umrao Singh and Km. Shanti have not supported the case of prosecution and there is no other substantive incriminating evidence against the appellant to prove his complicity in the incident of murder of his wife Smt. Ram Pyari. In this regard, it was contended by learned amicus curiae that the answers given by the accused in his examination under section 313 Cr. P. C. is not evidence within the meaning of section 3 of Indian Evidence Act and conviction cannot be based merely on such answers containing admission of the guilt by the accused. It was also submitted by learned Amicus curiae that examination of the appellant made by the court below under section 313 Cr.P.C. is improper, as certain circumstances which do not appeal in the evidence, have also been put to the appellant and hence any statement made by him cannot be take in to consideration for convicting him.

12. The learned AGA also fairly did not seriously dispute aforesaid contentions made by learned amicus curiae.

13. We have given our thoughtful consideration to the above mentioned submissions made by learned amicus curia. We find force in these submissions. As mentioned earlier also, four witnesses namely P.W.1 Imrat, P.W.2 Phool Singh, P.W. 3 Umrao Singh and P.W. 4 Km. Shanti have been examined by the prosecution in this case as eye witnesses, but all these witnesses have stated in their statements that they did not see the accused Balwant committing murder of his wife. P.W.1 Imrat had lodged the FIR of this case. He has stated that the report was lodged by the village pradhan and on his saying, he had put his thumb impression on the report without hearing it. All these witnesses have been declared hostile. Barring the testimony of these witnesses, there is no other substantive incriminating evidence to establish the complicity of the appellant in the incident of murder of his wife. Therefore, in our considered view, in the absence of any substantive incriminating evidence to establish the complicity of the appellant Balwant in the incident of murder of his wife, he cannot be convicted merely on the basis of his confessional statement recorded in the examination under section 313 Cr. P. C. This Court has held in the case of ***Omi @ Om Prakash vs. State of U.P. (supra)*** that the statement by accused under section 313 Cr. P. C. is quite different from a confessional statement made under section 164 Cr. P. C. The expression "may be taken into consideration" occurring in section 313 (4) Cr.P.C. means at all events that the statement made by the accused is not to have the force of sworn evidence and a conviction based on such statement alone

cannot be maintained". It is further held that if the prosecution evidence is vague and insufficient, the Court cannot supplement it by such statement of accused by taking up passages from it.

14. The Hon'ble Supreme Court in the case of ***Mohan Singh vs. Prem Singh and another AIR 2002 SC 3582*** has held that the statement made by the accused under section 313 of the Code of Criminal Procedure can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under section 313 of the Code cannot be made the sole basis of his conviction.

15. In the case of ***Vijendrajit Ayodhya Prasad Goel vs. State of Bombey AIR 1953 SC 247***, the Hon'ble Supreme Court has held that the statement recorded under section 313 Cr. P. C. cannot be regarded as evidence and conviction of the accused cannot be based merely on this statement.

16. Therefore, having regard the law laid down in the above mentioned rulings, in instant case also, the appellant could not be convicted for the murder of his wife merely on the basis of admissions made in the answers given to the questions put to him in the examination under section 313 Cr.P.C., because there is no other substantive incriminating evidence to establish his complicity in the incident of murder of his wife. Hence, in our view, the conviction and sentence of the appellant is not in accordance with law.

17. From the statement of the appellant recorded under section 313 Cr.P.C., it is observed that the court below did not formulate proper questions. The question No. 2 is that "it has come in the evidence that you pressed the neck of your wife Ram Pyari sitting on her chest in the intervening night 6/7-05-1983 at about 4.00 a.m. due to which she died on the place of incident, what have you to say about it". This question cannot be put to the accused in his examination under section 313 Cr. P. C., because there is no evidence on record to show that the accused had pressed the neck of his wife in intervening night of 6/7-05-1983 at about 4.00 a.m. No witness has stated in his statement that the accused Balwant had pressed the neck of his wife on the alleged date, time and place. Therefore, there was no occasion for the court below to put question no. 2 before the accused in the manner as mentioned above. Similarly question No. 3 also can not be put in the manner as it has been formulated, because the witnesses Imrat, Phool Singh, Umrao and Kumari Shanti had not seen the incident as stated by them in their statements. Only the incriminating circumstances appearing in the evidence against the accused can be put in the examination under section 313 Cr.P.C. If there is no incriminating circumstance appearing in the prosecution evidence to explain which the accused could be examined, his examination by the Magistrate or Judge is improper and any statement made by him cannot be taken into consideration for convicting him. As mentioned above, the court below had put certain circumstances in the examination of the appellant under section 313 Cr.P.C., which did not at all appear in the evidence led by the prosecution. That being so, in our considered view, the examination of the appellant made by the court below is improper and hence any statement containing his admission for

committing the murder of his wife made by him in answers to the questions put to him in the examination under section 313 Cr.P.C. cannot be taken into consideration for convicting him.

18. Although the murder of Smt. Ram Pyari was committed in the house of appellant, but in our view, the appellant can not be convicted in this case with the aid of section 106 of Indian Evidence Act. The reason for our coming to this conclusion is that there is no reliable evidence on record to show that in the fateful light, the appellant and the deceased had slept together in the room in which her murder was committed. Although P.W.1 Imrat and P.W. 2 Umrao Singh have stated in their statements in cross-examination that Balwant was present at his house on the day of incident, but this evidence cannot be used against the appellant, because this circumstance appearing in the statements of these witnesses was not put to him in his examination under section 313 Cr.P.C. The law is well settled that if any circumstance appearing in evidence has not been put to the accused at the time of his examination under section 313 Cr.P.C, then the evidence regarding that circumstance cannot be used against him. The Hon'ble Apex Court in the case of ***Basava Raj R. Patil & others vs. State of Karnataka & others 2000 (41) ACC 1013*** has held that the circumstance about which the accused was not asked to explanation cannot be used against him. Therefore, in instant case also, on the basis of aforesaid statements of the witnesses Imrat and Umrao Singh, it cannot be presumed with the appellant Balwant and his wife Smt. Ram Pyari had slept together in the fateful night in the room in which her murder was committed. Moreover, P.W.4 Km. Shanti, who is the daughter of deceased and appellant has stated in her statement that in the fateful night her mother had slept alone in the room (kotha) and her father was not present at the house on that day. Therefore, seeking aid of Section 106 of Indian Evidence Act, the appellant cannot be deemed to have committed murder of the deceased.

19. For the reasons mentioned here-in-above, this appeal has to be allowed, as the conviction and sentence of the appellant merely on the basis of his confessional statement made in the examination under section 313 Cr. P. C. cannot be sustained, being wholly illegal. It is worthwhile to mention that unfortunately the appellant has served out the entire sentence imposed by the court below vide impugned judgment, as is evident from the report dated 27.10.2007 of the Chief Judicial Magistrate Moradabad.

20. In the result, the appeal is allowed. The conviction and sentence of the appellant -accused Balwant in S.T. No. 543 of 1983 are set aside and he is acquitted of the charge under section 302 IPC.

Let the lower court record along with a copy of this judgment be returned expeditiously. Appeal allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2007

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

Special Appeal No.1527 of 2007

Baldeo Singh ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Appellant:
Sri A.P. Tewari
Sri S.S. Tripathi

Counsel for the Respondents:
S.C.

Constitution of India-Art. 39 (d)-Principle of 'Equal Pay for Equal Work'-can not be applied mechanically on ground of nomenclature-it depends upon variety of factors-even a single difference may justify differences in Pay Scale-Lab Assistant (Ayurvedic)-eligibility of work, area of work different, service rules different-held-can not invoke the said principle.

Held: Para 21

In view of the aforesaid exposition of law and considering the facts that the qualification, nature of work etc. of the Lab Assistant (Ayurved) and Lab Assistant (Rural) both cannot be said to be identical in any manner, in our view, the petitioner cannot invoke the above principle being situated differently. We, therefore, do not find any factual or legal error in the judgment of the Hon'ble Single Judge impugned in this appeal warranting interference.

1982 (1) SCC-618, 1987 (4) SCC-505, 1998 (3) SCC-91, 1988 (3) SCC-354, 1989 (1) SCC-121, J.T. 1991 (1) SC-60, J.T. 1992 (2) SC-27, AIR 1992 SC-126, 1993 (1) SCC-539, 1994 (2) SCC-521, 1995 (6) SCC-515, J.T. 1995 (2) SC-578, JT 1995 (2) SC-578, J.T. 196 (7) SC-438, AIR 1968 SC-349, AIR 1974 SC-1, 1993 (2) SCC-340, AIR 1997 SC-1788, 1997 SCC-24, 2000 (8) SCC-580, 2003 (1) SCC-200, 2002 96) SCC-72, 2002 (4) SCC-556, AIR 2006 SC-161, AIR 2007 SC-1948, J.T. 2007 (10) SC-272.

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

1. The intra court appeal, under the rules of the court, arises from the judgment of the Hon'ble Single Judge dated 25.9.2007 dismissing the appellant's Civil Misc. Writ Petition No.46478 of 2007, which had been preferred against the order of the State Government-respondent no.1 dated 5.9.2007.

2. We have heard Shri S.S. Tripathi, learned counsel for the appellant and the learned Standing Counsel appearing for the respondents and perused the record.

3. It appears that the petitioner-appellant is working as Lab Assistant (Rural). However, he made representation before the State Government claiming pay scale of Lab Assistant (Ayurved), which had been rejected vide order dated 5.9.2007. Aggrieved, the appellant preferred the aforesaid writ petition. The Hon'ble Single Judge having heard learned counsel for the parties and having noticed that the eligibility of work and the area of work being different held that there could be no comparison between the Lab Assistant (Ayurved) and the Lab Assistant (Rural) and, therefore, dismissed the writ petition. Hence, this appeal.

4. Shri S.S. Tripathi, learned counsel for the appellant vehemently contended that earlier there were only one cadre of

Lab Assistant and common pay scale had been provided. However, subsequently, the Lab Assistant (Ayurved) claimed salary of Lab Technician, which was allowed. The Hon'ble Single Judge by the judgment dated 3.2.1989 in Civil Misc. Writ Petition No.8364 of 1989 directed to the State Government to examine the case and grant the aforesaid pay scale on the ground that their qualification, nature of duties are similar to each other, therefore, they deserve same pay scale. It is further contended that against the aforesaid judgment SLP was dismissed and, therefore, the State Government granted pay scale of Lab Technician to the Lab Assistant (Ayurved). He, therefore, submitted that since the qualification etc. are similar to each other the Lab Assistants (Rural) are entitled to get the same scale, which is paid to Lab Assistant (Ayurved).

5. We are not convinced with the submission for the reason that it is apparent from the order of the State Government dated 5.9.2007 that the qualification, nature of work etc. of the Lab Assistant (Rural) is not similar to that of Lab Assistant (Ayurved). Besides that, admittedly, their cadre is separate and governed by separate rules. Thus, there being no similarity in the nature of work, qualification and the place of work, the parity in the pay scale cannot be claimed.

6. The principle of equal pay for equal work can neither be applied mechanically nor in a casual manner nor would be attracted only on the ground that nomenclature or some of the conditions of work or qualification etc. are similar. It depends upon a variety of factors and even a single difference may justify difference in the pay scale. It is difficult to exhaustively give all such factors or circumstances wherein the difference in pay can be justified but some of such aspect may be given hereunder as having been laid down even by the Hon'ble Apex Court, since this issue has time and again cropped up before the Hon'ble Apex Court and this Court frequently. The law has been laid down by the Hon'ble Apex Court in catena of cases, some of which are referred to herein-below.

7. In ***Randhir Singh vs. Union of India and others, (1982) 1 SCC 618*** the Apex Court considering the principle of equal pay for equal work held as under-

"It is not an abstract doctrine but one of substance. Construing Articles 14 and 16 in the light of the Preamble and Article 39 (d) of the Constitution, the Apex Court held that the principle of equal pay for equal work is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer." (Paras 7 & 8)

In ***R.D. Gupta & others vs. Lt. Governor, Delhi Administration & others, (1987) 4 SCC 505*** the Apex Court applying the principle of equal pay for equal work, in para 20 of the judgment, considered the correctness of defence justifying non application of the said principle and held: -

"the ministerial staff in the NDMC constitute a unified cadre. The recruitment policy for the selection of the ministerial staff is a common one and the recruitment is also done by a common agency. They are governed by a common seniority list.

The ministerial posts in the three wings of the BDNC viz, the general wing, the electricity wing and the waterworks wing are interchangeable posts and the postings are made from the common pool according to administrative convenience and exigencies of service and not on the basis of any distinct policy or special qualifications. Therefore, it would be futile to say that merely because a member of the ministerial staff had been given a posting in the electricity wing, either due to force of circumstances or due to voluntary preferment, he stands on a better or higher footing or in a more advantageous position than his counterparts in the general wing. It is not the case of the respondents that the ministerial staff in the electricity wing perform more onerous or more exacting duties than the ministerial staff in the general wing. It therefore follows that all sections of the ministerial staff should be treated alike and all of them held entitled to the same scales of pay for the work of equal nature done by them." (Para 20)

8. In ***Federation of All India Customs and Central excise Stenographers & others Vs. Union of India and others. (1988) 3 SCC 91***, it was held that- "there may be qualitative difference as regards reliability and responsibility justifying different pay scale. Functions may be the same but the responsibilities make a difference. One cannot deny that often the difference is a mater of degree and that there is an element of value judgment by those who are charged with the administration in fixing the scales of pay and other conditions of service. So long as such value judgment is made bonafide, reasonably on an intelligible criterion, which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. It was further observed that the same amount of physical work may entail different quality of work, some more sensitive, some requiring more tact, some less, it varies from nature and culture of employment." (Paras 7 & 11)

9. In ***Jaipal and others Vs. State of Haryana & others (1988) 3 SCC 354***, the Apex Court held as under: -

"The doctrine of equal work equal pay would apply on the premise of similar work, but it does not mean that there should be complete identity in all respects. If the two classes of persons do same work under the same employer, with similar responsibility, under similar working conditions the doctrine of "equal work equal pay would apply and it would not be open to the State to discriminate one class with the other in paying salary. The State is under a constitutional obligation to ensure that equal pay is paid for equal work." (Para...6)

In ***State of U.P. and others Vs. J.P. Chaurasia and others, (1989) 1 SCC 121***, the Apex Court while considering the justification of two pay scales of the Bench Secretaries of the High Court observed as under: -

"Entitlement to the pay scale similar would not depend upon either the nature of work or volume of work done by Bench Secretaries. Primarily it requires among others, evaluation of duties and responsibilities of the respective posts. More often functions of two posts may appear to be the same or similar, but there may be difference in degrees in the performance. The quantity of work may

be the same, but quality may be different that cannot be determined by relying upon averments in affidavits of interested parties. The equation of posts or equation of pay must be left to the executive Government. It must be determined by expert bodies like Pay commission. They would be the best judge to evaluate the nature of duties and responsibilities of posts. If there is any such determination by a Commission or Committee, the court should normally accept it. The Court should not try to tinker with such equivalence unless it is shown that it was made with extraneous consideration." (Para-18).

In ***Grih Kalyan Kendra Workers' Union vs. Union of India & others, JT 1991 (1) SC 60,*** it was observed that- " the question of parity in pay scale cannot be determined by applying mathematical formula. It depends upon several factors namely nature of work, performance of duties, qualifications, the quality of work performed by them. It is also permissible to have classification in services based on hierarchy of posts, pay scale, value of work and responsibility and experience. The classification must, however, have a reasonable relation to the object sought to be achieved." (Para-7)

In ***The secretary, Finance Department & others vs. The West Bengal Registration Service Association & others, JT 1992 (2) SC 27***, the Apex Court observed as under: -

"job evaluation is both a difficult and time consuming task which even expert bodies having the assistance of staff with requisite expertise have found difficult to undertake sometimes on account of want of relevant data and scales for evaluating performances of different groups of employees. The factors which may have to be kept in view for job evaluation may include (1) the work programme of his department (ii) the nature of contribution expected of him (iii) the extent of his responsibility and accountability in the discharge of his diverse duties and functions (iv) the extent and nature of freedoms/limitations available or imposed on him in the discharge of his duties (v) the extent of powers vested in him (vi) the extent of his dependence on superiors for the exercise of his powers (vii) the need to co-ordinate with other departments etc. It was further observed that normally a pay structure is evolved keeping in mind several factors e.g., ((i) method of recruitment, (ii) level at which recruitment is made, (iii) the hierarchy of service in a given cadre, (iv) minimum educational/technical qualifications required, (v) avenues of promotion (vi) the nature of duties and responsibilities, (vii) the horizontal and vertical relativities with similar jobs, (viii) public dealings, (ix) satisfaction level, (x) employer's capacity to pay, etc.".....(Para 12)

10. In ***Jaghnath Vs. Union of India & another, AIR 1992 SC 126*** the Apex Court following the earlier judgment observed that- "classification of officers into two grades with different scales of pay based either on academic qualification or experience or length of service is sustainable. Apart from that, higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is very common in career service. There is selection grade for District Judges. There is senior time scale in Indian Administrative Service. There is suppertime scale in other like services. The entitlement to these higher pay scales

depends upon seniority-cum-merit or merit -cum-seniority. The differentiation so made in the same cadre will not amount to discrimination. The classification based on experience is a reasonable classification. It has a rational nexus with the object thereof. To hold otherwise, it would be detrimental to the interest of the service itself."...(Para-7)

11. In ***State of Madhya Pradesh & another Vs. Pramod Bhartiya & others, (1993) 1 SCC 539*** the Apex Court held as under:-

"It would be evident from this definition that the stress is upon the similarity of skill, effort and responsibility when performed under similar conditions. Further, as pointed out by Mukharji, J. (as he then was) in Federation of All India Customs and Excise Stenographers' the quality of work may vary from post to post. It may vary from institution to institution. We cannot ignore or overlook this reality. It is not a matter of assumption but one of proof. The respondents (original petitioners) have failed to establish that their duties, responsibilities and functions are similar to those of the non-technical lecturers in Technical Colleges. They have also failed to establish that the distinction between their scale of pay and that of non technical lecturers working in Technical Schools is either irrational and that it has no basis, or that it is vitiated by mala fides, either in law or in fact (see the approach adopted in Federation case). It must be remembered that since the plea of equal pay for equal work has to be examined with reference to Article 14, the burden is upon the petitioners to establish their right to equal pay, or the plea of discrimination, as the case may be. This burden the original petitioners (respondents herein) have failed to discharge.".(.Para-13)

12. In ***Shyam Babu Verma & others Vs. Union of India & others, (1994) 2 SCC 521*** the Apex Court observed that- "the principle of equal pay for equal work should not be applied in a mechanical or casual manner. Inequality of the men in different groups excludes applicability of the principle of equal pay for equal work to them. Unless it is established that there is no reasonable basis to treat them separately in matters of payment of wages or salary, the Court should not interfere holding different pay scale as discriminatory" (Para-9)

13. In ***Sher Singh & others Vs. Union of India & others, (1995) 6 SCC 515***, the Apex Court rejected the claim of the library staff of Delhi University and its constituent colleges regarding parity in pay with the teaching staff on the ground that the nature of duties, work load, experience and responsibilities of the two sets of employees in question are totally different from each other. **(Para..5)**

In ***Union of India & others vs. Delhi Judicial Service Assn. & another- JT 1995 (2) SC 578*** the Apex Court reversing the judgment of the High Court allowing the same scale of pay to all the officers of Higher Judicial Services, held as under: -

"We think that the high Court was not right in giving selection grade scale of pay to all the officers on the principle of equal pay for equal work. If that be so the Dist. Munsif (Junior civil Judge, Junior subordinate Judge) etc, lowest officer in judicial hierarchy is entitled to the pay of the Senior most super-time scale district

Judge as all of hem are discharging judicial duty. The marginal difference principle also is equally inappropriate. Similarly of posts or scale of pay n different services are not relevant. The nature of the duty, nature of the responsibility and degree of accountability etc. are relevant and germane considerations. Grant of selection grade, suppertime scale etc. would be akin to a promotion. The result of the impugned direction would wipe out the distinction between the time Scale and Selection grade officers. The learned counsel for the Union of India, pursuant to our order, has placed before us the service conditions prevailing in the Higher Judicial Services in other States in the country. Except Gujrat which had wiped out the distinction after the judgment in all India Judges Association's case, all other States maintained the distinction between the Grade 1 and Grade II Higher Judicial offices or Time Scale and Selection Grade or Suppertime scales etc. In fact this distinction is absolutely necessary to inculcate hard work, to maintain character, to improve efficiency, to encourage honesty and integrity among the officers and accountability. Such distinctions would not only be necessary in the Higher Judicial Service but also, indeed in all services under the State and at every stage."...(Para-5).

14. In ***Sita Devi & others Vs. State of Haryana & others -JT 1996 (7) SC 438***, the Apex Court upheld different pay scale on the basis of qualification relying on the earlier judgments of the Apex Court in ***The State of Mysore and another v. P. Narasinga Rao, AIR 1968 SC 349; State of Jammu and Kashmir v. Triloki Nath Khosa, AIR 1974 SC 1*** and ***P. Murugesan & others v. State of Tamil Nadu, 1993 (2) SCC 340.***

In ***State of Haryana Vs. Jasmer Singh & others, AIR 1997 SC 1788***, the Apex Court justified different pay scale on various factors observing as under: -

"It is, therefore, clear that the quality of work performed by different sets of persons holding different jobs will have to be evaluated. There may be differences in educational or technical qualifications which may have a bearing on the skills which the holders bring to their job although the designation of the job may be the same. There may also be other considerations which have relevance to efficiency in service which may justify differences in pay scales on the basis of criteria such as experience and seniority, or a need to prevent stagnation in the cadre, so that good performance can be elicited from persons who have reached the top of the pay scale. There may be various other similar considerations which may have a bearing on efficient performance in a job. This Court has repeatedly observed that evaluation of such jobs for the purposes of pay scale must be left to expert bodies and, unless there are any mala fides, its evaluation should be accepted." (Para-8)

In ***Garhwal Jal Sansthan Karmachari Union & another Vs. State of U.P. & others- (1997) SCC 24***, the Apex Court in para 8 of the judgment rejected the claim of pay parity between the employees of Jal Nigam and Jal Sansthan on the ground of qualitative difference in the duties, function and responsibilities in the two organizations. (Para 8)

In ***Union of India & others vs. Pradip Kumar Dey, (2000) 8 SCC 580***, the question of parity of pay scale of Naik, Radio Operator in CRPF and the employees working as Radio Operator in Directorate of Coordination Police Wireless came up for consideration on the principle of equal pay for equal work, the Apex Court negated the validity of parity observing that the different pay scale prescribed taking into account hierarchy in service and other relevant factors cannot be interfered as it would disturb the entire chain of hierarchy....Para-14

In ***State of Orissa & others v. Balaram sahu & others, (2003) 1 SCC 250*** the Apex Court observed in para 11 as under: -

"Though "equal pay for equal work" is considered to be a concomitant of Article 14 as much as "equal pay for unequal work" will also be a negation of that right, equal pay would depend upon not only the nature or the volume of work, but also on the qualitative difference as regards reliability and responsibility as well and though the functions may be the same, but the responsibilities do make a real and substantial difference."...(Para 11)

In ***State of Haryana & another Vs. Haryana Civil Secretariat Personal Staff Association, (2002) 6 SCC 72***, it was held in para 10 –

"It is to be kept in mind that the claim of equal pay for equal work is not a fundamental right vested in any employee though it is a constitutional goal to be achieved by the Government. Fixation of pay and determination of parity in duties and responsibilities is a complex matter which is for the executive to discharge. While taking a decision in the matter, several relevant factors, some of which have been noted by this court in the decided case, are to be considered keeping in view the prevailing financial position and capacity of the State Government to bear the additional liability of a revised scale of pay. It is also to be kept in mind that the priority given to different types of posts under the prevailing policies of the State Government is also a relevant factor for consideration by the State Government. In the context of the complex nature of issues involved, the far-reaching consequences of a decision in the matter and its impact on the administration of the State Government, courts have taken the view that ordinarily courts should not try to delve deep into administrative decisions pertaining to pay fixation and pay parity. That is not to say that the matter is not justiciable or that the courts cannot entertain any proceeding against such administrative decision taken by the Government. The courts should approach such matters with restraint and interfere only when they are satisfied that the decision of the Government is patently irrational, unjust and prejudicial to a section of employees and the Government while taking the decision has ignored factors which are material and relevant for a decision in the matter...(Para 10)

15. In ***State Bank of India & another Vs. M.R. Ganesh Babu & others, (2002) 4 SCC 556,*** the Apex Court observed in para 16 as under: -

"The principle of equal pay for equal work has been considered and applied in may reported decisions of this Court. The principle has been adequately explained

and crystallized and sufficiently reiterated in a catena of decisions of this Court. It is well settled that equal pay must depend upon the nature of work done. It cannot be judged by the mere volume of work; there may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. One cannot deny that often the difference is a matter of degree and that there is an element of value judgment by those who are charged with the administration in fixing the scales of pay and other conditions of service. So long as value judgment is made bona fide, reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. The principle is not always easy to apply as there are inherent difficulties in comparing and evaluating the work done by different persons in different organizations, or even in the same organization. Differentiation in pay scales of persons holding same posts and performing similar work on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation. The judgment of administrative authorities concerning the responsibilities which attach to the post, and the degree of reliability expected of an incumbent, would be a value judgment of the authorities concerned which, if arrived at bona fide, reasonably and rationally, was not open to interference by the court." (Para-16)

16. In ***State of Haryana and others v. Charanjit Singh and others, AIR 2006 SC 161*** in para 17 the Apex Court observed as under: -

"Having considered the authorities and the submissions we are of the view that the authorities in the cases of Jasmer Singh, Tilak Raj, Orissa University of Agriculture & Technology and Tarun K. Roy lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a Court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough

to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities made a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regards." (Para 17)(emphasis added).

17. Recently, in ***State of Bihar and others v. Bihar State + 2 Lecturers Association and others, AIR 2007 SC 1948*** the Hon'ble Apex Court referring to its earlier judgments has stated that the doctrine of equal pay for equal work should not be applied in casual manner. Though it is a doctrine well established in service jurisprudence and also is a concomitant of Article 14 of the Constitution but equal pay depends not only on the nature or volume of work but also on quality of work as regards reliability and response etc. In ***S.C. Chandra and others v. State of Jharkhand and others, JT 2007 (10) SC 272*** dated 21.8.2007 the Hon'ble Apex Court held that "to attract the principle of "equal pay for equal' work one must satisfy the basis that he is performing equal and identical work as is being discharged by others against him.

18. His lordship Hon'ble Markandey Katju, J in his separate but concurring judgment in ***S.C. Chandra and others*** (supra) has observed as under: -

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

19. His lordship has also observed that grant of pay scale is purely executive function and the Court should not interfere with the same. It may have a cascading effect creating all kinds of problem for the government and authority, hence the court should exercise judicial restraint and should not interfere in such executive functions. In para 26 of the judgment ***S.C. Chandra and others*** (supra) his Lordship further held as under:-

"In our opinion, fixing pay scale by courts by applying the principle of equal pay for equal work upsets the high Constitutional principle of separation of powers between the three organs of the State. Realizing this, this Court has in recent years avoided applying the principle of equal pay for equal work, ***unless there is complete and wholesale identity between the two groups*** *(and there too the matter should be sent for examination by an expert committee*

appointed by the Government instead of the Court itself granting higher pay.)

20. Same view was reiterated by his Lordship in ***Canteen Mazdoor Sabha v. Metallurgical Engineering Consultants (I) Ltd. and others, JT 2007 (10) SC 292*** and recently, in ***Union of India and others v. Hiranmoy Sen and others*** (Civil Appeal No.7232 of 2003) decided on 12.10.2007.

21. In view of the aforesaid exposition of law and considering the facts that the qualification, nature of work etc. of the Lab Assistant (Ayurved) and Lab Assistant (Rural) both cannot be said to be identical in any manner, in our view, the petitioner cannot invoke the above principle being situated differently. We, therefore, do not find any factual or legal error in the judgment of the Hon'ble Single Judge impugned in this appeal warranting interference.

22. The appeal is devoid of merit and is hereby dismissed. No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2007

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

Criminal Misc. Application No. 20834 of 2007

Adesh Kumar and another ...Applicants
Versus
State of U.P. ...Opposite party

Counsel for the Applicants:
Sri Prabha Shankar Pandey

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

Code of Criminal Procedure-Section 51-Release of Vehicle-Vehicle having temporary registration-involve in accident-punishment of driver-cannot come in the way of release of vehicle-for in definite period-Magistrate ought to have exercised such power promptly-direction issued for release of vehicle in favour of owner or insurer within 15 Days.

Held: Para 8

In view of decisions of the Apex Court, I quash the impugned orders dated 16.9.2006 and 10.1.2007 passed by the Judicial Magistrate and the Session Judge respectively and direct the courts concerned to release Chassis No. 426021AUZ200824. Engine no. 50A62380439 vide temporary registration no. JH-O5 C-49977 in favour of the applicants either Adesh Kumar or Tata Motors forthwith within a period of 15 days from the date a certified copy of this order is produced before him.

Case law relied on:
2003(43) ACC 223
1997(14) ACC 220 (SC)

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

1. Heard Sri Prabha Shanker Pandey, learned counsel for the applicants and learned A.G.A. for the State.

2. The order dated 16.9.2006 passed by the Judicial Magistrate, Bhoganipur, Kanpur Dehat in case no. 13 of 2005 is impugned ill the instant application, whereby an application for release of Chassis No. 426021 AUZ200824, Engine No. 50A62380439 vide temporary registration no. JH-05 C-4977 (hereinafter referred as the vehicle in question) has been rejected. The order rejecting release

application was challenged in criminal revision no. 151 of 2006, which was dismissed vide order dated 10.1.2007. This order is also impugned in the instant application.

3. Temporary registration form issued from Jharkhand on 19.7.2006 is annexed as annexure no. 1 to the affidavit filed in support of the application, wherein Chassis and Engine numbers are clearly shown, which was being taken from Jharkhand to Jaipur to its purchaser. The vehicle in question met with an accident en-route to Jaipur and consequent thereon First Information Report was registered at case crime no. 97 of 2005 under Sections 279/304-A I.P.C. P.S. Moosanagar, District Kanpur Dehat.

4. Driver of the vehicle Adesh Kumar, applicant no. 1 was convicted under Section 279 I.P.C. awarding fine of Rs.l,000/- and under Section 304-A I.P.C. to undergo rigorous imprisonment for a period of one month. In the event of non-deposit of fine, additional sentence was of one month. The application for release was moved by Driver Adesh Kumar himself, which was rejected on the ground that driver is not the registered owner of the vehicle in question, therefore, release application could not be allowed. Revision has also been dismissed on the same ground. The instant application has been moved on behalf of driver Adesh Kumar as well as Tata Motors, who is manufacturer of Chassis of the truck, which is sold to the different, dealers.

5. On perusal of annexure no.5, it transpires that trade tax was paid and there was no illegality whatsoever save for the unfortunate accident. The vehicle is lying in the custody of the police, despite criminal case has come to an end and driver has also served out his sentence.

6. Counsel for the applicants has placed reliance on decision of the Apex Court in the case of *Sunderbhai Ambalal Desai Vs. State of Gujrat 2003 (43) ACC page 223*, wherein the Apex Court has clearly stated that the vehicle can be released in favour of the owner or insurance company or a third person, if he is found to be entitled to take delivery. The Apex Court further directed that power under section 451 Cr.P.C should be exercised promptly expeditiously and articles seized should not be kept for a long time at the police station, in any case for not more than 15 days or one month.

7. In the instant case, courts have completely overlooked that the vehicle in question was being manufacture by Tata Motors and sold to different dealers. Chassis of trucks transported to the different States. It is always entrusted to the respective driver. In the instant case, admittedly, accident had taken place at the hands of the driver Adesh Kumar. He was prosecuted and convicted. The present application is moved at his instance as well as by the actual manufacturer i.e. Tata Motors. The Apex Court in the case of Sunderbai (supra) as well as *Smt. Basavva Kom Dyamangouda Patil Vs. State of Mysore and another 1997 (14) ACC 220 (SC)*, was of the view that where the property which has been the subject matter of an offence is seized by the police, ought not be retained in the custody of the court or of the police for any time longer than what is absolutely necessary as seizure amounts to clear entrustment of the property to a government servant, the idea behind

Section 451/457 Cr.P.C. is that property should be restored to the original owner after necessity to retain it ceases.

8. In view of decisions of the Apex Court, I quash the impugned orders dated 16.9.2006 and 10.1.2007 passed by the Judicial Magistrate and the Session Judge respectively and direct the courts concerned to release Chassis No. 426021AUZ200824. Engine no. 50A62380439 vide temporary registration no. JH-O5 C-49977 in favour of the applicants either Adesh Kumar or Tata Motors forthwith within a period of 15 days from the date a certified copy of this order is produced before him.

9. With the aforesaid direction, the application under Section 482 Cr.P.C. is finally disposed of.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2007

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Application No. 2259 of 2007

Dushyant Thakor and others ...Applicants
Versus
State of U.P. and another ...Respondents

Counsel for the Applicants:
Sri. Vinay Saran

Counsel for the Respondents:
Sri.Shishir Prakash
Sri. Navin sinha
Mrs. Tulika Prakash
Sri. Vipin Sinha
AGA

Code of Criminal Procedure Code Section 482-quashing of criminal proceeding-offence under 498 A, 323, 504, 506 IPC-both parties on the basis of compromise decided to live separately-the wife appeared and accepted to receive Rs.7 Lacs in furtherance of compromise-fate of pending criminal proceeding pre-decided-held-continuance of such proceeding would amount to abuse of process-hence quashed.

Held: Para 6

In such circumstances the fate of proceedings pending in the Court of the learned C.J.M. Concerned is pre decided i.e. the acquittal of the accused because the witness shall not support the prosecution story on account of compromise. It shall be abuse cf the process of the court if the proceedings are not quashed. In view of the decision of Apex Court in case of B.S. Joshi and others Vs. State of Haryana and another AIR 2003 SC 1386, in such matrimonial case if the parties have entered into a compromise the proceedings may be quashed.

Case law discussed:
AIR 2003 SC 1386

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

1. This application under Section 482 Cr.P.C. has been filed by the applicants Dushyant Thakor, Smt. Kusum Thakor, Vaishaii Mittar and Mandir Mittar with a prayer to quash the proceedings of Criminal Case No. 18236 of 2006 under Sections 498A, 323, 504, 506 I.P.C. and 3/4 Dowry Prohibition Act pending in the court of learned C.J.M., Allahabad.

2. The facts in brief of this case are that the FIR of this case has been lodged by Neeraj Chug against the applicants at P.S. Civil Lines, District Allahabad in

case Crime No. 231 of 2006 on 11.09.2006 at 3.10 p.m. alleging therein that first informant has performed marriage of his sister Vaishali with applicant NO.1 Dushyant Thakor on 23.04.2003, thereafter the demand of dowry was raised. To fulfill the demand of dowry the sister of the first informant was subjected to cruelty. The matter was investigated by the I.O. who submitted the charge sheet on 27.11.2006 in the court of learned C.J.M. Allahabad who took the cognizance and summoned the applicants to face the trial on 21.12.2006. Subsequently, the matter was settled between the parties, they entered into a compromise and both the husband and wife decided, to live separately. On the basis of the compromise the present application has been filed to quash the proceedings pending in the court of learned C.J.M., Allahabad vide Criminal Case No. 18236 of 2006 arising out of charge sheet submitted by the I.O. in case Crime No. 231 of 2006 under Sections 498A, 323, 504, 506 I.P.C., P.S. Civil Lines, District Allahabad.

3. Heard Sri Vinay Saran, learned counsel for the applicants, learned A.G.A. for the State of U.P. and Sri Vipin Sinha, learned counsel for·O.P.No.2.

4. It is contended by learned counsel for the applicant that in the present case Smt. Nidhi Thakor the sister of O.P. No.2 has entered into a compromise with her husband Dushyant Thakor, the applicant No.1 and they have decided to live separately. In terms of the compromise a maintenance case No. 501 of 2006 under Section 125 Cr.P.C. filed by Smt. Nidhi Thakor has been decided. In terms of the compromise a draft of Rs. 7 Lacs having No. 489844 issued by Punjab National Bank has been handed over to Smt. Nidhi Thakor by applicant No. 1 Dushyant Thakor. Smt. Nidhi Thakor has also appeared before this Court and she stated that she does not want to prosecute the applicants because she has entered into a compromise. In such circumstances the proceedings arising out of charge sheet dated 27.11.2006 under Sections 498A, 323, 504, 506 I.P.C. pending in the court of learned C.J.M., Allahabad shall not serve any purpose because the witnesses shall not support the prosecution story, the result of the proceedings shall be the acquittal of the applicants. In such circumstances to meet the ends of justice, the proceedings pending against the applicants may be quashed.

5. In reply of the above contention, it is submitted by learned counsel for O.P. No. 2 that both the parties have entered into a compromise and they have decided to live separately and in terms of the compromise a draft of Rs. 7 Lacs has been given to Smt. Nidhi Thakor the wife of applicant No. 1. Smt. Nidhi Thakor and her brother O.P. No. 2 Neeraj Chug do not want to proceed further against the applicants in the present case and they are having no objection in quashing the proceedings of this case pending against the applicants. In the present case the applicant No. 1 Dushyant Thakor and her wife Smt. Nidhi Thakor appeared before this Court. Smt. Nidhi Thakor orally stated before the Court that she has entered into a compromise with the applicants and she has accepted the cheque of Rs.7 Lacs which has been given in pursuance of the compromise, she does not want to proceed further against the applicants and she is having no objection in quashing the proceedings.

6. Considering the facts and circumstances of the case and submissions made by learned counsel for the applicants, learned A.G.A., and from the perusal of the record it appears that it is a matrimonial dispute between the applicant No.1 and his wife Smt. Nidhi Thakor, they have entered into a compromise and decided to live separately to lead their life, according to their free will and consent. The O.P. No.2 and his sister Smt. Nidhi Thakor do not want to proceed further against the applicants and they are having no objection in quashing the proceedings of this case against the applicants. In terms of compromise a draft of Rs.7 Lacs has been given to Smt. Nidhi Thakor the wife of applicant No. 1. In such circumstances the fate of proceedings pending in the Court of the learned C.J.M. Concerned is pre decided i.e. the acquittal of the accused because the witness shall not support the prosecution story on account of compromise. It shall be abuse of the process of the court if the proceedings are not quashed. In view of the decision of Apex Court in case of **B.S. Joshi and others Vs. State of Haryana and another AIR 2003 SC 1386,** in such matrimonial case if the parties have entered into a compromise the proceedings may be quashed.

7. In view of above discussion the proceedings of case No.18236 of 2006 under Sections 498A, 323, 504, 506 I.P.C. and 3/4 Dowry Prohibition Act pending in the court of learned C.J.M., Allahabad arising out charge sheet dated 27.11.2006 of Case Crime No. 231 of 2006 P.S. Civil lines, District Allahabad are hereby quashed.

Accordingly, this application is **allowed**.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.10.2007

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 19287 of 2007

Ujjwal Singh ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri. Kamlesh Shukla
Sri. Mangala Prasad Rai

Counsel for the Opposite Party:
Sri. Manish Chandra Tiwari
Sri. Sanjay Singh
AGA

High Court Rules-Chapter XVIII Rule 18 (4)(b)-Bail application without disclosing the date of surrender or arrest-held-not maintainable-direction issued accordingly for strict compliance-Bail application rejected only on this ground.

Held: Para 6

The date of the applicant's arrest/ surrender in the court concerned has not been mentioned in the bail application which is mandatory requirement as provided by the High Court rules, Allahabad under Chapter XVIII Rule 18 sub rule (4)(b). The period of detention is also one of the grounds to consider the bail of the accused, if applicant's arrest/surrender is not mentioned in the bail application, the bail application shall not be entertained. It is also one of the ground to reject the bail application.

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

1. This bail application has been filed by the applicant Ujjwal Singh with a prayer that he may be released on bail in case crime No. 86 of 2007 under sections 498-A, 323, 506, 419, 420, 504 IPC and section 3/4 D.P. Act, P.S. George Town, District Allahabad.

2. The brief facts of this case are that F.I.R. of this case has been lodged by Sachchidanand Rai on 21.3.2007 at 0.25 A.M. in respect of the incident which had occurred during the period of 18.5.2004 to 20.2.2007. It is alleged that the first informant went to the house of applicant with a proposal of the marriage of her daughter Anita Rai. The applicant was also present along with the family members. The first informant was apprised by the applicant and other co-accused persons that after obtaining the degree of B.Tech. the applicant was serving as engineer in Delhi, on this consideration the first informant has settled the marriage of his daughter with the applicant and the date of the marriage was fixed on 28.5.2004. The applicant and other co-accused persons pressurized the first informant to pay the Rs. Ten lacs, when the first informant shown his inability to pay the same, the threat was extended to him. All the formalities including the invitation cards were done by the first informant, considering his respect in the society he paid Rs.50,000/- in cash and draft of Rs. Five lacs dated 18.5.2005, a draft of Rs.2.75 lacs and Rs.1.75 lacs in cash the total amount of Rs. Ten lacs was paid to the applicant and his family members prior the marriage. The ornaments of Rs.3.50 lacs and all the articles having the valuation of Rs. Three lacs were given in the marriage. The marriage was solemnized on 28.5.2004. The applicant has made a demand of Rs. Five lacs for taking admission in M.Tech classes for which the daughter of the first informant was compelled to place the demand before her father and she was subjected to cruelty. She was, compelled to place the demand before his elder sister who was, living in America who sent the Rs.2.50 lacs in the account of the first informant and a cheque dated 26.8.2005 was given to the applicant, the same was encashed also. The applicant has asked to obtain the degree of the M. Tech., thereafter to serve as engineer. In the meantime the daughter of the first informant gave birth to a female child. She was again subjected to cruelty by her in-laws and again a demand of Rs. Ten lacs was raised and daughter of the first informant was asked to bring the same amount from her father, her ornaments and other articles have been taken by the applicant and other co-accused persons are were extending the threats to his daughter. The applicant applied for bail before the learned Sessions Judge, Allahabad who rejected the same on 17.8.2007, being aggrieved from the order dated 17.8.2007 the present bail application has been filed by the applicant.

3. Heard Sri Mangla Rai and Sri Kamlesh Shukla learned counsel for the applicant, learned A.G.A. and Sri Manish Chandra Tiwari and Sri Sanjay Singh, learned counsel for the complainant.

4. It is contended by learned counsel for the applicant that there is dispute between husband and wife and there is no medical examination report to show that the wife of the applicant was ever subjected to cruelty and there was no

demand of dowry. The applicant has filed a suit for restoration of conjugal right, she does not want to live with the applicant. The applicant has taken the loan from his father-in-law to bear the expenses of the study with an assurance that same shall be returned after getting the employment. The applicant in jail for a considerable period, therefore, he may be released on bail.

5. In reply of the above contention, it is submitted by learned A.G.A. and learned counsel for the complainant that the applicant and other co-accused persons had compelled the first informant to pay dowry, a huge amount of the money has been taken as dowry and to fulfill the demand of dowry the deceased was subjected to cruelty and the applicant has compelled his wife to leave his house and applicant has extended the threats. In such circumstances, if applicant is released on bail, he shall tamper with evidence.

6. Considering the facts, circumstances of the case, submissions made by learned counsel for the applicant, learned A.G.A., learned counsel for the complainant and from the perusal of the record it appears that there is dispute between husband and wife, there is specific allegation against the applicant that he had demanded the dowry up to the some extent it was fulfilled thereafter more demand was raised to fulfill the same. The wife of the applicant was subjected to cruelty. The date of the applicant's arrest/ surrender in the court concerned has not been mentioned in the bail application which is mandatory requirement as provided by the High Court rules, Allahabad under Chapter XVIII Rule 18 sub rule (4)(b). The period of detention is also one of the grounds to consider the bail of the accused, if applicant's arrest/surrender is not mentioned in the bail application, the bail application shall not be entertained. It is also one of the ground to reject the bail application, therefore, without expressing any opinion on the merits of the case, the applicant is not entitled for bail. The prayer for bail the refused. At this stage.

7. It is directed that no bail application shall be entertained by the Registry if the date of applicant's arrest/ surrender is not mentioned therein because it is necessarily required by the Rule 18 sub rule (4)(b) under Chapter XVIII of the High Court Rules, Allahabad.

8. A copy of this order shall be placed before the Registrar General for issuing the necessary direction to the concerned section of the office where the bail applications are entertained.

9. With the above direction this bail application is rejected.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.08.2007

BEFORE
THE HON'BLE AJAI KUMAR SINGH, J.

Jail Appeal No.1014 of 1994
&
Jail Appeal No.1015 of 1994
&
Jail Appeal No. 1016 of 1994

Pramod ...Appellant
Versus
State ...Respondent

Counsel for the Appellant:
Sri Dr. Abida Syed (Amicus Curiae)

Counsel for the Respondent:
A.G.A.

Narcotic Drug and Psychotropic-Substance Act–Section 22 and 57-punishment of one year R.I. with fine of Rs. One Lac-challenged on the ground of violation of the provision of section 50 as no immediate information of seizure given to the superior officer-No public witness-held-being burning example of sudden arrest and chance recovery-in absence of allegation regarding bias-Police witness as good as the public witness-and the violation of the provision of section 57 being directory in nature-cannot effect the genuineness of recovery proceeding.

Held: Para 6,11,and 12

Since all the three cases, i.e. Special Cases No. 2/1994, 3/1994 and 4/1994 arose out of the same occurrence, they were consolidated and case no. 2 of 19994 was declared the leading case in which evidence was recorded and all the three cases were disposed of by the trial Court by a common judgment.

In absence of any evidence regarding bias, the testimony of a police witness is as good as that of a public witness. I find that in the present case, there is no effect of non examination of the public witness of recovery because no bias has been alleged on behalf of the appellants accused with the police officers/officials nor any suggestion to this effect has been given from the side of the defence to the prosecution witnesses.

In my opinion, since there is nothing on record to show that the seizure proceedings are not genuine, hence. The violation of provisions of Section 57 being direct in nature has no effect on the genuineness of the recovery proceeding.

Case law discussed:
2004(2) JIC 410 (Alld) distinguished.

(Delivered by Hon'ble Ajai Kumar Singh, J.)

1. All these jail appeals have been preferred against the common judgment and order dated 30.3.1994 passed by Sri K.N. Singh, the then First Addl. Sessions Judge, Saharanpur in Special Cases No. 2/1994, 3/1994 and 4/1994 under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act'), P.S. G.R.P., Saharanpur convicting all the three appellants accused for offence under Section 22 of N.D.P.S. Act and sentencing them each to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1 lac and in default of payment of fine to undergo a further imprisonment for two years.

2. Briefly stated the prosecution case is that on 18.11.1993 Anil Kumar, S.O. G.R.P. Saharanpur along with Head Constable Shishupal Singh, Constable Ravindra Singh and Constable Narendra Kumar had gone to platform no. 2 in connection with the investigation of case crime no. 108 of 1993, under Section 328 I.P.C. and complainant of the said case was also present with him. Complainant of the that case Sri Zaheer Ahmad pointed out towards three persons sitting on the bench and informed the police party that those persons had intoxicating article, which they had given to him some time back. Upon this information, the first informant with the help of the police party arrested those three persons sitting on the Bench at about 14.10 hrs. After telling them the reasons for their arrest all the three accused were arrested. Before making enquiry about their names and

addresses, it was asked from those persons as to whether they would like to give their search before a Magistrate or gazetted officer, which they denied and asked the police party itself to take their search. Then the names and addresses of those persons were asked by the police party. The first person disclosed his name as Jasondi. On his personal search 16 packing tablets of Serepas-30 and also the powder of these tablets kept in a sachet of brown paper was recovered from the front pocket of the '*bundi*' he was wearing. On the personal search of second person, who disclosed his name as Ram Singh, 10 tablets of serepas-30 and 9 tablets Nitravet-10 and powder of serepas tablets kept in a brown paper was recovered from the Gamachha tied up with the waist of the accused. From the personal search of the third person, who disclosed his name as Pramod, 20 tablets of serepas-30 and one sachet of powder of these tablets kept in brown paper was recovered from the turban of the accused. When enquired about the contraband article possessed by these accused, they could not give any satisfactory reply in this regard. Instead they voluntarily admitted that they have been caught red handed. The accused Ram Singh disclosed the modus operandi of the accused persons. Accused Ram Singh disclosed that at any railway station or bus stand, the accused Jasondi after showing his palm to him used to ask questions from him. During this time if any passenger also happen to come to Ram Singh to show his palm he was asked to wait and in the meantime, accused Pramod used to go to bring the tea from a tea stall and used to mix the powder of intoxicating tablet in the tea of that passenger. As soon as the passenger became intoxicated these accused persons used to take all his belongings and run away and after selling the said articles, they used to make merry. The contraband articles recovered from the three accused persons were kept separately in three pieces of cloths and were sealed at the spot. Sample of the seal was also prepared. The tumbler in which tea was given to the complainant and was lying empty near that place was also taken in police custody and was sealed at the spot and the sample of seal was prepared. Memo of recovery was prepared at the spot and was read over to the witnesses and their signatures were obtained. Copy of the recovery memo was given to each of the accused separately and their thumb impressions were obtained. Thereafter, accused and the recovered contraband were taken to the police station and on the basis of the recovery memo, FIR was registered at the police station.

3. Charge under Section 22 of the Act was framed against all the three accused in three separate cases, which they denied and claimed to be tried.

4. In order to prove its case, the prosecution examined Anil Kumar, S.I., P.S. G.R.P. Saharanpur P.W.-1, Constable Ravi Dutta, P.W.-2 and S.I. Khanjan Lal Gangwar, P.W.-3. P.W.-1 Anil Kumar proved the prosecution story and the manner of arrest of the accused and proved the recovery memo Ex. Ka-1 and tablets Ex. 1-3 recovered from the possession of the accused. He also proved power Ex.-4-6 recovered from the possession of the accused persons. He also stated that due opportunity as required under section 50 of the Act was given to the accused persons to get themselves searched before a Magistrate of a Gazetted Officer to which they denied. The witness has also stated that he

had informed the gazetted officer, i.e., Circle Officer, about the arrest of the accused persons orally. P.W.-2, Ravi Dutta, has corroborated the testimony of P.W.-1. P.W.-3, who is I.O. of the case, has proved G.D. Ex. Ka-3, site plans Exs. Ka-4 to Ka-6, report of the chemical examination Exs. Ka-7 to Ka-9 and the charge sheet Exs.Ka-10 Ka-12.

5. In their statements under Section 313 Cr.P.C. all the accused denied the prosecution version and have stated that they have been falsely implicated due to enmity.

6. Since all the three cases, i.e. Special Cases No. 2/1994, 3/1994 and 4/1994 arose out of the same occurrence, they were consolidated and case no. 2 of 19994 was declared the leading case in which evidence was recorded and all the three cases were disposed of by the trial Court by a common judgment.

7. On the basis of oral and documentary evidences adduced before the Trial Court all the three accused persons were held guilty of the charge under Section 22 of the Act and were accordingly convicted and sentenced vide impugned judgment to undergo R.1. for 10 years each and a fine of Rs. 1 lac each and in default of payment of fine each of them to undergo additional R.1. for two years.

8. Feeling aggrieved, these three Jail Appeals have been preferred by the accused Jasondi, Ram Singh and Pramod respectively.

9. I have heard amicus curiae for all the three accused persons and the learned A.G.A. and have gone through the record. Since all the three appeals arise out of the same judgment, the same have been heard together and are being decided by this common judgment.

10. The first argument put forward by amicus curie on behalf of the appellants is that there has been a clear cut violation of the provisions of Section 50 of the Act. It has been submitted that no information has been recorded at the police station regarding the fact that the first informant was proceeding from the police station in connection with the recovery of the contraband article. It is also submitted that there is no evidence to show that information for the seizure of the contraband was given to the immediate superior officer within the time prescribed. It is also submitted that the accused persons were not made aware of their right of personal search before a gazetted officer of a magistrate. To the contrary, learned A.G.A. argued that it is a case of sudden arrest and of chance recovery and, hence, the provisions of Section 50 of the Act are not attracted to the present case. Learned A.G.A. in this regard placed reliance on the decision in **Azhar Hussain Vs. State of U.P. & another 2004 (2) JIC 410 (Alld.)** wherein it has been held that the provisions of Section 50 of the Act are not attracted if the recovery of the contraband article was made from the person of the appellant all of a sudden. From the perusal of recovery memo and oral evidence on recovery, I find that the present case is an example of sudden arrest and the recovery is a chance recovery. Hence, in my opinion in view of the principal of law laid down in **Azhar Hussain Vs. State of U.P.& another (supra)** the provisions of Section 50 of the Act are not attracted.

11. The next argument advanced on behalf of the appellants is that there is no independent witnesses of the recovery and that the complainant of the case crime no. 108 of 2993 namely Zaheer Ahmad has also not been examined, who was also a witness of recovery, hence, adverse inference will be taken against the prosecution. To the contrary, it has been submitted by learned A.G.A. that one public witness of recovery, namely, Zaheer Ahmad was already with the police party, hence, there was no need for the police party to have collected any other public witness. It has also been submitted that this witness has already been examined in the case in which the accused persons were being tried for the offence under Section 328 I.P.C. and in that case also accused persons have been convicted and it does not matter that the said witness could not be examined in this case. In my opinion, the testimony of the police witnesses cannot be doubted only on the ground that the witnesses are police officers/officials. In absence of any evidence regarding bias, the testimony of a police witness is as good as that of a public witness. I find that in the present case, there is no effect of non examination of the public witness of recovery because no bias has been alleged on behalf of the appellants accused with the police officers/officials nor any suggestion to this effect has been given from the side of the defence to the prosecution witnesses.

12. It has been next argued that no information of the seizure was given by the arresting officer to his immediate superior officer within 48 hours of the seizure, hence, there is violation of the provisions of Section 57 of the Act, which vitiates the entire recovery proceedings. To the contrary, learned A.G.A. contended that the provision of section 57 of the Act are only directory and only on this ground the recovery proceedings cannot be held to be vitiated. Moreover, there has been compliance of the provisions of Section 57 of the Act as the arresting officer, P.W.-1 has clearly stated that the information of the seizure was given to the Circle Officer orally after the occurrence. In my opinion, since there is nothing on record to show that the seizure proceedings are not genuine, hence. The violation of provisions of Section 57 being direct in nature has no effect on the genuineness of the recovery proceeding.

13. No other point has been raised during the course of argument on behalf of the appellants.

14. From the above, I find that the prosecution case is fully established by the documentary as well as oral evidences adduced during the trial and no material contradictions have been pointed out in the statements of the prosecution witnesses. The provisions of Section 50 of the Act are not attracted. There is no material on record to show that the appellant/accused has been falsely implicated. Thus, I am of the opinion that the prosecution has successfully proved its case beyond reasonable doubt and the judgment and order of the lower Court does not suffer from any infirmity. The conviction and sentence awarded to the appellants are liable to be upheld.

15. In the result, the appeals fail and are dismissed.

16. Copy of this judgment be placed on records of connected Jail Appeals No.1015 of 1994 and 1016 of 1994.

17. Dr. Abida Syed appointed as Amicus Curiae on behalf of the appellants in all the three appeals shall get Rs.5,000/- as her fees.

18. Let the lower court record be sent back to District Judge, Siddharth Nagar without delay along with a copy of this judgement for compliance and for making entry in the relevant record. Compliance report be submitted within two months.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.10.2007

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No.25035 of 2007

Smt. Seema ...Applicant
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Applicant:
Ashok Kumar Mishra
Sri Arun Kumar Singh

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

Code of Criminal Procedure-Section 154 (1), 156 (3)-cognizable offence-disclosed-refusal by Magistrate to direct the Police to register and investigate the case-On ground-victim has knowledge of all facts-No further investigation required-held-contrary to procedure, as well as various dictum of the Apex Court-Magistrate is under bounded duty to enforce the law laid down by the Apex Court-order impugned can not sustained-accordingly dismissed.

Held: Para 10

From the perusal of the impugned order it seems that the Magistrate has refused to direct the police to register the FIR on the ground that the victim is a knowledge of all the facts and the matter does not require any investigation. This view of the Magistrate is wholly un-sanctified and is against the very spirit of Section 154(1) in conjunction with 156(3) Cr.P .C. and the law laid down by the Apex Court. Criminal Procedure Code no where provides that if the facts of a cognizable offence is known to the victim then his FIR should not be registered. From where the Magistrate is getting this law is not understandable. On the contrary Criminal Procedure Code as well as various rulings referred to above by the Apex Court clearly speaks that FIR of all cognizable offence must be registered.

Case law discussed:
2001 (Suppl.) ACC-957
AIR 1992 SC (Crl.)-426
1993 SCC (Crl.)-177

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

1. Smt. Seema Verma a tortured wife has approached this Court in its inherent jurisdiction under Section 482 Cr.P.C. praying to quash the order dated 13.9.2007 passed by Additional Chief Judicial Magistrate, Baghpat in Application No.440 of 2007, Smt. Seema Versus Manoj and others, under Section 156(3) Cr.P.C., police station Chhaprauli, district Baghpat. By the impugned order learned Magistrate has refused to direct the police to register the FIR and investigate the offence of cognizable nature disclose in the application under Section 156(3) Cr.P.C. filed by the present applicant.

2. Before coming to the contentions raised by learned counsel for the applicant a resume of facts is sketched below.

Smt. Seema Verma is the daughter of Motiram Verma, resident of Village Shabaga, police station Chhaprauli, district Baghpat. She was married with Manoj son of Brajbhan, resident of Binauli, police station Binauli, district Baghpat on 6.5.2006 according to the Hindu customs and rites in her village Shabaga. The in-laws and other relatives of the husband were not satisfied with the dowry given in the marriage and resultantly they started torturing the wife Seema Verma, the present applicant. The demand of motorcycle plus Rs.50000/- (Rs. fifty thousand) was put forth by the aforesaid persons. On 3rd November 2006 Mukesh and his wife Smt. Babli, who are *jeth* and *jethani* of Seema Verma badly assaulted her. On 8th December 2006 her mother-in-law Smt. Roshni wife of Brajbhan and her husband Manoj also bet her and locked her inside a room and kept her starving. On 8th January 2007 her *jeth* Mukesh and Rakesh and father-in-law Brajbhan repeated the assault on her and on 16.1.2007 her mother-in-law Roshni, *jethani* Babli and her husband Manoj even endeavoured to burnt her alive. Seema Verma saving herself from the clutches of in-laws and her husband went to the police station Binauli to lodge the complaint. She also informed her mother Smt. Kunti wife of Motiram and her brother Krishna. The aforesaid two persons in the company of other relatives Narendra, Yogendra and Rakesh endeavoured to pacify the in-laws and the husband of Seema Verma but they refuse to take back the applicant without a motorcycle and RS.50000/-. They also did not allow the applicant to remain in their house and she was turned out along with her mother and brother. Since 16.1.2007 Seema Verma is residing with her parental relatives. It is alleged that repeated applications by the applicant to police station Binauli, district Baghpat fell on deaf ears and her report for cognizable offence was not registered. When the in-laws and other relatives of the husband came to know of the applications filed by Seema Verma then on 16.8.2007 at 10.00 a.m. her husband Manoj, jeth Mukesh and Rakesh and father-in-law Brajbhan came to the parental house of the applicant and threatened her to be annihilate if their demand is not fulfilled. Her brother was also threatened for life. Police of police station Chhaprauli, district Baghpat refused to pen down of her FIR and therefore, the applicant dispatched an application on 18.8.2007 to S.P. Baghpat but of no use. Ultimately on 21.8.2007 she invoked the jurisdiction of the Magistrate under Section 156(3) Cr.P.C. praying therein that the police be directed to register her FIR and investigate the offence.

3. From the perusal of record of this criminal miscellaneous application it transpires that the Magistrate directed her application to be registered as a complaint case and fixed 27.9.2007 for recording of her statement under Section 200 Cr.P.C. vide impugned order dated 13.9.2007 which application was registered as Criminal Miscellaneous Application No.404 of 2007, Seema Verma vs. Manoj and others. The order dated 13.9.2007 is impugned in the instant application.

4. Learned counsel for the applicant contended that the application of the applicant was filed at a pre-cognizance stage seeking a direction form the Magistrate to direct the police to follow the mandate of law and register the FIR of cognizable offence committed by the accused and investigate the offence. This

was of pre-cognizance stage and the Magistrate has refused the prayer to direct the police to register the FIR by referring to the decisions of this Court reported in **Ram Babu Gupta vs. State of U.P. 2000(2) J.I.C. page 23** and also judgement in **Josef Mathuri vs. Swami Sachidanand Hari Saakchi 2001 (Suppl.) ACC 957**. Learned counsel for the applicant contended that the full Bench judgement of the this Court in Ram Babu Gupta is misinterpreted and misutilized.

5. Learned AGA on the other hand contended that the impugned order does not suffer from any infirmity.

I have pondered over the contentions raised by both the counsels.

6. It is the intention of legislature that FIR of all cognizable offence must be registered and offences must be investigated. It is the duty of police to register the FIR of all cognizable offence under Section 154(1) Cr.P.C. and investigate the same under Section 156(1) Cr.P.C. subject to exception under Section 157(1) thereof. The apex court in the case of **State of Haryana vs. Bhajan Lal 1992 SC (criminal) page 426** and **Union of India Vs. W.N. Chadha 1993 SCC (Cr.) 1171** and many other judgements have categorically held that if the police does not register the FIR of cognizable offence, it flouts the mandate of law. Magistrate was approached by the applicant only for this purpose and no other. The grievance of the applicant was that the police has not followed the mandate of law as has been laid down by the Apex Court and is flouting the same. ACJM Baghpat was under the boundant duty to preserve the sanctity of law laid down by the Apex Court and not to allow the police to flout: The applicant wanted the Magistrate to direct the police to follow the mandate of law. Magistrate was not approached to start the litigation of his own. ACJM Baghpat should have considered the application from the point of view of the prayer made therein. He was not accepted to travel beyond the scope of the prayer made therein. The applicant never wanted to start litigation. She wanted her FIR to be registered of cognizable offence under Section 498A and 3/4 D.P. Act and she wanted all the ingredients of the offence to be surfaced. The Magistrate, who lack the jurisdiction to investigate into the offence cannot decide whether the cognizable offence requires investigation or not? It is for the police to decide whether the cognizable offence is to be investigated or not under Section 157(1) Cr.P.C. When the law declared by the Apex Court is that all cognizable offence must be registered it was the duty of the Magistrate to direct the police to register the FIR of cognizable offence. The law laid down by the Apex Court is above all law laid down by various High Courts of this country. No High Court can laid down the law against the view expressed by the Supreme Court.

7. Coming to the ruling of Ram Babu Gupta's case (supra). It has become tool in the hands of the Magistrate to get the law laid down by the Apex Court flouted at the hand of the police. In the case of Ram Babu Gupta (supra) full Bench of this Court has no where said that the Magistrate can suo moto convert an application under Section 156(3) Cr.P.C into a complaint. The ruling and the law laid down by this Court as well as by Apex Court has to be read in what it

actually says and not what it could have said. The cordinal principle of interpretation of statute and the law is that nothing has to be read in a judgement what it has not said. By allowing the police to flout the law laid down by the Apex Court is to bring ignominy to the rule of law. No High Court can laid down a law against the view expressed by the Apex Court and if such a view has been laid down then that view and the opinion of the High Court is per incurrium and I say no more.

8. In Ram Babu Gupta (supra) full Bench of the Court has only said that if an application under Section 156(3) Cr.P.C. is filed and it is prayed to be treated as a complaint by the aggrieved person then merely because the application has been filed under Section 156(3) Cr.P.C. the Magistrate cannot refuse to treat the application under Section 156(3) Cr.P.C as a complaint. What has been laid down in Ram Babu Gupta is that if the victim filed an application under Section 156(3) Cr.P.C. and prayed the Magistrate to treat the application as a complaint then the Magistrate cannot refuse such a prayer merely because the application under Section 156(3) Cr.P.C. was filed by the victim at a pre-cognizance stage. To allow the Magistrate to take cognizance lies within the realm of the victim. Magistrate cannot on his own whimsical and arbitrarily exercise against the prayer made by the victim, suo mota start the litigation. The following observation in Ram Babu Gupta (supra) completely interdicts the view as has been often expressed by the Magistrate that the aforesaid ruling Ram Babu Gupta (supra) allows them to suo moto convert the application under Section 156(3) Cr.P.C. into one as compliant under Section 190(1) (a) Cr.P.C.:

"In this connection it may be immediately added that where in an application, a complainant states facts which constitute cognizable offence but makes a defective prayer, such an application will not cease to be a complaint nor can the Magistrate refuse to treat it as a complaint even though there be no prayer seeking trial of the known or unknown accused."

In the same judgement Hon'ble R.K. Dash, J. has been please to held as under:

"However, it is always to be kept in mind that it is the primary duty of the police to investigate in cases involving cognizable offences and aggrieved person cannot be forced to proceed in the manner provided by Chapter XV and to produce his witnesses at his cost to bring home the charge to the accused. It is the duty of the State to provide safeguards to the life and property of a citizen. If any intrusion is made by an offender, it is for the State to set the law into motion and come to the aid of the person aggrieved."

Hon'ble J.C. Gupta, J. while answering the question has been pleased to observe as follows:-

"It is obvious that power to order investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The power under Section 156(3) is exercisable at a pre-cognizance stage while the other at post-cognizance stage. Once the Magistrate has taken cognizance of the offence, it is not within

his competence to revert back to pre-cognizance stage and invoke Section 156(3) Cr.P.C."

9. The above quoted passage leaves no room for doubt that the full Bench decision of this Court has no where said that Magistrate can start their litigation by suo moto converting an application under Section 156(3) Cr.P.C. into a complaint against the wishes of the victim, who by suo moto conversion of his application becomes the complainant. The aforesaid ruling of Ram Babu Gupta is being utilized by the lower court Magistrate for passing illegal orders if not for ulterior motives. The judgement of Ram Babu Gupta (supra) is being misinterpreted and misquoted only to thwart the legitimate registration of FIR of cognizable offence as is disclose in the application under Section 156(3) Cr.P.C. The Magistrate should have looked into the law laid down by the apex Court in various pronouncements on the subject and then pass an order in accordance with law.

10. From the perusal of the impugned order it seems that the Magistrate has refused to direct the police to register the FIR on the ground that the victim is a knowledge of all the facts and the matter does not require any investigation. This view of the Magistrate is wholly un-sanctified and is against the very spirit of Section 154(1) in conjunction with 156(3) Cr.P .C. and the law laid down by the Apex Court. Criminal Procedure Code no where provides that if the facts of a cognizable offence is known to the victim then his FIR should not be registered. From where the Magistrate is getting this law is not understandable. On the contrary Criminal Procedure Code as well as various rulings referred to above by the Apex Court clearly speaks that FIR of all cognizable offence must be registered. This naturally follows from the aforesaid judgement of the apex court that if the police fails to follow the mandate of law and the Magistrate is approached to directed the police to obey the law laid down by the Supreme Court the Magistrate is under boundant duty to see that the law laid down by the Apex Court is observed.

11. In view of the what I have stated above I find force in the contentions raised by the learned counsel for the applicant and the impugned order is wholly unsustainable in law.

12. This Criminal Miscellaneous Application is allowed. The impugned order dated 13.9.2007 passed by Additional Chief Judicial Magistrate, Baghpat in Application No.440 of 2007, Smt. Seema Versus Manoj and others, under Section 156(3) Cr.P.C., police station Chhaprauli, district Baghpat is hereby quashed. The matter is remanded back to ACJM, Baghpat to rehear and decide the application of the applicant strictly in accordance with law keeping the law laid down the by Apex Court and pass order thereon.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2007

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

Civil Misc. Writ Petition No. 8510 of 2002
Connected With
Civil Misc. Writ Petition No. 36028 of 2000

Kripa Shankar Tiwari ...Petitioner
Versus
District Inspector of School, Fatehpur and another ...Respondents

Counsel for the Petitioner:
Sri S.N. Singh
Sri Piyush Mishra
Sri manoj Kumar Pandey

Counsel for the Respondents:
Sri R.K. Tripathi
Sri Suresh singh
S.C.

Constitution of India, Art. 226-Service law-Cancellation of appointment-petitioner's father died on 04.07.1989-working as Head Master in Junior High School retired on 30.10.88-keeping view of the interest of students-in the eye of law deemed to be retired on 30.10.88-petitioner cannot be appointed on compassionate ground-held-cancellation order warrant no interference.

Held: Para 10

According to law, the father of the petitioner stood retired on 30.10.1988, but keeping in view the interest of the students, extension of service till the end of the academic session was granted to him under the Rules so that the teaching in the institution is not affected. This session extension could only be treated as an extension of service till the end of the academic session. It would, therefore, be akin to a fixed term appointment, automatically terminating the contract of service at the end of the academic session. Such fixed tenured employees cannot be treated as regular employees whose Dependants could seek compassionate appointment, at best, they could claim the salary up to the period of expiry of the aforesaid contract. It has already come on record that the entire salary uptil 30.6.1989 has already been paid to the petitioner's mother and, therefore, on this ground also the petitioner is not entitled to compassionate appointment.

Case law discussed:
1994(4) SCC-138, 1997 (8) J T 332
2000(7) SCC 192, 2002 (2) PWC - 144

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

1. Heard learned counsel for the petitioner and Shri Suresh Singh, learned Standing counsel for the respondents.

2. It is pleaded that the father of the petitioner Late Shri Shiv Shankar Prasad was working as a Headmaster in Junior High School, Dev Goan in district Fatehpur when he died in harness on 4.6.1989 and thereafter petitioner was granted compassionate appointment vide order dated 3.10.1997. However, without any notice or opportunity, the said order was cancelled vide order dated 8.10.1997 which is impugned in the connected petition no. 36028 of 2000. In pursuance of an order dated 18.8.2000 passed in the aforesaid connected petition, the respondents have passed a fresh order dated 28.8.2001 rejecting his representation and affirming the order dated 8.10.1997 which is challenged in the present petition.

3. Learned counsel for the petitioner has firstly urged that the order dated 8.10.1997 was passed without notice or

opportunity and as such ought to be quashed.

4. It is apparent from the record that in pursuance of the interim order passed in the connected petition, the representation of the petitioner has been decided afresh affirming the order dated 8.10.1997 and, therefore, it cannot be said that the order is ex parte.

5. It is next contended that the finding in the order dated 28.8.2001 that his father died on 4.7.1989 is not correct and the respondents have ignored the evidence filed in support thereof and as such the order is vitiated.

6. It is undisputed that the retirement date of the father of the petitioner was 30.10.1988 but he was given benefit of session extension uptill 30.6.1989. It is also evident from the record that the incharge Headmaster of the Institution had informed the respondents that in fact the father of the petitioner had died on 4.7.1989. One real brother of the petitioner viz. Shri Vijay Shankar Tripathi had given a letter dated 3.7.1989 to the Senior Assistant Teacher of the Institution that though his father had retired on 30.6.1989 he could not give the charge of the office because he was admitted in a hospital. The mother of the petitioner and wife of Late Shri Shiv Shankar Prasad claimed and was paid family pension w.e.f. 5.7.1989. It is also evident that the full salary for the month of June 1989 was credited and paid in the account of Shiv Shankar Prasad which has been paid and accepted by the petitioner's mother. All these documents proved beyond doubt that the father of the petitioner died after retirement on 4.7.1989.

Apart from the aforesaid, there is another aspect to the issue.

7. There is nothing on record to show that on which date the petitioner claimed compassionate appointment nor the said application has been made part of the record. On persistent query of the Court to disclose the actual date, the petitioner could not give any satisfactory reply. Assuming that the father of the petitioner died on 4.6.1989, compassionate appointment cannot be given after eight years especially when there is no specific pleading or proof that the family was in financial penury. The petitioner is unable to show how the provisions of U.P. Dying in Harness Rules 1974 applies to the case of the petitioner. The said Rules apply to Government servants while the deceased was an employee of the Basic Education Board, which is an autonomous body. In fact, for the first time the benefit of compassionate appointment was extended to the Board employees vide Government order dated 5.2.1992. Neither the petitioner has been able to demonstrate that the said Government order was retrospective. In effect, nor there is anything on record to show that it applies to dependants of those employees who had died prior to that date. Further, even if the aforesaid Government order applied to the case of the petitioner, under the Government order dated 2.2.1996 there is a bar that no compassionate appointment would be granted to any dependant of a deceased employee, if it is sought after five years from the date of death unless the Board grants permission before considering the said application. But, in the present case, there is nothing on record to show that whether any permission was sought or given for

appointment of the petitioner which was made about eight years after the death of the incumbent.

8. The provision for giving compassionate appointment is a departure from the regular rules of recruitment and by the aforesaid rule an exception was carved out with the sole object to help the bereaved family where the sole bread winner expires, so that the family may tide over the immediate financial crises created on the demise. The Apex Court in the case of **Umesh Kumar Nagpal v. State of Haryana and others** [(1994) 4 SCC 138] has held to the following effect:

"The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis."

It has further gone on to hold that it:

"cannot be granted after a lapse of reasonable periods which must be specified in the rules. The consideration for such employment is not a vested right, which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole bread winner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

In **Jagdish Prasad v. State of Haryana** 1996 (1) SLR 7, the Apex Court was considering the claim of the incumbent who was only four years old when his father died in harness, for compassionate appointment on attaining majority. It disallowed the claim holding:

"The very object of appointment of a dependent of the deceased employees who die in harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family. Since the death occurred way back in 1971, in which year, the appellant was four years old, it cannot be said that he is entitled to be appointed after he attained majority long thereafter. In other words, if that contention is accepted, it amounts to another mode of recruitment of the dependent of a deceased Government servant which cannot be encouraged, de hors the recruitment rules.'"

9. Similar view has been taken in **Haryana State Electricity Board v. Hakim Singh** [1997 (8) JT 332] where it was held that if the family had survived for sufficiently long period, it would be presumed that there is no such financial distress where compassionate appointment could be granted. In **Sanjai Kumar v. State of Bihar** [2000 (7) S.C.C. 192] and thereafter in **Haryana State Electricity Board v. Krishna Devi** [2002 (2) A.W.C. 1411], the Apex Court has gone on to hold that:

"compassionate appointment cannot be claimed as a matter of right and it cannot be utilized as a reservation of vacancy till such time that the claimant becomes major and eligible for appointment and if such claims are entertained the very object of the rules would be defeated."

10. There is yet another facet to this case. According to law, the father of the petitioner stood retired on 30.10.1988, but keeping in view the interest of the students, extension of service till the end

of the academic session was granted to him under the Rules so that the teaching in the institution is not affected. This session extension could only be treated as an extension of service till the end of the academic session. It would, therefore, be akin to a fixed term appointment, automatically terminating the contract of service at the end of the academic session. Such fixed tenured employees cannot be treated as regular employees whose Dependants could seek compassionate appointment, at best, they could claim the salary up to the period of expiry of the aforesaid contract. It has already come on record that the entire salary uptil 30.6.1989 has already been paid to the petitioner's mother and, therefore, on this ground also the petitioner is not entitled to compassionate appointment.

11. No other point has been urged.

12. In view of the above, it is apparent that the petitioner was not entitled for compassionate appointment in any view of the matter and, therefore, the order appointing him was itself illegal. Even, if the order cancelling the appointment is vitiated on any account, this Court is not bound to quash the impugned order which would result in reinstatement of an another illegal order.

13. For the reasons given above, this is not a fit case for interference under Article 226 of the Constitution of India. Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2007

BEFORE
THE HON'BLE ANJANI KUMAR, J.
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.18871 of 2006

Jai Vir Singh ...Petitioner
Versus
State of U.P and another ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri Swapnil Kumar

Counsel for the Respondents:
Sri K.R. Sirohi
Sri Amit Sthalekar
Sri Rajiv Gupta
S.C.

Constitution of India, Art. 226-Disproportinate Punishment-Petitioner while working as Additional District Judge decided to many land acquisition reference cases-placing reliance upon another reference court-without considering finality-charges about giving undue benefit to the claimants proved-Need no interference-considering 27 years unblemished service record-punishment of reduction in rank from H.J.S. to civil Judge (J.D.)-highly excessive, disproportionate, irrational-hence molded to stoppage of three increments with cumulative effect from the date impugned punishment order by restoring back to the post of A.D.J.-held proper.

Held: Para 67 & 68

Thus, in given facts and circumstances of the case, we are of the firm opinion that punishment inflicted upon the petitioner is disproportionate to the charge levelled against him and is highly excessive,

irrational and arbitrary, therefore, can not be sustained, accordingly we quash the impugned order dated 17.1.2006 passed by the State Government.

We are of the further opinion that in given facts and circumstances of the case, remitting the matter for consideration of Full Court will take some considerable time, thereupon recommendation has to be sent to the State Government, which again take time in taking decision. Having regard to the mental agony and torture faced by the petitioner, we are not inclined to tolerate present state of affair further more. Therefore, we are inclined to mould the relief appropriately and in given facts and circumstances of the case, we think it appropriate that stoppage or withholding of three future annual increments of the petitioner with cumulative effect permanently from the date of impugned punishment order dated 17.1.2006 after restoring him back to his post of Additional District Judge as on the date of impugned order, would meet the ends of justice. Such stoppage of increments would also be amounted to reduction in rank to a lower stage in a time scale of pay of the petitioner as a major penalty under relevant service rules. However, we are constrained to withhold the integrity of the petitioner for the year 2000-2001, the year in which he has rendered the decision in question giving rise cause of action to the instant case.

Case law discussed:

J.T. 1993 (6) SC-287, AIR 1979 SC-1022, AIR 1962 SC-2188, AIR 1962 SC-1233, AIR 1993 SC-1478, 1996 (4) SCC-539, 1998 (7) SCC-310, AIR 1999 SC-2881, AIR 2001 SC-2788, AIR 1988 (2) SC-473, AIR 1968 SC-453, AIR 1965 SC-304, AIR 1979 SC-404, AIR 2002 SC-726, AIR 2003 SC-2302, J.T. 1999 (1) SC-61, J.T. 2007 (5) SC-628

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

1. By this petition the petitioner has sought relief in the nature of certiorari for quashing the order of punishment dated 17th January 2006 (Annexure-1) as well as inquiry report dated 14th September 2005 (Annexure-2 to the writ petition). Vide impugned order dated 17th January 2006 passed by State Government a major penalty of reduction in rank i.e. from substantive rank of Civil Judge (Senior Division) to the rank of Civil Judge (Junior Division) has been inflicted upon the petitioner. A further relief in the nature of mandamus has been sought for commanding the respondents not to take any further action either in furtherance of or as a consequence of the impugned order and to grant and restore all benefits for which the petitioner was entitled but for the impugned punishment awarded to him vide order dated 17th January 2006.

2. The facts of the case in brief are that the petitioner was appointed as Munsif (Civil Judge {Junior Division}) in the year 1980. Thereafter he was promoted on the next higher post of Civil Judge (Senior Division) substantively in the year 1990. He was further promoted to the cadre of Higher Judicial Service in the year 2000, under Rule 22(3) of U.P. Higher Judicial Service Rules, 1975 (hereinafter referred to as '1975 Rules). On all these posts the petitioner worked with utmost devotion, sincerity, integrity and in accordance with well established judicial norms. And to the best of his knowledge, during the entire period of about 26 years of his service, the work and conduct of the petitioner has been unblemished. No complaint, whatsoever, was ever brought to the notice of the petitioner. The petitioner understands and believes that the Hon'ble High Court granted to the petitioner promotion to the rank of Civil Judge (Senior Division) substantively and to the post of Additional

District Judge in the cadre of U.P. Higher Judicial Service under Rule 22(3) of the 1975 Rules after careful, appropriate and effective evaluation of the merit of his work and conduct including efficiency, honesty and integrity reflected on its record. All of a sudden, without any material the petitioner has been presumed to be dishonest in performing his judicial duties on extraneous consideration or anxiety to unduly favour a party and thereby guilty of misconduct and a charge sheet dated 25.10.2004 was served upon the petitioner on 16.11.2004 vide letter dated 28.10.2004 through District Judge, Pilibhit where the petitioner was working as Additional District Judge. A true copy of the communication dated 28.10.2004 along with charge-sheet dated 25.10.2004 is on record as Annexure-4 of the writ petition. By this charge memo an allegation was levelled against the petitioner that on 16.1.2001 while working as IV th Additional District Judge, Ghaziabad, he had decided a reference case without proper reference and thereby unduly favoured the claimant in the said decision, against all judicial norms and propriety for extraneous consideration, thus committed misconduct within the meaning of Rule 3 of U.P. Government Servant Conduct Rules 1956 (hereinafter referred to as 1956 Rules) and the petitioner was asked to file written reply within stipulated time. In response to the said charge-sheet the petitioner has submitted his written reply on 20.1.2005 through proper channel, a true copy whereof is on record as Annexure 5 to the writ petition. Before the Hon'ble Enquiry Judges also the petitioner has submitted a written submission dated 3.9.2005. A true copy whereof is on record as Annexure-6 to the writ petition. Thereafter Hon'ble Enquiry Judges have held inquiry against the petitioner and submitted their inquiry report dated 14.9.2005 holding the petitioner guilty of charge levelled in the charge-sheet. A true copy of inquiry report is on record as Annexure-2 of the writ petition. Thereupon the Registrar (Confidential) High Court, Allahabad vide letter dated 21.9.2005 has invited the comments of the petitioner against the findings of Hon'ble Enquiry Judges, in response to which the petitioner has submitted his comments dated 22.10.2005 through proper channel, a true copy whereof is on record as Annexure-3 to the writ petition. The said inquiry report was approved in Full Court meeting of this Court and the penalty of reduction in rank was recommended thereby to the State Government. Thereupon while acting upon the said recommendation the State Government has passed the impugned order reducing the petitioner in rank from his substantive post of Civil Judge (Senior Division) to the post of Civil Judge (Junior Division), hence this petition.

3. It is further stated that a dispute giving rise cause of action of aforesaid disciplinary inquiry was that a land bearing Khasra No.437 ad-measuring an area about 3 Bighas 4 Biswa situated in village Dasna under Govind Puram Scheme, Ghaziabad belonging to Wing Commander P.D. Bali was acquired under the provisions of the Land Acquisition Act, 1894, hereinafter referred to as the 'Act'. It is stated in the writ petition that besides earth, on the land acquired, 7500 trees of Eucalyptus were standing thereon; there existed construction of two rooms, two hand pumps, one room housing boring of 5" diameter and a boundary wall on the four sides of the land. There were also tree of Guava, Mango, Neem, Adoo. There was also a

Samadhi on the land. After usual formalities were gone through, the Special Land Acquisition Officer determined the compensation vide, allegedly exparte, award dated 7.12.1990 confined only in respect of the earth, at the rate of Rs.71.43 per square yard. The Special Land Acquisition Officer did not determine the compensation in respect of the trees and superstructure standing on the earth, although he was legally required to do so in view of the fact that the expression 'land' includes earth as well as benefits arise out of land and things attached to the earth or permanently fasten to anything attached to the earth vide Clause (a) of Section 3 of the Act; and that in view of the fact that Section 11(1) of the Act requires that the award must include, inter-alia, the compensation which ought to be allowed for the land as defined in Section 3 (a) of the Act. The award dated 7.12.1990 did not comply fully the requirements of Section 11 of the Act, and was, obviously, incomplete. The compensation of the earth of the land determined by the award dated 7.12.1990 was neither paid to nor accepted by Wing Commander P.D. Bali till the year 1997. In the meantime, he filed Civil Misc. Writ Petition No.22274 of 1993, Wing Commander P.D. Bali Vs. State of U.P. and others, before this Court, initially challenging the acquisition proceedings, lateron, by amendment application, he also prayed for restoration of the land under proviso to Section 17(1) of the U.P. Urban Planning and Development Act, 1973. It was also stated that P.D. Bali had also applied to the State Government for restoration of the land vide his application dated 17th April, 1994 but the State Government had not decided the same. This Court, without going into the merits of the claim of Wing Commander P.D. Bali, disposed of the writ petition finally, vide order dated 15th May, 1996 with the direction to the State Government to dispose of the application of Wing Commander P.D. Bali dated 17th April, 1994 within two months from the date of production of a certified copy of the order, by a speaking order after hearing Wing Commander P.D. Bali as well as Ghaziabad Development Authority. In compliance of the order of this Court dated 15th May, 1996 the State Government considered the application of Wing Commander P.D. Bali dated 17th April, 1994 and disposed of vide order dated 20th July, 1996 holding that it is true that uptil now compensation has been awarded only in respect of land (earth) but thereafter award in respect of trees and superstructure standing on the land on the basis of development of land shall surely be made. A true copy of the order of State Government dated 20th July, 1996 is on record as Annexure-7 to the writ petition.

4. Thereafter on the strength of the observation of the State Government, the exercise of determination of the compensation in respect of trees and construction etc. standing on the acquired land was undertaken by the Additional Collector (Land Acquisition) Ghaziabad and the exercise was culminated into supplementary award dated 10.8.1997 (wrongly mentioned in the charge sheet served on the petitioner as dated 30.8.1997). It is submitted that the award dated 7.12.1990 came to be completed on 10.8.1997 when the supplementary award was given and the requirement of Section 11 of the Act stood fully satisfied. It is further submitted that the award dated 7.12.1990 would be deemed to be

incomplete till the delivery of supplementary award dated 10.8.1997.

5. It is further stated in the writ petition that Wing Commander P.D. Bali did not accept the offer of compensation made to him through the awards dated 7.12. 1990 and 10.8.1997 as he was not satisfied with the quantum of compensation determined by the Special Land Acquisition Officer offered to him and on 8.9.1997 the Wing Commander P.D. Bali submitted an application under Section 18 of the Land Acquisition Act 1894 before Addl. Collector (L.A.) (Irrigation) Ghaziabad for making reference before the court for determination of compensation of land as well as trees and superstructure standing on the land. It is pointed out that Wing Commander P.D. Bali had never applied for reference under Section 18 of the Act in respect of the determination of compensation offered to him through award dated 7.12.1990 which fact is admitted on record by the Additional Collector in his referral order passed under Section 19 of the Act as well as by E.W. '1', Sri Rajendra Kumar Tyagi, Legal Assistant of the Ghaziabad Development Authority before the Hon'ble Enquiry Judges, presumably, he waited for finality of award which was accomplished on the delivery of the supplementary award dated 10.8.1997. The claim of Wing Commander P.D. Bali under Section 18 of the Act, for determination by the Court, was referred to by the Additional Collector (Land Acquisition), Ghaziabad. A true copy of the referral order is on record as Annexure-9 to the writ petition. Vide his judgement and order dated 16.1.2001, the petitioner decided the reference. He decided the objections of Wing Commander P.D. Bali on the basis of oral evidence produced by the parties and the documentary evidence in the shape of examplers produced by Wing Commander P.D. Bali alone. No documentary evidence was produced either on behalf of the State Government or on behalf of Ghaziabad Development Authority, Ghaziabad leaving the documentary evidence produced by Wing Commander P.D. Bali unrebutted. The fact that no documentary evidence was produced on behalf of State Government or Ghaziabad Development Authority, Ghaziabad has also been admitted by E.W. '1' Sri Rajendra Kumar Tyagi before the Hon'ble Enquiry Judges. However, while deciding the reference, the petitioner kept in mind the provisions of Sections 23 and 24 as well as other relevant provisions of the Act and the guidance given by the Hon'ble Supreme Court of India, Hon'ble Privy Council and the Hon'ble High Courts. The petitioner observed all judicial norms and propriety and decided the objection of the claimant Wing Commander P.D. Bali without any other consideration much less any extraneous consideration as inferred and presumed in the enquiry report dated 14th September, 2005 without any basis. In the date events chart filed in the writ petition, it is shown that claimant has filed First Appeal No.365 of 2001 Wing Commander P.D. Bali Vs. State of U.P. and others against the decision rendered by the petitioner in L.A.R. No.624 of 1997 and Ghaziabad Development Authority, Ghaziabad has also filed First Appeal No.466 of 2002 Ghaziabad Development Authority Vs. Wing Commander P.D. Bali against the same decision before this Court.

6. On the basis of assertions made in the pleadings of the writ petition, learned

Senior Counsel Sri Shashi Nandan, Advocate appearing for the petitioner has submitted that the petitioner was appointed as Munsif (Civil Judge {Junior Division}) in the year 1980. He was promoted as Civil Judge (Senior Division) substantively in the year 1990. He was further promoted to the Cadre of U.P. Higher Judicial Service and appointed as Additional District Judge in the year 2000 under Rule 22(3) of 1975 Rules. On all these posts the petitioner worked with utmost devotion, sincerity, integrity and in accordance with the well established judicial norms. And, to the best of his knowledge, during the entire period of about 26 years of his service the work and conduct of the petitioner has been unblemished. No complaint, whatsoever, was ever brought to the notice of the petitioner. The petitioner understands and believes that the Hon'ble High Court granted to the petitioner promotion to the rank of Civil Judge (Senior Division) substantively and to the post of the Additional District Judge in the cadre of U.P. Higher Judicial Service under Rule 22(3) of 1975 Rules after careful, appropriate and effective evaluation of the merit of his work and conduct, including efficiency, honesty and integrity reflected on its record. All of a sudden and without any material the petitioner has been presumed to be dishonest in performing his judicial duties on extraneous consideration or anxiety to unduly favour a party and thereby guilty of misconduct. To the best of the knowledge of the petitioner, there is no statable data to buttress the presumption or inference of his dishonesty or performance of judicial duties for extraneous consideration or anxiety to unduly favouring a party leading to the guilt of alleged misconduct. Indeed, there is utter dearth of evidence in this regard. There being absolutely no evidence on record or otherwise giving rise to the presumption or inference of dishonesty or performance of judicial duties for extraneous consideration or anxiety to unduly favouring a party indicating alleged misconduct, the inferential finding holding the petitioner guilty of misconduct is totally arbitrary and perverse. The Hon'ble Enquiry Judges have also not specifically concluded in enquiry report regarding misconduct of petitioner. Thus, charge levelled against the petitioner remains unproved.

7. While elaborating and substantiating his submission Sri Shashi Nandan, learned Senior Counsel appearing for the petitioner has submitted that the misconduct implies a wrongful intention and not a mere error of judgment or decision. What is of relevance is not the correctness or legality of the judgment or decision. There is no evidence to demonstrate that the petitioner was actuated by any wrongful intention in rendering the judgment/decision giving rise to the controversy. At best, there may be some legal error in the judgment/decision rendered by the petitioner, which is not admitted. But, the alleged error does not constitute the fulcrum of any misconduct by the petitioner. In the context of the charge of alleged misconduct, it is further submitted that erroneous interpretation of law in the judgment in question, if any, which is not admitted, has not been held to be misconduct by this Hon'ble Court and the Hon'ble Supreme Court of India. It is also submitted that the possibility of any inference or conclusion other than the one drawn and arrived at in the judgment in question, which is not admitted, has not been held to be misconduct by this

Hon'ble Court and the Hon'ble Supreme Court of India. The alleged error in the judgment/decision rendered by the petitioner cannot be held to reflect on his integrity. The error, if any, does not show prima facie or otherwise that the judgment/decision was given by the petitioner for extraneous consideration of any kind. No motives could be attributed to the petitioner on the basis of the alleged error. In any event as held by the Hon'ble Supreme Court of India in the case of ***K.P. Tiwari Vs. State of M.P., JT 1993 (6) SC 287***, (para 4 at the page 289), our legal system acknowledges the fallibility of judges and hence provides for appeals and revisions. In the said case it has further been held that a judge who has not committed an error is yet to be born. And this applies to the judges at all levels from the lowest to the highest. The Hon'ble Supreme Court also cautioned that attributing motives is that surest way to take the judiciary downhill.

8. It is further submitted that the error, if any, alleged to have been committed by the petitioner, is not so grave as to invite the extreme two penalties of reductions in rank, namely, reversion from the post of Additional District Judge (officiating) to the post of Civil Judge (Senior Division) (substantive) and from the rank of Civil Judge (Senior Division) to the rank of Civil Judge (Junior Division). It is also submitted that material, such as any complaint or inspection report or preliminary report, if any, which formed the basis of initiation of the departmental enquiry for alleged extraneous consideration or anxiety to unduly favour the claimant has not be furnished, though it is the mandate of the principles of natural justice as has been held, times out of number, by this Hon'ble Court as well as the Hon'ble Supreme Court of India. The punishment inflicted upon the petitioner is highly disproportionate to the gravity of the alleged charge of misconduct and violative of the Article 14 of the Constitution of India. A penalty disproportionate to the gravity of the misconduct being violative of the Article 14 of the Constitution of India is liable to be annulled. The enquiry report dated 14th September, 2005 which is the foundation of the order of punishment, is based on conjectures and surmises. Thus, it is not sustainable in law and is liable to be quashed. The impugned order of punishment dated 17th January 2006 as well as its foundation i.e. the enquiry report dated 14th September 2005 both are wholly illegal and arbitrary, they eminently deserve to be quashed. In support of his submission learned counsel for the petitioner has cited several decisions to which we will refer a little latter.

9. A detailed counter affidavit has been filed on behalf of the High Court in justification of the impugned action taken against the petitioner, the pertinent averments made therein will be referred by us hereinafter at appropriate places.

10. We have heard Sri Shashi Nandan, learned Senior Counsel assisted by Sri Swapnil Kumar Advocate for the petitioner and Sri. K.R. Sirohi, learned Senior Counsel assisted by Sri Rajiv Gupta for the High Court and learned Standing Counsel for the State Government and also perused the original records summoned by us during the course of the hearing of the writ petition.

11. In view of the aforesaid submission the first question which arises for our consideration is that what constitutes 'misconduct'? In this connection it is necessary to point out that the 1956 Rules is applicable to the petitioner and said rules prescribes the code of conduct to be observed by the petitioner. Although the expression 'misconduct' has not been defined under the 1956 Rules but various provisions have been made thereunder to regulate the conduct of the Government servants. For instance Rule 3 of the said Rules provides that every Government servant shall at all times maintain absolute integrity and devotion to duty and conduct himself in accordance with specific or implied orders of Government regulating behaviour and conduct which may be in force. It implies that any conduct unbecoming to the Government servants would be misconduct.

12. A similar controversy has drawn attention of Hon'ble Apex Court in ***Union of India and others Vs. J. Ahmed A.I.R. 1979 SC 1022***, wherein similar rule namely All India Service Conduct Rules 1954 was under consideration. In para 10 of the decision Hon'ble Apex Court has formulated the question as to what generally constitutes misconduct specially in the context of disciplinary proceedings entailing penalty? While adverting to the said question in para 11 and 12 of the decision the Hon'ble Apex Court observed as under:-

"11. Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that that conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see Pearce v. Foster) (1886) 17 QBD 536 (at p. 542). A disregard of an essential condition of the contract of service may constitute misconduct [see Laws v. London Chronicle (Indicator Newspapers)](1959) 1 WLR 698. This view was adopted in Shardaprasad Onkarprasad Tiwari v. Divisional Supdt., Central Railway, Nagpur Division, Nagpur, 61 Bom LR 1596: (AIR 1961 Bom 150) and Satubha K. Vaghela v. Moosa Raza, (1969) 10 Guj LR 23. The High Court has noted the definition of misconduct in Stroud's Judicial Dictionary which runs as under:

"Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct."

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in ***Management, Utkal Machinery Ltd. V. Workmen, Miss Shanti Patnaik, (1966) 2 SCR 434: (AIR 1966 SC 1051)****, in the absence of standing orders governing the employee's undertaking,* ***unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive.*** *In* ***S. Govinda Menon V. Union of India, (1967) 2 SCR 566: (AIR 1967 SC 1274),*** *the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error*

or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P.H. Kalyani v. Air France, Calcutta, (1964) 2 SCR 104: (AIR 1963 SC 1756), wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar (examples) instances of which (are) a railway cabinman signalling in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashing causing heavy loss of life. Misplaced sympathy can be a great evil (see Navinchandra Shakerchand Shah v. Manager, Ahmedabad Co-op. Department Stores Ltd., (1978) 19 Guj LR. 108 at p. 120). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

12. The High Court was of the opinion that misconduct in the context of disciplinary proceeding means misbehaviour involving some form of guilty mind or mens rea. We find it difficult to subscribe to this view because gross of habitual negligence in performance of duty may not involve mens rea but may still constitute misconduct for disciplinary proceedings."

13. Again in ***State of Punjab Vs. Ram Singh Ex-constable A.I.R. 1992 S.C. 2188***, single instance of heavy drinking of alcohol by constable while on duty was held gravest misconduct warranting his dismissal from service. In this case the Hon'ble Apex Court has interpreted the expression 'misconduct' by taking assistance of the definition of 'misconduct' as given in Black's Law Dictionary and Aiyar's Law Lexicon and observed as under:-

"Thus it could be seen that the word 'misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour,

unlawful behaviour, wilful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgement, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve."

14. Thus from the afore-stated legal position enunciated by Hon'ble Apex Court, it is clear that code of conduct as set out under Conduct Rules clearly indicates the conduct expected of a member of service. It would follow that the conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct. A disregard of an essential condition of the contract of service may constitute misconduct. In Stroud's Judicial Dictionary the expression 'Misconduct' means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct. In **S. Govinda Menon's case (supra)** it was held that a member of service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences, the same may amount to misconduct as held in **P.H. Kalyani's case (supra)**, wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, negligence in work in the context of serious consequences was treated as misconduct. In **J. Ahmed's case (supra)** Hon'ble Apex Court has further went on observing that it is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy; that the degree of culpability would be very high. In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct. It was further observed in para 12 of the decision that the opinion of the High Court that misconduct in context of disciplinary proceeding means misbehaviour involving some form of guilty mind or mens rea could not be held to be a correct approach. According to the Hon'ble Apex Court the expression 'misconduct' does not necessarily involve ill motives or mens rea as necessary con-committant of it. It implies that there may be misconduct without any misbehaviour involving some form of guilty mind or mens- rea such as gross or habitual negligence in performance of duty may not involve mens rea but may still constitute misconduct for disciplinary proceeding.

In view of aforesaid discussion, we are of the considered opinion that it is not that misbehaviour involving some ill motive or mens rea which alone is to be seen rather the negligence or recklessness in discharge of duty and a lapse in performance of duty or error of judgment may also be looked into in context of consequences directly attributable to such negligence. However, in ***State of Punjab Vs. Ram Singh*** (supra) the Hon'ble Apex Court has interpreted the expression 'misconduct' to mean that mere error in judgement, carelessness or negligence in performance of duty are not misconduct. The act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of statute and the public purpose it seeks to serve.

15. Now next question, which arises for consideration is that as to whether the authority enjoys immunity from disciplinary proceedings with respect to matters decided by him in exercise of judicial or quasi judicial functions? In this connection, it is necessary to point out that while taking note of earlier decision rendered in ***S. Govinda Menon' case (supra)*** and ***Union of India Vs. A. N. Saxena A.I.R. 1992 SC, 1233*** in ***Union of India Vs. K.K. Dhawan A.I.R. 1993 SC, 1478*** the Hon'ble Apex Court has dealt with the question in issue in quite detail in paras 16 to 29 of the decision. It would be useful to reproduce the observations made in paras 16 to 19, 26, 28 and 29 of the decision as under:-

"16. In Govinda Menon v. Union of India, AIR 1967 SC 1274, it was contended that no disciplinary proceedings could be taken against appellant for acts or omissions with regard to his work as Commissioner under Madras Hindu Religious and Charitable Endowments Act, 1951. Since the orders made by him were quasi-judicial in character, they should be challenged only as provided for under the Act. It was further contended that having regard to scope of Rule 4 of All India Services (Discipline and Appeal) Rules, 1955, the act or omission of Commissioner was such that appellant was not subject to the administrative control of the Government and therefore, the disciplinary proceedings were void. Rejecting this contention, it was held as under (at pp.1278-79) of AIR):

"It is not disputed that the appropriate Government has power to take disciplinary proceedings against the appellant and that he could be removed from service by an order of the Central Government, but it was contended that I.A. S. Officers are governed by statutory rules, that 'any act or omission' referred to in Rule 4(i) relates only to an act or omission of an officer when serving under the Government means subject to the administrative control of the Government and that disciplinary proceedings should be, therefore, on the basis of the relationship of master and servant. It was argued that in exercising statutory powers the Commissioner was not subject to the administrative control of the Government and disciplinary proceedings cannot, therefore, be instituted against the appellant in respect of an act or omission committed by him in the course of his employment as Commissioner. We are unable to accept the proposition contended for by the appellant as correct. Rule 4(i) does not impose any limitation or qualification as to the nature of the act

or omission in respect of which disciplinary proceedings can be instituted. Rule 4(1)(b) merely says that the appropriate Government competent to institute disciplinary proceedings against a member of the Service would be the Government under whom such member was serving at the time of the commission of such act or omission. It does not say that the act or omission must have been committed in the discharge of his duty or in the course of his employment as a Government servant. It is, therefore, open to the Government to take disciplinary proceedings against the appellant in respect of his acts or omissions which cast a reflection upon his reputation for integrity or good faith or devotion to duty as a member of the service. It is not disputed that the appellant was, at the time of the alleged misconduct, employed as the First Member of the Board of Revenue and he was at the same time performing the duties or Commissioner under the Act in addition to his duties as the First Member of the Board of Revenue. In our opinion, it is not necessary that a member of the Service should have committed the alleged act or omission in the course of discharge of his duties as a servant of the Government in order that it may form the subject matter of disciplinary proceedings. In other words, if the act or omission is such as to reflect on the reputation of the officer for his integrity or good faith or devotion to duty, there is no reason why disciplinary proceedings should not be taken against him for that act or omission even though the act or omission relates to an activity in regard to which there is no actual master and servant relationship. To put it differently, the test is not whether the act or omission was committed by the appellant in the course of the discharge of his duties as servant of the Government. The test is whether the act or omission was some reasonable connection with nature and condition of his service or whether the act or omission has cast any reflection upon the reputation of the member of the Service for integrity or devotion to duty as a public servant. We are of the opinion that even if the appellant was not subject to the administrative control of the Government when he was functioning as Commissioner under the Act and was not the servant of the government subject to its orders at the relevant time, his act or omission as Commissioner could form the subject-matter of disciplinary proceedings provided the act or omission would reflect upon his reputation for integrity or devotion to duty as a member of the service." In this context reference may be made to the following observations of Lopes, C.J. In Pearce v. Foster, (1986) 17 QBD 536, p.542.

"If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service of the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant."

(Emphasis supplied)

17. Concerning, the exercise of quasi-judicial powers the contention urged was to the following effect (at pp. 1279-80 of AIR):

"We next proceed to examine the contention of the appellant that the

Commissioner was exercising a quasi-judicial function in sanctioning the leases under the Act and his orders, therefore, could not be questioned except in accordance with the provisions of the Act. The proposition put forward was that quasi-judicial orders, unless vacated under the provisions of the Act, are final and binding and cannot be questioned by the executive Government through disciplinary proceedings. It was argued that an appeal is provided under Section 29(4) of the Act against the order of the Commissioner granting sanction to a lease and that it is open to any party aggrieved to file such an appeal and question the legality or correctness of the order of the Commissioner and that the Government also may in revision under Section 99 of the Act examine the correctness or legality of the order. It was said that so long as these methods were not adopted the Government could not institute disciplinary proceedings and re-examining the legality of the order of the Commissioner granting sanction to the leases."

18. That was rejected as under (at pp.1280-810 of AIR) :

"The charge is, therefore, one of misconduct and recklessness disclosed by the utter disregard of the relevant provisions of S. 29 and the Rules thereunder in sanctioning the leases. On behalf of the respondents it was argued both by Mr. Sarjoo Prasad and Mr. Bindra that the Commissioner was not discharging quasi-judicial functions in sanctioning leases under Section 29 of the Act, but we shall proceed on the assumption that the Commissioner was performing quasi-judicial functions in granting leases under Section 29 of the Act. Even upon that assumption we are satisfied that the Government was entitled to institute disciplinary proceedings if there was prima facie material for showing recklessness or misconduct on the part of the appellant in the discharge of his official duty. It is true that if the provisions of Section 29 of the Act or the Rules are disregarded the order of the Commissioner is illegal and such an order could be questioned in appeal under Section 29(4) or in revision under Section 99 of the Act. But in the present proceedings what is sought to be challenged is not the correctness or the legality of the decision of the Commissioner but the conduct of the appellant in the discharge of his duties as Commissioner. The appellant was proceeded against because in the discharge of his functions, he acted in utter disregard of the provisions of the Act and the Rules. ***It is the manner in which he discharged his functions that is brought up in these proceedings. In other words, the charge and the allegations are to the effect that in exercising his powers as Commissioner the appellant acted in abuse of his power and it was in regard to such misconduct that he is being proceeded against. It is manifest, therefore, that though the propriety and legality of the sanction to the leases may be questioned in appeal or revision under the Act, the Government is not precluded from taking disciplinary action if there is proof that the Commissioner had acted in gross recklessness in the discharge of his duties or that he failed to act honestly or in good faith or that he omitted to observe the prescribed conditions which are essential for the exercise of the statutory power. We see no reason why the Government cannot do so for the purpose of showing that the***

Commissioner acted in utter disregard of the conditions prescribed for the exercise of his power or that he was guilty of misconduct or gross negligence*. We are accordingly of the opinion that the appellant has been unable to make good his argument on this aspect of the case."*

19. ***The above case, therefore, is an authority for the proposition that disciplinary proceedings could be initiated against the government servant even with regard to exercise of quasi-judicial powers provided:***

i) The act or omission is such as to reflect on the reputation of the government servant for his integrity or good faith or devotion to duty, or
ii) there is prima facie material manifesting recklessness or misconduct in the discharge of the official duty, or
iii) the officer had failed to act honestly or in good faith or had omitted to observe the prescribed conditions which are essential for the exercise of statutory power.

26. In the case on hand, article of charge clearly mentions that the nine assessments covered by the article of charge were completed:

i) in an irregular manner,
ii) in undue haste, and
iii) apparently with a view to confer undue favour upon the assessee concerned. (Emphasis supplied)

Therefore, the allegation of conferring undue favour is very much there unlike Civil Appeal No.560/91. If that be so, certainly disciplinary action is warranted. This Court had occasion to examine the position. In ***Union of India v. A.N. Saxena, (1992) 3 SCC 124: (AIR 1992 SC 1233)*** *to which one of us (Mohan, J.) was a party, it was held as under (Paras 7 and 8 of AIR):*

"It was urged before us by learned counsel for the respondent that as the respondent was performing judicial or quasi-judicial functions in making the assessment orders in question even if his actions were wrong they could be corrected in an appeal or in revision and no disciplinary proceedings could be taken regarding such actions.

In our view, an argument that no disciplinary action can be taken in regard to actions taken or purported to be done in the course of judicial or quasi-judicial proceedings is not correct. It is true that when an officer is performing judicial or quasi-judicial functions disciplinary proceedings regarding any of his actions in the course of such proceedings should be taken only after great caution and a close scrutiny of his actions and only if the circumstances so warrant. The initiation of such proceedings, it is true, is likely to shake the confidence of the public in the officer concerned and also if lightly taken likely to undermine his independence. Hence the need for extreme care and caution before initiation of disciplinary proceedings against an officer performing judicial or quasi-judicial functions in respect of his actions in the discharge or purported to discharge his functions. But it is not as if such action cannot be taken at all. Where the actions of such an officer indicate culpability, namely a desire to oblige himself or unduly favour one of the parties or an improper motive there is no reason why disciplinary action should not be taken."

28. Certainly, therefore, the officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person

is not acting as a Judge. Accordingly, the contention of the respondent has to be rejected. It is important to bear in mind that in the present case, we are not concerned with the correctness or legality of the decision of the respondent but the conduct of the respondent in discharge of his duties as an officer. The legality of the orders with reference to the nine assessments may be questioned in appeal or revision under the Act. But we have no doubt in our mind that the Government is not precluded from taking the disciplinary action for violation of the Conduct Rules. Thus, we conclude that the disciplinary action can be taken in the following cases:

i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;

ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;

iii) if he has acted in a manner which is unbecoming of a government servant;

iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

v) if he had acted in order to unduly favour a party;

vi) if he had been actuated by corrupt motive however, small the bribe may be because Lord Coke said long ago "though the bribe may be small, yet the fault is great."

29. The instances above catalogued are not exhaustive. However, we may add that for a mere technical violation or merely because the order is wrong and the action not falling under the above enumerated instances, disciplinary action is not warranted. Here, we may utter a word of caution. Each case will depend upon the facts and no absolute rule can be postulated."

16. Thus, from a close analysis of decision of Hon'ble Apex Court in **K.K. Dhawan's case** it is clear that while taking note of **S. Govinda Menon's** case in para 18 of the decision the Hon'ble Apex Court observed that **though the propriety and legality of the sanction to leases may be questioned in appeal or revision under the Act, the Government is not precluded from taking disciplinary action if there is proof that the Commissioner had acted in gross recklessness in discharge of his duties or that he failed to act honestly or in good faith or that he omitted to observe the prescribed conditions which are essential for exercise of statutory power. We see no reason why the Government cannot do so for the purpose of showing that the Commissioner acted in utter disregard of conditions prescribed for the exercise of his power or that he was guilty of misconduct or gross negligence.** In para 19 of the decision Hon'ble Apex Court has further held that the above case, therefore, is an authority for the proposition that disciplinary proceedings could be initiated against the government servant even with regard to exercise of quasi-judicial powers provided; **(i) The act or omission is such as to reflect on the reputation of the government servant for his integrity or good faith or devotion to duty, or (ii) there is** *prima facie* **material manifesting recklessness or misconduct in the discharge of the official duty, or (iii) the officer had failed to act honestly or in good faith or had omitted to observe the prescribed conditions**

which are essential for the exercise of statutory power. In para 26 of the decision the observations made by Hon'ble Apex Court in paras 7 and 8 of decision rendered in **A.N. Saxena's case (supra) have been quoted for approval, wherein it has been held that where the actions of such an officer indicate culpability namely a desire to oblige himself or unduly favour one of the parties or in improper motive, there is no reason why the disciplinary action should not be taken. In paras 28 of the decision the Hon'ble Apex Court has further held that the officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a Judge. It was also observed that legality of orders with reference to nine assessments may be questioned in appeal or revision under the Act. But we have no doubt in our mind that the Government is not precluded from taking disciplinary action for violation of Conduct Rules. Thereafter the Hon'ble Apex Court concluded that the disciplinary action can be taken (i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty; (ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty; (iii) if he has acted in a manner which is unbecoming of a government servant; (iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers; (v) if he had acted in order to unduly favour a party; (vi) if he had been actuated by corrupt motive however, small the bribe may be because Lord Coke said long ago "though the bribe may be small, yet the fault is great."**

17. In ***K.P. Tiwari Vs. State of Madhya Pradesh JT. 1993 (6) SC, 287,*** wherein while cancelling the bail granted by the petitioner, a Judicial Officer, High Court passed certain strictures against him. On challenge being made, the Hon'ble Apex Court while expunging the adverse remarks has held that every error in the judgement may not to be attributed to improper motive. The pertinent observations made by the Hon'ble Apex Court in para 4 of the decision are extracted as under:

"4. We are, however, impelled to remind the learned Judge of the High Court that however anguished he might have been over the unmerited bail granted to the accused, he should not have allowed himself the latitude of ignoring judicial precaution and propriety even momentarily. The higher courts every day come across orders of the lower courts which are not justified either in law or in fact and modify them or set them aside. That is one of the functions of the superior courts. Our legal system acknowledges the fallibility of the judges and hence provides for appeals and revisions. A judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to err. It is will said that a judge who has not committed an error is yet to be born. And that applies to judges at all levels from the lowest to the highest. Sometimes, the difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. On such occasions, the lower courts are not necessarily wrong and the higher courts always right. It has also to be remembered

that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks- more correctly upto their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed tom improper motive. It is possible that a particular judicial officer may be consistently passing orders creating a suspicion of judicial conduct which is not wholly or even partly attributable to innocent functioning. Even in such cases, the proper course for the higher court to adopt is to make note of his conduct in the confidential record of his work and to use it on proper occasions. The judges in the higher courts have also a duty to ensure judicial discipline and respect for the judiciary from all concerned. The respect for the judiciary is not enhanced when judges at the lower level are criticised intemperately and castigated publicly. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary than when the judges of the higher courts publicly express lack of faith in the subordinate judges for one reason or the other. It must be remembered that the officers against whom such strictures are publicly passed, stand condemned for ever in the eyes of their subordinates and of the members of the public. No better device can be found to destroy the judiciary from within. The judges must, therefore, exercise self-restraint. There are ways and ways of expressing disapproval of the orders of the subordinate courts but attributing motives to them is certainly not one of them. That is the surest way to take the judiciary downhill."

18. In ***Kashi Nath Roy Vs. State of Bihar 1996 (4) SCC, 539***, wherein the appellant was a Judicial Officer in Superior Judicial Service in State of Bihar. In a case in which a bail application had been rejected by his predecessor he granted bail on the ground that the evidence of test identification on parade of the culprits gathered by investigation, an evidence important in a dacoity case, was highly suspicious inasmuch as witnesses who were made to participate in the same had already on their own disclosed the names of the accused committing the crime, to the Investigating Officer. A Single Judge of High Court, while setting aside the appellant's order and cancelling the bail, passed serious remarks against the appellant and proposed disciplinary action against him. Allowing his appeal and expunging the said remarks, the Hon'ble Apex Court has held that the courts exercising bail jurisdiction normally do and should refrain from indulging in elaborate reasoning in their orders in justification of grant or non-grant of bail. For, in that manner, the principle of "presumption of innocence of an accused" gets jeopardized; and the structural principle of "not guilty till proved guilty" gets destroyed, even though all sane elements have always understood that such views are tentative and not final, so as to affect the merit of the matter. Here, the appellant has been caught and exposed to a certain adverse comment and action solely because in reasoning he had disclosed his mind while grating bail. This may have been avoidable on his part, but in terms not such a glaring mistake or impropriety so as to visit the remarks that

the High Court has chosen to pass on him as well as to initiate action against him as proposed.

19. In ***M.S. Bindra Vs. Union of India and others 1998 (7) SCC 310 = A.I.R. 1998 SC, 3050*** the appellant being Director of Ante Evasion Wing conducted series of raids on business houses to unearth huge amount of concealed excise duty. He was dubbed as an officer of doubtful integrity and ordered to compulsorily retire. The Screening Committee has evaluated three instances and recommended his compulsory retirement. The order of premature compulsory retirement was challenged by the the appellant before Central Administrative Tribunal. Being unsuccessful before the Tribunal, he preferred appeal before the Hon'ble Apex Court. The Hon'ble Apex Court has held that there was utter dearth of evidence for the Screening Committee to conclude that the appellant had doubtful integrity. In para 13 of the decision, the Hon'ble Apex Court observed as under:

"13. While viewing this case from the next angle for judicial scrutiny, i.e., want of evidence or material to reach such a conclusion, we may add that want of any material is almost equivalent to the next situation that from the available materials, no reasonable man would reach such a conclusion. While evaluating the materials, the authority should not altogether ignore the reputation in which the officer was held till recently. The maxim "Memo firut repente turpissimus" (no one becomes dishonest all of a sudden) is not unexceptional but still it is a salutary guideline to judge human conduct, particularly in the field of administrative law. The authorities should not keep their eyes totally closed towards the over all estimation in which the delinquent officer was held in the recent past by those who were supervising him earlier. To dunk an officer into the puddle of "doubtful integrity" , it is not enough that the doubt fringes on a mere hunch. That doubt should be of such a nature as would reasonably and consciously be entertainable by a reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an officer with the label "doubtful integrity".

20. In ***Zunjarrao Bhikaji Nagarkar Vs. Union of India and others A.I.R. 1999 SC 2881***, the appellant was Collector of Central Excise while adjudicating the case of assessee held that assesseee had clandestinely manufactured and cleared the excise goods wilfully and evaded the excise duty. The Collector ordered confiscation of the goods. However, penalty under Rule 173-Q of Excise Rules was not levied on the assessee. Disciplinary proceedings were initiated against the appellant Collector on allegation that he favoured the assessee by not imposing penalty. The Hon'ble Apex Court has held that it was not the case that the appellant did not impose penalty because of any negligence on his part but he said it was not a case of imposition of penalty. When penalty is not levied, the assessee certainly benefits. But it cannot be said that by not levying the penalty the officer has favoured the assessee or shown undue favour to him. There has to be some basis for the disciplinary authority to reach such a conclusion even prima facie. The pertinent observation

made by Hon'ble Apex Court in paras 40 to 44 are extracted as under:-

"40. When we talk of negligence in a quasi judicial adjudication, it is not negligence perceived as carelessness inadvertence or omission but as culpable negligence. This is how this Court in State of Punjab Vs. Ram Singh Ex-constable ((1992) 4 SCC 54) : (1992 AIR SCW 2595: AIR 1992 SC 2188) interpreted "misconduct" not coming within the purview of mere error in judgment, carelessness or negligence in performance of the duty. In the case of K.K. Dhawan (1993 (2) SCC 56) : (1993 AIR SCW 1361 : AIR 1993 SC 1478 : 1993 Lab IC 1028), the allegation was of conferring undue favour upon the assessees. It was not a case of negligence as such. In Upendra Singh's case (1994 (3) SCC 357) : (1994 AIR SCW 2777), the charge was that he gave illegal and improper directions to the assessing officer in order to unduly favour the assessee. Case of K.S. Swaminathan (1996 (11) SCC 498), was not where the respondent was acting in any quasi judicial capacity. This Court said that at the stage of framing of the charge the statement of facts and the charge-sheet supplied are required to be looked into by the Court to see whether they support the charge of the alleged misconduct. In M.S. Bindra's case (1998 (7) SCC 310) : (1998) AIR SCW 2918: AIR 1998 SC 3058: 1998 Lab IC 3491) where the appellant was compulsorily retired this Court said that judicial scrutiny of an order imposing premature compulsory retirement is permissible if the order is arbitrary or mala fide or based on no evidence. Again in the case of Madan Mohan Choudhary (1999) 3 SCC 396 : (1999 AIR SCW 648: AIR 1999 SC 1018), which was also a case of compulsory retirement this Court said that there should exist material on record to reasonably form an opinion that compulsory retirement of the officer was in public interest. In K.N. Ramamurthy's case (1997) 7 SCC 101: (1997AIR SCW 3677: AIR 1997 SC 3571), it was certainly a case of culpable negligence. One of the charges was that the officer had failed to safeguard Government revenue. In Hindustan Steel Ltd.'s case (AIR 1970 SC 253), it was said that where proceedings are quasi judicial penalty will not ordinarily be imposed unless the party charged had acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. This Court has said that the penalty will not also be imposed merely because it is lawful so to do. In the present case, it is not that the appellant did not impose penalty because of any negligence on his part but be said it was not a case of imposition of penalty. We are, however, of the view that in a case like this which was being adjudicated upon by the appellant imposition of penalty was imperative. But then, there is nothing wrong or improper on the part of the appellant to form an opinion that imposition of penalty was not mandatory. We have noticed that Patna High Court while interpreting Section 325, I.P.C. held that imposition of penalty was not mandatory which again we have said is not a correct view to take. A wrong interpretation of law cannot be a ground for misconduct. Of course it is a different matter altogether if it is deliberate and actuated by mala fides.

41, When penalty is not levied, the assessee certainly benefits. But it cannot be said that by not levying the penalty the officer has favoured the assessee or

shown undue favour to him. There has to be some basis for the disciplinary authority to reach such a conclusion even prima facie. Record in the present case does not show if the disciplinary authority had any information within its possession from where it could form an opinion that the appellant showed 'favour' to the assessee by not imposing the penalty. He may have wrongly exercised his jurisdiction. But that wrong can be corrected in appeal. That cannot always form basis for initiating disciplinary proceedings for an officer while he is acting as quasi judicial authority. It must be kept in mind that being a quasi judicial authority, he is always subject to judicial supervision in appeal.

42. Initiation of disciplinary proceedings against an officer cannot take place on an information which is vague or indefinite. Suspicion has no role to play in such matter. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer. Merely because penalty was not imposed and the Board in the exercise of its power directed filing of appeal against that order in the Appellate Tribunal could not be enough to proceed against the appellant. There is no other instance to show that in similar case the appellant invariably imposed penalty.

43. If, every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi judicial officers like the appellant. Since in sum and substance misconduct is sought to be inferred by the appellant having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi judicial authority something more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge-sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi judicial authority. The entire system of administrative adjudication whereunder quasi judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings.

44. Considering whole aspects of the matter, we are of the view that it was not a case of initiation of any disciplinary proceedings against the appellant. Charge of misconduct against him was not proper. It has to be quashed."

21. In ***P.C. Joshi Vs. State of U.P. and others AIR 2001 SC 2788 = (2001) 3 S.C.J. 111***, it has been held by Hon'ble Apex Court that possibility of different conclusion in given set of facts cannot create basis to initiate disciplinary proceedings against judicial officer discharging judicial functions. While taking note of earlier decisions, the pertinent observation made in para 7 of the judgment of Hon'ble Apex Court is reproduced as under:-

*"7**. In the present case, though elaborate enquiry has been conducted by the Enquiry Officer there is hardly any material worth the name forthcoming except to scrutinize each one of the orders made by the appellant on the judicial side to arrive at a different conclusion. That there was possibility on***

a given set of facts to arrive at a different conclusion is no ground to indict a judicial officer for taking one view and that too for alleged misconduct for that reason alone. The Enquiry Officer has not found any other material, which would reflect on his reputation or integrity or good faith or devotion to duty or that he has been actuated by any corrupt motive. At best he may say that the view taken by the appellant is not proper or correct and not attribute any motive to him which is for extraneous consideration that he had acted in that manner. If in every case where an order of a subordinate court is found to be faulty a disciplinary action were to be initiated, the confidence of the subordinate judiciary will be shaken and the officers will be in constant fear of writing a judgment so as not to face a disciplinary enquiry and thus judicial officers cannot act independently or fearlessly*. Indeed the words of caution are given in K.K. Dhawan's case (supra) and A.N. Saxena's case (supra) that merely because the order is wrong or the action taken could have been different does not warrant initiation of disciplinary proceedings against the judicial officer. In spite of such caution, it is unfortunate that the High Court has chosen to initiate disciplinary proceedings against the appellant in this case."*

22. In recent case of ***Ramesh Chander Singh Vs. High Court of Allahabad and another JT 2007 (4) SC 135***, the Hon'ble Apex Court has again considered the earlier decisions rendered in case of ***Ishwar Chandra Jain Vs. High Court of Punjab and Haryana J.T. 1988 (2) SC 473, K.P. Tiwari Vs. State of Madhya Pradesh (supra), Kashi Nath Roy Vs. State of State of Bihar (supra), Brij Kishore Thakur Vs. Union of India A.I.R. 1997 SC 1157, Alok Kumar Roy Vs. Dr. S.N. Sharma A.I.R. 1968 SC 453*** and in para 17 of the decision reiterated the view taken in ***Zunjarrao Bhikaji Nagarkar (supra)*** as under:-

*"17. In **Lunjarrao Bhikaji Nagarkar Vs. Union of India**, this Court held that wrong exercise of jurisdiction by a quasi judicial authority or mistake of law or wrong interpretation of law cannot be the basis of initiating disciplinary proceeding. Of course, if the Judicial Officer conducted in a manner as would reflect on his reputation or integrity or good faith or there is a prima facie material to show recklessness or misconduct in discharge of his duties or he had acted in manner to unduly favour a party or had passed an order actuated by corrupt motive, the High Court by virtue of its power under Article 235 of the Constitution may exercise its supervisory jurisdiction. Nevertheless, under such circumstances it should be kept in mind that the Judges at all levels have to administer justice without fear or favour. Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate judicial officers and subjecting them to serve disciplinary proceedings would ultimately harm the judicial system at the grass-root level."*

23. Thus in view of the aforesaid legal position stated by the Hon'ble Apex Court we have to examine the case in hand. In this connection we must first note the gist of charge-memo which has been made basis for holding disciplinary inquiry against the petitioner and further the findings of Hon'ble Enquiry Judges

forming basis of impugned order of punishment passed against the petitioner.

24. The charge-memo dated 25.10.2004 contained in Annexure-4 of the writ petition is extracted as under:-

"CHARGE SHEET

To,

Sri Jaivir Singh
the then IV th Addl. District Judge
Ghaziabad.

You are hereby charged as under:-

Charge No.1. *That you on 16.01.2001, while posted as IV th Additional District Judge, Ghaziabad, made a re-assessment of the value of 3 Bighas and 4 Biswa, by Rs.95/- per square yard without having jurisdiction, so to do on the supplementary award restricted to dwelling house and trees, in your judgment in Land Acquisition Reference No.624 of 1997, Wing Commander P.D. Bali Vs. State of U.P., entertaining the application of the claimant without there being any provision, so to do, in your anxiety to unduly favour the claimant illegally, as no reference u/s 18 of the Land Acquisition Act 1894 had been made against the award dated 07.12.1990 given by A.D.M. (Land Acquisition), thereby unduly giving the claimant an additional amount of Rs.24,49,493/- against all judicial norms and propriety for extraneous considerations, and you thus committed misconduct within the meaning of Rule 3 of U.P. Government Servant Conduct Rules 1956."*

Evidence which is proposed to be considered in support of the charges:-

1. *Photocopy of your judgment dated 16.01.2001 passed in L.A.R. No.624/1997, Wing Commander P.D. Bali Vs. State of U.P.*
2. *Photocopy of supplementary award dated 10.8.1997 of A.D.M. (Land Acquisition) in the aforesaid matter.*
3. *Photocopy of application of claimant dated 04.09.1997.*
4. *Photocopy of award of Special Land Acquisition Officer dated 07.12.1990.*
5. *Photocopy of Writ Petition No. 22274/1993 Wing Commander P.D. Bali Vs. State of U.P.*
6. *Record of Civil Misc. Writ Petition No. 22274/1993, Wing Commander P.D. Bali Vs. State of U.P.*
7. *Calculation chart of the amount payable to the claimants on the basis of your judgment in the matter.*
8. *Any other evidence relating to any of the aforementioned charge, which may be found necessary during the course of enquiry, shall be considered after due notice to you.*

You are required to put in your written reply to the charge, within 15 days of the receipt of this charge sheet.

You are further informed that in case you do not file written reply within the prescribe time, it will be presumed that you have none to furnish and if you fail to appear on the specified date, the enquiry shall proceed and be completed ex-parte.

The copies of the documentary evidence in support of the charge are attached herewith, except record of Civil Misc. Writ Petition No. 2274/1993, Wing Commander P.D. Bali Vs. State of U.P. which may be inspected by you in the

office of O.S.D. (Enquiry) after giving prior information therefore.

If you desire, or if the undersigned so directs, an oral enquiry shall be held in respect of such allegations not admitted. At that enquiry, such oral evidence will be recorded as the undersigned consider necessary and you shall be entitled to cross-examine the witnesses.

You are further required to inform the undersigned, in writing, whether you desire to be heard in person and in case you wish to examine any witnesses, to submit alongwith your written reply, their names and addresses, together with a brief indication of the evidence which each such witness shall be expected to give.

Sd/-Illegible Sd/-Illegible
(JUSTICE S.U. KHAN) (JUSTICE IMTIYAZ MURTAZA)
Enquiry Judge Enquiry Judge
25.10.2004

25. The inquiry report dated 14.9.2005 is extracted as under:-

"DEPARTMENTAL ENQUIRY NO.23 (D) OF 2004 AGAINST SHRI JAIVIR SINGH, ADDITIONAL DISTRICT JUDGE

The charge-sheet was issued against Shri Jaivir Singh, A.D.J. On 25.10.2004 containing the following charge:

"That you on 16.01.2001, while posted as IV th Additional District Judge, Ghaziabad, made a re-assessment of the value of the land enhancing the value of acquired land, area 3 Bighas & 4 Biswas, by Rs.92/- per square yard without having jurisdiction, so to do, on the supplementary award restricted to dwelling house and trees, in your judgment in Land Acquisition Reference No.624 of 1997, Wing Commander P.D. Bali Vs. State of U.P., entertaining the application of the claimant, without there being any provision, so to do, in your anxiety to unduly favour the claimant illegally, as no reference u/s 18 of the Land Acquisition Act 1894 had been made against award dated 7.12.1990 given by A.D.M. (Land Acquisition), thereby unduly giving the claimant and additional amount of Rs.24,49,493/- against all judicial norms and propriety for extraneous considerations, and you thus committed misconduct within the meaning of Rule 3 of U.P. Government Servants Conduct Rules 1956."

When the aforesaid L.A., Reference No.624 of 1997 was decided by Sri Jaivir Singh, charged officer, (hereinafter referred to as C.O.) on 16.01.2001 he was posted as IV th Additional District Judge, Ghaziabad.

The original award was given by S.L.A.O. on 7.12.1990 and it was confined only to the valuation of the acquired land. Thereafter the claimant i.e. Wing Commander P.D. Bali pressed before S.L.A.O. for award of compensation in respect of superstructure and the trees respect of the said two items was given on 30.08.1997 which is termed as supplementary award. Thereafter on 08.09.1997 claimant applied for reference to the District Judge under Section 18 of Land Acquisition Act as he was not satisfied with the compensation awarded by S.L.A.O. S.L.A.O. made the reference on the basis of which reference in question was registered and transferred to C.O. for disposal. In the referring order S.L.A.O. under clause 17 pertaining to basis for determination of

compensation made a note, English translation of is given below:

"The land owner did not file any application for reference under Section 18 against award in respect of land dated 07.12.1990 regarding which claimant/land owner has mentioned in his application dated 08.09.1997. Award in respect of property (superstructure and trees) was given on 30.08.1997. Hence application for reference in respect thereof is within time. In the application land owner has also requested for making reference in respect of the acquired land. In my opinion in respect of reference pertaining to acquired land, court, will have to decide as to whether it is maintainable or not."

"17-प्रतिकर निर्धारण का आधारः भूस्वामी द्वारा भूमि के .अभिनिर्णय दिनांक 07-12-1990 के विरूद्ध धारा १८ का रेफरेन्स योजित नहीं किया गया था जिसका विवरण उन्होंने अपने संलग्न प्रार्थना पत्र दिनांक 08-09-1997 में दिया है। सम्पत्ति का एवार्ड 30-08-1967 को हुआ है जो समय के अन्तर्गत है। जिसमें भूस्वामी ने अर्जित भूमि का भी रेफरेन्स किया है। मेरे विचार से अर्जित भूमि के रेफरेन्स पर न्यायालय को निर्णय लेकर यह तय करना होगा कि भूमि का रेफरेन्स प्रगतिशील है अथवा नहीं।"

ह०/-
अपर जिलाधिकारी
घ्भू०अ०घ्
सिंचाई, गाजियाबाद

From the above it is quite clear that Land Acquisition Officer had not made any reference in respect of correctness of compensation awarded for the acquired land. While hearing the reference under Section 18 of Land Acquisition Act, D.J./A.D.J. cannot go beyond the referring order.

In this regard reference may be made to the observation of Privy Council in ***P.N.M. Bahadur Vs. Secretary of State AIR 1930 P.C. 84*** *quoted with approval by the Supreme Court in* ***P.U.A.E.N.S.S. Ltd. Allahabad Vikas Pradhikaran A.I.R. 2003 S.C. 2302*** *(para 7)*

"Their Lordships have no doubt that the jurisdiction of the courts under this Act. (L.A. Act) is a special one and is strictly limited by the terms of these sections. It only arises when a specific objection has been taken to the Collector's award and it is confined to a consideration of that objection. Once, therefore, it is ascertained that the only objection taken is to the amount of compensation that alone is the "matter" referred and the court has no power to determine or consider anything beyond it."

However, C.O. while deciding the reference enhanced the compensation in respect of the land also by determining and directing payment of compensation of the acquired land at the rate of Rs.163/- per sq. alongwith solatium etc. S.L.A.O. had determined the market value of the land at the rate of Rs.71.43 p. per.sq. Yard. In this manner C.O. by the judgment in question enhanced the market value of the land by Rs.91.57 p. (Area of claimant's land which was acquired was 9680 sq. yards).

In this manner we are of the opinion that C.O. has absolutely no jurisdiction or authority to re-determine the market value of the land. The said matter had not been referred to him. S.L.A.O. in the referring order unnecessarily noted the question of maintainability of reference in respect of the valuation of land shall be decided by court. There is no provision under Land Acquisition Act under which maintainability of reference may be left to be decided by the civil court. The decision whether to refer a particular matter or

not has to be taken by S.L.A.O. The note appended by S.L.A.O. at the end of referring order leaves no doubt that no reference was made in respect of market value of the land. The most alarming aspect is that even if it is assumed that by virtue of note appended to the referring order by S.L.A.O., reference court was authorised to determine the validity of the reference, in respect of market value of land C.O. should have specifically dealt with this aspect of the matter. It is rather shocking that C.O. in his judgment in question did not say single word about the maintainability of reference in respect of the acquired land.

Accordingly we hold that the charge mentioned in the charge sheet is proved against the C.O.

Quantum of punishment is left upon the Hon'ble the Chief Justice/A.C./Full Court.

The report is submitted accordingly.

Sd/- Sd-
(Justice S.U.Khan) (Justice Imtiyaz Murtaza)
Enquiry Judge Enquiry Judge
14.9.2005

26. From the perusal of charge-sheet dated 25.10.2004 contained in Annexure-4 of the writ petition and inquiry report dated 14.9.2005 contained in Annexure-2 of the writ petition it appears that a charge was levelled against the petitioner that while deciding the Land Acquisition reference no.624 of 1997 he made a re-assessment of value of land enhancing the value of acquired land area 3 Bighas 4 Biswas by Rs.92 per square yard without having jurisdiction to do so on supplementary award restricted to dwelling house and trees while entertaining the application of the claimant without there being any provision so to do in his anxiety to unduly favour the claimant illegally without any reference under Section 18 of the Land Acquisition Act had been made against the award dated 7.12.1990 given by Additional Collector Land Acquisition, thereby unduly given the claimant an additional amount of Rs.24,49,493/- compensation against all judicial norms and propriety for extraneous considerations and thus has committed misconduct within the meaning of Rule 3 of 1956 Rules.

27. At this juncture it is necessary to point out that from the perusal of charge-sheet dated 25.10.2004 and inquiry report dated 14.9.2005 there is nothing to indicate that either Ghaziabad Development Authority or anybody else has made any complaint against the petitioner or any preliminary inquiry or fact of finding inquiry has been held against him wherein some more material has been collected to establish guilt against the petitioner in disciplinary inquiry or any oral or other evidence has been adduced to demonstrate that some extraneous consideration has played dominant role or actuated the petitioner for giving the judgement and award dated 16.1.2001 which is subject matter of such disciplinary inquiry, rather the aforesaid judgment and order/award delivered in Reference No.624 of 1997 alone is subject matter of disciplinary inquiry in question held against him, therefore, it is necessary to examine the same and test it at the anvil of the norms set out by Hon'ble Apex Court in various decisions rendered from time to time referred herein

before. It is no doubt true that legality and propriety of the decision rendered by the petitioner can be examined at Appellate forum in the judicial side under Section 54 of the Act by this Court and thereafter by Apex Court. Nevertheless the same cannot be held to be immune from the scrutiny in disciplinary proceeding held against the petitioner. It is no doubt true that in such disciplinary proceeding the decision rendered by the petitioner while discharging his judicial or quasi judicial function cannot be set aside, howsoever erroneous it may be and error committed in the decision can be corrected and rectified only at higher forum in appeal but very conduct of the petitioner while discharging his judicial and quasi judicial function can be examined in disciplinary proceeding as otherwise there would be complete immunity from such inquiry regarding the acts or omissions of the officers discharging judicial or quasi judicial functions, while passing judicial or quasi judicial orders.

28. Now the questions arise for our consideration are that what are the essential conditions for making reference under Section 18 of the Act and how for the reference is made to the court and what is scope of inquiry to be made by the court? In this connection, it is pointed out that Section 18 of the Act provides provision for making reference which reads as under:-

"REFERENCE TO COURT AND PROCEDURE THEREON

18. Reference to Court.- *(1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.*

2. The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made,-

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under Section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire."

29. Section 19 of the Act provides provision for Collector's statement to the court while making reference under Section 18 of the Act which reads as under:-

"19. Collector's statement to the Court.- *(1) In making the reference, the Collector shall state for the information of the Court, in writing under his hand,-*

(a) the situation and extent of the land, with particulars of any trees, buildings or standing crops thereon;

(b) the names of the persons who he has reason to think interested in such land;

(c) the amount awarded for damages and paid or tendered under Sections 5 and 17, or either of them, and the amount

of compensation awarded under Section 11;

[(cc) the amount paid or deposited under sub-section (3-A) of Section 17; and]

(d) if the objection be to the amount of the compensation, the grounds on which the amount of compensation was determined."

(2) To the said statement shall be attached a schedule giving the particulars of the notices served upon, and of the statements in writing made or delivered by, the parties interested respectively."

30. Section 20 of the Act deals with service of notice upon interested persons and Section 21 imposes restrictions on the scope of proceedings. The provisions of Sections 20 and 21 of the Act are extracted as under:-

***"20. Service of notice**.- The Court shall thereupon cause a notice, specifying the day on which the Court will proceed to determine the objection, and directing their appearance before the Court on that day, to be served on the following persons, namely:-*

(a) the applicant;
(b) all persons interested in the objection, except such (if any) or them as have consented without protest to receive payment of the compensation awarded; and
(c) If the objection is in regard to the area of the land or to the amount of the compensation, the Collector."

***"21. Restriction on scope of proceedings.-** The scope of the enquiry in every such proceeding shall be restricted to a consideration of the interests of the persons affected by the objection."*

31. At this juncture it would be useful to refer some decisions rendered by Hon'ble Apex Court from time to time. In ***Kothamasu Kanakarathama and others Vs. State of Andhra Pradesh A.I.R. 1965 SC 304***, the Land Acquisition Officer made a reference to the court for apportionment of compensation amount among the various claimants under Section 30 of the Act. Six of the appellants did not accept the award of Land Acquisition Officer and made application in writing to him within time allowed by law for referring the matter for determination of the court but no reference was made by Land Acquisition Officer in pursuance of these applications. When the matter came up before the court, it proceeded on footing that the reference made to it by the Land Acquisition Officer was not limited to the apportionment of compensation but was also with respect to amount of compensation. No objection was however raised on behalf of State that in absence of any reference upon the application of six of the appellants the court was incompetent to deal with that matter. When the matter went before the High Court by way of appeal from the judgement of Subordinate Judge, the government pleader raised the question that in absence of reference on the question of quantum of compensation by the Land Acquisition Officer, the court had no jurisdiction to consider the matter at all. The High Court, though it ultimately reversed the finding of the court as to the amount of compensation, unfortunately allowed the plea to be raised before it but ultimately upon a consideration of certain decisions

negatived it. In para 2 of the decision the Hon'ble Apex Court has noticed that quite clearly applications objecting rate at which compensation was allowed were taken in time by persons interested in the land which were under acquisition and it was no fault of theirs that reference was not made by Land Acquisition Officer. The Hon'ble Apex Court has observed as under:-

"Indeed, whenever applications are made under S.18 of the Land Acquisition Act, it is the duty of the Land Acquisition Officer to make a reference unless there is a valid ground for rejecting the applications such as for instance that the applications were barred by time. Where an officer of the State is remiss in the performance of his duties in fairness the State ought not to take advantage of this fact. We are further of the opinion that the High Court, after the plea had been raised, would have been well-advised to adjourn the matter for enabling the appellants before us, who were respondents in the High court, to take appropriate steps for compelling the Land Acquisition Officer to make a reference."

32. In para 3 of the decision the Hon'ble Apex Court has further observed as under:-

"The proviso to sub Section (2) prescribes the time within which an application under sub-S.(1) is to be made. Section 19 provides for the making of a reference by the Collector and specifies the matters which are to be comprised in that reference. Thus the matter goes to the court only upon a reference made by the Collector. It is only after such a reference is made that the court is empowered to determine the objections made by a claimant to the award. Section 21 restricts the scope of the proceedings before the court to consideration of the contention of the persons affected by the objection. These provisions thus leave no doubt that the jurisdiction of the court arises solely on the basis of a reference made to it. No doubt, the Land Acquisition Officer has made a reference under S. 30 of the Land Acquisition Act but that reference was only in regard to the apportionment of the compensation amongst the various claimants. Such a reference would certainly not invest the Court with the jurisdiction to consider a matter not directly connected with it. This is really not a mere technicality for as pointed out by the Privy Council in Nusserwanjee Pestonjee V. Meer Mynoodeen Khan wullud Meer Mynoodeen Khan wullud Meer Sudroodeen Khan Bahadoor, 6 Moo Ind App 134 at p.155(PC) wherever jurisdiction is given by a statute and such jurisdiction is only given upon certain specified terms contained therein it is a universal principle that those terms should be complied with, in order to create and raise the jurisdiction, and if they are not complied with the jurisdiction does not arise. This was, therefore, a case of lack of inherent jurisdiction and the failure of the State to object to the proceedings before the court on the ground of an absence of reference in so far as the determination of compensation was concerned cannot amount to waiver or acquiescence. Indeed, when there is an absence of inherent jurisdiction, the defect cannot be waived nor can be cured by acquiescence."

33. The duty and scope of power of Collector for making reference under Section 18 of the Act and the duty and

scope of inquiry of the reference court has been considered again by Hon'ble Apex Court in quite detail in case of ***Mohammed Hasnuddin Vs. State of Maharashtra AIR 1979 S.C. 404***, wherein one of the question which fell for consideration before the Hon'ble Apex Court was that whether the court can go into a question that the application for reference was not made to the Collector within time prescribed under Section 18 sub Section (2) of the Land Acquisition Act and if so, can it refuse to entertain the reference if it finds it to be barred by time. The aforesaid question has been answered by Hon'ble Apex Court in paras 24 and 25 of the decision as under:-

"24. The word 'require' in Section 18 of the Act implies compulsion. It carries with it the idea that the written application makes it incumbent on the Collector to make a reference. The Collector is required to make a reference under Section 18 on the fulfilment of certain conditions. The first condition is that there shall be a written application by a person interested who has not accepted the award. The second condition is as to the nature of the objections which may be taken and the third condition is as to the time within which the application shall be made. The power of the Collector to make a reference under Section 18 is thus circumscribed by the conditions laid down therein, and one condition is the condition regarding limitation to be found in the proviso.

25. The conditions laid down in Section 18 are 'matters of substance and their observance is a condition precedent to the Collector's power of reference', as rightly observed by Chandavarkar J. in Re Land Acquisition Act (supra). We are inclined to the view that the fulfilment of the conditions, particularly the one regarding limitation, are the conditions subject to which the power of the Collector to make the reference exists. It must accordingly be held that the making of an application for reference within the time prescribed by proviso to Section 18, sub-section (2) is a sine qua non for a valid reference by the Collector."

34. However, in the aforesaid case while deciding another question regarding the scope of inquiry by the reference court in paras 26, 27, 28 and 29 of the aforesaid decision the Hon'ble Apex Court has observed as under:-

"26. From these considerations, it follows that the court functioning under the Act being a tribunal of special jurisdiction, it is its duty to see that the reference made to it by the Collector under Section 18 complies with the conditions laid down therein so as to give the court jurisdiction to hear the reference. In view of these principles, we would be extremely reluctant to accept the statement of law laid down by the Allahabad High Court in Abdul Karim's case (AIR 1963 All 556) (FB) (supra).

27. Every tribunal of limited jurisdiction is not only entitled but bound to determine whether the matter in which it is asked to exercise its jurisdiction comes within the limits of its special jurisdiction and whether the jurisdiction of such tribunal is dependent on the existence of certain facts or circumstances. Its obvious duty is to see that these facts and circumstances exist to invest it with jurisdiction, and where a tribunal derives its jurisdiction from the statute that creates it and that statute also defines the conditions under which the tribunal can function, it goes without

saying that before that tribunal assumes jurisdiction in a matter, it must be satisfied that the conditions requisite for its acquiring seisin of that matter have in fact arisen. As observed by the Privy Council in Nusserwanjee Pastonjee Vs. Meer Mynoodeen Khan, (1855) 6 Moo Ind App 134, wherever jurisdiction is given to a court by an Act of Parliament and such jurisdiction is only given upon certain specified terms contained in that Act it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction for if they be not complied with the jurisdiction does not arise.

28. If an application is made which is not within time, the Collector will not have the power to make a reference. In order to determine the limits of his own power, it is clear that the Collector will have to decide whether the application presented by the claimant is or is not within time and satisfies the conditions laid down in Section 18. Even if a reference is wrongly made by the Collector the court will still have to determine the validity of the reference because the very jurisdiction of the court to hear a reference depends on a proper reference being made under Section 18, and if the reference is not proper, there is no jurisdiction in the court to hear the reference. It follows that it is the duty of the court to see that the statutory conditions laid down in Section 18 have been complied with, and it is not debarred from satisfying itself that the reference which it is called upon to hear is a valid reference. It is only a valid reference which gives jurisdiction to the court and, therefore, the court has to ask itself the question whether it has jurisdiction to entertain the reference.

29. In deciding the question of jurisdiction in a case of reference under Section 18 by the Collector to the court, the court is certainly not acting as a court of appeal; it is only discharging the elementary duty of satisfying itself that a reference which it is called upon to decide is a valid and proper reference according to the provisions of the Act under which it is made. That is a basic and preliminary duty which no tribunal can possibly avoid. The court has, therefore, jurisdiction to decide whether the reference was made beyond the period prescribed by the proviso to sub-section (2) of Section 18 of the Act, and if it finds that it was so made, decline to answer reference."

35. In ***Khazan Singh Vs. Union if India A.I.R. 2002 S.C. 726***, while dealing with the import of the provisions of Sections 18, 20 and 26 of the Act it was held as under :-

"*6. Section 18 of the Act empowers a person interested in the land to move by a written application to the Collector requiring that the matter is referred for determination of the Court, whether his objection be to the measurement of the land, the amount of compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested. If the application for reference is in order the Collector is bound to make a reference of it to the Court. Section 20 of the Act enjoins on the Court to "proceed to determine the objection." The Court shall after holding such inquiry as may be necessary pass an award."*

36. In ***Prayag Upnivesh Awash Evam Nirman Sahkari Samiti Ltd. Vs.***

Allahabad Vikas Pradhikaran and another A.I.R. 2003 SC 2302, wherein a piece of land was acquired under the provisions of the Act at the instance of Allahabad Development Authority in the year 1987. Emergency provisions invoked and an award was published on 25.5.1987. The land in question was Government land which had been given on lease to Shiv Narain Chaudhary, Laxman Narain Chaudhary and others. The period of lease had expired in 1960 and it was not renewed. An amount of Rs.9,80,565.06/- was fixed in award. As both the Government and lease holders claimed the compensation, the Special Land Acquisition Officer referred the dispute to the Civil court on 12.10.1987 under Section 30 of the Act. The reference was registered as Reference case No.124 0f 1987. While the reference was pending before the Civil court, the Additional District Judge, Allahabad sent a communication on 11.8.1992 to the S.L.O. stating that on perusal of case file an application filed under Section 18 of the Act by appellant before Hon'ble Apex Court namely Sahkari Samiti was found to be on file and that no mention had been made regarding that application in the letter of reference. A clarification, therefore, was sought by the Additional District Judge. Pursuant to this communication the S.L.O. sent the reply stating that such an application was also attached and due to an error, the same was not mentioned in the letter dated 12.10.1987. After rectification of this letter, the 11th Additional District Judge impleaded the appellant Samiti and proceeded in the matter as if there was a proper reference under Section 18 of the Act, thus, the market value of the land was enhanced and 75% amount of compensation was awarded to the appellant whereas 25% to the Government. The aforesaid award was challenged before this Court by the A.D.A. and State Government both. This Court held that there was no proper reference under Section 18 of the Act and enhancement of compensation ordered by Reference Court was set aside. However, the apportionment of compensation between the appellant and State Government in proportion of 75% and 25% remained intact. The aforesaid decision of this Court was challenged before the Hon'ble Apex Court by the appellant.

37. In para 4 of the decision the Hon'ble Apex Court formulated the question and in para 5, 6 and 7 of the decision, the aforesaid question has been dealt with and answered as under:-

"4. The short question that arises for consideration is whether the SLAO had made a reference under Section 18 of the Act? Admittedly, the original reference was only under Section 30 of the Act, or apportionment as there was a dispute as to who should get the compensation.

5. In the reference letter sent by the SLAO on 12.10.1987, nothing has been stated regarding the claim for enhancement of compensation put in by any of the parties. It is also pertinent to note that in the reference letter, the appellant-Samiti is not shown as a party. The first claimant is one, Shiv Narain Lal Chaudhary and there are six other claimants. The reference letter of the SLAO clearly shows that the appellant-Samiti was not a party to such reference. It is surprising as to how the learned Addl. District Judge could seek a clarification on the basis of an application which was found on the file and if such an application was made by

any party, naturally there would have been a reference under Section 18 of the Act and it would have been specifically mentioned in the reference letter. It is equally surprising that even though the appellant was not a party to the reference case and was allegedly not having knowledge of the proceedings, how and at whose instance the clarification was sought by the Addl. District Judge. It is also pertinent to note that the clarification issued by the SLAO subsequent to the letter from the Addl. District Judge, cannot be construed as reference under Section 18 of the Act. There letter from SLAO reads as follows:-

"This is with reference to your letter dated 11.8.1992 whereby you have enquired as to whether in the reference forwarded on 12.10.1987 entitled as State State Government Vs. Shiv Narayan Chaudhary and others, the reference of Prayag Upnivesh Sahkari Samiti, under Section 30/18 was also made? In this connection it is submitted that in the file of the office, the reference of Prayag Upnivesh Samit Ltd., is also attached. Probably, due to error in the previous reference letter dated 12.10.1987 the same was not mentioned."

6. The letter quoted above by itself is not sufficient to make it as a reference purported to have been made under Section 18 of the Act. The learned Addl. District Judge clearly erred in assuming that there a reference under Section 18 of the Act. The subsequent impleadment of the Samiti as a party to the reference, which was pending under Section 30 of the Act, and the conversion of the same also as a reference under Section 18, were illegal and has rightly been quashed by the High Court.

7. It is well established that the reference Court gets jurisdiction only if the matter is referred to it under Section 18 or 30 of the Act by the Land Acquisition Officer and that Civil Court has got the jurisdiction and authority only to decide the objections referred to it. The reference Court cannot widen the scope of its jurisdiction or decide matters which are not referred to it. This question was considered by various judicial authorities and one of the earliest decisions reported on this point is Pramatha Nath Mullick Bahadur Vs. Secy. Of State, AIR 1930 PC 84. This was a case where the claimant sought a reference under Section 18 of the Act. In the application filed by the claimant, he raised objection only regarding the valuation of the land. The claimant did not dispute the measurements of the land given in the award. Before the reference Court, the claimant raised objection regarding the measurements of the land and sought for fresh measurements. This was refused and the claimant applied to the High Court for revision of this order, but without success. Again, in the appeal. The claimant raised same objection regarding measurements and the High Court rejected it. The Judicial Committee of the Privy Council held thus:-

" Their Lordships have not doubt that the jurisdiction of the Courts under this Act is a special one and is strictly limited by the terms of these sections. It only arises when a specific objection has been taken to the Collector's award, and it is confined to a consideration of that objection. Once therefore it is ascertained that the only objection taken is to the amount of compensation, that alone is the "matter" referred, and the Court has no power to determine or consider any thing beyond it."

38. From a close analysis of the statement of law enunciated by the Hon'ble Apex Court and a bare reading of the provisions of Section 18 of the Act it is clear that any person interested who has not accepted the award may by written application to the Collector, require that the matter be referred by the Collector for determination of the court whether his objection be the measurement of the land, the amount of the compensation, the persons to whom it is payable or the apportionment of the compensation among the persons interested. The application shall state the grounds on which the objection to the award is taken. Provided that every such application shall be made, (a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of Collector's award, (b) in other cases within six weeks of the receipt of the notice from the Collector under Section 12 sub section (2) or within six months from the date of the Collector's award which ever period first expire.

39. Thus, from a plain reading of the provisions of Section 18 of the Act it is clear that any person interested who has not accepted the award may by written application to the Collector require that the matter be referred by the Collector for determination of the court, provided his application is within time as stipulated under sub section 2 of Section 18 of the Act and further his objection be in respect of (i) the measurement of land, (ii) the amount of compensation, (iii) the person to whom it is payable, or the apportionment of compensation among the persons interested. Therefore, in our opinion, the first condition, which is essential for making reference by the Collector for determination of the court is that the application must be in writing to the Collector requiring him to refer the matter for determination of the court by a person interested who has not accepted the award, the second condition is that such application must be within stipulated period of time provided under sub section 2 of Section 18 of the Act and the third condition is that application shall state the grounds on which the objection to the award is taken. Those grounds of objection against the award may be only in the nature of (i) the measurement of the land (ii) amount of compensation i.e. quantum of compensation and (iii) the persons to whom it is payable or apportionment of compensation. If the aforesaid conditions are satisfied, the Collector/S.L.A.O. is under statutory duty to make reference or refer the matter to the court for determination. It follows that if the aforesaid conditions are satisfied, the Collector is bound to refer the matter for determination of the court in respect of the objections of the claimant, therefore, he can be compelled to do so.

40. Section 19 of the Act provides that while making reference the Collector is required to make certain statements of fact for information of the court in writing under his hand, which are to be comprised in that reference. Thus, the matter goes to the Court only upon a reference made by the collector. It is only after such reference is made, that the Court is empowered to determine the objections made by the claimant to the award of collector. Section 21 of the Act imposes the restriction on the scope of proceeding which, provides that every such proceeding shall be restricted to a consideration of the interests of person affected by the objection. The objection

contemplated under Section 21 is same as contained in the application of the person for making reference before the Collector for determination of the Court against the award. Therefore, in our opinion a reference is nothing but it is precisely the grounds on which objection is taken by the claimant against the Collector's award and the information sent by the Collector along with the said objection against the collector's award. These informations are not mere formality but furnish basis for reference made to the court and which ultimately gives jurisdiction to the court, solely on the basis of reference made to it. It is in this background, it is to be held that the reference court cannot enlarge the scope of inquiry in the reference proceeding under the Act.

41. In the light of aforesaid settled legal position, now we have to examine that how the reference was made and what was actually referred by the Collector to the court for determination? From the covering letter of Addl. Collector(Land acquisition) Irrigation, Ghaziabad dated 3.12.1997 addressed to the District Judge, Ghaziabad, as contained in Annexure-10 of the writ petition (which is in Hindi Dev Nagari script), it indicates that the application of Sri P.D. Bali for making reference under Section 18 was sent by him along with his comment and relevant documents purported to be under Section 19 of the Act. The English translation of the said letter reads as under:-

"Sir,

In context of the above reference, I have to submit that the above applicant had made the application for making reference under Section 18. His application with comments and relevant documents are sent to the court for disposal."

42. From the above referring letter it appears that along with said letter Addl. Collector had also sent the application of claimant and his comments purported to be under Section 19 of the Act, a gist of comments is on record as Annexure-9 of the writ petition. A bare reading of item no. 17 of gist of comments, which pertains to the basis for determining of compensation, it indicates that a statement was made to the effect that "the land owner had not filed any application for reference under Section 18 against the award dated 7.12.1990 in respect of land, regarding which claimant/land owner has mentioned in his application dated 8.9.1997. Award in respect of property (super-structure and trees) was given on 30.8.1997 (correct date 10.8.97) hence the application for reference in respect thereof is within time. In the application, land owner has requested for making reference in respect of acquired land also. In my opinion, in respect of reference pertaining to acquired land, court will have to decide as to whether it is maintainable or not".

43. Thus from a careful reading of the aforesaid statement of facts purported to have been made under Section 19 of the Act, it is clear that Addl. Collector had found that the reference against supplementary award dated 10.8.97 was within time and had made reference pertaining thereto, but so far as reference in respect of compensation or value of land against the initial award dated 7.12.90 was concerned, though he had clearly stated that land owner had not made reference earlier to it in respect of the initial award dated 7.12.90 and had prayed for making reference in respect

thereto but it appears that the Additional Collector (L.A.) was in utter confusion about the period of limitation for making reference against the award dated 7.12.1990 and otherwise about maintainability of reference against the said award, therefore, instead of deciding its maintainability, he had left the matter to be decided by the court. It implies that the Addl. Collector did not make reference in respect of quantum of compensation pertaining to the land against the initial award dated 7.12.1990 and had left the matter to be decided by the court. In our opinion, he could not do so. He was under statutory obligation to decide maintainability of reference and could not be justified in leaving the matter of maintainability of reference to be decided by the Court. In fact, he has failed to discharge his duties assigned under law. In such a situation, now it is to be seen that as to whether the court was competent and justified to deal with the maintainability of reference in respect of the acquired land also along with the super-structure and trees standing thereon and if it was found maintainable in respect of acquired land also along with superstructure and trees standing in that eventuality whether the court was justified to answer it or it could decline to answer it for the reason that it was not properly made to it?

44. It is no doubt true as held by Hon'ble Apex Court in ***Kothamasu Kanakarathamma's case (supra), Mohammad Hasnuddin's case*** (supra) and in ***P.U.A.E.N.S.S. Ltd. Vs. A.V.P. and another's*** case (supra) that the reference court is under statutory duty to examine that as to whether all the three essential conditions for making proper and valid reference were existing before the Collector while making reference under Section 18 of the Act for determination to the court or not. If it is found that all the aforesaid three essential conditions were not existing despite thereof Collector has made reference, the court was bound to decline to answer the reference because of the simple reason that in such eventuality, the Collector has no jurisdiction to make reference under Section 18 of the Act, as the existence of those three essential conditions, are condition precedent for exercise of his jurisdiction for making reference under said section of the Act. However, if it is found that all the three conditions for making reference were existing but the Collector/officer of the State Government has failed to make reference to the court, in that eventuality as held by Hon'ble Apex Court in **Kothamasu Kanakarathamma's case (supra),** the court should adjourn the matter for enabling the claimant to take appropriate steps for compelling the land acquisition officer to make a reference, but the court can not proceed to answer the reference in absence of proper reference made to it. In our opinion, the existence of all the essential conditions for making valid and proper reference before the Collector is one thing and making of valid and proper reference by the Collector is quite different thing altogether. Therefore, from the aforesaid discussion, it is clear that before proceeding with the reference, the court is under statutory duty to examine the maintainability of the reference and to be satisfied about the fulfilment and existence of all the essential conditions stipulated under Section 18 of the Act for making valid reference because of the simple reason that it is only valid and proper reference, which gives jurisdiction to the court to proceed with the reference

but despite existence of such essential conditions, unless proper reference is made by the Collector, court has no jurisdiction to decide the same.

45. Now in the light of the aforesaid legal position, it is necessary for us to examine the facts and circumstances of the case and judgment and award purported to have been made under Section 26 of the Act by the court/petitioner in Reference Case No.624 of 1997 Wing Commander P.D. Bali Vs. State of U.P. and others decided on 16.1.2001. From a bare perusal of paragraphs 3 and 4 of the judgment and order/award passed by Charged Officer i.e. petitioner, it appears that while deciding the reference he has noted the case of State Government as well as Ghaziabad Development Authority wherein they have taken stand that the reference is barred by time and not maintainable inasmuch as the claimant has accepted the award given by the Collector and received the compensation without protest, therefore, the reference is not maintainable on both the counts. It appears that while deciding the reference the petitioner/Charged Officer has framed as many as four issues. The issue no.1 has been framed in the manner that as to whether claimant is entitled to get compensation of the acquired land at the rate of Rs. 2000/- per sq. meter? The issue no. 2 pertains to the amount of compensation in respect of super-structure and trees standing on the acquired land. The third issue has been framed to the effect that as to whether the reference is barred by time and Sections 25 and 9 of the Act? Fourth and last issue has been framed to the effect that for which relief the claimant is entitled? No issue was framed regarding the fact that as to whether the claimant has accepted the award and received the compensation or not and as to whether on that count the reference is maintainable or not? Although, it was specific case of respondents before the reference court that the claimant Sri P.D. Bali has accepted the award made by the Collector and received the compensation without protest but neither any issue has been framed in this regard nor the same has been dealt with by the charged officer i.e. petitioner which was one of the essential condition for making valid and proper reference by the Collector to the court. The reference court was also under statutory duty to examine about the aforesaid facts and maintainability of reference on that count as being a tribunal having jurisdiction of special nature, it could not assume the jurisdiction unless satisfied about the existence of essential condition for making valid reference as held by Hon'ble Apex Court in Mohammad Hasnuddin's case (supra) referred herein before. Not only this but in his application dated 8.9.1997 (contained in Annexure-8 of the writ petition) for for making reference before the Addl. Collector, the claimant Wing Commander Sri P.D. Bali had stated that he had received the compensation in the year 1997 but it was not clearly stated that as to when he had received the compensation and as to whether he had received the said compensation under protest or without protest. In the statement of information, contained in Annexure-9 of the writ petition, purported to be under Section 19 of the Act sent by the Collector to the Court, there is nothing to indicate clearly as to whether the compensation awarded under Section 11 of the Act has been received by the claimant or not? If it is received on which date and as to whether

it was received under protest or without protest?

46. In order to examine the aforesaid factual position, we have summoned the original record from the office of Land Acquisition Officer. In compliance of our direction, the learned Standing Counsel has placed the original records before us during the course of the hearing of the case. From a perusal of records it indicates that claimant Wing Commander Sri P.D. Bali has received the compensation under protest on 21.7.97 amounting Rs.13,58.978=91p. after deduction of income tax amounting Rs. 55,910=00 against total sum of Rs. 14,14,888=91 p. in respect of initial award dated 7.12.1990 by making his signature and endorsement on receipt. He has also received a sum of Rs. 10,59,483=41 p. after deduction of income tax amounting Rs.46011=00 against total sum of compensation amounting Rs.11,05,494=41 p. on 2.9.1997 under protest against the supplementary award dated 10.8.1997. From a perusal of original records pertaining to the receipt of the compensation offered under supplementary award dated 10.8.1997, it appears that claimant Wing Commander Sri P.D. Bali had made his signatures while receiving the compensation on 2.9.1997 twice and in between both the signatures he had made endorsement to the effect that the payment received under protest. It appears that initially while making signature on receipt of the payment, nothing had been written by him but subsequently thereafter he had made aforesaid endorsement and made his signature again. At this juncture, it is also necessary to point out that coupled with the aforesaid factual position, the omission to frame the issue as to whether the claimant had accepted the aforesaid awards and compensation offered thereunder or not and if received as to whether under protest or without protest, a reasonable doubt is created in our mind about the truthfulness of fact that the claimant Sri P.D. Bali has accepted the amount of compensation under protest. The aforesaid events leads to a conclusion that during the pendency of reference before the court, the said endorsement of receipt of payment of compensation under protest could not be made by the claimant Sri P.D. Bali and subsequently thereafter, having got some occasion, he has manipulated the office of Land Acquisition Officer and succeeded in making such endorsement otherwise there was no justification to omit this essential issue for determination by the petitioner. In our opinion, therefore, in order to escape from this controversy the charged officer/petitioner has deliberately omitted to frame and decide the aforesaid issue as otherwise the reference of claimant would not have been maintainable on that count alone and he would not have been able to proceed with reference and to decide the same. The aforesaid inference drawn by us also finds further support from the statement of facts falsely made by the petitioner in para 21 of the writ petition that claimant P.D. Bali did not accept the offer of compensation made to him through the awards dated 7.12.1990 and 10.8.1997, as he was not satisfied with the quantum of compensation. Although this statement of fact has been replied in para 29 of the counter affidavit filed on behalf of High Court, wherein it was stated that the same is subject matter of record and was further stated that in para 1 of his application dated 8.9.1997 (Annexure-8 of the writ Petition) the claimant P.D. Bali

himself had stated that he was paid compensation in the year 1997 when he could know that award has been made. Although, in the said application no specific averment had been made to this effect that he had received the compensation under protest or without protest, but the aforesaid statement of fact made by the petitioner while filing of instant writ petition at later stage, contrary to the record as indicated herein before, again creates doubt in our mind about his conduct. In this connection it is to be noted that when a specific plea was taken on behalf of the State Government and Gaziabad Development Authority regarding the receipt of payment of the compensation by claimant and the argument regarding the same was also advanced and before the petitioner, as noticed by him in judgment in question, it is surprise to note that why he did not frame and decide the said issue which was one of the essential conditions for making reference under Section 18 of the Act, and the court was duty bound to ascertain the existence of aforesaid essential condition before proceeding to answer the reference and enhancing compensation thereby. In our opinion, it was deliberate act or omission of the petitioner with ulterior motive or some gain by benefiting the claimant.

47. Another essential condition for making proper and valid reference under Section 18 of the Act is the period of limitation stipulated thereunder. It is not in dispute that initial award had been made on 7.12.90 and claimant Sri P.D. Bali, no doubt, had not made any application for making reference prior to 8.9.97. It is first time by making application on 8.9.97 he had sought composite reference for enhancement of compensation in respect of land against the award dated 7.12.90 and superstructure and trees standing on the acquired land against supplementary award dated 10.8.97 both after expiry of a period of about more than six and half years from the date of award dated 7.12.90. While dealing with the question of limitation the petitioner (charged officer) has made serious attempt to justify that the application for making reference made by the claimant is within time on account of the fact that supplementary award has been made by Addl. Collector on 10.8.97 in respect of super-structure and trees standing on the acquired land, as such according to the petitioner that the award dated 7.12.90 would be deemed to be incomplete till the delivery of supplementary award dated 10.8.97 and same shall be treated to be in continuity of award dated 07.12.1990. Accordingly both the awards i.e. award dated 7.12.90 and award dated 10.8.97 would be treated to be one and single integrated award within the meaning of section 11 of the Act. Thus, the period of limitation for making application for reference would start to run from the date of supplementary award dated 10.08.1997 and not from the date of initial award dated 7.12.90. In support of his findings and reasonings he has also placed reliance upon a decision of Hon'ble Privy Council rendered in ***Prag Narain Vs. Collector, Agra A.I.R. 1932 Privy Council, 102***, wherein their Lordships of Privy Council have observed at page 104 as under:-

"*The Act does not appear to contemplate that where more than one person is interested in a parcel of land there should be more than one award relating thereto. Their Lordships do not by this mean that the whole of the land at*

any one time to be acquired under the Act must necessarily be dealt with in one award: but only that any one piece of land (forming part of the whole) in which more than one person has an interest for which he can claim compensation, ought not to be made the subject of more than one award. Each award should contain within its four corners the fixing of the value of the land with which it deals and the apportionment of that value between the various persons interested in that land.

In the present case the difficulty has arisen from the fact that the officer has dealt with the land by two documents, and so far as the 495 square yards are concerned, that particular parcel of land figures in both. Their Lordships however think that the two documents (the later of which specifically refers to the earlier) must be read together as constituting one award in relation to that parcel of land by which the officer awards the compensation to be allowed for that land at a figure of Rs.8 per square yard and awards the apportionment of that compensation in the proportion of one-fourth to the appellant and three-fourths to the tenants."

48. It is no doubt true that the learned counsels appearing for the State Government and High Court did not bring any other Authority of Hon'ble Apex Court wherein the aforesaid question has been considered and different view was taken. In such situation, the law laid down by their Lordship of Privy Council is binding upon this court and ratio of the decision has to be accepted as continuance of existing law under Art. 372 read with Art. 141 of the Constitution but before its application in given facts of the case, it is to be seen that what is ratio of the said decision.

49. In this connection, it is also necessary to point out that a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from various observations made in it. In this connection the observations made by Hon'ble Apex Court in State of Orissa Vs. Sudhansu Shekhar Misra AIR 1968 S.C. 647 para 13):-

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."

50. In **Ambica Quarry Workds Vs. State of Gujarat & others** (1987) 1 SCC 213 (vide para 18) Hon'ble Apex Court observed:-

"The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

51. In **Bhavnagar University Vs. Palitana Sugar Mills Pvt. Ltd** (2003) 2 SCC 111 (vide para 59), Hon'ble Apex Court observed:-

"It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

52. In the said decision their Lordships of Privy Council have held that the Act does not appear to contemplate

that where more than one person is interested in a parcel of land there should be more than one award relating thereto. Their Lordships do not by this mean that the whole of the land at any one time to be acquired under the Act must necessarily be dealt within one award: but only that any one piece of land (forming part of the whole) in which more than one person has an interest for which he can claim compensation, ought not to be made the subject of more than one award. In the aforesaid case a particular piece of land ad measuring an area of about 495 square yards had been dealt with by the Land Acquisition Officer in two documents and that particular parcel of land figured in both. Their Lordships however thought that the two documents (the later of which specifically referred to the earlier) must be read together as constituting one award in relation to that parcel of land by which officer awarded the compensation to be allowed for that land to the interested persons.

53. In view of the aforesaid legal position enunciated by Hon'ble Privy Council, in absence of any decision of Hon'ble Apex Court contrary thereto, brought before us, we have no doubt in our mind to hold that the initial award dated 7.12.1990 and supplementary award dated 10.8.1997 in respect of the same parcel of the land and superstructure in question ought to have been dealt with as single unit in the same single award and pertaining to the same claimant could not be split up into two awards as the awards dated 7.12.1990 and 10.8.1997, pertain to same piece of acquired land with regards to the same claimant, therefore, they must be read together, so far as determination of compensation of acquired land and super-structure and trees standing on the said acquired land is concerned but the aforesaid decision cannot be further stretched upon to assume that the supplementary award dated 10.08.1997 shall be treated to be in continuity of initial award dated 07.12.1990 and the period of limitation would start to run from the date of delivery of supplementary award dated 10.8.97. In our opinion, the decision rendered by their Lordship of Privy Council in aforesaid case should be understood in context of the facts in which it was rendered and no logical conclusion can be drawn from the aforesaid decision that the award dated 10.8.97 should be treated to be in continuity of the initial award dated 07.12.1990 and the period of limitation would start to run from the date of delivery of supplementary award dated 10.08.1997. The charged officer did not mention any authority of Hon'ble Apex Court or any other High Courts in support of the proposition of continuity of initial award till the date of delivery of supplementary award. From a careful reading of the aforesaid decision of their Lordships of Privy Council, it transpires that the same piece of land cannot be subjected to two awards in respect of persons interested thereto so that a repetition of determination of compensation in respect of the same land is to be avoided. It is settled law that in evaluating the market value of acquired property, namely, land and building or the land with fruits bearing trees standing thereon, the value of both is to be determined not as separate unit but as one unit. (See- Airport Authority of India Vs. Satya Gopal Rai, AIR 2002 S.C. 1423, para 8). Since in pursuance of direction of this court dated 15.5.96 in writ petition filed by the claimant and pursuant thereto the State Government vide order 20.7.96

has directed the Collector to make supplementary award on 10.8.97 in respect of super-structure and trees standing on the acquired land, in our opinion, therefore, only for the purpose of determination of compensation both the awards will be treated to be single unit and one award so far as it pertains to the value of land and superstructure of the acquired land for determination of compensation in respect thereof is concerned and nothing more than that.

54. In view of aforesaid settled legal position, we are unable to agree with the observation made by charged officer that the initial award dated 7.12.90 would be treated to be in continuity till the date of delivery of supplementary award dated 10.8.97 and period of limitation would start to run from the date of supplementary award dated 10.8.1997 for the purpose of making reference against the award dated 07.12.1990. In our considered opinion, the award dated 7.12.90 cannot be said to have been merged in the supplementary award dated 10.8.97 while integrating together and after the delivery of supplementary award dated 10.8.97 the initial award dated 7.12.90 has lost its identity. Neither the doctrine of merger has any application in facts of the case nor it can be said that initial award dated 07.12.1990 was interim award and not a final award thus, could not be challenged by aggrieved interested person earlier to the delivery of supplementary award on 10.8.97. Similarly, the initial award dated 7.12.90 can also not be treated as incomplete award within the meaning of Section 11 in the sense that it could not be challenged earlier by the aggrieved person unless it is completed by delivery of supplementary award dated 10.8.97, therefore, the observation made by charged officer while dealing with the question of limitation and theory of continuity of initial award dated 7.12.90 till the date of supplementary award dated 10.8.97 propounded by the petitioner, in our opinion, could not find any support from the aforesaid decision of Their Lordships of Privy Council, therefore, cannot be accepted at all. We are of the considered opinion that the aforesaid theory of continuity of initial award till the delivery of supplementary award has been evolved by the Charged Officer just to save his skin from committing grave error while treating time barred reference within time in respect of compensation of the land against the award dated 7.12.90 for which no reference was made by the Collector by evolving such a novel device in this regard. The aforesaid attempt clearly shows the screen of mind of Charged Officer that how much he was eager and anxious to decide the reference in question in favour of claimant, which was patently barred by time and was not made for determination to the court, thus, clearly shows his corrupt motive in this regard.

55. Not only this but on examining the issue from another angle, it appears that while dealing with issue no.1 the Charged Officer has noticed the statement of Sri P.D. Bali/claimant that the land in question has been acquired in the year 1988, the award of which has been made on 7.12.1990 but neither any notice nor any information was given to the claimant. The claimant could hardly know about the said award in the year 1997 which was made in respect of the acquired land but not in respect of trees and superstructure standing thereon. Thereafter he moved representation for

determination of compensation of superstructure and trees standing on the acquired land which ultimately resulted in supplementary award dated 10.8.1997. Being aggrieved by both the awards the claimant has moved application before the Collector for making reference but there is nothing to indicate that on which date the claimant got information about initial award dated 7.12.1990 and as to when he moved application before the State Government as well as before the Land Acquisition Officer/Additional Collector for making such supplementary award? In this connection, it is to be noted that it is not in dispute that the claimant has filed Writ Petition No.22274 of 1993 titled as Wing Commander P.D. Bali Vs. State of Uttar Pradesh, which has been decided by this Court on 15.5.1996, wherein the claimant had initially challenged the proceeding under Land Acquisition Act but later on by amendment application, the prayer was made to restore/exempt the land belonging to the claimant under the Proviso of Section 17(1) of U.P. Urban Planning and Development Act. During the pendency of the writ petition, the claimant had also applied to the State Government on 17.4.1994 for redressal of his grievance but no decision was taken by the State Government in that regard, therefore, without going into the merits of the case, this Court vide judgement and order dated 15.5.1996 had directed the State Government to dispose of the said application of claimant finally within a period of two months from the date of production of certified copy of the order passed by this Court by a speaking order after hearing the petitioner of the aforesaid case as well as Ghaziabad Development Authority. It cannot be disputed that in pursuance of the aforesaid direction given by this Court, the claimant had approached the State Government. Thereupon vide order dated 20th July 1996 the State Government had directed to give compensation to the claimant in respect of superstructure and trees standing on the acquired land. It clearly indicates that the State Government could not have given such direction to the Land Acquisition Officer unless the claimant P.D. Bali had categorically stated before the State Government that initial award dated 7.12.1990 does not contain the compensation of superstructure and trees standing on the acquired land, otherwise there would have been no occasion for the State Government to issue any such direction for making award of the superstructure and trees standing on the acquired land. Thus, it further indicates that the claimant P.D. Bali must have clear cut knowledge about the contents of initial award dated 7.12.1990 prior to 20.7.1996 when the State Government had passed order on the application of Sri P.D. Bali for making supplementary award in respect of superstructure and trees standing on the acquired land and further after the aforesaid decision of State Government dated 20.7.1996 he must have knowledge of the contents of initial award dated 7.12.1990 while moving application for making supplementary award before the Additional Collector.

56. We have already summoned the original records from the office of Land Acquisition Officer which was brought by learned Standing Counsel during the course of argument, whereby he has also produced copy of supplementary award dated 10.8.1997. A bare reading of which, it indicates that on 12.4.1993 the claimant P.D. Bali had moved an application before the Additional Collector (Land

Acquisition), thereupon on 13.4.1993 the Additional Collector had directed to the Niab Tehsildar to make enquiry regarding superstructure and trees standing on the acquired land as the same had escaped attention from the initial award dated 7.12.1990. This fact clearly indicates that the claimant was aware of the contents of award dated 7.12.1990 at least on 12.4.1993 when he had moved the aforesaid application to the Additional Collector (Land Acquisition) for inspection of superstructure and trees standing on the acquired land. In pursuance of said application, the Niab Tehsildar, Ghaziabad Development Authority and Amin have made joint inspection on 16.4.1993 in respect of plot in question belonging to the claimant and submitted their report. Besides this, the Additional Collector had also noticed in his judgment/supplementary award dated 10.8.1997 that Principal Secretary Awas had decided the application of Sri P.D. Bali on 20.7.1996, wherein he had mentioned that compensation has been awarded in respect of the acquired land and not in respect of superstructure and trees standing thereon, therefore, at any rate the claimant must have knowledge about the contents of initial award dated 7.12.1990 latest by 12.4.1993 and 20.7.1996 but he did not make any application before the Collector under Section 18 for making reference against the award dated 7.12.90 earlier to 8.9.1997. Thus it appears that on the basis of aforesaid facts the reference was clearly barred by time even under Second part of proviso (b) of Section 18 (2) of the Act which prescribes period of limitation 6 months where the case is not covered under other parts of the provisos of Section 18 (2) of the Act. Although in ***State of Punjab Vs. Mst. Qaisar Jehan Begum and another AIR 1963 SC 1604 (para 5),*** Hon'ble Apex Court has held that the limitation of six months under the second part of clause (b) runs from the date of knowledge of the contents of award. But in given facts and circumstances of the case, in our opinion, the claimant could not get help of the aforesaid decision of Hon'ble Apex Court, that is why it appears that the Charged Officer/petitioner did not deal with issue to its logical conclusion from the aforesaid angle and evolved a novel device of aforesaid theory of continuity of initial award till the date of supplementary award referred herein before. In our opinion, therefore, the reference against award dated 7.12.1990 was clearly barred by time prescribed under Section 18(2) of the Act and no proper and valid reference could have been made for determination of compensation by the Additional Collector in respect of the acquired land to the court and at any rate reference made in respect of superstructure and trees standing on the acquired land against the supplementary award dated 10.8.1997 could not include the reference of acquired land against the award dated 7.12.1990 automatically without any valid and proper reference is made by the Additional Collector in respect of the aforesaid land and Court has inherent lack of jurisdiction to proceed with the reference against the award dated 7.12.1990, therefore, the enhancement of value of acquired land/quantum of compensation in the tune of Rs.24,49,493/- in our considered opinion is wholly without jurisdiction and contrary to the statutory provision of the Act, thus the petitioner has unduly favoured the claimant by giving the aforesaid benefit to him against all

judicial norms and propriety for extraneous consideration.

57. It is, no doubt, true that the third essential condition for making reference under Section 18 of the Act in respect of nature of objection to be raised by the claimant against the award dated 7.12.90 was existing, as by the aforesaid application dated 8.9.1997 the claimant has clearly raised the objection regarding the quantum of compensation against the award dated 7.12.1990 and prayed for enhancement of compensation awarded by the Collector under said award but that alone could not entitle/empower the Collector to make valid and proper reference in absence of existence of other two conditions under Section 18 of the Act as held by us herein before. Therefore, in our considered opinion, in absence of valid and proper reference against the award dated 7.12.1990 made by Collector, the court/petitioner had no jurisdiction to proceed with the reference and enhance the compensation sought for by the claimant. In given facts and circumstances of the case, since all the essential conditions referred herein before were not existing before the Collector/Land Acquisition Officer, therefore, the Collector could not be compelled to make reference for enhancement of compensation in respect of acquired land against the award dated 7.12.90, even by adjourning the proceeding before reference court or appellate court. In view of the aforesaid discussion, we have no doubt in our mind that the charge levelled against the petitioner has been fully established and clearly proved against him from his judgement itself, thus the findings of Hon'ble Enquiry Judges, in our considered opinion, cannot be faulted with.

58. Besides the aforesaid charge and findings of Hon'ble Enquiry Judges, we have also gone through the award dated 16.1.2001 made by the petitioner and we found that while evaluating the market value of acquired land, the petitioner/Charged Officer did not place reliance upon only sale deed dated 12.2.88 filed by claimant, which was executed by Mohammad Gani in favour of Mohd. Irafan, few month earlier from the date of notification under Section 4(1) of the Act in respect of the acquired land. Except to copy of aforesaid sale deed no other sale-deed was filed by the claimant as revealed from decision of the petitioner. This sale deed was of very small piece of land measuring only 100 sq. yards at sale consideration of Rs.10,000/-, which would come to Rs.100/- sq. yard. The circle rate prescribed by Government for stamp duty was Rs.150/- per sq. yard but the petitioner has placed reliance upon the decisions made in some reference cases in respect of land acquired under same notification under Section 4(1) dated 16.8.88 in respect of same villages namely, Dasna, Sadarpur and Harsoan, wherein the Reference Courts have awarded compensation at a rate of Rs.163 per square yard. It appears that in Reference No. 329/92 the sale instances pertaining to plot nos. 696/1, 694/1, 693/2, 693 and 696 of village Harsoan have been considered by the Reference court. The sale instance pertaining to plot nos. 298/1 at a rate of Rs.298/- per sq. yard was executed on 30.8.88 after notification under Section 4(1) of the Act which was made on 16.8.88, thus could not be considered to be a genuine sale, therefore, could not be relied by the reference court, but for the reason best known to the petitioner, he has placed

reliance upon the aforesaid sale instance, which was not filed before him by the claimant, rather was filed in another reference case. Another instance of sale deed dated 11.7.93 in respect of plot no. 693 at a rate of Rs.160/- per sq. yard was also noticed by petitioner, but no reason has been assigned to reject the aforesaid sale instance, though it appears that this sale deed was also considered in another reference case, which was relied upon by the petitioner. No reason has been assigned to ignore only sale instance given by the claimant, though it was in respect of very small piece of land, despite thereof the petitioner has accepted the sale instance of plot no. 298 of different village Harsoan, though included in same notification but awards could be made by belting the land included therein having regard to large track of the land and location thereof. In case, sale instance given by the claimant would have been accepted by the petitioner the market value of the land would come to Rs.100/- per sq. yard only and after deducting 25%-30% for development charge having regard to the purpose of acquisition and area of 346 Acre land acquired, the market value of the land would hardly come to Rs.70/- to 75/- per sq. yard. The petitioner has fixed market value in respect of acquired land in question as fixed by other reference courts without ascertaining that as to whether the aforesaid references have attained finality or they have been challenged under appeal under Section 54 of the Act or not. It appears that no exempler of any sale-deed or sale instance of any land of vicinity of land of claimant has been independently considered and relied upon rather sale instance of aforesaid reference has been taken into account and market value of the land in question appears to have been fixed on that basis. In our opinion, such judgements of reference court could not have been relied upon by the petitioner without ascertaining the finality of judgements of reference court that too under Section 23 of the Act while making award under Section-26 of the Act. Such approach of the petitioner as reflected from his judgement does not appear to be a mere bonafide error in his judgement but reflects his mental screen and integrity showing his corrupt motive to extend undue benefits to the claimant.

59. It is, no doubt, true that in case any award under reference made in respect of the land acquired under the same notification has attained finality, in that event of the matter the Collector under Section 28-A of the Act can re-determine the compensation of similarly situated persons who have not made reference despite they have accepted the compensation under the award made by the Collector. But so long as such award under reference has not attained finality, the Collector should stay his hands in the matter for re-determination of the compensation and keep the matter pending till the appeal is finally disposed of and he should re-determine the compensation only on the basis of final judgment and decree of Appellate forum as held by Hon'ble Apex Court in ***Babua Ram and others Vs. State of U.P. and another L.J., 324 (SC) = 1995 (2) SCC, 689*** (para 39) which has been overruled by Hon'ble Apex Court on limited question of limitation in ***Union of India and another Vs. Pradeep Kumari and others AIR 1995 SC 2259*** but not on other questions. The decision of Hon'ble Apex Court in ***Union of India Vs. Pradeep Kumari and others*** (supra) has also been overruled in ***Union of India***

and another Vs. Ansoli Devi AIR 2002 SC 3240 (para 4 and 5) on another limited question that when an application of land owner under Section 18 is dismissed on the ground of delay, even then such land owner is entitled to make application under Section 28-A of the Act. In view of aforesaid legal position, the claimant P.D. Bali could get his grievances redressed by the Collector himself, provided the conditions stipulated under Section 28-A of the Act are satisfied and he has moved such application within prescribed time provided under aforesaid section, but while passing award under Section 26 of the Act in reference under Section 18 of the Act, in our considered opinion, the Reference court could not place reliance upon any judgement and award made by another reference court under Section 26 of the Act, in reference of other land owners of the land, acquired under the same notification under Section 4 of the Act unless such award attained finality.

60. In the wake of facts and circumstances of the case, we are of the opinion that while deciding the reference in question, the petitioner has made each and every efforts to give undue benefit to Sri P.D. Bali for extraneous consideration and unless he was actuated by corrupt motive, we are of the firm opinion that no such judgement and award dated 16.1.2001 could be given by the petitioner in aforesaid reference case. His decision aforesaid, itself speaks about the state of affairs under which it was rendered. In view of foregoing discussion, we are of the further opinion that the charge levelled against the petitioner has been clearly proved against him and accordingly, the petitioner has been rightly held guilty of misconduct by the Hon'ble Judges of this court vide inquiry report dated 14.9.2005, we are in full agreement with them and do not find any ground for interference in the said inquiry report. The submissions of the learned counsel for the petitioner in this regard appears to be wholly misplaced in given facts and circumstances of the case, therefore, has to be rejected.

61. Next question, which arises for our consideration is that what would be appropriate punishment even if the charge levelled in the charge sheet against the petitioner having been found proved by Hon'ble Inquiry Judges against him? In this connection, it is pointed out that there are series of decisions of Hon'ble Apex Court on the question of judicial review of disciplinary inquiry and quantum of punishment inflicted upon delinquent employee in such disciplinary inquiry. In **Union of India Vs. Parmanand AIR 1989 S.C. 1185** while considering earlier decisions of Hon'ble Apex Court including **State of Orissa Vs. Bidyabhushan Mohapatra, AIR 1963 S.C. 779**, **Bhagat Ram Vs. State of Himachal Pradesh AIR 1983 S.C. 454, Union of India Vs. Tulsi Ram Patel AIR 1985 S.C. 1416**, Hon'ble Apex Court has held that the tribunal can not interfere with the quantum of punishment on the ground that it is not commensurate with the delinquency of employee, however, as exception to the aforesaid rule Hon'ble Apex Court has held that where the punishment has been imposed under clause (a) of the second proviso of Article 311 (2) only in those circumstances the quantum of punishment can be interfered with, where the court finds that the penalty imposed by impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed, or

not warranted by facts and circumstances of the case.

62. In **B.C. Chaturvedi Vs. Union of India and others, AIR 1996 S.C. 484**, after making detail survey on the question in issue Hon'ble Apex Court has held that if the punishment is shocking conscience of High Court or tribunal, it can direct the authority to reconsider the punishment. However, it may also itself to shorten the litigation, impose appropriate punishment with cogent reasons in support thereof. For ready reference it would be appropriate to extract the pertinent observations made by Hon'ble Apex Court in para 17 and 18 of the decision as under:

"17. The next question is whether the Tribunal was justified in interfering with the punishment imposed by the disciplinary authority. A constitution Bench of this Court in State of Orissa Vs. Bidyabhushan Mohapatra, AIR 1963 S.C. 779 held that having regard to the gravity of the established misconduct, the punishing authority had the power and jurisdiction to impose punishment. The penalty was not open to review by the High Court under Article 226. If the High Court reached a finding that there was some evidence to reach the conclusion, it became unassailable. The order of the Governor who had jurisdiction and unrestricted power to determine the appropriate punishment was final. The High Court had no jurisdiction to direct the Governor to review the penalty. It was further held that if the order was supported on any finding as to substantial misconduct for which punishment "can lawfully be imposed", it was not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The court had no jurisdiction, if the findings prima facie made out a case of misconduct, to direct the Governor to reconsider the order of penalty. This view was reiterated in Union of India Vs. Sardar Bahadur, (1972) 2 SCR 218: (1972 Lab IC. 627). It is true that in Bhagat Ram V. State of Himachal Pradesh, AIR 1983 SC 454, a Bench of two Judge of this Court, while holding that the High Court did not function as a court of appeal, concluded that when the finding was utterly perverse, the High Court could always interfere with the same. In that case, the finding was that the appellant was to supervise felling of the trees which were not hammer marked. The Government had recovered from the contractor the loss caused to it by illicit felling of trees. Under those circumstances, this Court held that the finding of guilt was perverse and unsupported by evidence. The ratio, therefore, is not an authority to conclude that in every case the Court/Tribunal is empowered to interfere with the punishment imposed by the disciplinary authority. In Rangaswami V. State of Tamil Nadu, AIR 1989 SC 1137, a Bench of three Judges of this Court, while considering the power to interfere with the order of punishment, held that this Court, while exercising the jurisdiction under Article 136 of the Constitution, is empowered to alter or interfere with the penalty; and the Tribunal had no power to substitute its own discretion for that of the authority. It would be seen that this Court did not appear to have intended to lay down that in no case, the High Court/Tribunal has the power to alter the penalty imposed by the disciplinary or the appellate authority. The controversy was again canvassed in State Bank of India's

case (1994 AIR SCW 1465) (supra), where the court elaborately reviewed the case law on the scope of judicial review and powers of the Tribunal in disciplinary matters and nature of punishment. On the facts in that case, since the appellate authority had not adverted to the relevant facts, it was remitted to the appellate authority to impose appropriate punishment.

18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

63. The aforesaid view has also been reiterated by Hon'ble Apex Court in **Apparel Export Promotion Council Vs. A.K. Chopra, JT 1999 (1) S.C. 61**. While considering the scope of applicability of doctrine of proportionality in judicial review of punishment imposed in disciplinary inquiry, Hon'ble Apex Court in **Management of Coimbatore District Central Co-operative Bank Vs. Secretary Coimbatore District Central Co-operative Bank Employees Association and Another J.T. 2007 (5) S.C. 628** in para 24 of the decision held as under:

"24. *So far as our legal system is concerned, the doctrine is well-settled. Even prior to CCSU, this Court has held that if punishment imposed on an employee by an employer is grossly excessive, disproportionately high or unduly harsh, it cannot claim immunity from judicial scrutiny, and it is always open to a Court to interfere with such penalty in appropriate cases."*

64. In **B. Swamy Vs. Depot Manager, APSRTC J.T. 2007(6) SC 290**, it was held by the Hon'ble Apex Court that even one act of dishonesty of Bus conductor amounting to breach of faith may invite serious punishment while upholding the punishment of removal, it was further observed that there is no guarantee that he had not acted dishonestly in the past as well which went undetected. The pertinent observations made in para-7 of the decision are as under:

"7. We fail to understand how the incident could be characterised as accidental. The mere fact that this was the first occasion when the respondent was caught, is no ground to hold that it was accidental. What weighed with the learned Judges was the fact that the respondent had not been found to be involved in such irregularities earlier. In our view that is not very material in the facts of this case. A conductor of a bus enjoys the faith reposed in him. He accepts the responsibility of honestly

collecting fares from the passengers after issuing proper tickets and is obliged to account for the money so collected. If conductors were to be dishonest in the performance of their duties, it would cause serious pecuniary loss to the employer. The High Court was therefore, not justified in observing that the management gave "excess gravity" to the offence. We are constrained to observe that the High Court was not justified in characterising the order of the management as one induced by exaggeration of the gravity of the offence. The conductor performs only the duty of issuing tickets to the passengers and accounting for the fare collected from the passengers to the management. If he is dishonest in the performance of his duties, he is guilty of serious misconduct and the gravity of the misconduct cannot be minimised by the fact that he was not earlier caught indulging in such dishonest conduct. There is no guarantee that he had not acted dishonestly in the past as well which went undetected. Even one act of dishonesty amounting to breach of faith may invite serious punishment."

65. However in ***Ramesh Chander Singh's case (supra),*** Hon'ble Apex Court has held that in given facts and circumstances of the case, reduction in rank to the next lower post and withholding of two annual increments are harsh, disproportionate to the gravity of charge against the officer discharging function of granting bail application. Therefore, in view of aforesaid settled legal position, now we have to examine as to whether the punishment imposed upon the petitioner is harsh, excessive or disproportionate of the gravity of the charge levelled against him and found proved by Hon'ble Judges or it is justified in given facts and circumstances of the case? In this connection, we must note that in para 38 and 39 of the writ petition, it is stated that the petitioner was appointed as Munsif (Civil Judge {Junior Division}) in the year 1980. He was promoted as Civil Judge (Senior Division) substantively in the year 1990. He was further promoted to the Cadre of U.P. Higher Judicial Service and appointed as Additional District Judge in the year 2000 under Rule 22(3) of 1975 Rules and was continuing on the said post for a period of about six years, till the date of impugned order of punishment of reduction in rank was passed against him on 17.1.2006.. On all these posts the petitioner worked with utmost devotion, sincerity, integrity and in accordance with the well established judicial norms. And, to the best of his knowledge, during the entire period of about 26 years of his service the work and conduct of the petitioner has been unblemished. No complaint, whatsoever, was ever brought to the notice of the petitioner. The petitioner understands and believes that the Hon'ble High Court granted to the petitioner promotion to the rank of Civil Judge (Senior Division) substantively and to the post of the Additional District Judge in the cadre of U.P. Higher Judicial Service under Rule 22(3) of 1975 Rules after careful, appropriate and effective evaluation of the merit of his work and conduct, including efficiency, honesty and integrity reflected on its record.

66. The reply of the aforesaid averments of the writ petition has been given in para 42 of the counter affidavit filed on behalf of High Court but same has been replied by saying that averments are wholly irrelevant in context of present case. Except the aforesaid averments, no

other averments have been made anywhere in this counter affidavit with regard to the work and conduct and integrity of the petitioner. It is no doubt true that absence of specific reply of aforesaid assertion would not take the place of conclusive proof but uncontroverted facts would certainly raise a presumption in favour of the petitioner as a salutary guideline to judge his conduct from his past, particularly in the field of administrative law, as held by Hon'ble Apex Court in M.S. Binara's case (supra) (para-13), therefore, while deciding the quantum of punishment, the past conduct of the petitioner, in our opinion, as held by Hon'ble Court is also relevant factor to be considered. Thus on the basis of aforesaid uncontroverted fact through counter affidavit filed on behalf of the High Court, we find that the petitioner has rendered unblemished service for about 26 years except the incident in question giving rise cause of action of the disciplinary inquiry against him. Although in his aforesaid service career there is no guarantee that he had not acted dishonestly in past as well which went undetected, but having regard to the gravity of misconduct committed by the petitioner in the instant case, the punishment inflicted upon him, in our considered opinion, is highly extreme and disproportionate to the charge levelled and found proved against him.

67. By impugned order of punishment dated 17.1.2006 the petitioner has been reduced in rank from the post of Addl. District Judge to the post of Civil Judge (Jr. Div.) which is two ranks below from his present officiating post and one rank below from his substantive post of Civil Judge (Sr. Div.). Officiating post of Addl. District Judge is promotional post in higher pay scale from the post of Civil Judge (Sr. Div.). The effect of this punishment would be that he would lose his entire service benefits from the year 1989-1990 onwards from the post of Civil Judge (Senior Division) except the continuity of service and pay scale and other emoluments drawn by him till the date of impugned order dated 17.1.2006. Now he has to re-start from the stage prior to his promotion on the post of Civil Judge (Sr. Div.) from before the year 1990 in respect of pay scale and other service benefits and has to lose his service benefits for about 16-17 years. In other words, the clock is put back to the stage of Civil Judge (Junior Division), now he has to start working from that stage. He has to lose not only service benefits for about 16 years, but it would also ultimately affect adversely the pensionary or post retiral benefits. Not only this, but since the petitioner is still continuing in service, therefore, in our opinion, this state of affair is continuing cause of his mental torture and humiliation among the brother officers also. Thus, in given facts and circumstances of the case, we are of the firm opinion that punishment inflicted upon the petitioner is disproportionate to the charge levelled against him and is highly excessive, irrational and arbitrary, therefore, can not be sustained, accordingly we quash the impugned order dated 17.1.2006 passed by the State Government.

68. We are of the further opinion that in given facts and circumstances of the case, remitting the matter for consideration of Full Court will take some considerable time, thereupon recommendation has to be sent to the State Government, which again take time in taking decision. Having regard to the

mental agony and torture faced by the petitioner, we are not inclined to tolerate present state of affair further more. Therefore, we are inclined to mould the relief appropriately and in given facts and circumstances of the case, we think it appropriate that stoppage or withholding of three future annual increments of the petitioner with cumulative effect permanently from the date of impugned punishment order dated 17.1.2006 after restoring him back to his post of Additional District Judge as on the date of impugned order, would meet the ends of justice. Such stoppage of increments would also be amounted to reduction in rank to a lower stage in a time scale of pay of the petitioner as a major penalty under relevant service rules. However, we are constrained to withhold the integrity of the petitioner for the year 2000-2001, the year in which he has rendered the decision in question giving rise cause of action to the instant case.

69. In view of the aforesaid observations and directions, a writ of mandamus is issued directing the respondents to restore the petitioner, status quo ante, on the post of Addl. District Judge as on the date 17.1.2006 (the date on which impugned order of reduction in rank was passed against him) thereafter his three annual increments in future with cumulative effect permanently starting from the aforesaid date will be withheld or stopped. The petitioner shall also be entitled to get benefits of his arrears of salary and other emoluments attached to the post of Addl. District Judge from the date of impugned order till the date of restoration of his earlier position or status quo ante on the post of Additional District Judge (officiating) as on 17.1.2006 and shall be paid to him within two months. However, his integrity for the year 2000-2001 shall be treated to be withheld and an entry in this regard shall be made in his Annual Confidential Remarks of the aforesaid year.

70. Before parting with the judgement, we must state that from the date and events chart enclosed in the writ petition, it appears that against the judgement and award dated 16.1.2001 passed by the petitioner in reference case no. 624/97 Wing Commander Sri P.D. Bali Vs. State of U.P. and others (contained in Annexure-11 of the writ petition) the claimant has filed first appeal no. 365/2001 Wing Commander P.D. Bali Vs. State of U.P. and others and G.D.A. has also filed first appeal no. 466/2002 G.D.A. Vs. Wing Commander P.D. Bali. We could not ascertain the fact as to whether the aforesaid appeals are still pending before this Court or have been disposed of. In all probabilities having regard to the pendency of appeals, we expect that those appeals might have been still pending before this Court. In this connection, it is necessary to point out that although we have examined the decisions dated 16.1.2001 rendered by petitioner for the purpose of examining his conduct while discharging his judicial function but at the same time we have taken considerable pain to examine the relevant records even by asking from the office of Addl. Collector (Land Acquisition Officer) Ghaziabad referred herein before in the judgement and have recorded the finding regarding the maintainability of reference without hearing the claimant namely Wing Commander Sri P.D. Bali, therefore, our observations should not prejudice to the claimant without affording him adequate opportunity of hearing in the appeal filed

by him. However, for perusal and necessary information the Registry of this Court is directed to place a copy of our decision upon the aforesaid first appeals by consolidating them together and we expect that this Court while hearing the appeals would not be influenced by our observations made in this judgement, however, it can be taken as information regarding the facts stated therein. The office is directed to list the aforesaid appeals before appropriate court forthwith after placing the copy of this order on the files of aforesaid appeals.

71. With the aforesaid observations and directions, the writ petition succeeds and allowed to the extent indicated herein before.

72. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.10.2007

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

Civil Misc. Writ Petition No. 52241 of 2007

Vikram Singh Kathait & others ...Petitioners
Versus
Union of India and others ...Respondents

Counsel for the Petitioners:
H.R. Misra

Counsel for the Respondents:
Sri N.P. Singh

Constitution of India, Art. 226-Territorial Jurisdiction-writ petition against the order passed by Central Administrative Tribunal Allahabad-petitioner working in Central School, in Uttarakhand-the judgment passed by High Court, Allahabad-not binding upon the authorities of Uttarakhand-held-petition not maintainable at Allahabad-want of jurisdiction.

Held: Para 8

In our view, the preliminary objection with respect to territorial jurisdiction is squarely covered by the Apex Court decision in Ambica Industries (Supra) and has to be sustained. The law laid down in Jamshed N. Guzdar (Supra) was wholly on different facts and circumstances and has no relevance to the issue involved in the present writ petition. Accordingly, we uphold the preliminary objection and dismiss the writ petition for lack of territorial jurisdiction since, in our view, the petitioner can file writ petition before the Hon'ble Uttarakhand High Court and not in Allahabad High Court. The writ petition is accordingly dismissed for want of territorial jurisdiction. No order as to costs.

Case law discussed:
1975 (2) SCC-671, AIR 1976 SC-331, 2004 (6) SCC-254, 1994 ELT 264, 2000 (123) ELT-471, 2005 SCC-591, 2007 SCC (6)-769

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

1. Heard Sri H.R. Mishra, learned counsel for the petitioners and Sri N.P. Singh, learned counsel appearing for respondents no. 3 to 6.

2. The petitioner is aggrieved by the order of Central Administrative Tribunal, Allahabad *(hereinafter referred to as the "Tribunal")* dated 12.10.2007 whereby the Original Application has been rejected.

3. Sri N.P. Singh, learned counsel appearing for respondents no. 3 to 6 has raised a preliminary objection about the maintainability of the writ petition stating

that the entire cause of action has initiated in the State of Uttarakhand and, therefore, this Court lacks territorial jurisdiction and placed reliance on the Apex Court's judgment in **Ambica Industries Vs. Commissioner of Central Excise 2007 (6) SCC 769**.

4. Sri Mishra, on the contrary submitted that since the Tribunal at Allahabad has passed the judgment impugned in this writ petition, therefore, part of cause of action has arisen in the State of Uttar Pradesh and the writ petition in this Court is maintainable and placed reliance on the Apex Court's judgment in **Jamshed N. Guzdar Vs. State of Maharashtra and others, 2005 SCC 591**.

5. Having considered the rival submissions, in our view, the preliminary objection raised by the learned counsel for the respondents deserve to be sustained. It is true that the Tribunal exercise jurisdiction over two states i.e. State of Uttar Pradesh and State of Uttarakhand. All the petitioners are appointed in Kendriya Vidyalaya. New Tehri Town, Uttarakhand i.e. within the State of Uttarakhand. Since the Tribunal at Allahabad exercise jurisdiction in respect of both the States, therefore, the Original Application under Section 19 of Administrative Tribunal Act, 1985 was filed at Allahabad. In the circumstances, mere judgment of Tribunal at Allahabad, in our view, would not give rise to a cause of action, partly or wholly, to file a writ petition in Allahabad High Court. This issue has been considered by the Apex Court in **Ambica Industries (Supra)** and para 13 and 14 of the judgment may be reproduced as under:-

"13. The Tribunal, as noticed hereinbefore, exercises jurisdiction over all the three States. In all the three States there are High Courts. In the event, the aggrieved person is treated to be the domius litis, as a result whereof, he elects to file the appeal before one or the other High Court, the decision of the High Court shall be binding only on the authorities which are within its jurisdiction. It will only be of persuasive value on the authorities functioning under a different jurisdiction. If the binding authority of a High Court does not extend beyond its territorial jurisdiction and the decision of one High Court would not be binding precedent for other High Courts or courts or tribunals outside its territorial jurisdiction, some sort of judicial anarchy shall come into play. An assessee, affected by an order of assessment made at Bombay, may invoke the jurisdiction of the Allahabad High Court to take advantage of the law laid down by it and which might suit him and thus he would be able to successfully evade the law laid down by the High Court at Bombay.

14. Furthermore, when an appeal is provided under a statute, Parliament must have thought of one High Court. It is a different matter that by way of necessity, a tribunal may have to exercise jurisdiction over several States but it does not appeal to any reason that Parliament intended, despite providing for an appeal before the High Court, that appeals may be filed before different High Courts at the sweet will of the party aggrieved by the decision of the tribunal."

6. The Hon'ble Apex Court has also approved the judgments of Delhi High Court in **Suraj Woolen Mills Vs. Collector of Customs, 2000 (123) ELT**

471 wherein Hon'ble Lahoti, J., as His Lordship then was, had also taken the same view and the said decision of Hon'ble Delhi High Court was followed by Division Bench of Hon'ble Bombay High Court in **Bombay Snuff (P) Ltd. Vs. Union of India, 2006 (194) ELT 264**. Both the judgements of Hon'ble Delhi High Court and Hon'ble Bombay High Court have been affirmed by Hon'ble Apex Court in **Ambica Industries (Supra).** Moreover, concept of part of cause of action as laid down in **Nasiruddin Vs. STAT, 1975 (2) SCC 671:AIR 1976 SC 331** and **Kusum Ingots & Alloys Ltd. Vs. Union of India, 2004 (6) SCC 254**, which was relied upon in order to contend that the jurisdiction would lie in the High Court within whose territorial jurisdiction Tribunal has decided the matter, has also been considered and distinguished in para 30 in **Ambica Industries (Supra).**

7. What has been observed by the Apex Court in para 30 of the judgment in **Ambica Industries (Supra)** squarely apply to the present case also. Here also if it is held that the petitioners can elect to file writ petition either before Allahabad High Court or Uttarakhand High Court, that may likely to result in conflicting judgements besides the fact that the judgment of Allahabad High Court may not be binding on the authorities who are outside the territorial jurisdiction of this Court.

8. In our view, the preliminary objection with respect to territorial jurisdiction is squarely covered by the Apex Court decision in **Ambica Industries (Supra)** and has to be sustained. The law laid down in **Jamshed N. Guzdar (Supra)** was wholly on different facts and circumstances and has no relevance to the issue involved in the present writ petition. Accordingly, we uphold the preliminary objection and dismiss the writ petition for lack of territorial jurisdiction since, in our view, the petitioner can file writ petition before the Hon'ble Uttarakhand High Court and not in Allahabad High Court. The writ petition is accordingly dismissed for want of territorial jurisdiction. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2007

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 11336 of 2006

Vijay Soren ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Shyamal Narain

Counsel for the Respondents:
Sri Mahendra Pratap Singh
S.C.

Constitution of India, Art. 226-Cancellation of Admission-petitioner applied as S.T. candidate-at the time of counseling produced the original certificate-allowed to persue 5 years M.B.B.S. course-cancellation of admission on the ground that petition is not S.T. candidate particularly when the father of petitioner-working as S.T. candidate with central Government.

Held: Para 13

The further important factor of this case that the petitioner was admitted to the Course of five years in the year 2002 but

when the petitioner was in fourth year and only one year was left to be completed for full course, at that stage, the admission of the petitioner has been cancelled. If there was any doubt in the mind of the respondents at the time of admission that the certificate of scheduled tribe submitted by the petitioner is not in accordance with guidelines, it should have been verified immediately and if the respondents comes to the conclusion at that stage, the admission would have cancelled. But after completion of four years, of course, the admission of the petitioner has been cancelled.

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

1. By means of the present writ petition the petitioner has approached this Court for quashing the order dated 7.2.2006 passed by the Principal B.R.D. Medical College, Gorakhpur cancelling the petitioner's admission to the MBBS Course (Annexure 11 to the writ petition). Further a writ in the nature of mandamus directing the respondents to allow the petitioner to pursue his studies in the MBBS Programme at B.R.D. Medical College, Gorakhpur.

2. The facts arising out of the present writ petition are that the petitioner is a son of one Sri Smanta Rai Soren who originally belongs from village Deo Kundi, District Mayurbhanj, Orissa. Petitioner belong to Santhal tribe which is recognised as a scheduled tribe under the Constitution (Scheduled Caste) Order 1950, the Constitution (Scheduled Tribes) Order 1959 as amended by Scheduled castes and Scheduled Tribes (Amendment) year 1976. Petitioner's father is a Central Government employee and was entered in service as medical officer in the year1981 as a reserved category candidate on the instant of his being a member of scheduled tribe. The father of the petitioner was given benefit of reservation and presently posted as Chief Medical Officer Central Government Health Scheme at Lucknow.

3. The petitioner appeared in combined Pre Medical Test in 2002 as a Scheduled Tribe candidate claiming benefit of reservation. The result was declared in October, 2002 and the name of the petitioner appeared in the list of successful candidates. The counselling taken place at King George Medical College Lucknow on 25th October, 2002. At the time of counselling the petitioner submitted a scheduled tribe certificate dated 23.7.1997 issued by Tehsildar Bahalda District Mayurbhanj Orissa and another certificate dated 12.6.2001 issued by the Additional City Magistrate (IIIrd) Lucknow. It has been mentioned in the said certificate that the aforesaid certificate is being issued on the basis of certificate dated 23.7.1997. An objection was taken by the authorities at the time of counselling that the certificate dated 12.6.2001 not being as per prescribed proforma, as such, the petitioner was required to submit a fresh certificate in the prescribed format. Under these circumstances, the father of the petitioner approached the authority and petitioner furnishes a fresh certificate dated 25.10.2002 in a prescribed format issued under a sealed and signature of Prabhandh Adhikari on behalf of the District Magistrate, Lucknow. The petitioner was allocated B.R.D Medical College, Gorakhpur and was admitted to the MBBS Course on 31.10.2002. The petitioner was pursuing his studies and was presently studying in Fourth year in

MBBS examination (i.e. the penultimate year of the course).

4. The petitioner was served with a show cause notice dated 19.11.2005, with an allegation that the certificate of scheduled tribe submitted by the petitioner had been sent to the District Magistrate, Lucknow for verification whereupon the District Magistrate had replied stating therein that the said certificate had not been issued by the office and as such, the same was not being confirmed. The show cause notice further states that as on the alleged refusal on the part of the office of the District Magistrate, Lucknow regarding confirming the petitioner's certificate, the petitioner was directed to show cause by 7.12.2005 that as to why the admission be not cancelled. The petitioner was not furnished with a copy of the alleged letter of the District Magistrate, Lucknow dated 10.6.2005 nor the letter of the Director General dated 9.10.2002. There was no whisper in the said show cause notice that which certificate furnished by the petitioner had been sent to the District Magistrate office for verification. As the show cause notice was served upon the petitioner on 1.12.2005 therefore, a request was made by the petitioner to the Principal of the College vide request letter dated 3.12.2005 for granting one month time for submitting the explanation. Though no letter was issued by the Principal of the College extending the time but it was verbally allowed the petitioner to submit his reply on the basis of request made by the petitioner. The petitioner submitted a reply on 4.1.2006 which was received in the office of principal on 6.1.2006. With the reply, the petitioner has also submitted a fresh scheduled tribe certificate dated 3.1.2006 issued in a prescribed format under the seal and signature of tehsildar, Sadar, Lucknow. A bare perusal of the said certificate would show that the same has been issued on the basis of the enquiry report dated 12.12.2005 submitted by the Revenue Inspector, Lucknow dated 23.12.2005 written by the Tehsildar, Bahalda, Mayurbhanj, Orissa. The petitioner came to know that the principal of the college has sent a letter to the Director General Medical Education and Training, Lucknow on 24th December, 2005 conveying the petitioner's request for grant of one month's time for filing his reply. On 10.1.2006, the principal has sent a fax letter to the Director General recommending cancellation of the petitioner's admission. The petitioner is not in a possession of the said letter and it was never served to the petitioner. When the petitioner came to know regarding the aforesaid fact, as a measure of abundant precaution, sent directly a reply of the show cause notice to the Director General on 18.1.2006, annexing all the relevant documents. It appears that without considering the reply of the petitioner to the show cause notice, the admission of the petitioner to MBBS was cancelled vide order dated 7.2.2006 passed by the Principal of the said college. Aggrieved by the aforesaid order of cancellation, the petitioner has approached this Court.

5. Notices were issued and the respondents were granted time to file counter affidavit. Further a direction was given to permit the petitioner to continue his course and permit him to appear in the semester as well as in the written examination without taking into consideration the order dated 7.2.2006, but the result will be subject to the decision of the writ petition.

6. It has been submitted by the learned counsel for the petitioner that even the reply of show cause notice dated 19.11.2005 was received in the office of the Principal on 6.1.2006. The impugned order contains a specific and unambiguous recital to the effect that the documents and letter furnished by the petitioner in his defence had been forwarded to the Director General dated 24th December, 2005. A bare perusal of the impugned order clearly appears that a direction issued by the Director General vide letter dated 20.10.2006 copy of the same has never been furnished to the petitioner. The letter dated 24th December, 2005 sent to the Director General was confined the issue of grant of further time. As the reply filed by the petitioner is only submitted in the office of the principal on 6.1.2006, there could not be any question of his reply and other documents and letters annexed thereof being forwarded to the Director General for consideration. As the order dated 7.2.2006 cancelling the candidature of the petitioner is on the basis of the principal's letter dated 24.12.2005, a conclusion can be drawn that the said direction has been issued without considering the reply of the petitioner.

7. The order dated 7.2.2006 has been passed arbitrarily without affording proper opportunity to the petitioner. The respondents while passing the aforesaid order have failed to take into consideration the undisputed fact that subsequent certificate issued from Lucknow is on the basis of the original certificate dated 23.7.1997 issued by the State of Orissa from where the petitioner and his family belongs. There is no dispute that the father of the petitioner is in government service on the strength of his candidature as a member of a recognised scheduled tribe, enjoying the benefits of reservation in job. As the petitioner's father is indisputedly a member of one of the recognised scheduled tribes enjoying the benefit of reservation and serving in a government job as a reserved category candidate, it cannot be presumed that the certificate submitted by the petitioner in any way is false and fabricated. The effect of the cancelling of the admission by impugned order dated 7.2.2006, the petitioner being a IVth year student of five years medical course, the effect of the cancellation is that the career of the petitioner has come to halt and the petitioner has been stopped from attending the classes and also been directed to vacate the hostel.

8. Further submission has been made by the learned counsel for the petitioner is that the caste certificate submitted at the time of counseling was issued from the State of Orissa by the competent authority. It is not the case of the respondents that certificate dated 23.7.1997 is forged one and has not been issued from the office of tehsildar Bahalda, State of Orissa. The relevant authority situated at Lucknow has issued the subsequent certificate on the basis of the certificate dated 23.7.1997 and a verification to that effect has also been made by the authority sitting at Lucknow. Therefore, it cannot be presumed in any manner that petitioner does not belong to scheduled tribe. Further it has been submitted that Annexure 2, which is the order regarding promotion of the petitioner's father, clearly goes to show that the petitioner's father is being treated as a scheduled tribe and as such, the son cannot be treated otherwise. It is also not the case of the respondents that the

certificate which has been submitted by the petitioner was in any way forged and fabricated by the petitioner. The certificate dated 3.1.2005 clearly states that the certificate is being issued on the basis of certificate of tehsildar Bahalda, dated 23.7.1997, therefore, under no imagination it can be presumed that there is any fault on the part of the petitioner. Further relevant factor to be considered by the Court is that as submitted by the petitioner that the impugned order dated 7.2.2006 has been passed without consideration of the reply submitted by the petitioner, as such, the presumption will be that the said order is an order without affording an opportunity to the petitioner, therefore, the same is against the principle of natural justice.

9. A counter affidavit has been filed on behalf of the contesting respondents stating therein that the petitioner was required to produced original caste certificate issued by the concerned District Magistrate i.e. District Magistrate Lucknow. Point No.7 indicates that the students granted admission against reserved category shall have to submit original caste certificate issued by the concerned District Magistrate. Further it was mentioned that if in future it is found that the caste certificate submitted by the candidate is false, there will be a cancellation of admission. As the District Magistrate through his letter dated 15.6.2005 informed the principal that the certificate in question was not issued from his office, on that basis a show cause notice was given. Further it has been stated in the counter affidavit that on the basis of the letter dated 20.1.2006 the principal of the institution has cancelled the admission of the petitioner. The student admitted against the reserved category must submit the original caste certificate from concerned District Magistrate, therefore, the certificate issued from Tehsildar Bahalda, State of Orissa, cannot be taken into consideration, so far as U.P. CPMT examination is concerned. As the admission of the petitioner was provisional, therefore, the admission of the petitioner was cancelled.

10. I have heard learned counsel for the petitioner and learned counsel for the respondents and have perused the record.

11. There is no dispute to this effect that the father of the petitioner is a central government employee having granted benefit of scheduled tribe. Therefore, legally it will be presumed that the petitioner is also entitled to benefit of the category of scheduled tribe. It is also apparent from the record that at the time of counselling, the petitioner has submitted a caste certificate issued from the office of Tehsildar Bahalda dated 23.7.2007 and when the petitioner was directed to submit a certificate of district-Lucknow, a certificate was issued in favour of the petitioner with a clear indication that the said certificate is being issued to the petitioner on the basis of certificate of 1997. Subsequently, again, the petitioner has obtained a certificate dated 3.1.2006 in a proper format in which it has also been mentioned after verification it was found that the said certificate of Scheduled Tribe is being issued on the basis of the certificate dated 23.7.2007 and it is also relevant that the said certificate of 1997 has been verified by the concerned authority.

12. Further it is also clear from the order dated 7.2.2006 that the said order

has been issued by the Principal of the institution on the basis of the direction issued by the Director General. It is also apparent that the letter dated 24.12.2005 is a letter sent by the Principal to the Director General for taking guidance that what action has to be taken on the basis of reply submitted by the petitioner. It is not clear from the order that reply submitted by the petitioner to the Principal of the institution was ever forwarded to the competent authority for a direction to pass the appropriate orders. It is also clear from the record and there is no denial by the respondents that the petitioner has directly submitted a reply of show cause to the Director General, it was only submitted on 6.1.2006 in the office of Principal. Therefore, there was no question that the principal has forwarded any paper in the letter dated 24.12.2005. With abundant precaution the petitioner has submitted a reply, directly to Director General annexing all the documents on 18.1.2006. The order dated 7.2.2007 clearly indicates that letter dated 24.12.2005 is only a letter of guidance. This clearly goes to show that reply furnished by the petitioner has never been forwarded, as such, there will be a presumption that reply of the petitioner has not been considered.

13. The further important factor of this case that the petitioner was admitted to the Course of five years in the year 2002 but when the petitioner was in fourth year and only one year was left to be completed for full course, at that stage, the admission of the petitioner has been cancelled. If there was any doubt in the mind of the respondents at the time of admission that the certificate of scheduled tribe submitted by the petitioner is not in accordance with guidelines, it should have been verified immediately and if the respondents comes to the conclusion at that stage, the admission would have cancelled. But after completion of four years, of course, the admission of the petitioner has been cancelled.

14. In my opinion, it will ruin the career of the petitioner. Further from the record there is no denial by the respondents that the father of the petitioner who is a government servant has not been given benefit of scheduled tribe and it is not the case of the respondents that original certificate submitted by the petitioner dated 23.7.1997 is in any way forged and fictitious document and the caste shown therein is not define under the Constitution as scheduled tribe.

In view of the aforesaid fact, the writ petition is allowed. The order dated 7.2.2006 (Annexure 11 to the writ petition) passed by the principal B.R.D Medical College, Gorakhpur is hereby quashed. A mandamus is issued to the respondents to permit the petitioner to continue his studies and permit him to appear in semester as well as in the written examination and further the petitioner will be permitted to complete his MBBS Course. It is further directed that respondent No.5 will declare the result of those examinations in which the petitioner has already appeared and if due to inaction of the respondent No.5 petitioner has not been permitted to any of the paper, he will be permitted to appear in the next examination.

No order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2007

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

Civil Misc. Writ Petition No. 16109 of 1996

Miss Manju Shikdar ...Petitioner
Versus
The General Manager (Planning and Development), State Bank of Indore and others ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Srivastava
Sri Swarn Kumar Srivastava

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226- termination of probationer-inspite of extension of probation period-not improved-after assessment of work-performance found unsatisfactory-held-such termination neither can be founded on misconduct nor stigmatic nor amount to colorable exercise of power-warrant no interference.

Held: Para 21 & 22

The petitioner in the present case was also similarly not only given opportunity to improve herself but even period of probation was extended yet she could not avail opportunity and the authorities found her unsuitable for the job and unfit for confirmation.

Considering the facts of the present case as well as after careful reading of the impugned order of termination and the law laid down in above discussed authorities, we are clearly of the view that the impugned order of termination is neither founded on alleged misconduct of the petitioner nor can be said to be stigmatic nor is vitiated on account of alleged biased or colourable exercise of power on the part of the appointing authority. The writ petition, therefore, devoid of merit and is accordingly dismissed.

Case law discussed:
AIR 1999 SC-983, AIR 2002 SC-23, 2003 (96) FLR-1002 (SC), 2005 (106) FLR-1214, J.T. 2005 (7) SC-512, J.T. 1991 (1) SC-108, 2002 (1) SCC-743, 2003 (3) SCC-263, AIR 2005 SC-344, AIR 1996 SC-2030, AIR 2006 SC-3471, AIR 1987 SC-2408

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

1. The order dated 20.01.1999, dismissing the writ petition in default, having been recalled vide order of date passed on the recall application, the writ petition is restored to its original number.

2. Since the matter is pending since 1996, with the consent of learned counsel for the parties, we have heard the matter on merits.

3. The petitioner, who was working as probationer in the State Bank of Indore (*hereinafter referred to as the "Bank"*), has been terminated by the General Manager of the Bank vide order dated 16.08.1995 on the ground that after adjudging her work and performance she has not been found fit for confirmation and, therefore, has been terminated during the period of probation.

4. Learned Counsel for the petitioner contended that though the petitioner was probationer, yet the impugned order cast stigma upon the petitioner and, therefore, could not have been passed without giving any opportunity. He further contended that the petitioner has made a complaint against the Branch Manager, respondent no.4 and it is on account of the

mala fide action of the respondent no. 4, the impugned order has been passed and, therefore, it is a colourable exercise on the part of the respondents.

5. Having heard learned counsel for the petitioner and perusing the record, we do not find any force in the submission. Admittedly, the petitioner was appointed by the General Manager of the Bank and the orders for extension of his probation and termination have also been passed by the General Manager. The work and performance of the petitioner has been assessed at the level of the General Manager. The alleged complaint made by the petitioner against the Branch Manager would not ipso facto taint the order passed by the General Manager with bias or mala fide inasmuch as, there is no such allegation against the General Manager. He being a much higher officer than Branch Manager, it cannot be conceived that a Branch Manager could have influenced such a superior officer for getting an order passed which, otherwise the superior officer was not inclined unless proved by cogent material. Therefore, the allegation of colourable exercise of power is unacceptable and even otherwise is not substantiated from anything on record. On the contrary the impugned order of termination makes it clear that the General Manager has assessed the work and performance of the petitioner and after finding her unfit for confirmation has terminated since she was only a probationer.

6. It is well settled that a probationer has no right to hold the post and if the work and performance of the probationer is not found satisfactory during the period of probation or extended probation he/she can be terminated.

7. Coming to the next submission that mention of the fact that her work and performance has not been found satisfactory and she is not fit for confirmation, therefore, she is being terminated, whether can make the order of termination stigmatic and by way of punishment instead of termination simplicitor, we find that the mention of a fact about assessment of work and performance of an employee would not make the order of termination *ipso facto* punitive or stigmatic warranting any interference from this Court.

8. On this aspect of the matter we find that the issue is no more res integra having already been considered by the Apex Court time and again and it would be useful to refer some of such authorities which are binding upon this Court also.

9. In **Dipti Prakash Banerjee Vs. Satyendra Nath Bose, AIR 1999 SC 983** the order of termination mentions the word "unsatisfactory work and conduct'. After review of earlier entire case-law on the subject, the Apex Court did not find the aforesaid order to be stigmatic and held as under:

"At the outset, we may state that in several cases and in particular in State of Orrisa Vs. Ram Narain Dass it has been held that the use of the word "unsatisfactory work and conduct' in the termination order will not amount to a stigma"

10. Similarly, in **Pavanendra Narayan Verma Vs. Sanjay Gandhi Post Graduate Institute of Medical Sciences and another, AIR 2002 SC 23** it was mentioned that "the work and conduct was not found satisfactory'.

Following **Dipti Prakash Banerjee (Supra)**, the Apex Court in **Pavanendra Narayan Verma (Supra)** held as under:

"Returning now to the facts of the case before us. The language used in the order of termination is that the appellant's "work and conduct has not been found to be satisfactory". These words are almost exactly those, which have been quoted in Dipti Prakash Banerjee's case as clearly falling within the class of non stigmatic orders of termination. It is, therefore, safe to conclude that the impugned order is not ex facie stigmatic" (para 31)

11. In **Dhananjay vs. Chief Executive Officer, Zila Parishad, Jaina, 2003 (96) FLR 1002 (S.C.)** mention of the word 'suspension' in the order of termination was not held to be stigmatic or punitive. In **State of U.P. and others versus Ram Bachan Tripathi, 2005(106)FLR 1214** the Hon'ble Apex Court considering as to when an order of termination simplicitor can be said to be stigmatic held as under:-

"We shall first examine the plea relating to the stigma. Usually a stigma is understood to be something that is detraction from the character or reputation of a person. It is blemish, imputation, a mark or label indicating a deviation from a norm."(Para 6)

"Mere description of a background fact cannot be called as stigma. In the termination order it was merely stated that the show cause notices were issued and there was no response. This can by no stretch of imagination be treated as a stigma as observed by the Tribunal and the High Court."(Para 7)

12. In **Rajasthan State Road Transport Corporation & others vs. Zakir Hussain, JT 2005 (7) SC 512** the Hon'ble Apex Court following its earlier judgment in the case of **State of Uttar Pradesh & another vs. Kaushal Kishore Shukla, JT 1991 (1) SC 108** held:-

"In State of Uttar Pradesh & another vs. Kaushal Kishroe Shukla this Court has observed in Para 6 as under:-

"The High Court held that the termination of respondent's services on the basis of adverse entry in the character roll was not in good faith and the punishment imposed on him was disproportionate. It is unfortunate that the High Court has not recorded any reasons for this conclusion. The respondent had earned an adverse entry and complaints were made against him with regard to the unauthorized audit of the boys fund in an educational institution, in respect of which a preliminary inquiry was held and thereupon, the competent authority was satisfied that the respondent was not suitable for the service. The adverse entry as well as the preliminary inquiry report with regard to the complaint of unauthorized audit constituted adequate material to enable the competent authority to form the requisite opinion regarding the respondent's suitability for service. Under the service jurisprudence a temporary employee has no right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service. ***If on the perusal of the character roll entries or on the basis of preliminary inquiry on the allegations made against on employee, the competent authority is satisfied that the employee is not suitable for the***

whereupon the services of the temporary employee are terminated, no exception can be taken to such an order of termination." (Para 20) *(emphasis added)*

13. Similar situation arises in the case of **State of Punjab Vs. Balbir Singh, 2002(1) SCC 743**. The order of discharge mention the words "unlikely to prove an efficient police officer." Further before passing the aforesaid order of discharge it appears that Shri Balbir Singh, who was found to have consumed liquor and misbehaved with a lady constable was medically examined and thereafter discharge order was passed. The appeal, which was filed before the Deputy Inspector General of Police, was rejected and while rejecting the appeal, he referred to the aforesaid facts and stated that the discharge order was correct. Shri Balbir Singh challenged the order of discharge on the basis of the averments contained therein as well as in the order of the Deputy Inspector General of Police. The Hon'ble Apex Court upholding the aforesaid order of discharge held as under;-

"In the present case, order of termination cannot be held to be punitive in nature. The misconduct on behalf of the respondent was not the inducing factor for the termination of the respondent. The preliminary enquiry was not done with the object of finding out any misconduct on the part of the respondent, it was done only with a view to determine the suitability of the respondent within the meaning of Punjab Police Rule 12.21. The termination was not founded on the misconduct but the misbehaviour with a lady constable and consumption of liquor in office were considered to determine the suitability of the respondent for the job, in the loight of the standards of discipline expected from police personnel."(para 17)

14. In **Mathew P. Thomas vs. Kerala State Civil Supply Corporation Ltd. and others, (2003) 3 SCC 263** after following **Dipti Prakash Banerjee (Supra)** and Pavanendra Narayan Verma (Supra), the Hon'ble Apex Court has observed as under:-

"From a long line of decisions it appears to us that whether on order of termination is simplicitor or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simplicitor falling in one or the other category, based on misconduct as foundation for passing the order of termination simplicitor or on motive on the ground of unsuitability to continue in service. If the form and language of the so called order of termination simplicitor of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simplicitor or punitive. In cases where the services of a probationer are terminated by an order of termination simplicitor and the language and form of it do not show that either it is punitive or stigmatic on the face of it but in some cases there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer.

In other words, the façade of the termination order may be simplicitor, but the real face behind it is to get rid of the services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simplicitor to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service as he is in reality removed from service on the foundation of his misconduct."(Para 11)

15. In **Registrar, High Court of Gujarat and another vs. C.G. Sharma, AIR 2005 Supreme Court 344** the Hon'ble Apex Court has held as under:-

"We are also satisfied, after perusing the Confidential Reports and other relevant vigilance filed etc. that the respondent is not entitled to continue as a judicial Officer. The order of termination is termination simplicitor and not punitive in nature and, therefore, no opportunity needs to be given to the respondent herein. Since the overall performance of there was found to be unsatisfactory by the High Court during the period of probation. It was decided by the High Court that the services of the respondent during the period of probation of the respondent be terminated because of his unsuitability for the post. In this view of the matter, order of termination simplicitor cannot be said to be violative of Articles 14, 16 and 311 of the Constitution of India. The law on the point is crystallized that the petitioner remains probationer unless he has been confirmed on the basis of the work evaluation. Under the relevant Rules under which the respondent was appointed as a Civil Judge, there is no provision for automatic or deemed confirmation and/or deemed appointment on the regular establishment or post, and in that view of the matter, the contentions of the respondent that the respondent services were deemed to have been continued on the expiry of the probation period, are misconceived."

16. Thus as has been held by the Apex Court in **Ram Bachan Tripathi (Supra)** mere description of background fact cannot be treated to constitute stigma. The term 'stigma' has to be understood in its plain meaning as something that is detraction from the character or reputation of a person. It is blemish, imputation, a mark or label indicating a deviation from a norm The assessment of work and performance and the recording of satisfaction of the authority concerned that he is not satisfied with the work and performance regarding fitness of the employee concerned would not make the order stigmatic since it is not a blemish on the character and reputation of the person concerned but it reflects on the capacity and efficiency of the incumbent with respect to the work for which he/she was employed.

17. In **Allahabad Bank Officers Association and another Vs. Allahabad Bank and others, AIR 1996 SC 2030** the Apex Court while considering as to whether an order of compulsory retirement can be treated to be stigmatic and in what circumstances, held that if it contains an statement casting aspersion on the conduct of the employee, it would be stigmatic but if it merely highlights the unsuitability of the employee, it is an

order simplicitor. The Court held that expression like "want of application", "lack of potential" and "found not dependable" when made in relation to the work of the employee would not be sufficient to attract the charge that they are stigmatic.

18. The aforesaid observation has been referred to and relied upon recently in **Abhijit Gupta Vs. S. N. B. National Centre, Basic Sciences and others, AIR 2006 SC 3471** observing:

"The real test to be applied in a situation where an employee is removed by an innocuous order of termination is: Is he discharged as unsuitable or is he punished for his misconduct?.." (para-14)

19. Another argument was raised in **Abhijit Gupta (Supra)** that when the words referring to unsuitability etc. are mentioned in the order, if they are read by the future employer it may prejudice the future employment of the employee and in that view of the matter it should be treated to be stigmatic. However, the Apex Court rejected the above contention by relying on its earlier decision in **Ravindra Kumar Misra, Vs. U.P. State Handloom Corporation Ltd. and another, AIR 1987 SC 2408** and it would be useful to reproduce para 12 and 13 dealing with the above contention as under:

*"12. -It referred to **Dipti Prakash Banerjee (supra)** and pointed out that in **Dipti Prakash Banerjee (supra)** the termination letter expressly made reference to an earlier letter which had explicitly referred to all the misconducts of the employee and a report of an inquiry committee which had found that the employee was guilty of misconduct and so the termination was held to be stigmatic and set aside. Finally, this Court said that whenever a probationer challenges his termination the court's first task will be to apply the test of stigma or the 'form' test. If the order survives this examination the 'substance' of the termination will have to be found out. What this Court further observed in para 29 is crucial and of great relevance :*

"Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or inaptitude, whatever the language used in the termination order may be. Although strictly speaking the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above meter unsuitability for the job."

13. In the case of the appellant before us, the record in uncertain terms makes it clear that every time the appellants attention was drawn to his deficiencies and he was repeatedly advised to improve his behaviour, conduct and discharge of work. True, that in some of the letters there was intemperate language used (the appellant was also equally guilty of doing that). Notwithstanding the intemperate

language, we are unable to accept the contention of the appellant's counsel that the letter dated 7-4-1998 indicates that the appellant was being charged with the misconduct and, therefore, being removed from service. Read as a whole, the letter gives the impression that the removal of the appellant from service was only because the respondents, after giving a long rope to the appellant, had come to the conclusion that the appellant's service was unsatisfactory and there was no hope of his improvement."

20. The order of termination simplicitor, it is no doubt, can be passed by the employer in accordance with the terms of appointment or the relevant rules since a temporary employee or a probationer has no right to hold the post and is liable to be terminated in accordance with law. The order of termination simplicitor can be challenged on the ground of being violative of rule or if it is by way of punishment founded on misconduct. The distinction between foundation and motive has been explained in **Dipti Prakash Banerjee (Supra),** and in para 21 of the judgement the Court says:

"If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid. *From a long line of decisions it appears to us that whether an order of termination is simplicitor or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simplicitor or on motive on the ground of unsuitability to continue in service."(para 9) (emphasis added)*

"When the factual scenario of the present case is considered in the background of legal principles set out above, the inevitable conclusion is that the High Court was not justified in interfering with the order of termination."(para 10)

21. The petitioner in the present case was also similarly not only given opportunity to improve herself but even period of probation was extended yet she could not avail opportunity and the authorities found her unsuitable for the job and unfit for confirmation.

22. Considering the facts of the present case as well as after careful reading of the impugned order of termination and the law laid down in above discussed authorities, we are clearly of the view that the impugned order of termination is neither founded on

alleged misconduct of the petitioner nor can be said to be stigmatic nor is vitiated on account of alleged biased or colourable exercise of power on the part of the appointing authority. The writ petition, therefore, devoid of merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2007

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 39528 of 2006

Dhirendra Singh ...Petitioner
Versus
The Collector, Kanpur Dehat, and another ...Respondents

Counsel for the Petitioner:
Sri Kr. R.C. Singh

Counsel for the Respondents:
S.C.

Constitution of India-Art. 226-Suspension Order-allegations-No seriousness in achieving the target of recovery-in absence of efficiency, inability on the part of employee-not amount to misconduct-No disciplinary proceeding under Rule 1999 could be initiated-suspension order Quashed.

Held: Para 14

In view of the aforesaid exposition of law and considering the allegations contained in the suspension order and charge sheet, I am of the view that the allegations levelled against the petitioner do not amount to 'misconduct' and, therefore, proceeding under 1999 Rules cannot be initiated against him. The impugned order of suspension, therefore, cannot sustain.

AIR 1979 SC-1022, 1992 (4) SCC-64, 2004 (5) SCC-689, 2002 SC-1124

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

1. Heard Sri R.C. Singh, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. Despite time having been granted to the respondents, no counter affidavit has been filed till date. However, learned counsel for the petitioner submitted that he is raising a legal issue that the impugned order of suspension dated 07.06.2006 and the charge sheet cannot be sustained under law, inasmuch as assuming the charges mentioned in the charge sheet to be true they do not constitute misconduct and, therefore, no disciplinary inquiry can be conducted against the petitioner. Learned Standing Counsel, in view of the nature of the arguments advanced by learned counsel for the petitioner, stated that the writ petition may be heard on merits and he does not propose to file any counter affidavit. Therefore, with the consent of learned counsel for the parties, under the Rules of the Court, this matter has been heard and is being decided finally.

3. Learned counsel for the petitioner referring to the impugned order of suspension and the charge sheet pointed out that the only allegation levelled against the petitioner is that he did not take interest in work as a result whereof the recovery of Government Revenue is not up to the target and he has failed to take effective steps to increase the same. He contended that the allegations, even if treated to be correct, at the best shows inefficiency on the part of the petitioner and do not constitute misconduct.

Misconduct is something else than inefficiency or mere error of judgment on the part of the employee and, therefore, the petitioner cannot be suspended on the basis of the allegations mentioned in the impugned order of suspension.

4. Learned Standing Counsel, on the contrary, contended that the petitioner was working as a Collection Amin and his principal duty was to collect the Government Revenue and for the said purpose he had to take all possible steps to recover Government Revenue at least up to the target fixed by the authorities concerned. Since the petitioner has failed in discharge of his duties, this amounts to dereliction on duty and for the said purpose the inquiry can be conducted under U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as the "1999 Rules").

5. It would be appropriate to reproduce the allegations on the basis of which the petitioner was placed under suspension and also the charges no. 1 and 2 contained in the charge sheet to find out whether the allegations contained therein constitute a misconduct or not:-

Suspension Order

''नायब तहसीलदार, तहसीलदार तथा उपजिलाधिकारी, रसूलाबाद की आख्या एवं संस्तुति के आधार पर श्री धीरेन्द्र सिंह, संग्रह अमीन, तहसील रसूलाबाद को मुख्य तथा विविध देयों की मांग तथा मानक के सापेक्ष अत्यन्त निकृष्ट श्रेणी की वसूली किये जाने, वसूली बढ़ाये जाने हेतु बार-बार दिये गये आदेशों / निर्देशों के बाद भी कोई सुधार न लाने के परिपेक्ष्य में इनके विरूद्ध अनुशासनिक कार्यवाही प्रस्तावित है, एतद्द्वारा तत्काल प्रभाव से निलम्बित किया जाता है।''

Charge sheet

''आरोप सं० -१ यह कि आप तहसील रसूलाबाद के क्षेत्र नेवादा देवराय में संग्रह अमीन के पद पर कार्यरत हैं। आप द्वारा १४१३ रवी में दिनांक १६.४.२००६ से २२.६.२००६ तक भू राजस्व की मांग रू० ६५०६.०० तथा सिंचाई देय की मांग २,१८,४८०.०० कुल मुख्य देय की मांग २,२४,६८२.०० रूपया के सापेक्ष रू० २६,७५८.०० एवं विविध देय की मांग रू० २,१०,८४०.०० के सापेक्ष मात्र रू० ८०,०५६.०० की वसूली की गयी है। इस प्रकार कुल मांग ४,३५,८२२.०० के सापेक्ष कुल रू० १,०६,८१४.०० की वसूली की गयी है। जबकि २ माह से अधिक के समय में निर्धारित मानक एक लाख प्रति माह के सापेक्ष कम से कम २.०० लाख की वसूली किया जाना आपेक्षित था। बार-बार लिखित तथा मौखिक रूप से दिये गये निर्देशों के बाद भी आप द्वारा वसूली बढ़ाये जाने में कोई रूचि नहीं ली गयी। अतः मांग तथा मानक के सापेक्ष निकृष्ट श्रेणी की वसूली किये जाने के दोषी हैं।

आरोप सं०-२ यह कि नायब तहसीलदार द्वारा दिनांक - २४.५.२००६ को वसूली बढ़ाने हेतु निर्देश दिये गये। तहसीलदार द्वारा दिनांक १५.५.२००६ को मुख्य एवं विविध देय की वसूली खराब होने के कारण चेतावनी दी गयी तथा उपजिलाधिकारी रसूलाबाद द्वारा दिनांक २०.५.२००६ को पेशी रजिस्टर पर वसूली में सुधार लाने हेतु चेतावनी दी गयी। परन्तु आप द्वारा उच्चाधिकारियों के दिये गये आदेशों / निर्देशों की अवहेलना करते हुए वसूली बढ़ाये जाने में कोई रूचि नहीं ली गयी। इस प्रकार आप उच्चाधिकारियों के आदेशों / निर्देशों का पालन न करने के दोषी हैं।''

6. *Ex-facie* the allegations contained in the charge sheet levelled against the petitioner shows that despite directions of the higher authorities the petitioner could not make recovery up to the target prescribed by the authorities concerned and did not take much interest in enhancing the amount of recovery and, therefore, was guilty of poor recovery. The allegations ex-facie shows that the petitioner is a poor and inefficient official but in the absence of anything more, reflecting on the conduct of the petitioner, in my view, it cannot be said that the petitioner is guilty of any misconduct warranting disciplinary proceeding.

7. 'Misconduct' has been defined in Black's Law Dictionary, Sixth Edition at page 999:

"A transgression of some established and definite rule of action a forbidden act, a dereliction from duty, unlawful behavior, wilful in character, improper or wrong behavior, its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness."

'Misconduct in Office' has been defined as:

"Any unlawful behavior by a public officer in relation to the duties of his office, wilful in character. Term embraces acts which the office holder had no right to perform, acts performed improperly and failure to act in the face of an affirmative duty to act."

8. P. Ramanatha Aiyar's Law Lexicon, Reprint Edition 1987 at page 821 defines "misconduct' thus:

"The term misconduct implies a wrongful intention, and not a mere error of judgment. Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word misconduct is a relative term, and has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct. In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected."

9. The meaning of 'misconduct' came up for consideration before the Apex Court in the case of **Union of India Vs. J. Ahmed, AIR 1979 SC 1022**, wherein, explaining the term 'misconduct' the Hon'ble Court held as under:

"It would be appropriate at this stage to ascertain what generally constitutes misconduct, especially in the contest of disciplinary proceedings entailing penalty." (para 10)

"Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that that conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see Pearce v. Foster) (1988) 17 QBD 536 (at p.542). A disregard of an essential condition of the contract of service may constitute misconduct [see Laws v. London Chronicle (Indicator Newspaper)]. (1959) 1 WLR 698. This view was adopted in Shardaprasad Onkarprasad Tiwari v. Divisional Supdt., Central Railway, Nagpur Divn., Nagpur, 61 Bom LR 1596: (AIR 1961 Bom 150) and Satubha K.

Vaghela v. Moosa RazaF, (1969) 10 Guj LR 23. The High Court has noted the definition of misconduct in Stroud's Judicial Dictionary which runs as under: -

"Misconduct means, misconduct arising from ill motive; act of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct."

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in Management, Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik, (1966) 2 SCR 434: (AIR 1966 SC 1051), in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In S. Govinda Menon v. Union of India, (1967) 2 SCR 566: (AIR 1967 SC 1274), the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P.H. Kalyani v. Air France, Calcutta, (1964) 2 SCR 104: (AIR 1963 SC 1756), wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar (examples) instances of which (are) a railway cabinman signalling in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intraveious injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashing causing heavy loss of life. Misplaced sympathy can be a great evil (see Navinchandra Shakerchand Shah v. Manager, Ahmedabad Co.-op. Department Stores Ltd., (1978) 19 Guj LR 108 at p.120). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty." (para 11)

10. Again in the case of **State of Punjab and others vs. Ram Singh Ex-Constable, (1992) 4 SCC 54** the Hon'ble Apex Court has held as under: -

"Thus it could be seen that the word "misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order." (para 6)

11. In the context of Section 31 of Advocates Act, 1961, the Apex Court in **Noratanmal Chouraria Vs. M.R. Murli & another 2004 (5) SCC 689** said:

"Misconduct, inter alia, envisages breach of discipline, although it would not be possible to lay down exhaustively as to what would constitute conduct and indiscipline, which, however, is wide enough to include wrongful omission or commission whether done of omitted to be done intentionally or unintentionally. It means, "improper behaviour, intentional wrongdoing or deliberate violation of a rule or standard of behaviour".

Misconduct is said to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, it is a violation of definite law."

12. In **Baldev Singh Gandhi Vs. State of Punjab & others AIR 2002 SC 1124**, with reference to the provisions of Punjab Municipal Act, the Apex Court, considering the term 'misconduct' held as under:

"'Misconduct' has not been defined in the Act. The word 'misconduct' is antithesis of the word 'conduct.' Thus, ordinarily the expression 'misconduct' means wrong or improper conduct, unlawful behaviour, misfeasance, wrong conduct, misdemeanour etc."

13. The allegations at the best shows that the petitioner is a non serious employee and is not able to achieve target. It shows that he is an inefficient official but in the absence of anything further, inability of an employee to achieve target or to show efficiency, upto desired level, ipso facto would not amount to 'misconduct' warranting punishment under 1999 Rules as held in **J. Ahmed (supra)** that Lack of efficiency or failure to attain highest standards in discharge of duties attached to public office would not constitute misconduct, unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high, which is not the case in hand.

14. In view of the aforesaid exposition of law and considering the allegations contained in the suspension order and charge sheet, I am of the view that the allegations levelled against the petitioner do not amount to 'misconduct' and, therefore, proceeding under 1999 Rules cannot be initiated against him. The impugned order of suspension, therefore, cannot sustain.

15. In the result, the writ petition is allowed. The impugned order of suspension dated 06.07.2006 and the charge sheet dated 06.07.2006 both are hereby quashed. The respondents are directed to reinstate the petitioner with all consequential benefits.

16. However, it is made clear that if the petitioner is an employee lacking efficiency etc., it is open to the respondents to take such action as permissible under law in respect to such aspect of the matter.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2007

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No.42822 of 2007

Mohd. Yasin Khan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Narendra Singh Chahar

Counsel for the Respondents:
S.C.

(A) U.P. Panchayati Raj Act 1947-Section-12-J (2)-Removal of nominated village Pradhan-after death of elected village Pradhan-District. Magistrate nominated the petitioner with condition-about cancellation/revocation at any time without assigning any reason-power to grant includes revocation-working on the basic of nomination depends upto the pleasure of authority–complaint about irregularity committed by such Nominated Pradhan-held-removal proper.

Held: Para 8

From the provisions Of the General Causes Act. It is clear that when an act confers a power unless the different intention is there such power can be exercised from time to time as occasion requires, thus, the power of nomination can be exercised by the District Magistrate from time to time. The submission of the petitioner that once he has been nominated his nomination cannot be withdrawn cannot be accepted. Further more this submission also runs contrary to the very condition of the petitioner's nomination as contained in the letter dated 13.6.2007. The order clearly contemplates that the nomination of the petitioner is purely temporary and can be withdrawn without any notice, hence, the submission of the petitioner that nomination could not have been withdrawn cannot be accepted.

(B) Constitution of India-Art. 226-Principle of natural justice-Revocation of Nomination of petitioner-as nominated village Pradhan-complaint of irregularities-Section 14 of General clauses Act–empowers the authority to exercise such power time to time-held-no personal right affected-opportunity of hearing before revocation-not required.

Held: Para 8

The appointment of a nominee is generally up to the pleasure of the authority nominating a person. After receiving complaints regarding functioning of the petitioner no error was committed by the District Magistrate in recalling the nomination without giving any opportunity. Furthermore, the termination of the nomination was according to the terms of the engagement of the petitioner as contained in the order dated 13th June, 2007.

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

1. Heard counsel for the petitioner and learned Standing Counsel.

2. By this writ petition the petitioner has prayed for quashing the order dated 3rd September, 2007 by which the petitioner's authorization/ nomination to work as Pradhan has been withdrawn.

3. The Pradhan of the Village died on 30th April, 2007 causing a vacancy. Exercising power under Section 12-J (2) of U.P. Panchayati Raj Act, 1947 an order was passed by District Magistrate on 13th June, 2007 nominating the petitioner to discharge the duties of the Pradhan copy of the said order has been filed as Annexure-2 to the writ petition. The order itself indicates that the nomination of the petitioner was purely temporary and can be withdrawn without any notice. Subsequently the District Magistrate by the impugned order dated 3.9.07 has withdrawn the nomination of the petitioner and appointed another person to function as Pradhan.

4. Learned counsel for the petitioner contended that the said order has been passed without any opportunity and, hence, it is wholly illegal. He further contended that according to Section 12-J (2) nominated persons is authorized to continue till the vacancy in the office of Pradhan is filled, hence, he could not have been removed in between.

5. Learned Standing Counsel appearing for the respondents supported the order and contended that the petitioner's nomination being temporary he can be removed without any notice.

Section 12-J (2) of the U.P. Panchayat Raj Act provides for arrangements of temporary vacancy in the office of Pradhan, Section 12-J (2) is as follows:-

"Where the offices of both, Pradhan and Up-Pradhan are vacant for any reason whatsoever, or when both, Pradhan and UpPradhan are incapable to act for any reason whatsoever, the prescribed authority shall nominate a member of (Gram Panchayat) to discharge the duties and exercise the powers of the Pradhan until such vacancy in the office of either the Pradhan or Up-Pradhan is filled in, or until such incapacity of either of two is removed"

6. Submission of the petitioner is that the nomination is till the vacancy is filled, hence before the vacancy is filled up the petitioner was not removable.

7. Section 12-J (2) provides nomination for a member, when a statute confers a power of a statutory authority to do a particular thing that power can be exercised from time to time. To nominate under Section 12-J (2) was not a one time power which after nominating the petitioner exhausted. The power shall continue with the prescribed authority to

nominate, re-nominate as the exigency may arise. In case the interpretation put by the petitioner is accepted the power of District Magistrate shall come to an end after once nominating a person to discharge the duties of Pradhan. If such interpretation is accepted that will not advance the object of provisions of Section 12-J(2) of the Act 1947. U.P. General Causes Act provides that power conferred by a statute is to be exercisable from time to time Section 14 of the U.P. General Causes Act is quoted as below:-

"Power conferred on the State Government to be exercisable from time to time:-*Where, by any (Uttar Pradesh) Act, any power is conferred (XX) then that power may be exercised from time to time as occasion requires."*

8. From the provisions Of the General Causes Act. It is clear that when an act confers a power unless the different intention is there such power can be exercised from time to time as occasion requires, thus, the power of nomination can be exercised by the District Magistrate from time to time. The submission of the petitioner that once he has been nominated his nomination cannot be withdrawn cannot be accepted. Further more this submission also runs contrary to the very condition of the petitioner's nomination as contained in the letter dated 13.6.2007. The order clearly contemplates that the nomination of the petitioner is purely temporary and can be withdrawn without any notice, hence, the submission of the petitioner that nomination could not have been withdrawn cannot be accepted. The next submission of the petitioner is that he was required to be given an opportunity before passing an order for removing him. The petitioner was nominated by the District Magistrate to discharge the function of the Pradhan. The petitioner is not an elected office bearer nor he can claim to have any right to the office of Pradhan, by virtue of nomination. The appointment of a nominee is generally up to the pleasure of the authority nominating a person. After receiving complaints regarding functioning of the petitioner no error was committed by the District Magistrate in recalling the nomination without giving any opportunity. Furthermore, the termination of the nomination was according to the terms of the engagement of the petitioner as contained in the order dated 13th June, 2007.

9. None of the submissions raised by the petitioner has any substance. The writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2007

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

Civil Misc. Writ Petition No. 2447 of 1984

Pratap Singh Shisodhia ...Petitioner
Versus.
Board of Revenue & others ...Respondents

Counsel for the Petitioner:
Sri. Kunwar R.C. Singh

Counsel for the Respondents:
Sri. O.P. Kulsherstha.
S.C.

<u>UPZA & LR Rules-Rule 115-M</u> Allotment of land- belonging to Gaon Sabha- without following the order of preference-petitioner being totally outsider to the village-obtained patta by

taking into confidence to the Government authorities- concurrent finding of facts recorded by all the three revenue Courts- cannot be interfered- No license to a wrong activities

Held: Para 8

The factum of illegal arrangement without resorting any procedure known to law and without any notice/information to any body, if was disapproved/cancelled in quickest possible time, then this Court is not to come to the rescue of such a claimant who has tried to grab public land by a back door process. So far as finding given by all three courts are concerned, they are on the question of facts in which, no illegality or any-perversity has been shown to the Court. If finding of fact recorded by all three courts below are accepted, then this Court cannot be in a position to approve the claim of petitioner and thus will have to decline to interfere in the impugned orders.

Case law discussed:

2007(102) R.D. 303

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

1. Heard Sri Kunwar R.C. Singh in support of this petition. No body appeared for the respondents.

2. Challenge in this petition is the order passed by Board of Revenue, Additional Commissioner and that of the Additional Collector dated 24.11.1983, 10.6.1983 and 13.01.1982 (Annexures XI, X and VIII) respectively.

Before adverting to the arguments, notice of facts in brief, will suffice.

3. Petitioner:claims to have received a portion of Plot No. 729 and 731 situated in Agrawala Mandi Tateeri Tehsil Baghpat, district Meerut, in view of allotment made/approved by the Sub-Divisional Officer dated 28.02.1980 pursuant to which on 04.09.1980, he deposited Rs.326.80 and then he claims to have raised construction. For the aforesaid allotment, petitioner claims to have filed application on 27.09.1979 on the ground that he is residing at present in Tateeri Meerut and he has no land for his residence and therefore, he be allotted suitable area. On that application, Lekhpal, Supervisor Kanungo and Naib Tehsildar appears to have submitted their reports favouring petitioner and thus, approval of allotment by the Sub-Divisional Magistrate on 28.02.1980 as noted above. On filing application by respondent for cancellation of the allotment, on various grounds so taken in the application, the Additional Collector proceeded in the matter and after giving full opportunity to the petitioner, allotment was ordered be cancelled by order dated 13.01.1982 and that has been affirmed by the Additional Commissioner and the Board of Revenue and thus, all the three orders are under challenge in this petition.

4. Submission of learned counsel is that as the town area committed was under suspension, the Prescribed Authority was incharge of the affairs he after getting report from lower staff allotted the land to the petitioner in which, no illegality can be found. Submission is that petitioner has been validly allotted the land being entitled for the same which is clear from the report so submitted. It was then submitted that even if it is found that allotment in favour of petitioner is illegal, as the petitioner obtained possession and raised some construction, land is to be settled with him on market rate as has been held by this, Court in the

case of **Sukhdeo Vs. Collector reported in 2007(102) RD 83** and **Kishore Singh Vs.Addl. Collector reported in 2007(102) RD. 303**.

In view of the aforesaid, this Court has examined the matter.

5. Before proceeding to deal with the matter, this Court has to observe that the case in hand is a clear case where the petitioner having taken into confidence the administrative authorities has been able to grab public property/land in most illegal manner and now as alternate argument, he claims its legalization/settlement on payment of premium.

6. There is no dispute about the fact that the land in dispute is the public property/land. In the report of Naib Tehsildar (Annexure 2-C) and in the order dated 28.2.1980 which have been placed on record there is clear mention that the land is Gaon Sabha land and it is under the provision of UPZA & L.R. Act. There is further mention in all the reports that petitioner may be given land under Rule 115-M of UPZA & LR Rules which permits allotment on deposit of amount equal to forty times of the rent of land in the manner and procedure so provided. Thus on the admitted facts, as the land has been mentioned to be Gaon Sabha land and the provision of Rule 115-M has been quoted/referred in all the reports, this Court will have to notice these provisions before coming to a particular conclusion.

7. Rule 115-M of UPZA &LR Rules permits allotment of the land for construction of building in residential area or for charitable purposes or for purposes of cottage industries in a particular order or preference which speaks landless labourer, village artisans etc. In the next category to a bhumidhar, sirdar ,or assami residing in the village and then to any other person residing in the village. The procedure for making allotment has been given in Rule 115-N of the Rules which provides that the land will be allotted by due publication by beating the drum in the village about exact location of the site, time and date and the venue of allotment. Then Rule 115-O comes which clearly provides that maximum limit will be 250 meters.

8. So far as case in hand is concerned, petitioner claims that it has been allotted by the Sub-Divisional Officer after getting report from the lower administrative authorities as the town area committee was under suspension. From the documents as has been brought on record, this has not been made clear that when the land belongs to Gaon Sabha and there, is clear mention that the land is under the provision of UPZA & L.R. Act, how and in what circumstances, town area committee came in picture and even if town area committee is said to be competent to allot the Committee is said to be under suspension, how and in what circumstances, land can be allotted just after taking application from the petitioner and on getting reports without any notice to any body, and without any knowledge to other eligible persons. Land in dispute admittedly, is not the private property of the prescribed authority or any administrative authority. It being public property, even if petitioner may be entitled to get the land allotted that has to be done by taking public into confidence i.e. to say by making the factum of allotment known to every body so that other eligible may also if they so like

claim the land for being allotted. There is a clear provision in the Rules as referred above that if there are several claimants then it is to be settled by lottery system. By no stretch of imagination, it can be accepted that in the prevailing circumstances, there being paucity of accommodation, no body else in the village /town can be inclined to take the land but for the petitioner. At the same time, preference as given in the rules will also be required to be adhered to. There is clear finding of all the three courts that neither any munadi was made nor any publication was made and the factum of allotment was never made to known to an body. There is a further finding that petitioner is not resident of that place which is clear from the khatauni extract so filed in the proceeding which clearly mentions that petitioner is having land in village Sapnawat in district Ghaziabad. There is a further finding that the petitioner is not, landless labourer, resident of the village and in fact, he is teacher in High Secondary School, Daula, Meerut and he is Rajput by caste. On these facts, it is crystal clear that all three courts have rightly concurred in taking the view that petitioner was not entitled to get allotment and he obtained allotment by maneuvering things by exerting pressure on the administrative authorities. The allotment is said to have been made in the year 1980 and immediately thereafter an application for its cancellation was moved and the order of Additional Collector is dated 13.01.1982 and thus, it is clear that a prompt action was taken against the illegal allotment. It is not a case where allotment has been questioned after a lapse of sufficiently long time. Although petitioner claimed for allotment of an area of 500 meters which is otherwise also not permissible but the fact as has come at various places, that an area of 0-8-15 of plot no. 729 and an area of 0-8-0 of plot no. 731 came to be allotted. That is further very unreasonable The factum of illegal arrangement without resorting any procedure known to law and without any notice/information to any body, if was disapproved/cancelled in quickest possible time, then this Court is not to come to the rescue of such a claimant who has tried to grab public land by a back door process. So far as finding given by all three courts are concerned, they are on the question of facts in which, no illegality or any-perversity has been shown to the Court. If finding of fact recorded by all three courts below are accepted, then this Court cannot be in a position to approve the claim of petitioner and thus will have to decline to interfere in the impugned orders.

9. At this stage, alternative claim of petitioner of settling and in the light of two decisions given by this Court, will have to be noticed.

10. On examination of the facts of present case and the facts of cases on which reliance has been placed by learned counsel, this Court is of the view that there is clear distinction on facts and thus the decision relied upon have no application to the facts of the present case. So far as the judgment given in the case of Sukhdeo (supra) is concerned, action against unauthorised occupation was taken after about 30 years and therefore, on the facts, this Court exercising equity powers granted relief. So far the judgment in the case of Kishore Singh (supra) is concerned, a finding has been recorded that Navin Parti was made cultivable land and therefore, on the facts of that case considering the hardship, relief was

granted by this Court. Otherwise also if this kind of tactics is permitted, then it will be very easy for a mighty person to grab public property by back door process in an illegal manner and then to claim its settlement to get it legalised. This will be clearly arbitrary and discriminatory and in violation of principle of natural justice to the public at large. The benefit to which, large number of eligible persons may be entitled cannot be permitted to be given to an individual in a secret manner without any opportunity of participation to all eligible. It has been repeatedly said by the Apex Court and this Court that in the matter of public settlement, it has to be after opportunity of participation to public at large and, in the manner so provided. Thus this Court has to reject the claim of the petitioner for settling the land on premium basis as that will be in violation of principle of natural justice as others are to suffer and that will be laying a bad precedent of granting premium to wrong acts certifying the slogan that might is right. We can take judicial notice of the fact that now a days, tendency of encroachment of public land/property is increasing day by day and thus that has to be checked although on its beginning itself and if for any reason that could not come to notice at its start then as and when, it comes to the notice of a person authorised/capable to take action in accordance with law, There cannot be any license/premium to a wrong and void act unless it is permitted in law or it could get protection in law.

11. For the reasons given above, this Court is of the view that petitioner has not been able make out any case for interference in the impugned orders by pointing out any illegality.

This petition accordingly fails and is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.11.2007

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

Criminal Misc. Application no. 2749 of 2005

Ramesh ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Rajul Bhargava

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

Code of Criminal Procedure-Section 362- Bar of jurisdiction once the Magistrate passed order-treating the protest petition as complaint-statement of the complaint as well as the witness recorded-can not be reviewed.

Held: Para 7

There is also one more aspect of the case. In the Cr.P.C. there is no provision for review of an earlier order passed by the court, and section 362 Cr.P.C. clearly bars review of earlier order. In the present case Sri S.N. Saroj had passed an order on 28.10.2003 for treating the protest petition as a complaint and so in view of the clear bar of seciton 362 Cr.P.C. Sri Amar Nath Kushwaha had no jurisdiction to review that order holding it to be illegal vide order dated 30.4.2004.

Case law discussed:
2002 ACR (2) 1693 (SC)
2004 (Cr.) 1135
2006 (1) SCC (Crl.)-575

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

1. This is an application under section 482 Cr.P.C. to quash the order dated 30.4.2004 passed by the Judicial Magistrate, Mathura in complaint case no. 105 of 2003, Ramesh Vs. Dibban and others, and the order dated 28.10.2004 passed by the Addl. District & Sessions Judge, Court No.1, Mathura in Criminal Revision no. 360/04, Ramesh Vs. State.

2. The facts relevant for disposal of this application are that the applicant had moved an application before the S.S.P. Mathura on 11.2.2001 with these allegations that he was resident of village Semra police station Shergarh district Mathura and on the above date at about 9 A.M. complainant's real brother Mukesh and cousin brothers Pramod and Mahesh had gone to Shyam Kund to take bath. The accused Dibban, Prem Chandra, Hukam, Sunil, Raju, Dalchand and Chetram, who had pistols, guns and lathies with them assaulted Pramod, Mukesh and Mahesh. The accused abused them and stated that they would not spare Pramod, Mukesh and Mahesh and on exhortation of Hukam, Sunil, Chetram, Dibban & Raju fired at them with an intent to kill them. The fire done by Sunil hit Mukesh, that done by Cheram hit Pramod but fires done by Raju and Prem Chand did not hit any one. Dal Chand gave a lathi blow to Mahesh. Upon noise Shiv Ji, Durga, Bhajan Lal, Vinod etc. of the same village reached there, who witnessed the incident and protected Pramod, Mukesh and Mahesh. The accused persons went away towards jungle threatening to kill them. Ramesh was taking the injured to the police station but the accused had obstructed the way. Then he took them to Methodist Hospital at Mathura where their treatment was going on. It was, therefore, prayed that action should be taken and the Station Officer of the police station should be directed to register a case against the accused persons.

3. On the basis of the order passed by the S.S.P. Mathura on this application a case was registered against the accused persons at police station Shergarh as case creime no. 14A/2001 under sections 147, 148, 149, 307, 323, 504 & 506, I.P.C.and it was investigated.

4. According to the injury report of Pramod Kumar he had a fire arm injury on his chest and left shoulder. Mahesh had head injury. Mukesh had gun shot injury on his chest. The police, however, after investigation submitted a final report in the case and against that final report, complainant filed protest petition. On that protest petition Sri S.N.Saroj, Judicial Magistrate, Mathura passed an order on 28.10.2003 for treating it as complaint and he fixed a date for recording statements of the complainant and his witnesses under sections 200 and 202 Cr.P.C. Accordingly the statements of the complainant and his witnesses were recorded. Thereafter the case was fixed for order. On 30.4.2004 Sri Amarnath Kushwaha, who was at that time posted as Judicial Magistrate, Mathura passed an order for accepting final report and rejecting the protest petition. He further observed in his order that his predecessor had passed an erroneous order for registering the protest petition as a complaint because the protest petition did not contain full particulars of the incident and it did not come within the definition of the word "complaint". Aggrieved with that order Ramesh filed criminal revision

no.360 of 2004 before the Sessions Judge, Mathura, which was dismissed by Sri A.K. Mathur, Addl. Sessions Judge, Court no.1, Mathura vide his order dated 28.10.2004. Aggrieved with both these orders the complainant has filed this application under section 482 Cr.P.C.

5. I have heard learned counsel for the applicant as well as the learned A.G.A. for the State.

6. The learned counsel for the applicant cited before me a Division Bench ruling of this Court in *'Pakhando and others Vs. State of U.P. and another* 2001(43) ACC 1096 in which it has been held that after filing of the final report by the police, the Magistrate has got jurisdiction to treat the protest petition as a complaint. He further submitted that, in this way, the view taken by the Magistrate and the Addl. Sessions Judge that protest petition could not be treated as a complaint is erroneous. As regards the contention of the learned Magistrate that the protest petition did not contain particulars of the incident, the learned counsel for the applicant referred to para 1 of the protest petition, (Annexure no. 5 to the affidavit filed in support of the application under section 482 Cr.P.C.) in which complete description of the entire incident has been given in brief and so the observation of the Magistrate is erroneous that the protest petition did not contain description of the incident. It gives complete description of the incident as well as the names of witnesses.

7. There is also one more aspect of the case. In the Cr.P.C. there is no provision for review of an earlier order passed by the court, and section 362 Cr.P.C. clearly bars review of earlier order. In the present case Sri S.N.Saroj had passed an order on 28.10.2003 for treating the protest petition as a complaint and so in view of the clear bar of seciton 362 Cr.P.C. Sri Amar Nath Kushwaha had no jurisdiction to review that order holding it to be illegal vide order dated 30.4.2004.

8. The Hon'ble Apex Court in *'State of Kerala Vs. M.M.Manikantan Nair'* 2002(2) A.Cr.R. 1693 S.C. and in 'R. Annapurna Vs. Ramadugu Anantha Krishna Sastry and others' 2004 SCC (Cr.) 1135 has held that a criminal court has no power to review its judgment and it can rectify clerical error under section 362 Cr.P.C. The same view was reiterated by the Hon'ble Apex Court in 'Surendra Singh Vs. State of Bihar 2006 (1) SCC (Cri) 575.

9. In view of the aforesaid rulings of the Hon'ble Apex Court the order passed by the Magistrate Sri Amar Nath Kushwaha on 30.4.2004 recalling the order of Sri S.N. Saroj dated 28.10.2003 is totally without jurisdiction and the order of the Addl. Sessions Judge passed in criminal revision confirming the order passed by Sri Amar Nath Kushwaha is also without jurisdiction and both these orders deserve to be set aside and that of Sri S.N. Saroj dated 28.10.2003 deserves to be restored.

10. The application under section 482 Cr.P.C. is, therefore, allowed and the order dated 30.4.2004 passed by Sri Amarnath Kushwaha, Judicial Magistrate, Mathura in Crl. Case no. 105 of 2003, Ramesh Vs. Dibban and others, and the order dated 28.10.2004 passed by Sri A.K. Mathur in Crl. Revision no.360 of 2004, Ramesh Vs. State, are hereby set

aside and the order dated 28.10.2003 passed by Sri S.N. Saroj, Judicial Magistrate, Mathura in criminal case no.105 of 2003, Ramesh Vs. Dibban and others, is hereby restored and the matter as remanded back to the Judicial Magistrate, Mathura for passing suitable orders under section 203/204, Cr.P.C. after hearing the complainant.

11. The learned Magistrate shall, be at liberty to pass suitable order as to whether any case for summoning the accused is made out or not on the basis of the evidence of the complainant and his witnesses under sections 200 and 202 Cr.P.C. as well as other evidence and circumstances.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2007

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 25974 of 2006

Ram Dutt Agnihotri ...Petitioner
Versus
State of U.P., and others ...Respondents

Counsel for the Petitioner:
Sri Shesh Kumar
Sri Sunil Dubey

Counsel for the Respondents:
Sri Vimal Chandra Misra
Sri S.K. Singh
S.C.

U.P. Basic Education Staff Rules 1973-Section 19-Adoption of the provisions of CCA Rules-1999 Rule-7 readwith Constitution of India Art. 311-Dismissal of Head Master-in Primary School-without charge sheet-without holding enquiry in utter violation of principle of Natural justice held illegal can not sustain-a man can not be condemn without reasonable opportunity.

Held: Para 8

Thus from the above provisions it is ample clear that before imposing a major punishment of dismissal from services, it is incumbent upon the disciplinary Authority to conduct a disciplinary enquiry against the delinquent officer either himself or through an officer subordinate to him as enquiry officer and the delinquent officer be informed of the charges levelled against him by means of a charge sheet along with the proposed documentary evidence and the name of the witnesses. It is only thereafter that an order of punishment of dismissal from service can be passed against the delinquent officer subject to the three exceptions carved out. In short the aforesaid rules in a way adopts the analogy of Article 311 of the Constitution of India and contemplates not to condemn any person without affording reasonable opportunity of hearing to him. Admittedly, in the present case no disciplinary enquiry was initiated against the petitioner and the petitioner has not been found guilty of any misconduct in any such enquiry so as to inflict the punishment of dismissal from service.

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Heard Sri Shesh Kumar, learned counsel appearing for the petitioner and Sri S.K. Singh, holding brief of Sri Vimal Chandra Misra learned counsel who appears for respondents No. 2,3 and 5. Standing Counsel appears for respondent No. 1.

2. The petitioner was working substantively since1986 as Head Master in Prathamik Vidhyala, District Banda. He had proceeded on a day's casual leave on 30th July 2003 and on the same day he

was put under suspension on account of unauthorized absence from duty. However, this order of suspension was revoked on 15.5.2004 and the communication to the said effect was given to the petitioner vide letter dated 19th August 2004. It is said that despite the suspension order being revoked the petitioner was not allowed to join at the institution on the pretext that he had not produced the order of reinstatement. Accordingly, the petitioner demanded the order of reinstatement which was not supplied to him and as a result he could not rejoin. Thereafter, a notice was published in the newspaper 'Amar Ujala' dated 25.3.2005 requiring the petitioner to join the institution before 30th March 2005, failing which a disciplinary action was contemplated against him for termination of his services. It appears that the petitioner could not join despite publication of the aforesaid notice in the newspaper and continued to insist for supply of the copy of the order of reinstatement. Thus, the Basic Shiksha Adhikari, Banda by the impugned order dated 17.5.2005 terminated the services of the petitioner on the ground that he has failed to resume his duties and has illegally absented himself despite notice dated 25.3.2005. Aggrieved by this order of termination the petitioner has filed this writ petition.

3. The writ petition was finally dismissed on 11.5.2006 on the ground that the petitioner has not exhausted the the alternative remedy of filing an appeal under Rule 5 of the U.P. Basic Education Staff Rules, 1973. However, this order dismissing the appeal was set aside in special appeal preferred by the petitioner and this how the petition has come up for consideration before me.

4. A counter affidavit has been filed on behalf of respondents No. 2,3 and 5 stating that in view of the fact that a notice was published in the newspaper and since the petitioner failed to resume his duty within time stipulated therein, his services have rightly been terminated.

5. Learned counsel for the petitioner has submitted that the services of the petitioner could not have been terminated without holding an enquiry or a disciplinary enquiry against him.

6. A plain reading of the impugned order dated 17.5.2005 indicates that the said order has been passed solely on the basis of the notice issued in the newspaper Amar Ujala dated 25.5.2005. There is no reference to any enquiry or of holding of disciplinary proceedings against the petitioner before imposing the above punishment of dismissal. The petitioner in paragraphs 30 and 32 of the writ petition has clearly stated that no disciplinary proceedings were initiated against him and he has been punished without holding him guilty of any misconduct. The counter affidavit is completely silent with regard to initiation of any disciplinary proceedings against the petitioner. Thus the conclusion is inevitable that no disciplinary enquiry whatsoever was conducted and the impugned order of dismissal has been passed without holing him guilty of any charge or misconduct.

7. The U.P. Basic Education Staff Rules, 1973 which have been framed in exercise of powers under Section 19 of the Basic Education Act, 1972 in sub-clause 3 of Rule 5 provides that the procedure laid down in the Civil Services (Classification, Control & Appeal) Rules,

as applicable to Servants of the U.P. Government shall, as far as possible, be followed in disciplinary proceedings. The said Rules have been superseded and have been replaced by the U.P. Government Servants (Discipline and Appeal) Rules, 1999. Rule 3 of the new Rules provides for the minor and major penalties which can be imposed upon the government servants including the penalty of dismissal and removal as major penalties by way of punishment. Rule 7 of the aforesaid Rules prescribes the procedure for imposing major penalties.

Rule 7 of the Rules, 1999 reads as under:-

1. 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 an Inquiry Officer to inquire into the charges.
(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called chargesheet. The chargesheet shall be approved by the Disciplinary Authority:

Provided that where the Appointing Authority is Governor, the chargesheet may be approved by the Principal Secretary or the Secretary, as the case may be, of the concerned department.
(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government Servant of the facts and circumstances against him. The proposed documentary evidence and the name of witnesses proposed to prove the same along with oral evidences, if any, shall be mentioned in the chargesheet.
(iv) The charged Government Servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of chargesheet and to state whether he desires to cross-examine any witness mentioned in the chargesheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case be does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and inquiry officer shall proceed to complete the inquiry exparte.
(v) The chargesheet, along with the copy of documentary evidences mentioned therein and list of witnesses and their statements, if any, shall be served on the charged Government Servant personally or by registered post at the address mentioned in the official records in case the chargesheet could not be served in aforesaid manner, the chargesheet shall be served by publication in a daily newspaper having wide circulation:

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with chargesheet, the charged government servant shall be permitted to inspect the same before the Inquiry Officer.
(vi) Where the charged Government Servant appears and admits the charges, the Inquiry Officer shall submit his report to the Disciplinary Authority on the basis of such admission.
(vii) Where the charged Government Servant denies the charges the Inquiry

Officer shall proceed to call the witnesses proposed in the chargesheet 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 evidences, 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 witnesses to give 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 witnesses 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 inspite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry exparte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the chargesheet in absence of the charged Government Servant.

(xi) The Disciplinary Authority, if it considers it necessary to do so, may, by an order appoint a government Servant or a legal practitioner, to be known as "presenting Officer" to present on its behalf of the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government Servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the presenting officer appointed by the Disciplinary Authority is a legal practitioner of the Disciplinary Authority having regard to the circumstances of the case so permits:

Provided that this rule shall not apply in following cases:-

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) where the disciplinary Authority is satisfied, that for reason to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Government is satisfied that, in the interest of the security of the State. It is not expedient to hold an inquiry in the manner provided in these rules.

8. Thus from the above provisions it is ample clear that before imposing a major punishment of dismissal from services, it is incumbent upon the disciplinary Authority to conduct a disciplinary enquiry against the delinquent officer either himself or through an officer subordinate to him as enquiry officer and the delinquent officer be informed of the charges levelled against him by means of a charge sheet along with the proposed documentary evidence and the name of the witnesses. It is only thereafter that an order of punishment of dismissal from service can be passed against the delinquent officer

subject to the three exceptions carved out. In short the aforesaid rules in a way adopts the analogy of Article 311 of the Constitution of India and contemplates not to condemn any person without affording reasonable opportunity of hearing to him. Admittedly, in the present case no disciplinary enquiry was initiated against the petitioner and the petitioner has not been found guilty of any misconduct in any such enquiry so as to inflict the punishment of dismissal from service. In fact the principles of natural justice which are applicable to the whole range of subjects particularly to the matters of imposing punishment contemplates of giving two opportunities to the delinquent, one before the inquiry officer and the other by the disciplinary Authority before passing the final order of punishment on the basis of the report of the inquiry officer. Here as the petitioner was not subjected to any disciplinary proceedings, he was not given any opportunity to defend himself at any stage and the order of punishment was passed in clear violation of the principles of natural justice. Thus as the impugned order is clearly within the teeth of the principles of natural justice and has been passed in violation of Rule 7 of the U.P. Government servants (Discipline and Appeal) Rules, 1999, it is liable to be quashed. Accordingly, a writ of certiorari is issued quashing the impugned order dated 17.5.2005 (Annexure-10 to the writ petition) with liberty to the disciplinary authority to take action afresh, if necessary, in accordance with law.

9. The petition succeeds and is allowed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2007

BEFORE
THE HON'BLE ANJANI KUMAR, J.
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.34774 of 1999

Raj Kishore Pathak ...Petitioner
Versus
Chancellor Deen Dayal Upadhyaya, Gorakhpur University, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri Ramesh Upadhyaya

Counsel for the Respondents:
Sri Neeraj Tripathi
Sri R.K. Ojha

U.P. State Universities Act 1973-Section-68-Eiligibility-whether for the Post of Reader in Law can be filled up by candidate having be research work in Political Science "A problem in constitutional Hermeneutics? Held-"No"-view taken by Vice-Chancellor correct can not be interfered by writ court.

Held: Para 4

The Chancellor, therefore, found that the research work done by the petitioner, Raj Kishore Pathak, cannot be said to be research work in connection with Law Faculty or in the subject of Law and, therefore, the Chancellor has held that since the petitioner, Raj Kishor Pathak, did not possess requisite qualification for appointment to the post of Reader, therefore, the appointment of the petitioner as Reader is cancelled. The petitioner has challenged this order by means of the present writ petition and the order dated 13th August 1999 which is consequential order communicated by the Registrar of the University.

Case law discussed:

1990 (4) SCC-570, 1994 (1) UPLBEC 312 (DB), 1997 (2) SCC-560, W.P. No. 111- (S/B) of 1993 decided on 16.9.96.

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

1. This writ petition under Article 226 of the Constitution of India by the petitioner, Raj Kishore Pathak, challenges the order passed by the Chancellor, Deen Dayal Upadhyaya Gorakhpur University, Gorakhpur (hereinafter referred to as the University) dated 9th August 1999 and the consequential order dated 13th August 1999 passed by the Vice Chancellor of the University. The Chancellor by its order impugned dated 9th August 1999 decided the representation filed by respondent no.3, Anirudh Prasad, under Section 68 of the U.P. State Universities Act 1973 (hereinafter referred to as the Universities Act). Respondent no.3, Anirudh Prasad, has challenged the appointment of the petitioner, Raj Kishore Pathak on the post of Reader in the Law Faculty of the University.

2. The case of respondent no.3 is that the post of Reader in Law Faculty and the appointment of the petitioner, Raj Kishore Pathak, is wholly illegal, inasmuch as the petitioner Raj Kishore Pathak did not possess the requisite qualification for appointment as Reader in Law Faculty. The Selection Committee in its meeting dated 10th October 1997 has interviewed the candidates including the petitioner, Raj Kishore Pathak, and found that except for the petitioner, Raj Kishore Pathak, everybody possesses the requisite educational qualification including respondent no.3. With regard to the petitioner Raj Kishore Pathak it is stated that he has obtained his Post Graduation Degree in Political Science and has also done his research work in Political Science whereupon he was awarded a Doctorate Degree by the University. The recommendation of the Selection Committee was accepted by the Executive Council by its resolution dated 11th October 1998. Respondent no.3 has alleged in his representation to the Chancellor that the respondent no.3 being a member of the Executive Council has recorded his dissent against the recommendation of the appointment of Sri Raj Kishor Pathak but the then Chairman of the Selection Committee, Professor R.K. Misra, was all out for recommending the name of the petitioner, Raj Kishore Pathak. Respondent no.3 has further submitted in his representation to the Chancellor that he has annexed a copy of the judgment of the Supreme Court in the case of ***Dr. Triloki Nath Singh vs. Dr. Bhagwan Bhagwan Din Misra, (1990) 4 SCC 510***, whereby the Apex Court has categorically observed that for the post of Reader the research should be in the subject concern, therefore, a degree in the subject of Political Science cannot be considered as a degree required for appointment as Reader in Law Faculty. The petitioner, Raj Kishore Pathak, has passed his graduation (B.Sc.) in III division and therefore does not possess requisite qualification for appointment as teacher within the phrase of "consistent good academic record'. Respondent no.3, therefore, prayed for setting aside the order of approval of the recommendation for appointment of Sri Raj Kishore Pathak, the petitioner.

3. On a notice being issued by the Chancellor, the petitioner submitted his reply denying all these allegations. The University has also submitted its comments before the Chancellor. The

University has taken stand before the Chancellor that respondent no.3 cannot be said to be an aggrieved person who can approach the Chancellor under Section 68 of the Universities Act. The University submitted that before the Selection Committee for the appointment to the post of Reader in Law the petitioner, Raj Kishore Pathak, who was already working in the Law Faculty as reader, along with four others, was present before the Selection Committee. The University has also denied the allegations of mala fides in favour of the petitioner, Raj Kishore Pathak. The University's stand before the Chancellor is further that in the curriculum of Law, Constitutional Law is one of the subjects and, therefore, the research work done by the petitioner, which is one of the topics of Constitutional Law, can be said to be a research work done by the petitioner in law department and in Political Science department. The petitioner, Raj Kishor Pathak, apart from having passed B.Sc, has passed B.A. also in which he has secured more than 54% marks, therefore, the stand taken by respondent no.3 that he does not possess the consistant good academic record is incorrect.

4. The Chancellor on the pleadings of the parties before him has observed that the main question for decision between the parties is as to whether the petitioner, Raj Kishore Pathak, having been appointed on the post of Lecturer in the University in the Law Faculty is eligible to be promoted or appointed as Reader or not and whether the petitioner, Raj Kishore Pathak, possesses requisite qualification of Doctorate in the subject of Law or not. The Chancellor has found that according to statutes of the University, apart from having consistent good academic record, the candidate must possess Doctorate degree or the published work of the candidate must be of a high standard and the candidate should have possessed the experience of teaching. In addition to the above the further requirement was that he must have worked as teacher for five years and out of that must have Lecturer for at least three years and have guided students for research. The Chancellor has found that the main controversy is as to whether the petitioner, Raj Kishore Pathak, possesses the Doctorate degree in Political Science or in the subject of Law. After considering the case set up by the petitioner, Raj Kishore Pathak, the Chancellor has arrived at a conclusion that no doubt the Constitution is one of the subjects in the Political Science but in the context of research conducted by the petitioner in the Political Science department cannot be said to be the research work done by the petitioner in the Constitutional Law. The Chancellor has recorded a finding that it is so because the study of Constitution in the context of Political Science is different than in the context of Law. The Chancellor, therefore, found that the research work done by the petitioner, Raj Kishore Pathak, cannot be said to be research work in connection with Law Faculty or in the subject of Law and, therefore, the Chancellor has held that since the petitioner, Raj Kishor Pathak, did not possess requisite qualification for appointment to the post of Reader, therefore, the appointment of the petitioner as Reader is cancelled. The petitioner has challenged this order by means of the present writ petition and the order dated 13th August 1999 which is consequential order communicated by the Registrar of the University.

5. We have heard learned counsel for the parties.

6. The brief facts as emerge out of pleadings are that the petitioner, Raj Kishore Pathak, before joining the post of Reader in the University on 11.10.1998 was working as Reader in Sant Vinoba Post Graduate College, Deoria which is a college affiliated to the University. The petitioner was appointed in the said college in Deoria in 1983 as Lecturer and in the year 1996 he had been awarded Ph.D Degree while working in the University as Lecturer in the Post Graduate College at Deoria for his thesis on "Semantics of the State under Article 12 of the Indian Constitution (A problem in constitutional Hermeneutics". This thesis according to the petitioner is based on Article 12 of the Constitution of India which is a very important constitutional provision, hence covered by the qualification required for appointment as Reader by Statute 11.02 of the First Statute of the University and the view taken by the chancellor to the contrary is arbitrary and illegal.

7. The petitioner has categorically pleaded that the mere fact that the Ph.D was awarded by the Department of Political Science of the University will not affect in any way the eligibility of petitioner for the post of Reader. The petitioner has attacked the maintainability of the reference filed by the respondent no.3 under Section 68 of the Universities Act. That the representation challenging the appointment of the petitioner to the post of Reader that the petitioner's appointment was not in accordance with the statute cannot be entertained by the Chancellor inasmuch as respondent no.3 cannot be said to be a person aggrieved within the meaning of Section 68 of the Universities Act.

8. The order passed by the Chancellor dealt with this objection of the petitioner in the impugned order and has held that the proviso of Section 68 of the Act confers power on the Chancellor to act suo motto and this power is being exercised while passing the impugned order by the Chancellor suo motto. The petitioner's contention further is that the petitioner has already worked as Reader in Law in Deoria on the pay scale meant for the Reader of the University; therefore, the impugned order has ruined his career. The contention of the petitioner is that the University is supporting the petitioner. The Selection Committee has found that the research work of the petitioner, namely, "Semantics of the State under Article 12 of the Indian Constitution (A problem in constitutional Hermeneutics" has been treated to be research work in the Faculty of Law and, therefore, the order passed by the Chancellor deserves to be quashed.

9. As against this contention of the petitioner, the State counsel representing the Chancellor and also the learned counsel for respondent no.3 has relied upon a decision of the Apex Court in the case of ***Dr. Triloki Nath Singh Vs. Dr. Bhagwan Das Misra reported in (1990) 4 SCC 510 (Paras 10 and 13)*** and the case of ***Dr. M. Ismail Faruqi Vs. State of U.P. and others 1994 (1) UPLBEC 312 (D.B.), Committee of Management Vasant College Vs Tribhuvan Nath Tripathi, (1997) 2 SCC 560 (Para 20)*** and other cases. In reply to the objection raised by the petitioner, regarding the representation filed by respondent no.3, learned counsel for the respondent has

relied upon a decision of a Division Bench of this Court in the case of ***Dr. R.R.K. Shukla Vs. Chancellor, University of Lucknow and others (Writ Petition No.1110 (SB) of 1993) and the case of Dr. Banvir Singh Vs. Chancellor of Lucknow University (Writ Petition No.132 (SB) of 1993, both decided on 16th September 1996***, wherein a similar objection has been dealt with by a Division Bench of this Court.

10. In view of what has been stated above and law laid down, referred to above, we find that the view taken by the Chancellor does not suffer from any illegality or infirmity which may warrant interference by this Court under Article 226 of the Constitution of India. This petition is, therefore, devoid of merits and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2007

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

Civil Misc. Writ Petition No. 56693 of 2007

Umesh Chandra Jaiswal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri D.K. Mishra
Sri R.K. Singh

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226-Rejection-Service law rejection of candidature-being overage-on 1.1.06 the cut off date-petitioner completed 40 years on 30.6.06 being O.B.C. candidate overage by one day-even if allowed to participate in preliminary test-can not be treated estoppal-held-rejection-proper.

Held: Para 10

As per the specific condition contained in the advertisement itself, the petitioner was overage and, therefore, could not have been allowed to appear in the recruitment for the post of Assistant Prosecution Officer. The mere fact that the respondents no. 2 and 3 permitted the petitioner to appear in the preliminary test would not operate as estoppal against the respondents from rejecting his candidature on the ground that he was overage since it is a condition with respect to eligibility and if some error has crept in, on account whereof the authorities permitted candidate to participate at some stage of selection, that would not operate as waiver or estoppal against the authorities for permitting the candidate to appear in selection despite the fact that he is not eligible. In the present case, the petitioner having been born on 01.07.1966 was clearly overage on 01.07.2006 and, therefore, in our view, his candidature has rightly been cancelled by the U.P. Public Service Commission and we do not find any fault or reason to interfere in the said decision of the Commission.

Case law discussed:
L.R. (1918) I Ch.-263, L.R. (1930) 1 K.B.-741, AIR 1967 Mysore 1359, AIR 1986 SC-1948 Spl. Appeal No (221)/2004 decided on 8.9.06.

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

1. In the instant petition the sole petitioner has come up for quashing of the order of Public Service Commission, Allahabad dated 05.11.2007 intimating that his form and fee for appearing in the test for appointment to the post of

Assistant Prosecution Officer is rejected on the ground that he was overage.

2. Learned counsel for the petitioner vehemently contended that since he was born on 01.07.1966, he would complete 40 years of age on 01.07.2006, therefore, was not overage, and, rejection of his application form is wrong.

3. We do not find any force in the submission for the reason that under the Rules the maximum age for appointment in the State Government Services is 35 years for general category candidates. The cut-off date is 01.07.2006. Relaxation by 5 years is admissible to the candidates belonging to reserve category i.e. S.C., S.T. and O.B.C. Since the petitioner belongs to O.B.C. category, therefore, even if benefit of 5 years is given to him he was overage by one day on 01.07.2006. A person complete the year on the day proceeding his date of birth. In the present case, the date of birth of the petitioner being 01.07.1966, he completed 35+5 years i.e. 40 years of age on 30.06.2006. The submission that he would complete 40 years of age on 01.07.2006 is incorrect and based on misconception.

4. In **Halsbury's Laws of England, 3rd Edition, Vol. 37, para 178 at page 100** the law on the subject has been stated as under:-

"In computing a period of time, at any rate when counted in years or months no regard is, as a general rule, paid to fractions of a day, in the sense that the period is recorded as complete although it is short to the extent of a fraction of a day---------- similar, in calculating a person's age the day of his birth counts as a whole day, and he attains a specified age on the day next before the anniversary of his birthday."

5. The issue was considered in an English decision. In **Re Shurey Savory Vs. Shurey [LR(1918) 1 Ch. 263]** where the question came up for consideration was: does a person attain a specified age in law on the anniversary of his or her birthday or on the day preceding that anniversary. It was held that law does not take cognizance of part of a day and the consequence is that person attains required age on the day preceding the anniversary of his birthday. The same view is taken in another English case in **Rex Vs. Scoffin [LR (1930) 1 KB 741].**

6. Probably the legislature recognizing the aforesaid principle expressly provided in section 4 of the Indian Majority Act, 1875 criteria for computation of age of majority. Section 4 of the Act of 1875 reads as under:-

4. Age of majority how compute:-*In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of Section 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of Section 3, at the beginning of eighteenth anniversary of that day.*

7. A Division Bench of Hon'ble Mysore High Court in **AIR 1967 Mysore 135 G. Vatsala Rani Vs. Selection Committee** following the aforesaid judgments, has also taken same view and has observed as under:-

"But in the absence of any such express provision, we think, it is well settled that any specified age in law has to be computed as having been attained or completed on the day preceding the anniversary of the birth day, that is, the day preceding the day of calendar corresponding to the day of birth of the person."

8. The apex Court has also approved the aforesaid principle and in **Prabhu Dayal Sesma Vs. State of Rajasthan and another AIR 1986 SC 1948** has held as under:-

"In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding the anniversary of his birthday."

9. This view has been reiterated by this Bench also in **Special Appeal No. (221) of 2004 (Achhaibar Maurya Vs. State of U.P. and others)** decided on 08.09.2006 wherein following the aforesaid exposition of law it was held as under:-

"The appellant having born on 1st July, the day of his birth is to be counted as a whole day and that being so, he completed one year of age on 30th June in the next year. Thus he attained 60 years of age on 30th June, 2003. That being so, he is not entitled for the benefit of extended employment up to 30th June inasmuch as rule 29 as amended in 1987 clearly exclude such teachers who attain age of superannuation on 30th June."

Moreover, in the case in hand, the advertisement itself provides as under:-

"7. Age- *The candidates must be of 21 years of age and not more than 35 years of age on 1st July, 2006 i.e. they must have born after 02.07.1971 and not later than 01.07.1985."*

10. As per the specific condition contained in the advertisement itself, the petitioner was overage and, therefore, could not have been allowed to appear in the recruitment for the post of Assistant Prosecution Officer. The mere fact that the respondents no. 2 and 3 permitted the petitioner to appear in the preliminary test would not operate as estoppal against the respondents from rejecting his candidature on the ground that he was overage since it is a condition with respect to eligibility and if some error has crept in, on account whereof the authorities permitted candidate to participate at some stage of selection, that would not operate as waiver or estoppal against the authorities for permitting the candidate to appear in selection despite the fact that he is not eligible. In the present case, the petitioner having been born on 01.07.1966 was clearly overage on 01.07.2006 and, therefore, in our view, his candidature has rightly been cancelled by the U.P. Public Service Commission and we do not find any fault or reason to interfere in the said decision of the Commission.

11. The writ petition, therefore, lacks merit and is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2007

BEFORE
THE HON'BLE H.L. GOKHALE, C.J.
THE HON'BLE PANKAJ MITHAL, J.

Special Appeal No.1595 of 2007

Awadh Naresh Sharma ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellants:
Sri Ashok Khare, Senior Advocate
Sri P.N. Ojha.

Counsel for the Respondents:
Sri Girish Chandra Upadhyay
Sri R.P. Dubey
Sri P.K. Ganguly

Allahabad High Court Rules 1952, Chapter VI, Rule-7-part heard cases-direction of Single Judge to list the case before him as part heard-even after change of Roster-at pre-admission stage-held-in violation of Rule-can not sustained-after change of roster all direction/orders without jurisdiction.

Held: Para 20

In the circumstances, we accept the contentions of the appellant that the orders passed by the learned Single Judge after change of roster were without jurisdiction and are liable to be treated as null and void.

Case law discussed:
2006 (8) SCC-294
1998 (1) SCC-I
1996 AWC 644 (FB)

(Delivered by Hon'ble H.L. Gokhale, C.J.)

1. Heard Sri Ashok Khare, Senior Advocate appearing with Sri P.N. Ojha for appellant., Sri G.C. Upadhyay, Standing Counsel for the State appearing for respondents no.1, 3 and 4, Sri R.P. Dubey appearing for respondent no.2 and Sri P.K. Ganguli appearing for respondent no.6.

2. Mr. Ashok Khare seeks to delete respondent no.5, Committee of Management, Rani Murar Kumari Balika Inter College, Bhojubir, Varansi as no relief is sought against it. He is permitted to do so during the course of the day.

3. The appellant herein is the Joint Director of Education (Basic). He was earlier working as the Secretary of respondent no.2, U.P. Secondary Education Service Selection Board, Allahabad.

4. Respondent no.6 herein had applied for the post of Assistant Teacher in L.T. Grade in pursuance of an advertisement no.1 of 2001 of U.P. Secondary Education Service Selection Board. She was amongst the successful candidates and her name was recommended for appointment at an intermediate college at Lucknow after a selection examination. On approaching that college she was informed that there was no vacancy. She was, therefore, asked by the Board to approach another intermediate college at Varanasi. She was not absorbed there also. She then filed Civil Misc. Writ Petition No.40684 of 2006. The prayer in this petition was to direct the Board to consider the claim of the petitioner for allocation of another institution for the post of L.T. Grade Teacher (Social Science).

5. The prayer in the petition was thus very clear and it was directed against the second respondent, Board. The

Authorities of the State and the intermediate college of Varanasi were also joined as respondents in that petition.

6. When the petition reached before the learned single Judge, he had the jurisdiction to look in the matter as per the roster as it stood at that point of time. The grievance of the appellant is that the learned single Judge has gone outside the frame of that petition. He has passed various orders and seven of these are affecting the appellant. As a result of these orders passed by the learned single Judge the appellant was suspended at one point of time. He has challenged that suspension by filing an independent petition and suspension has been stayed. A C.B.I. inquiry has also been directed by the Court in general against which the Board filed an appeal and that order has been stayed by another Division Bench and now a disciplinary proceeding is going on against the appellant. The impugned orders are:

(i) 28th August, 2006;
(ii) 14th September, 2006;
(iii) 19th July, 2007;
(iv) 26th July, 2007;
(v) 2nd August, 2007;
(vi) 17th September, 2007 and
(vii) 12th October, 2007.

7. This appeal was admitted on 19.11.2007. The appellant was not a party to the original petition and, therefore, he had applied for leave to appeal, as he was the affected person. The leave was granted and the appeal was adjourned to today's date. With the consent of the counsel for all the parties, the appeal is taken up for hearing and is being disposed of finally.

8. The principal grounds raised in this appeal are two. One, the court is required to restrict itself to the frame of the petition, i.e to the pleadings and the prayer. This is ground (b) of the memo of appeal. Ground (e) of the appeal is that the learned single Judge took up the matter when he was having the particular jurisdiction but subsequent thereto there has been change of jurisdiction of learned single Judge on account of rotation but despite that this petition continues to be treated as part heard/tied up. Another ground (g) is that this petition has erroneously been treated as part heard. Ground (h) is that various direction have been issued by the learned single Judge which could have only been issued at the stage of final disposal.

9. If we peruse the orders that have been passed, we find the first order is dated 7th August, 2006 asking the District Inspector of Schools to file his affidavit as to why the petitioner was not offered appointment at the institution for which she was selected. The order passed thereafter is dated 28th August, 2006, which is the first impugned order in this appeal. It questions the directions of absorption which have not been implemented. The second impugned order is dated 14th September, 2006, which refers to 180 orders, which have not been implemented and the Chief Standing Counsel was directed to take appropriate action against all responsible for the deliberate non-compliance of the directions issued. The third impugned order dated 19th July, 2007 records that an enquiry was conducted by the Secretary, Education Department of the State and the Additional Advocate General had to inform as to why the regular Secretary was not appointed in the

Secondary Education Department. The fourth impugned order challenged in this appeal is dated 26th July, 2007. This order directs impleadment of a private firm and its proprietor, one Mr. Ravi Prakash having his office at Noida as respondent no.6. This firm is supposed to have conducted the evaluation at the selection examination. The respondent no.6 was directed to file affidavit disclosing all the documents including the letter authorizing him to evaluate the answer sheet and the amount of payment actually received by him etc. The fifth order under challenge is dated 2nd August, 2007, which alleges that the Government is not holding the enquiry purposely and is not passing proper orders, so that the persons charge-sheeted may get benefit. The next impugned order dated 17th September, 2007, amongst others, records that the Board had made payment of Rs.5,38,600/- to the respondent no.6 for the evaluation of the answer sheets and that too without deducting the income tax at source. The Secretary was directed to examine whether such payment, without deducting the income tax at source, is legally justified or not. Last order is dated 12th October, 2007 which defers the matter to 16th November, 2007. This appeal was filed at that stage to challenge these orders.

10. Having seen the orders it is very clear that these orders have been passed going beyond the frame of the petition. Mr. Ganguli appearing for original petitioner, who is respondent no.6 does not dispute that these orders have gone beyond the prayer in the petition and states that the prayer in the petition has remained unattended. The respondent no.6 wanted a job. She had applied for the post of Assistant Teacher in L.T. Grade in pursuance of an advertisement of U.P. Secondary Education Service Selection Board. She was amongst the successful candidates and her name was recommended for appointment at an intermediate college at Lucknow after a selection examination. The Board is expected to have verified the vacancy before it was advertised. It was the duty of the Board to see that the respondent no.6 is appointed in that particular institution. If the Board had directed the respondent no.6 to approach another institution at Varanasi, then it should have been ensured that she joins there. Respondent no.6 has nothing against various other officers of the Board or the appellant, who is Joint Director of Education (Basic).

11. Thus, from the orders passed by the learned Single Judge it is clear that when the respondent no.6 wanted a job the learned Single Judge had gone into the question as to how the 180 appointment orders which were passed, have not been implemented and directed an enquiry to be made. He has further gone into the question as to how the examination for selection was made, how much payment was made to the organisation which conducted the evaluation and whether the tax was deducted at source. None of these questions were raised in the petition. The learned Single Judge had no occasion to go into all these questions. All these orders are clearly beyond the frame of the petition and not sought by the petitioner whose prayer has remained unattended in the meanwhile. The learned Single Judge was not taking any public interest litigation. He was looking into a specific petition of an individual petitioner that despite selection she was not given the job. Due to this approach, the matter

which was filed in July, 2006 continued with the learned Single Judge beyond October, 2007. There is much merit in the argument of Mr. Khare that the petitioner had come with a limited prayer when the appellant and other officers are being framed by the learned Judge by throwing a wider net.

12. The second ground is that the petition has erroneously been treated to be part heard for which there exists no justification. We have looked into the orders passed by the learned Single Judge. All throughout the learned Single Judge passed orders that the matter may be put up or listed on a subsequent date for further orders. Even if he was to treat the matter as part heard, it is not permissible under the Rules of the Court. The relevant rules from the Allahabad High Court Rules, 1952 are Rule 14 of Chapter V on tied up cases and Rule 7 of Chapter VI on part-heard cases, which read as follows:

"14. Tied up cases.- (1) A case partly heard by a Bench shall ordinarily be laid before the same Bench for disposal. A case in which a Bench has merely directed notice to issue to the opposite party or passed an ex parte order shall not be deemed to be a case partly heard by such Bench.

(2) When a criminal revision has been admitted on the question of severity of sentence only, it shall ordinarily be heard by the Bench admitting it."

"7. Part-heard cases.- A case which remains part-heard at the end of the day shall, unless otherwise ordered by the Judge or Judges concerned, be taken up first after miscellaneous cases, if any, in the Cause List for the day on which such Judge or Judges next sit. Every part-heard case entered in the list may, unless the Bench orders otherwise, be proceeded with whether any Advocate appearing in the case is present or not."

13. As far as the question with respect to pre-admission matters being part heard or tied up matters is concerned, the question is no longer res-integra and is answered in *Sanjay Kumar Srivastava Vs. Acting Chief Justice and others,* 1996 A.W.C. 644. In that matter a writ petition was pending in this Court for admission. The matter was adjourned for about seven dates and an interim order was passed. On the application to vacate the interim order the prayer was rejected by the Division Bench. On application being moved by the State Government the then Acting Chief Justice withdrew the matter and referred it to the Full Bench. This order of the Acting Chief Justice was challenged by filing another writ petition. It was stated that the writ petition was part heard before the earlier Bench and it was not permissible to the Acting Chief Justice to withdraw the same and refer to Full Bench. The Full Bench in para 36 has laid down law (Per Sagir Ahmed, J., as His Lordship then was in this Court) on above referred rule 14 as follows:

"36. The other part of sub-rule (1) lays down in clear terms that the case in which the Bench has merely issued notice to the opposite party or had passed an ex parte order shall not be deemed to be a case partly-heard by that Bench. This provision has been made to specify that a case does not become part-heard merely by passing of interim order. It also lays down that if notices are directed to be issued to the opposite party, the case does not become part-heard case of that Bench. The consequences are obvious. If the

Division Bench which has merely passed an ex parte order or directed notice to be issued to the opposite party locate it as a part heard case or passes an order that it will come up before that Bench for "further hearing" or as a part-heard" or as a "tied-up" case, the order would be in violation of the Rules of Court and, therefore, a nullity. Such an order would be without jurisdiction and would not confer any jurisdiction on the Bench concerned to proceed with that case unless the case is listed before them again under the orders of the Chief Justice. In a situation where any order has been passed indicating such a case on the order-sheet or on the main writ petition to be part heard or tied up case, the Chief Justice inspite of that order would retain his jurisdiction to list it before the appropriate Bench for hearing as the order limiting the case to be a part-heard or tied up would be in violation of the Rules of Court and would not bind the hands of the Chief Justice from listing that case as a "seen" case before any other Bench rather than as a "tied up" case before that very Bench." (Underling supplied)

14. Thus, the Full Bench of this Court has clearly laid down that if a Bench has issued only notice to the opposite party and passed an order that the matter will come up before that Bench for further hearing or as a part-heard or as a tied-up case, the order would be in violation of the Rules of Court and, therefore, a nullity. Such an order would be without jurisdiction and would not confer any jurisdiction on the Bench concerned to proceed with that case, unless the case is listed before that Bench under the orders of the Chief Justice.

15. In paragraphs 34 and 35 the Full Bench went into the question about the matters which are being heard finally and are part-heard. After referring Rule 14 of Chapter V of the Rules of the Court the Full Bench held in paragraph 34 that the provision of sub-rule (1) would indicate that even a case which is partly heard by a Division Bench is not necessarily to be laid before that Bench. The use of word "ordinarily" itself indicates that there can be a departure from the normal practice of listing a part-heard case before the same Bench.

16. Identical rules of Rajasthan High Court came up for consideration before the Apex Court in *State of Rajasthan Vs. Prakash Chand* reported in (1998) 1 SCC 1. A Bench of three Judges of the Apex Court (Per Dr. Anand, J. prior to His Lordship becoming, C.J.I.) affirming the judgment of the Full Bench in paragraph 23, specifically held that "the above opinion appeals to us and we agree with it." Paragraph 23 reads as follows:

"23. The above opinion appeals to us and we agree with it. Therefore, from a review of the statutory provisions and the case on the subject as rightly decided by various High Courts, to which reference has been made by us, it follows that no Judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from it can be permitted. If every Judge of a High Court starts picking and choosing cases for disposal by him, the discipline in the High Court would be the casualty and the administration of

justice would suffer. No legal system can permit machinery of the Court to collapse. The Chief Justice has the authority and the jurisdiction to refer even a part-heard case to a Division Bench for its disposal in accordance with law where the Rules so demand. It is complete fallacy to assume that a part-heard case can under no circumstances be withdrawn from the Bench and referred to a larger Bench, even where the Rules make it essential for such a case to be heard by a larger Bench."

17. In this paragraph the Apex Court has clearly held that no Judge or Bench can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from it can be permitted.

18. Recently, in another judgment the Apex Court has held in para 19 of ***Jasbir Singh Vs. State of Punjab*** reported in (2006) 8 SCC 294 that it is not within the competence of any Single or Division Bench of the High Court to give any direction to the Registry in that behalf which will run contrary to the directions of the Chief Justice. The judgment (Per Balakrishnan, J. prior to His Lordship becoming C.J.I.) specifically referred to the earlier judgment in ***State of Rajasthatn Vs. Prakash Chandra (Supra)*** and reiterated the legal position.

19. The law laid down in these judgments clearly establishes that the learned Single Judge could not have directed the Registry to continue the matter to be placed before him as the roster had been changed. Even if he was to say that the matter was part heard, in view of the law laid down by the Full Bench which is affirmed by the Apex Court: such a direction or order would be in violation of the Rules of Court and, therefore, nullity. Any case at pre admission stage cannot be treated as part heard or tied up and such a direction contrary to the roster is not within the competence of the any Single or Division Bench of the High Court as has also been held in the case of ***Jasbir Singh*** (supra).

20. In the circumstances, we accept the contentions of the appellant that the orders passed by the learned Single Judge after change of roster were without jurisdiction and are liable to be treated as null and void.

21. Accordingly, we allow this appeal and set aside the orders dated 28th August 2006, 14th September 2006, 19th July 2007, 26th July 2007, 2nd August 2007, 17th September 2007 and 12th October, 2007 passed by the learned Single Judge.

22. The relief sought by respondent no.6, the original petitioner remained unattended all this time. The writ petition will now be sent to the learned Single Judge, who is taking the work of educational service matters as per the present roster. The respondent no.2 must file affidavit stating as to what was the material before it on the basis of which the vacancy was noted at Lucknow and if there was a vacancy then why she could not be absorbed at Lucknow. The Board will also place the material which was before it to arrive at the conclusion that there was a vacancy at Lucknow or later at, Varanasi and what action they are

proposing to take against these institutions. All these institutions are receiving grant-in-aid from the Government and are duty bound to follow the orders of the Government. It is within the jurisdiction of the State Government to take necessary action against these institutions. The State Government must also state on the affidavit as to what action will be taken against these institutions if the directions given by the U.P. Secondary Education Service Selection Board are not honoured by these institutions. They will see to it that the petitioner is absorbed. It is for this purpose that the matter will be listed before the learned Single Judge. The matter will be listed on 17th December, 2007. By that date these affidavits must be filed.

23. The appeal is allowed in aforesaid terms. There will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2007

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 28429 of 2006

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

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

Counsel for the Respondents:
S.C.
Sri C.B. Yadav

U.P. Police Officers of Subordinate Ranks (Punishment & Appeal) Rules 1991-Rule-8-Dismissal from service without enquiry without-recording any reason for satisfaction-why enquiry not possible-merely this fact-the misconduct if incourased in discipline in force-held-contrary to requirement of Rules 8 (2)(b)-disciplinary authority not expected to dispense with enquiry lightly or arbitrarily.

Held: Para 12,13 & 15

After noticing this fact, the Superintendent of Police held that he is satisfied that it is not possible to hold an enquiry against the petitioner. It was also observed in the order that in case petitioner remain in post, it will give a bad lesson to others.

No reason in the order has been recorded as why it is not reasonably practicable to hold disciplinary enquiry against the petitioner as observed in Tulsi Ram Patel's case that disciplinary authority is not expected to dispense with a disciplinary enquiry lightly or arbitrarily.

In view of the aforesaid fact, it is clear that the power which has been exercised by the Superintendent of Police under Rule 8(2)(b) contrary to the requirement as laid down in Rule 8(2)(b).

Case law discussed:
2005 (2) ESC Alld-1229
1985 (2) SLR-576
1991 (1) SCC-362

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

1. By means of the present writ petition the petitioner has approached this court for a writ of certiorari quashing the order dated 8.5.2006 (Annexure 1 to the writ petition) passed by respondent No.2. Further a writ in the nature of mandamus commanding the respondents from

interfering with the peaceful functioning of the petitioner as Constable.

2. The petitioner was selected in the year 1998 on the post of Constable. After completion of training he was posted at different places. When the petitioner was posted at Kotwali, Farrukhabad, an incident took place on 30.4.1996 in which cross F.I.R.'s were lodged by the Superintendent of Police and Inspector Kotwali. It was stated in the F.I.R. that an incident has taken place on 2nd May, 2006, when the Superintendent of Police was sitting in his office and one Sri Nar Singh Pal Singh, Inspector, Kotwali along with Anand Kumar Singh and Rajesh Singh, Sub-Inspector Kotwali, Farrukhabad along with two constables, entered into the office and attacked the Superintendent of Police. It was also stated in the F.I.R. lodged by the Superintendent of Police that he was threatened by the police officials. Another F.I.R. was also lodged by Nar Singh Pal Singh, Inspector Kotwali which states that no such incident has taken place. On the basis of the aforesaid F.I.R. it appears that the Superintendent of Police had passed an order dispensing the services of the petitioner by invoking Rule 8(2)(b) of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rule, 1991 (here-in-after referred to as the Rules of 1991). Rule 8 is being reproduced below:-

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

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

Provided that this rule shall not apply-

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

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

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

3. Petitioner aggrieved by the aforesaid order of dismissal has approached this Court. It has been submitted by the learned counsel for the petitioner that Rule 8(2) (b) clearly indicates that no police officer shall be dismissed, removed or reduced in rank except after proper enquiry and disciplinary proceedings, as contemplated by the Rules, provided that this rule will not apply where an order of dismissal or removal was passed on the ground of conduct, which has led to conviction on a criminal charge or where the authority empowered to pass an order is satisfied that for some reasons, to be recorded in writing, it is not reasonably practicable to hold such enquiry or where the State Government is satisfied that in the interest of security of the State, it is not expedient to hold such an enquiry. The bare perusal of the order dated 8.5.2006 would clearly indicate that the conditions mentioned in the aforesaid rule has not at all been

complied with. The impugned order further indicate that some preliminary enquiry was conducted by the Superintendent of Police, Kannauj and on the basis of some information received from eye witnesses, he has submitted a report that Superintendent of Police Sri Rahul Asthana was assaulted by some police officials.

4. While passing the order impugned, the competent authority has not recorded a finding to this effect that it is not practicable to hold the regular enquiry. The condition precedent of Rule 8(2)(b) is over stayed rule can be invoked only when the authority who is empowered to pass the order is satisfied that holding of enquiry is not practicable. Once a finding has been recorded in the impugned order that there was some eye witness and on the basis of the information received, it was found that the Superintendent of Police was assaulted, then there is no justification for not conducting the enquiry while dispensing with the services of the petitioner. The rule clearly indicates that no police officer should be dismissed or removed from service by an authority except after proper enquiry and disciplinary proceedings, as contemplated under the Rule. The only exception in Rule 8(2)(b) provides that while passing the impugned order a satisfaction to that effect has to be recorded. As the disciplinary authority has not recorded satisfaction in respect of employment and the practicability of holding an enquiry, as such, the order is liable to be quashed. The respondents have erred in dismissing the services of the petitioner without holding any enquiry and without affording him an opportunity of hearing. But the preliminary enquiry alleged to have been done was behind the back of the petitioner. In view of the aforesaid fact, the learned counsel for the petitioner submits that order is liable to be quashed.

5. The learned counsel for the petitioner has placed reliance upon a judgement reported in 2005(2) ESC, Allahabad, 1229 ***Ravindra Raghav Vs. State of U.P. and others*** and reliance has been placed upon paras 8 and 9 of the said judgement. The same are being quoted below:-

"8. *In the present case, the order of Superintendent of Police, dismissing the petitioner from service, after invoking the powers under Rule 8(2) (b) of the Rules, has been given any reason as to why it is not reasonably practicable to hold an enquiry. The order notes the incident, dated 19th October, 2000, in which allegation against the petitioner was made that he along with other Constables had realised Rs.50/- each from drivers of Combine Machines and when Incharge Kotwali reached on the spot, then he misbehaved with Incharge in presence of public. Observation has been made in paragraph 3 of the order that by the misconduct of the petitioner, the faith of public is losing in police and by the above act of petitioner, there is strong possibility of encouragement of indiscipline in the force. After noticing the above facts, the Superintendent of Police held that he is satisfied that it is not reasonably practicable to hold enquiry against the petitioner. It was further observed that in case petitioner remain in the force, he may repeat the incident in future, and taking advantage of he being in police, he may make efforts to save himself from his deeds and in-continuing the petitioner in Department, there will be*

possibility of increase of indiscipline in the employees. No reason in the order has been recorded as to why it is not reasonably practicable to hold disciplinary enquiry against the petitioner. It has been observed by the Apex Court in Union of India v. Tulsiram Patel, (1985) ***3 SCC 398*** *that disciplinary authority is not expected to dispense with a disciplinary enquiry lightly, or arbitrarily. In the counter affidavit, which has been filed by the respondents also, there is no reason given for not holding disciplinary enquiry against the petitioner. No facts have been mentioned in the order, or referred to, on the basis of which satisfaction has been recorded for dispensing/holding of disciplinary enquiry against the petitioner. The observation that in the event petitioner is allowed to remain in the Department, there is possibility of increase of indiscipline in the Department, cannot be held to be germane for dispensing/holding of disciplinary enquiry. The appellate authority, while dismissing the appeal has observed that there was possibility of petitioner threatening the complainant and witnesses, was an observation, which does not find place in the order of Superintendent of Police, who invoked the power under Rule 8 (2) (b) of the Rules. Neither any reasons have been recorded in the order of Superintendent of Police for dispensing/holding of disciplinary enquiry, nor other observations made in the order to the effect that continuance of the petitioner in the police force, would have encouraged indiscipline in the Department were relevant for dispensing /holding of disciplinary enquiry. The key words in Rule 8(2) (b) are "not reasonably practicable". The Rules contemplate exercise of power under Rule 8(2) (b) for dispensing/holding of disciplinary enquiry, when it is not reasonably practicable to hold such enquiry. The reasons, thus, which can satisfy the requirement of Rule 8(2) (b) has to be referable to "not reasonably practicable", to hold an enquiry. No reasons have been given in the order, which can be said to fulfil the requirement of not reasonably practicable to hold enquiry. The statutory requirement of exercising the power is absent in the present case. As observed above, no reasons have also been given in the counter affidavit, bringing on the record the reasons on the basis of which such satisfaction was recorded by Superintendent of Police, the Court is at last to find out the basis for invoking the power under Rule 8(2) (b) of the Rules.*

9. *In above view of the facts, it is clear that power has been exercised by Superintendent of Police, under Rule 8 (2)(b) contrary to the requirement as laid down in Rule 8(2)(b). The order of Superintendent of Police, cannot be sustained. The appellate order, which confirms the said order, also cannot survive, and both the orders are consequently quashed. It is, however, open to the respondents to hold disciplinary enquiry against the petitioner, in accordance with law."*

6. As the counter and rejoinder affidavits have already been exchanged, therefore, with the consent of the parties the present writ petition is being disposed of finally.

7. In paragraph 4 of the counter affidavit, it has been submitted by the learned Chief Standing Counsel that petitioner in the year 2002, was punished for seven days, in the year 2003, for 14

days again in the year 2005 for seven days. On 2.5.2006, when the Superintendent of Police Farrukhabad was holding a meeting in his camp office, one Station House Officer Police station Kotwali along with three others entered in the office, abused by filthy languages and started beating to the Superintendent of Police, who sustained serious injuries on his stomach, chest, ears and eyes. This incident occurred on account of collusion with four police officers against the Superintendent of Police in order to create terror in Police Department. An F.I.R. was lodged and the case was registered as Case Crime No.611/2006 under Sections 147, 148, 149, 452, 307, 323, 504 and 506 I.P.C. read with Section 7 of the Criminal Act. The Station House Officer Kotwali has also lodged F.I.R. only to safe his skin and only by way of peshbandi and for the purposes of create a defence. The Superintendent of Police, Kannauj was requested to hold an enquiry of the incident which took place in the office of the Superintendent of Police, Farrukhabad. The enquiry officer after affording full and ample opportunity of hearing to all concerned who were involved in the incident holding full fledged enquiry as required under the provisions of U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 and after that the authority concerned has exercised the powers conferred under Rule 8(2)(b) of the Rules. The said action has been taken only for the purposes of maintaining the balance in the administration. It was necessary in the interest of administration, discipline in police force and also to maintain balance in administration, the power has rightly been exercised by the concerned authority. The rule clearly provides that if the authority concerned is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry in that contingency the order of dismissal may be passed, even without holding enquiry as required under the Rules.

8. The learned Chief Standing Counsel has submitted that this proviso has been dealt with by the Apex Court in a case of **Union of India and another Vs. Tulsi Ram Patel** reported in A.I.R. 1985 (2) S.L.R, 576. Reliance has been placed upon paras 61, 62, and 64 of the said judgement. The same are being reproduced below:-

"61. *The language of the second proviso is plain and unambiguous. The keywords in the second proviso are, "this clause shall not apply". By "this clause" is meant clasue (2). As clause (2) requires an inquiry to be held against a government servant, the only meaning attributable to these words is that this inquiry shall not be held. There is no scope for any ambiguity in these words and there is no reason to give them any meaning different from the plain and ordinary meaning which they bear. The resultant effect of these words is that when a situation envisaged in any of the three clauses of the proviso arises and that clause becomes applicable, the safeguard provided to a government servant by clause by clause (2) is taken away. As pointed out earlier, this provision is as much in public interest and for public good and a matter of public policy as the pleasure doctrine and the safeguards with respect to security of tenure contained in clauses (1) and (2) of Article 311.*

62. *Before, however, any clause of the second proviso can come into play the condition laid down in it must be satisfied. The condition for the application of each of these clauses is different. In the case of clause (a) a government servant must be guilty of conduct deserving the penalty of dismissal, removal or reduction in rank which conduct has led to him being convicted on a criminal charge. In the case of clause (b) the disciplinary authority must be satisfied that it is not reasonably practicable to hold an inquiry. In the case of the clause (c) the President or the Governor of State, as the case may be, must be satisfied that in the interest of the security of the State, it is not expedient to hold an inquiry. When these conditions can be said to be fulfilled will be discussed later while dealing separately with each of the three clauses. The paramount thing, however, to bear in mind is that the second proviso will apply only where the conduct of a government servant such as he deserves the punishment of dismissal, removal or reduction in rank. If the conduct is such as to deserve a punishment different from those mentioned above, the second proviso cannot come into play at all, because Article 311(2) is itself confined only to these three penalties. Therefore, before denying government servant his constitutional right to inquiry, the first consideration would be whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank. Once that conclusion is reached an the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an inquiry. The extent to which a government servant can be denied his right to an inquiry formed the subject matter of considerable debate at the Bar and we, therefore, now turn to the question whether under the second proviso to Article 311(2) even though the inquiry is dispensed with, some opportunity at least should not be afforded to the government servant so that he is not left wholly without protection. As most of the arguments on his part of the case were common to al the three clauses of the second proviso, it will be convenient at this stage to deal at one place with all the arguments on this part of the case, leaving aside to be separately dealt with the other arguments pertaining only to a particular clause of the second proviso.*

64. *So far as Article 311 (2) was concerned, it was said that the language of the second proviso did not negative every single opportunity which could be afforded to a government servant under different situations though the nature of such opportunity may be different depending upon the circumstances of the case. It was further submitted that the object of Article 311(2) was that no government servant should be condemned unheard and dismissed or removed or reduced in rank without affording him at least some chance of either showing his innocence or convincing the disciplinary authority that the proposed penalty was too drastic and was uncalled for in his case and a lesser penalty should, therefore, be imposed upon him. These arguments, though attractive at the first blush, do not bear scrutiny."*

9. In view of the aforesaid fact, the learned counsel for the respondents submits that the writ petition is liable to be dismissed.

10. After hearing counsel for the parties and after perusal of the record, Rule 8(2)(b) of the Rules provides that where the authority empowered to dismiss or remove a person, is satisfied that for some reason to be recorded by that authority in writing, it is not a reasonably practicable to hold such enquiry, the police officer shall be dismissed or removed, without proper enquiry as contemplated in Sub Rule (2) of Rule 8 of the Rules. For invoking the aforesaid rule, the authority empowered to dismiss has to be satisfied for reasons to be recorded in writing that it is not reasonably practicable to hold such enquiry. Thus, the requirement are two fold. Firstly, recording of reason and secondly, it is not reasonably practicable to hold such inquiry. It is well settled in law that when power under Rule 8(2)(b) is invoked judicial review is permissible where subjective satisfaction of the authority that it was not reasonably practicable to hold an enquiry not based on objective facts as laid down by the Apex Court in case of **Jaswant Singh Vs. State of Punjab and others** reported in 1991 (1) SCC 362. In that case, the Apex Court has considered the provisions of Article 311(2) second proviso (b) of the Constitution of India. Rule 8(2)(b) of the Rules is of parimateria with the second proviso (b) of Article 311, sub clause (2). The Apex Court has laid down two conditions for involving the power under Clause (b) of Rule 8(2) of the Rules. Following was laid down in para 4 of the said judgement:-

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

11. The Apex Court has also held that Clause (b) of Second Proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed before him that it was not reasonably practicable to hold enquiry. Further satisfaction has to be based on certain objective facts and not the out come of whim, or caprice of concerned officer. In Tulsiram Patel's case (supra) it has been observed that "A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely to avoid the holding of an inquiry or because the department's case against government servant is week and must fail. The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the

concerned authority. When the satisfaction of the concerned authority is questioned in a Court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer....."

12. In the present case, the order passed by the competent authority dismissing the petitioner from service, after invoking the powers under Rule 8(2)(b) of the Rules, has not recorded any reason as to why it is not reasonably practicable to hold an enquiry. The order mentioned the date 2.5.2006 in which the allegation has been made against the petitioner that about 10.00 in the night when Superintendent of Police was working in his camp office the petitioner with other police officials have quarreled and abused the Superintendent of Police and beaten him. An observation has been made in the order that by this misconduct of the petitioner, the discipline in the department is going down and there is strong possibility of encouragement of indiscipline in the force. After noticing this fact, the Superintendent of Police held that he is satisfied that it is not possible to hold an enquiry against the petitioner. It was also observed in the order that in case petitioner remain in post, it will give a bad lesson to others.

13. No reason in the order has been recorded as why it is not reasonably practicable to hold disciplinary enquiry against the petitioner as observed in Tulsi Ram Patel's case that disciplinary authority is not expected to dispense with a disciplinary enquiry lightly or arbitrarily.

14. In the counter affidavit filed on behalf of the respondents no reasons have been given that what were the circumstances against the petitioner for not holding the disciplinary enquiry. The observations that in the event the petitioner is allowed to remain in service, there is possibility of increase of indiscipline in the department cannot be held to be germane for dispensing /holding of disciplinary enquiry. As observed above, no reasons have been recorded and in the counter affidavit it has also not been mentioned any reason that what was the reason for dispensing of the enquiry. In my opinion the Superintendent of Police has not exercised his powers according to Rules as in the order there is no compliance of Rule 8(2)(b), therefore, in my opinion the order impugned cannot be sustained.

15. In view of the aforesaid fact, it is clear that the power which has been exercised by the Superintendent of Police under Rule 8(2)(b) contrary to the requirement as laid down in Rule 8(2)(b).

16. The writ petition is allowed. The order dated 8.5.2006 (Annexure 1 to the writ petition) passed by the respondent no.2 is hereby quashed. It is, however, open to the respondents to hold disciplinary enquiry against the petitioner in accordance with law.

No order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED; ALLAHABAD 14.11.2007

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 34830 of 2003
And
Civil Misc. Writ Petition No. 39268-04

Dhani Saran Khare ...Petitioner
Versus
State of U.P., and others ...Respondents

Counsel for the Petitioner:
Sri Brajesh Singh
Sri R.B. Singhal

Counsel for the Respondents:
S.C.

U.P. Minor Irrigation Department Boring Technicians Service Rules 1993-Rule-8-Qualification-Direct recruitment on the Post of Assistant Boring Technician-certificate in Diploma by I.T.I.-tool maker-Diploma stopped in 1968-diploma in tool Die maker started in 1976-rejection of candidature after written test of petitioner-on pretext absence of tool maker certificate-held-not proper-trade of Tool Maker and tool die maker is same-out of 401 only 387 filled up-consequential direction issued.

Held: Para 6

Thus controversy involved is squarely covered by the aforesaid decisions and therefore I am of the opinion that the petitioners can not be denied consideration for appointment on the post of Assistant Boring Technician in the Minor Irrigation Department after having qualified the written test and having appeared in the interview on the ground that they do not posses the diploma in the trade "Tool Maker" ignoring the diploma in "Tool and Die maker". The respondents are also estopped under law from ignoring their candidature at such a belated stage after they have accepted the applications of the petitioners to take the written examination followed by interview.

Case law discussed:
(Undated judgement)

(Delivered by Hon'ble Pankaj Mithal, J.)

1. The only prayer made in this writ petition is to direct the respondents to consider the candidature of the petitioners for the post of Assistant Boring Technician in the Irrigation department and not to ignore their candidature for the said post on the ground that they do not possess the Diploma in the trade of "Tool Maker" though they are holding two years diploma in " Tool and Die maker" awarded by the National Council for Vocational Training and State Council for Vocational Training from Adarsh Training Institute (ATI) Kanpur.

2. The Chief Engineer, Minor Irrigation Department, respondent No. 3 issued an advertisement inviting applications to fill up 401 posts of Assistant Boring Technicians. The said advertisement was published in the newspaper 'Amar Ujala' dated 8.6.2003. Advertisement provided that the candidates must have passed High School of the Board of High School and Intermediate examination U.P., or an examination recognized by the State government as equivalent thereto and at the same time must possess a certificate of Tube-well mechanic course awarded by the Government Technical Centre, Gorakhpur or certificate equivalent thereto recognized by the State government or a diploma of two years course awarded by Directorate of Employment and Training U.P., or

Industrial Training Institute in any of the following trades which included "Tool maker" apart from other trades. The petitioners applied in pursuance to the aforesaid advertisement. Their applications were duly accepted. They appeared in the written examination held on 22.6.2003 of which the result was declared on 5.7.2003. They successfully qualified the written examination and as such were called for interview on 7.7.2003. The petitioners also appeared for the interview. However, they were not considered for appointment at this stage on the ground that they are not qualified as they are not holding the diploma in the trade "Tool maker".

3. In the above background, the petitioners have approached this Court by means of this writ petition and have prayed that since they possessed diploma in the trade "Tool and Die maker" they are fully qualified for appointment on the post of Assistant Boring technician and as such their candidature can not be ignored.

4. I have heard Sri Brijesh Singh and Sri R.B. Singhal, learned counsel for the petitioners in the aforesaid two writ petitions and the Standing counsel for the respondents. The record of the petitions have also been perused by me.

5. The only ground for ignoring the candidate of the petitions for the posts of Assistant Boring technician is that they are Diploma Holders in the trade "Tool & Die Maker" and not in the trade of "Tool maker" which is a condition of eligibility for the post.

6. I have considered the submission of the parties. The U.P. Minor Irrigation Department Boring Technician Service Rules, 1993 in Rule 8 prescribes the qualification for direct recruitment to the post of Assistant Boring Technician as contained in the advertisement. It is not in dispute that the diploma course in the trade of "Tool maker" was stopped in the year 1968 and in its place the new course i.e., diploma in "Tool and Die maker" was started in the year 1976 by the National Council for Vocational Training. The new course is much wider and includes within its ambit the course of "Tool maker". Therefore, the petitioners possessing the diploma in "Tool and Die maker" do possess diploma in "Tool maker" as well. The question whether the diploma in "Tool and Die maker" is equivalent and at par with the diploma of "Tool maker" came up for consideration before Lucknow Bench of this Court in Writ Petition No. 239 (S/S) of 2004 Shailendra Kumar Vs. State of U.P., and others arising from the same from selection. The court while allowing the writ petition and commanding the opposite parties to appoint the petitioner of that writ petition on the post of Assistant Boring Technician held that the diploma in the trade of " Tool and Die maker" and the diploma in the trade of "Tool maker" are one and the same and therefore the candidates can not be denied appointment on the ground that they did not possess the specific diploma as "Tool maker" as prescribed in the rules. The above view has been followed and accepted by this Court by a decision rendered in writ another writ petition No. 1973 (S/S) of 2006 Umesh Singh Vs. State of U.P., and another. So far both the above judgments and orders of this Court are final as they have not been set aside or have been stayed by the superior Court. Thus controversy involved is squarely covered by the aforesaid decisions and therefore I

am of the opinion that the petitioners can not be denied consideration for appointment on the post of Assistant Boring Technician in the Minor Irrigation Department after having qualified the written test and having appeared in the interview on the ground that they do not posses the diploma in the trade "Tool Maker" ignoring the diploma in "Tool and Die maker". The respondents are also estopped under law from ignoring their candidature at such a belated stage after they have accepted the applications of the petitioners to take the written examination followed by interview.

7. Learned Standing counsel has submitted that the petitioners have not arrayed the selected candidates as the respondents who are 387 in number and as such they can not be granted the relief as claimed by them. The above submission is bereft of merit in as much as the petitioners are not challenging the selection of the selected candidates. Admittedly, 401 posts were advertised and only 387 have been filled up. Therefore, undisputedly 14 posts are still vacant and probably have been kept reserved by the inferior orders of Court. Therefore, the petitioners can easily be considered and if found successful in the ultimate analysis may be accommodated on the said remaining vacant posts without disturbing any of the selected candidates.

8. In view of the above, respondents are directed to consider the candidature of the petitioners for the post of Assistant Boring Technician in pursuance to the advertisement dated 8.6.2003 and not to ignore their candidature only on the ground that they possess diploma in the trade of "Tool and Die maker" and not the diploma in "Tool maker" prescribed in the rules. The respondents shall complete the process of selection as expeditiously as possible preferably within a period of two months from the date of production of the certified copy of this order.

9. The writ petition succeeds and is allowed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2007

BEFORE
THE HON'BLE V.K. SHUKLA, J.

Civil Misc. Writ Petition No.4271 of 2007
Connected with
Civil Misc. Writ Petition No.8643 of 2007
AND
Civil Misc. Writ Petition No.8307 of 2007

Masan Ali and others ...Petitioners
Versus
Union of India and others ...Respondents

Counsel for the Petitioners:
Sri R.C. Pathak
Sri Girish Kumar

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

Constitution of India, Art. 226- Cancellation of regularization Order- petitioner working as part time sweeper- regularised on policy decision-takes after discussion between management and employees union-petitioner regularized and getting benefit, of regular salary prior to 10.4.06 the date of judgement of Apex Court in Uma Devi case-held- decision can not be applied mechanically without considering the facts of individual case-cancellation of Regularisation order-illegal.

Held: Para 11 & 24

In the present case undisputed position is that on the date of delivery of judgment on 10.04.2006, petitioners continued to function as full time casual labourers (sweepers) and till then benefit of regularization as regular majdoor had not been extended, and the said exercise has been undertaken only after the said judgment of Hon'ble Apex Court had come and thereafter based on same regularization accorded has been cancelled.

There is one more aspect of the matter for consideration. Petitioners have been non-suited on the ground that regularization was not permissible after 10.04.2006. On the recommendation of the Committee as contained in Annexure- SRA-1 to the Supplementary rejoinder affidavit, in all six incumbents have been regularised. It is true that said incumbents who have been regularised were working for the long period, but as far as petitioners are concerned, their claim was covered under the policy decision, and they had been extended the benefit of regularisation, then mechanically by applying the judgment of Uma Devi's case, it was wholly inappropriate to cancel the regularization of petitioners, which cannot be subscribed, as each case has to be decided on its facts, looking to the peculiar characteristic and the dominant factors of the aforementioned case, which in the present case has been ignored by the authorities that there was agreement between Federation and BSNL and as per policy decision petitioners had been absorbed on regular basis.

(Delivered by Hon'ble V. K. Shukla, J.)

1. In this bunch of writ petitions, petitioners are assailing the validity of decision taken by respondents cancelling the order by means of which petitioners, who were full time sweepers, working under G.M.T.D. Mirzapur, were regularized as regular majdoors, have been reverted to their original cadre of full time sweeper/casual labourer and further action of directing recovery of the amount which has been paid in excess to each one of petitioners.

2. Brief background of the case is that each one of petitioners had been performing and discharging duties as part time casual labourers/sweepers. Policy decision was taken by Department of Telecom on 29.09.2000, mentioning therein that Employees Unions were demanding regularization of all the casual labourers and this issue was under consideration for quite sometime and in this background, decision had been taken to regularize the services of casual labourers working in the Department, including those, who had been granted temporary status with effect from 01.10.2000. Relevant extract of said scheme dated 29.09.2000, giving the order of regularisation and scheme to be adhered to is being quoted below:

"(1) All casual labourers, who have been granted temporary status up to the issuance of orders No.269-4/93-STN-II dated 12.2.99, circulated vide letter No.269-13/99-STN-II dated 12.2.99 and further letter No.269-13/93-STN-II dated 9.6.2000.
(2) All full time casual labourers as indicated in Annexure.
(3) All part time casual labourers who were working for four or more hours per day and converted into full time casual labourers vide letter No.269-13/93-STN-II dated 16.9.99.
(4) All part time casual labourers who were working for less than four hours per

day and converted into full time casual labourers vide letter No.269-13/93-STN-II dated 25.8.2000.

(5) All Ayas and Supervisors converted into full time casual labourers as per order No.269-10/97-STN-II dated 29.9.2000.

The number of casual labourers to be regularised in categories (2) to (5) above is given in the Annexure-enclosed. The figures given in the Annexure are based on information received from the Circles.

The casual labourers indicated from clause (i) to (iv) of communication dated 29.09.2000 were to be adjusted against available vacancies of regular majdoors. However, Chief General Managers are also authorised to create posts of Regular Majdoors as per prescribed norms, and to that extent, the prescribed ceiling for the Circle will stand enhanced.

As per this order, letter No.269-13/99-STN-II dated 12.2.99 vide which temporary status was granted to casual labourers eligible on 1.8.98, no casual labourers were to be engaged after this date and all the casual labourers are to be disengaged forthwith. Therefore, there should be no casual labourers after 01.08.1998. Other than those indicated in serial Nos. (2) to (5) above. However, if there is still any case of casual labourers left out due to any reasons, that may be referred to the Head Quarters separately."

3. In the year 2000 merger took place, Bharat Sanchar Nigam Limited, a Government of India Enterprises came into existence, and as per the averments mentioned in paragraph 3 of the supplementary counter affidavit, Bharat Sanchar Nigam Ltd. adopted directives contained in letter dated 29.09.2000. In respect of absorption of Group "C" and "D" staff working in B.S.N.L., Employees Federation had been pressing upon for absorption of casual labourers, as such preliminary meeting had been held with three Federations and Bharat Sanchar Nigam Limited on 09.11.2000, empowered the Management to negotiate with the Unions. pursuant to which meeting was held with three Federations on 02.01.2001 and following proposals were approved:

"1. IMPLEMENTATION OF STANDING ORDERS OF THE INDUSTRIAL EMPLOYMENT ACT, 1946

BSNL service rules are to be finalized after discussion with the recognized union formed by the optees of BSNL, and the Standing Orders of Industrial Employment Act, 1946.

2. SERVICE RULES

In the meantime it was agreed that Government will continue to apply existing rules/regulations. This is in line as per the provisions of Rule 1313 of Standing Orders of Industrial Employment Act, 1946. However, certain provisinal terms and conditions for absorption are enclosed as Annexure-I.

3. ABSORPTION OF CASUAL LABOURS

Orders have been issued by DoT for regularising Ayas and all casual labourers including part time casual labourers. Left out cases, if any will be settled by BSNL in accordance with order No.269-94/98-STN dated 29.9.2000.

4. OPTION OF STAFF FOR ABSORPTION IN BSNL

The BSNL will absorb the optees on as is where is basis. A list of optees will be made available to the three federations/unions.

5. OPTIONS OF STAFF FACING DISCIPLINARY CASES

It was agreed that the employees with on-going disciplinary cases can also opt for absorption in BSNL but their absorption will be subject to the outcome of the vigilance case. Their pending cases will be expedited on a fast track mode by DOT authorities.

6. PROMOTIONAL AVENUES

After absorption there will be negotiations with the newly formed recognised union regarding promotional avenues. Pending adoption of Standing Orders on promotional policy, the present OTBP/BCRACP (whichever is applicable) etc. will continue to be followed by BSNL

7. CHANGE OVER TO DA PAY SCALES

The pay scales and fitment formula will also be adopted through Standing Orders after negotiation with the recognised union in respect of non-executives. After detailed discussions, it was mutually agreed that pending fitment in the IDA Pay scales, the Group C & D optees will continue in the Central Government (CDA) pay scales. In addition to this, they will also be paid an adhoc amount of Rs.1000/- per month w.e.f. 1.10.2000 which will be adjusted from their IDA emoluments, perks and benefits on fixation of the same in the revised IDA scales. The revised negotiated IDA pay scales will be applicable form the date of absorption i.e. 1.10.2000.

8. TIME FRAME FOR VARIOUS POST ABSORPTITION ACVITIES

It was agreed that options will be called in January, 2001 providing about one month time to employees to give their options and the entire activity is expected to be completed by the end of 28th Feb. 2001. A list of optees of BSNL will be exhibited to rectify inaccuracies, if any.

The existing system of informal meetings with applicant Unions, as on 30.9.2000 and formal meetings with the three Federations shall continue.

9. The employees who opt for permanent absorption in BSNL would be governed by the provisions of rule 37-A of CCS Pension Rules, notification for which was issued by the Department of Pension Welfare on 30.09.2000. for the purpose of reckoning emoluments for calculation of pension and pensionary benefits, the emoluments as defined in CCS Pensions rules, on PSU in the IDA pay scales shall be treated as emoluments.

10. DoT has already clarified that the word "formula" mentioned in clause 8 of the Rule 37-A means payment of pension as per Government Rules in force in force at that time. It has also been clarified by the DoT that BSNL will not dismiss/remove an absorbed employee without prior review by the Administrative Ministry/Department.

11. The Group C & D employees who appear for any provisional examination whether direct or departmental and qualify in such examinations/outsiders coming through direct recruitment process, would rank junior to all the other employees in the promotional cadre, who had already been qualified in earlier examinations even though they get absorbed in BSNL subsequently.

The above modalities have been worked out in consultation with the following three federations for termination of the deemed deputation status in BSNL and the parties have put their signatures in token of their consent and agreement on this date 02.01.2001."

4. Thereafter, on 14.05.2001, from the office of the Chief General Manager Telecom, Bharat Sanchar Nigam Limited,

Lucknow, communication was issued, mentioning therein that for conversion of part time casual labourers working for not less than four hours duty into full time casual labourers, exercise be undertaken with the condition specifically provided for and same is one time relaxation, and was effective w.e.f. 25.08.2000. Thereafter on 21.06.2002, Deputy General Manager, B.S.N.L., U.P. (East) Circle, Lucknow, addressed letter in accordance with instructions contained in DOT New Delhi dated 14.08.1998, 25.08.2000, approved by CGMT U.P. (East) Circle Lucknow for conversion of part time casual labourers into full time casual labourers (performing duty four hours or more and less than four hours per day), as per enclosed Annexure I and II, on the following terms and conditions:

"1. The sanction of part time casual labourers by the competent authority and their continuously service till date with minimum 240 days working in the preceding 12 months as on 25.8.2000.
2. The Head of SSAs should personally verify the payment records of these approved part time casual labourers and obtain a certificate of the payment made from his IFA and therefore verify their eligibility as per the rule on the subject before ordering the conversion of the part time to full time casual labourers. It may further ensure that the payment of the part time casual labourers has been made directly by the department and not by any other agency like contractor etc.
3. The part time casual labourers should be engaged as full time casual labourers only where there is shortage of Gr. D staff (i.e. Existence of vacant Gr. D posts accounting for all SM and existing full time casual labourers) and no post should be created for the purpose. In the event there is no shortage in Gr. D posts as full time casual labourers, the part time casual labourers will not be converted into full time labourers.
4. Payment to the above full time casual labourers may be made as provided of under Rule 331 P & T FHB Vol. I under circumstances should they are paid through MUSTER ROLL.
5. In case of any violation to the above instructions/departmental instructions on the subject, the Head of SSAs will be personally responsible. It may also be ensured that no part time casual labourers have been engaged after the cut of date given by the DOT New Delhi. The Head of SSAs must get satisfied himself personally in each case before converting part time casual labourers into full time causal labourers and ensure that all the conditions laid down on the subject and departmental instructions are followed.
6. The name of part time casual labourers, who are found suitable for conversion into full time are attached to Annexure I & II. This is based on the report received from SSA concerned."

5. Requisite steps were undertaken in this direction and thereafter each one of petitioners, who were working as part-time casual labourers, were converted into full time casual labourers and requisite letter in this respect was issued by General Manager, Telecom District Mirzapur on 10.10.2002. Decision was taken on 23.01.2006 that all those part

time casual labourers, who had been converted into full time casual labourers, qua them proceedings be undertaken for extending the benefit of regularization against Group 'D' vacancies. Requisite direction was issued in this behalf by General Manager, East Circle, Lucknow along with communication dated 23.01.2006 sent by the office of the Chief General Manager, Telecom, U.P. Lucknow. List was also appended therewith. In the said letter it was categorically mentioned that directives were issued for undertaking requisite exercise and for verification of records. As against sanctioned strength of 116 regular majdoors, only 64 had been functioning as on 31.03.2006, as such there was shortage of 52 regular majdoors. Thereafter letter dated 17.05.2006 was sent by the office of the General Manager, Telecom, U.P. Circle, Lucknow, asking therein to forward the list after extending the benefit of regularization. Thereafter, requisite exercise was undertaken pursuant to said letter and on 20.07.2006, General Manager, Telecom District Mirzapur issued letter of regularisation qua each one of petitioners converting them from casual labourers to regular majdoors. Pursuant to said order requisite fixation of pay was done, and petitioners were paid their salary accordingly. Thereafter, impugned order has been passed qua each one of the petitioners.

6. Claim of petitioners has been rejected as per respondents solely on the ground that by no stretch of imagination, after pronouncement of judgment of Hon'ble Apex Court in the case of ***Secretary, State of Karnataka v. Uma Devi, 2006 (4) SCC 1***, regularisation could have been made, and in this background, it has been contended that action taken is strictly inconsonance with the said verdict, as the benefit of regularisation has been extended in ignorance of the directives of Hon'ble Apex Court, as such claim of petitioners is unsustainable.

7. In the present case pleadings inter se parties have been exchanged in the shape of counter affidavit, supplementary counter affidavit on one hand and rejoinder affidavit and supplementary rejoinder affidavit, on the other hand. Thereafter with the consent of the parties, present writ petition has been taken up for final hearing and disposal.

8. Sri R.C. Pathak, learned counsel, appearing along with Sri Girish Kumar Gupta, representing the petitioners, contended with vehemence that in the present case benefit of regularization has been extended as per the terms and conditions of agreement in between Unions and B.S.N.L., and thereafter said benefit has been revoked without providing any opportunity of hearing, as such impugned order in question is liable to be quashed, and further as there was no fraud or misrepresentation on the part of petitioners, as such recovery directed is vitiated in law.

9. Sri Subodh Kumar, learned counsel representing Bharat Sanchar Nigam Limited, contended with vehemence that benefit of regularization has been admittedly extended after the judgment in case of ***Secretary, State of Karnataka v. Uma Devi, 2006 (4) SCC page 1***, decided on 10.04.2006, wherein Hon'ble Apex Court has clearly ruled that no further regularization can be extended in violation of constitutional provisions,

as such writ petition on admitted position is liable to be dismissed.

10. After respective arguments have been advanced, factual position, qua which there is no dispute, is that as far as petitioners are concerned, their engagement as part time casual labourers/sweepers had been made without following any process of selection, and each one of petitioners had been performing and discharging duties as part time casual labourers, and thereafter as per agreement entered into between labourers' union and the Management, categorical decision was taken that part time casual labourers who were working for not less than four hours per day, their claim be considered. Petitioners who were working as part time casual labourers, their claim was considered and they were converted into full time casual labourers on 10.10.2002. Agreement dated 29.09.2000 categorically provided that casual labourers indicated from clause (i) to (iv) of communication dated 29.09.2000 were to be adjusted against available vacancies of regular majdoors. In the said letter itself there was a categorical mention that no casual labourers were to be engaged after that day and all the casual labourers were to be disengaged forthwith, and there should be no casual labourers after 01.08.1998. Petitioners who were part time casual labourers and were accorded status of full time casual labourers were intending to get adjusted against the regular vacancy of regular majdoors. Policy decision had been taken on 23.01.2006 for undertaking exercise of extending the benefit of regularization. Before such exercise could be undertaken and concluded, Hon'ble Apex Court in the case of Secretary, State of Karnataka v. Uma Devi, 2006 (4) SCC 1, came out with the judgment, wherein regularisation has not at all been approved, and it has been categorically mentioned that regularisation, if same has already been made, then the same would not be reopened based on the said judgment, but there should be no further by passing of constitutional requirements and regularising and making permanent, those not duly appointed as per constitutional scheme. Paragraphs 39, 43, 44, 45, 46, 47, 48, 49, 52, 53 and 54 being relevant being are quoted below:

"39.There have been decisions which have taken the cue from the Dharwad (supra) case and given directions for regularization, absorption or making permanent, employees engaged or appointed without following the due process or the rules for appointment. The philosophy behind this approach is seen set out in the recent decision in The Workmen of Bhurkunda Colliery of M/s. Central Coalfields Ltd. v. The Management of Bhurkunda Colliery of M/s. Central Coalfields Ltd. (JT 2006 (2) SC 1), though the legality or validity of such an approach has not been independently examined. But on a survey of authorities, the predominant view is seen to be that such appointments did not confer any right on the appointees and that the Court cannot direct their absorption or regularization or re-engagement or making them permanent.

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with

Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

44. The concept of 'equal pay for equal work' is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the Rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for

giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after the Dharwad decision, the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution of India permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.

45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain - not at arms length - since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be

just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.

46. Learned Senior Counsel for some of the respondents argued that on the basis of the doctrine of legitimate expectation, the employees, especially of the Commercial Taxes Department, should be directed to be regularized since the decisions in Dharwad (supra), Piara Singh (supra), Jacob, and Gujarat Agricultural University and the like, have given rise to an expectation in them that their services would also be regularized. The doctrine can be invoked if the decisions of the Administrative Authority affect the person by depriving him of some benefit or advantage which either (i) 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 have 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 they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn {See Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (1985 Appeal Cases 374), National Buildings Construction Corpn. v. S. Raghunathan, (1998 (7) SCC 66) and Dr. Chanchal Goyal v. State of Rajasthan (2003 (3) SCC 485). There is no case that any assurance was given by the Government or the concerned department while making the appointment on daily wages that the status conferred on him will not be withdrawn until some rational reason comes into existence for withdrawing it. The very engagement was against the constitutional scheme. Though, the Commissioner of the Commercial Taxes Department sought to get the appointments made permanent, there is no case that at the time of appointment any promise was held out. No such promise could also have been held out in view of the circulars and directives issued by the Government after the Dharwad decision. Though, there is a case that the State had made regularizations in the past of similarly situated employees, the fact remains that such regularizations were done only pursuant to judicial directions, either of the Administrative Tribunal or of the High Court and in some case by this Court. Moreover, the invocation of the doctrine of legitimate expectation cannot enable the employees to claim that they must be made permanent or they must be regularized in the service though they had not been selected in terms of the rules for appointment. The fact that in certain cases the court had directed regularization of the employees involved in those cases cannot be made use of to found a claim based on legitimate expectation. The argument if accepted would also run counter to the constitutional mandate. The argument in that behalf has therefore to be rejected.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment

being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

49. It is contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in Tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there

must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

52.Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College [(1962) Supp 2 SCR 144]. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (supra), R. N. Nanjundappa (supra), and B. N. Nagrajan (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what

we have held herein, will stand denuded of their status as precedents."

11. In the present case undisputed position is that on the date of delivery of judgment on 10.04.2006, petitioners continued to function as full time casual labourers (sweepers) and till then benefit of regularization as regular majdoor had not been extended, and the said exercise has been undertaken only after the said judgment of Hon'ble Apex Court had come and thereafter based on same regularization accorded has been cancelled.

12. Hon'ble Apex Court in ***Appeal (Civil) No.3765 of 2001, U.P. State electricity Board v. Pooran Chandra Pandey and others*** decided on 09.10.2007 has taken the view that often Uma Devi's case (supra) is being applied by the Courts mechanically without seeing the facts of particular case as a little difference in facts or even one additional fact may make a lot of difference in the precedential value of a decision, as such Uma Devi's case cannot be applied mechanically without seeing the facts of a particular case as a little difference in facts can make Uma Devi's case inapplicable to the facts of the case. Relevant paragraphs 11, 12, 13, 14, 15, 16, and 17 of the said judgment are being extracted below:

"11. Learned counsel for the appellant has relied upon the decision of this Court in Secretary, State of Karnataka & Ors vs. Uma Devi (3) & Ors (2006) 4 SCC 1 and has urged that no direction for regularization can be given by the Court. In our opinion, the decision in Uma Devi's case (supra) is clearly distinguishable. The said decision cannot be applied to a case where regularization has been sought for in pursuance of Article 14 of the Constitution.

12. As observed by this Court in State of Orissa vs. Sudhansu Sekhar Misra (AIR 1968 SC 647 vide para 13):-

A decision is only an authority for what it actually decides.

What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn v. Leathem, 1901 AC 495:

Now before discussing the case of Allen v. Flood (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all.

13. In Ambica Quarry Works vs. State of Gujarat & others (1987) 1 SCC 213 (vide para 18) this Court observed:-

"The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it

actually decides, and not what logically follows from it."

14. In Bhavnagar University vs. Palitana Sugar Mills Pvt. Ltd (2003) 2 SCC 111 (vide para 59), this Court observed:-

It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

15. As held in Bharat Petroleum Corporation Ltd. & another vs. N.R.Vairamani & another (AIR 2004 SC 4778), a decision cannot be relied on without disclosing the factual situation. In the same Judgment this Court also observed:-

"Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid`s theorems nor as provisions of the statute and that too taken out of the context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."

In London Graving Dock Co. Ltd. vs. Horton (1951 AC 737 at p. 761), Lord Mac Dermot observed:

The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge.

In Home Office vs. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, Lord Atkin speech is not to be treated as if it was a statute definition; it will require qualification in new circumstances.# Megarry, J. in (1971)1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said: There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus: Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo, J.) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice,

but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path of justice clear of obstructions which could impede it

16. We are constrained to refer to the above decisions and principles contained therein because we find that often Uma Devi's case (supra) is being applied by Courts mechanically as if it were a Euclid's formula without seeing the facts of a particular case. As observed by this Court in Bhavnagar University (supra) and Bharat Petroleum Corporation Ltd. (supra), a little difference in facts or even one additional fact may make a lot of difference in the precedential value of a decision. Hence, in our opinion, Uma Devi's case (supra) cannot be applied mechanically without seeing the facts of a particular case, as a little difference in facts can make Uma Devi case (supra) inapplicable to the facts of that case.

17. In the present case the writ petitioners (respondents herein) only wish that they should not be discriminated against vis-`-vis the original employees of the Electricity Board since they have been taken over by the Electricity Board in the same manner and position#. Thus, the writ petitioners have to be deemed to have been appointed in the service of the Electricity Board from the date of their original appointments in the Society. Since they were all appointed in the society before 4.5.1990 they cannot be denied the benefit of the decision of the Electricity Board dated 28.11.1996 permitting regularization of the employees of the Electricity Board who were working from before 4.5.1990. To take a contrary view would violate Article 14 of the Constitution. We have to read Uma Devi's case (supra) in conformity with Article 14 of the Constitution, and we cannot read it in a manner which will make it in conflict with Article 14. The Constitution is the supreme law of the land, and any judgment, not even of the Supreme Court, can violate the Constitution.

13. Now the facts of the present case are being looked into. Petitioners, who are from the lowest strata of the society; initially were inducted as part time casual labourers for performing and discharging duty and function of sweeper and then their status was converted into full time casual labourers and thereafter, they have been absorbed as regular majdoors. In the case of Uma Devi (supra), there was no statutory agreement in between the Employees Union and the authorities and powers of courts were being looked into as to whether courts have authority to issue direction for regularisation, qua incumbents, whose appointment is dehors the provisions of Article 14 and 16 of the Constitution. Here, in the present case undisputed position is that on 29.09.2000 one time policy decision was taken by the Department of Telecom Service for converting part time casual labourers into full time casual labourers and thereafter they were to be adjusted as regular majdoors. Not only this, after incorporation of Bharat Sanchar Nigam Ltd. in connection with absorption of Group 'C' and Group 'D' staff, primarily meetings were held with three Federations and after long negotiation with unions, it was categorically agreed on 02.01.2001 for implementation of the Standing Orders of the Industrial Employment Act, 1946 and BSNL Service Rules were to be finalized after discussion with the recognised union formed by the optees of BSNL and the Standing Orders of the Industrial Employment Act, 1946. Further

it was also categorically agreed for absorption of casual labourers in accordance with the order dated 29.09.2000. This particular agreement dated 02.01.2001 entered into between three Federations and BSNL in connection with absorption of Group 'C' and Group 'D' staff was there and consequent to the same decision had been taken to absorb. One time policy decision was taken in this regard after BSNL had come into existence taking into account earlier agreement and in between the employer and employees union once such an agreement has taken place, then it was binding and the benefit which has been conferred for regularization was strictly in consonance with the said agreement, which has statutory flavour in terms of Section 18 (1) of the Industrial Disputes Act, 1947. In the case of Uma Devi, such a situation was not there, as there was no statutory agreement in between the workers' union and employer in question, as such this is the most distinguishing feature available in the present case, as such the principle laid down in the case of Uma Devi could not have been invoked mechanically in the present case, as here regular status has been accorded on account of settlement made by BSNL and the three employees Federations, which was finalized on 02.01.2001. Section 18 of the Industrial Disputes Act, 1947 clearly provides that settlement arrived at by means of agreement in between employer and the workers otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement. The respondents do not dispute that there is agreement and it is binding on them. The only reason which has come, is that on account of Uma Devi's case no regularization is feasible. The fact of the agreement entered into inter se Employees union and BSNL has been totally ignored by the authorities while proceeding to cancel the regularization, whereas said agreement has statutory effect and was binding inter se parties in terms of Section 18 (1) of the Industrial Disputes Act, 1947, and as one time measure once decision has been taken for extending the benefit of regularization, the ratio of law laid down in the case of Uma Devi (supra) could not have been applied mechanically, as has been done in the present case.

14. Such settlements between workers union and employer have been approved by the courts time and again. Clause (p) of Section 2 of the "Act defines "settlement" as under:

"2 (p) "settlement" means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and the workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties hereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorized in this behalf by the appropriate Government and the Conciliation Officer."

15. An analysis of the above mentioned clause would show that it envisages two categories of settlements (i) a settlement which is arrived at in the course of conciliation proceedings, i.e. which is arrived at with the assistance and concurrence of the Conciliation Officer who is duty bound to promote a right settlement and to do everything he can to induce the parties to come to a fair and amicable settlement of the dispute and (ii) a written agreement between employer

and workmen arrived at otherwise than in the course of conciliation proceeding.

16. The consequence of the aforesaid two categories of settlement which are quite distinct are set out in Section 18 of the Act reads as under:

"18 (1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to agreement.

(2) Subject to the provisions of Sun Section (3), an arbitration award which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration.

(3) A settlement arrived at in the course of conciliation proceeding under this Act or an arbitration award in a case where notification has been issued under Sub-Section (3-A) of Section 10-A or an award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on–

(a) all parties to the industrial dispute;

(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, records the opinion that they were so summoned without proper cause;

(c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;

(d) Where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case maybe, to which the dispute relates on the date of the dispute and all person who subsequently become employed in that establishment or part."

17. A bare perusal of the above quoted section would show that whereas a settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding is binding on the parties to agreement, a settlement arrived in the course of conciliation proceeding under the Act is binding not only parties to the industrial dispute but also on other persons specified in clauses (b), (c) and (d) of sub-section (3) of Section 18 of the Act. Therefore, if the settlement arrived at between the employer and workman otherwise than in the course of conciliation proceeding with which we are concerned in this case it shall be binding on the parties to the settlement. The phrase, "parties to the settlement" includes both employer and an individual employee or the union representing the employees. If the settlement is between the employer and the workmen it would be binding on that particular employee and the employer; if it is between a recognised union of the employees and the employer, it will bind all the members of the union and the employer. That it would be binding on all the members of the union is a necessary corollary of collective bargaining in the absence of allegation of mala fides or fraud.

The aims and objects of the provisions of the Industrial Disputes Act include industrial peace which is essential to the industrial development and economy of the nation. Great emphasis is, therefore, laid on the settlement as they set at rest all the disputes and controversies between the employer and

the employees. In the case of Herbertsons Limited v. The Workmen of Herbertsons Ltd. and others, 1976 (4) SCC 36, the Supreme Court considered the effect of the settlement arrived at by the recognized union of majority workers. It was observed by Goswami J., speaking for the Court that when a recognised union negotiates with an employer, the workers as individuals do not come into the picture. It is not necessary that each individual worker should know the implications of the settlement since a recognized union, which is expected to protect the legitimate interest of labour enters into a settlement in the best interest of labour. This would be the normal rule. There may be exceptional cases where there may be allegations of mala fides, fraud or even corruption or other inducements. But in the absence of such allegations a settlement in the course of collective bargaining is entitled to due weight and consideration. In connection with justness and fairness of the settlement is observed that this has to be considered in the light of the conditions that were in force at the time of the reference. When, therefore, negations take place which have to be encouraged, particularly between labour and employer in the interest of industrial peace and well being, there is always give and take. The settlement has to be taken as a package deal and when labour has gained in the manner of wages and if there is some reduction in the matter of dearness allowance so far as the Award is concerned, it cannot be said that the settlement as a whole is unfair and unjust. It was further observed that it is not possible to scan the settlement in bits and pieces and hold some parts good and acceptable and others bad. Unless it can be demonstrated that the objectionable portion is such that it completely outweighs all the other advantages gained the Court will be slow to hold a settlement as unfair and unjust the settlement has to be accepted or rejected as a whole.

18. In the case of ***K.C.P. Ltd. v. Presiding officer and others, 1996 (4) STC 725 (SC) :1996 (2) L.L.N.970:1996 (74) F.L.R.***, the Supreme Court considered the concept of settlement entered into between the employer and the union representing the employees. In that case settlement arrived at by the union with the company was not in course of conciliation proceedings. The facts were that the issue of dismissal of 29 workmen, by way of punishment was pending for adjudication and during such pendency, the recognized union entered into a settlement with the management regarding these 29 dismissed workmen as well and it was agreed that an option would be given to them either to accept reinstatement without back wages or a lump sum amount of Rs.75,000/- with other monetary benefits may be accepted by the concerned workmen in lieu of reinstatement; 17 workmen accepted the settlement and remaining 12 challenged the said settlement and pressed for adjudication being continued by the Labour Court. The contesting workmen contended before the Supreme Court that the settlement regarding their interest as entered between the management and the recognized union during the pendency of adjudication of the dispute was illegal and was not binding on them. It was also submitted that they were not parties to the settlement and hence it did not bind them. The Supreme Court held that the settlement arrived at by direct negotiations between the management and union was valid and legal and the

recognized union had represented 29 dismissed workmen. Speaking for the Bench Majumdar, J, observed:

"It has to be kept in view that under the scheme of labour legislations like the Act in the present case, collective bargaining and the principle of industrial democracy permeate the relations between the management on the one hand and the union which reports to collective bargaining on behalf of its members-workmen with the management on the other. Such a collective bargaining which may result in just and fair settlement would always be beneficial to the management as well as to the body of workmen and society at large as there would be industrial peace and tranquility pursuant to such settlement and which would avoid unnecessary social strife and tribulation on the one hand and promote industrial and commercial development on the other hand. Keeping in view the aforesaid salient feature of the Act the settlement which is sought to be impugned has to be scanned and scrutinised. Settlement of labour disputes by direct negotiation and collective bargaining is always to be preferred for it is the best guarantee of industrial peace which is the aim of all legislations for settlement of labour disputes. In order to bring about such a settlement more easily and to make it more workable and effective it may not be always possible or necessary that such a settlement is arrived at in the course of conciliation proceedings which may be the first step towards resolving the industrial dispute which may be lingering between the employers and their workmen represented by their unions but even if at that stage such settlement does not take place and the industrial disputes gets referred for adjudication, even pending such disputes, the parties can arrive at amicable settlement which may be binding to the parties to the settlement unlike settlement arrived at during conciliation proceedings which may be binding not only to the parties to the settlement but even to the entire labour force working in the concerned organisation even though they may not be members of the union which might have entered into settlement during conciliation proceedings."

19. In the case of ***Balmer Lawrie Workers Union and another v. Balmer Lawrie & Consolidation Officer Ltd. and others, 1985 (50) F.L.R. 186***, Clause 17 of the settlement entered into between the management and the recognized union came to be challenged and as per the said Clause the company was to collect, from each workmen, an amount equivalent to 15 per cent of the gross arrears payable to each employee under the settlement as contribution to the union fund, and it was in turn, to be paid to the union within three days of the payment of the arrears. It was inter alia contended by the petitioner union that the said clause was in breach of the provisions of the Payment of Wages Act and while rejecting the challenge the Supreme Court observed:

"It is well known that no deduction could be made from the wages and salary payable to a workman governed to be the Payment of Wages Act unless authorized by the Act. A settlement arrived at on consent of parties can however permit a deduction as it is the outcome of understanding between the parties even though such deduction may not be authorized or legally permissible under the Payment of Wages Act."

20. Thus, all these judgments clearly and categorically take the view that agreement arrived in between workers union and the authorities have binding force, and said agreement is in form of package, and in the present case said agreement till date has not been cancelled, and based on the same, policy decision has been taken, which forms terms and conditions of absorption of Group 'C' and 'D' employees, and petitioners have been offered the status of substantive majdoors, as per the same, then same cannot be faulted.

21. Much emphasis has been laid on the fact that petitioners have not been appointed in regular manner as they were never registered with the Employment Exchange. Sri Subodh Kumar, Advocate, has placed reliance on paragraphs 6 and 7, which are extracted below:

"6. Appointment in Group 'D' Posts.- Casual labourers not registered with the Employment Exchange should not be appointed in regular posts. Those appointed through Employment Exchange and possessing minimum 2 years' continuous service as casual labour in the office/establishment are eligible for appointment to regular post without further reference to Employment Exchange. Those recruited directly without reference to Employment Exchange should register and then put in 2 years' service for becoming eligible for regular appointment if nominated by Employment Exchange.

7. Two years' continuous service.- The benefit referred to in previous para, will be available if the casual labourer has put in at least 240 days of service (206 days in the case of office observing 5-day week) including broken periods of service during each of the two years ' service."

22. This fact has been accepted that at no point of time vacancy in question had ever been advertised when petitioners had been appointed and entire emphasis is that petitioners have not got themselves registered with the Employment Exchange, as such they cannot be considered for being appointed on regular basis. Apart from the provision quoted above, no other provision has been pointed out. At this juncture provisions of The Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 are being looked into. Under Section 2 (a) of the aforementioned Act "appropriate Government" has been defined. Under Section 2(d) of the aforementioned Act "employment exchange" has been defined. Under Section 2(e) of the aforementioned Act "establishment" has been defined. Under Section 2(f) of the aforementioned Act "establishment in public sector" has been defined. Under Section 2(i) of the aforementioned Act "unskilled office work" has been defined. Section 3 of the said Act provides that the Act is not to apply in certain vacancies. Relevant provisions referred to above are being quoted below:

"2 (a) "appropriate Government" means-
1.in relation to-
(a) any establishment of any railway, major port, mine or oil field, or
(b) any establishment owned, controlled or managed-
(i) the Central Government or a department of the Central Government.
(ii) a company in which not less than fifty-one percent of the share capital is held by the Central Government or partly

by the Central Government and partly by one or more State Governments,
(iii) a corporation (including a co-operative society) established by or under a Central Act which is owned, controlled or managed by the Central Government,
the Central Government:
(2) in relation to any other establishment, the Government of the State in which that other establishment is situate:

2 (d) "employment exchange" means any office or place established and maintained by the Government for the collection and furnishing of information either by the keeping of registers or otherwise, respecting-
(i) persons who seek to engage employees,
(ii) persons who seek employment, and
(iii) vacancies to which persons seeking employment may be appointed:
2 (e) "employment" means
(a) any office, or
(b) any place where any industry, trade, business or occupation is carried on;
2 (f) "establishment in public sector" means an establishment owned, controlled or managed by-
(1) the Government or a department of the Government;
(2) a Government company as defined in Section 617 of the Companies Act, 1956;
(3) a corporation (including a co-operative society) established by or under a Central provision or State Act, which is owned, controlled or managed by the Central Government;
(4) a local body:
2 (i) "unskilled office work" means work done in an establishment by any of the following vcategories of employees, namely:
(1) daftari;
(2) jamadar, orderly and peon;
(3) dusting man or farras;
(4) bundle or record lifter;
(5) process server;
(6) watchman;
***(7) sweeper**;*
(8) any other employee doing any routine or unskilled work which the Central Government may, by notification in the Official Gazette, declare to be unskilled office work."
***3. Act not to apply in relation to certain vacancies:-** (1) This Act shall not apply in relation to vacancies.-*
(a).....
(b).....
(c).....
(d) in any employment to do unskilled office work;"

23. A bare perusal of the aforesaid provisions would go to show that "unskilled office work" has been defined as work done in an establishment by any of the categories of employees indicated herein. Sweeper is one of the category of unskilled employees. Section 3 (d) clearly provides that this Act would not apply in relation to vacancies in any employment to do unskilled office work. Thus, the unskilled employees were not at all required to get themselves registered with the Employment Exchange, as such the provisions of the said Act were not at all applicable to such unskilled employees. Once this is admitted position that each one of the petitioners are sweepers and have been performing unskilled office work, then they were exempted from being registered with the Employment Exchange under the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959. In this background, once petitioners were not obliged to get themselves registered under the aforementioned Act and their claim was

considered and is covered under the policy decision, then seeing the nature of work being performed by the petitioners, in the present case, it cannot be said that merely because petitioners were not registered under the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959, they were not entitled to be considered for regularization. The provisions quoted above clearly show that pre-requisite criteria is registration with Employment Exchange with two years continuous service as casual labour. Once petitioners were not required to get themselves registered and they fulfilled other eligibility criteria, then petitioners were fully eligible for consideration for regular appointment under the scheme of policy which has been formulated.

24. There is one more aspect of the matter for consideration. Petitioners have been non-suited on the ground that regularization was not permissible after 10.04.2006. On the recommendation of the Committee as contained in Annexure-SRA-1 to the Supplementary rejoinder affidavit, in all six incumbents have been regularised. It is true that said incumbents who have been regularised were working for the long period, but as far as petitioners are concerned, their claim was covered under the policy decision, and they had been extended the benefit of regularisation, then mechanically by applying the judgment of Uma Devi's case, it was wholly inappropriate to cancel the regularization of petitioners, which cannot be subscribed, as each case has to be decided on its facts, looking to the peculiar characteristic and the dominant factors of the aforementioned case, which in the present case has been ignored by the authorities that there was agreement between Federation and BSNL and as per policy decision petitioners had been absorbed on regular basis.

25. At last Sri Subodh Kumar has contended that large scale manipulations have been committed in extending the benefit of regularization. The sole ground on which regularisation has been cancelled is the judgment in Uma Devi's case and no other ground has been disclosed. In case there is any fraud or misrepresentation, then it is open to the authorities to issue show cause notice and thereafter cancel the regularisation, but here said grounds have not been taken in the impugned order, and impugned order is nothing but mechanically following of the judgment in case of Uma Devi (supra), which cannot be subscribed, as Hon'ble Apex Court in the case of U.P. Secondary Education Service Selection Board v. Pooran Chandra Pandey (supra) has held that each case has to be decided on its fact and not by blindly following the Uma Devi's case.

26. Consequently, writ petitions succeed and are allowed. The impugned orders are quashed.
