ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Writ Petition No. 375 of 2008

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

Counsel for the Petitioner:
Sri. Satyanshu Ojha
Sri. Radha Kant Ojha

Counsel for the Respondents:
Sri. Ashok Khare
S.C.

U.P. Intermediate Education Act 1921-Chapter III Regulation 21-benefit of academic session-person working as Adhoc Principal-achieve the age of superannuation-during period of availing benefit of academic session-cannot be treated as Adhoc Principal.

Held: Para 3

The benefit of continuing to avail the benefit of the academic session after attaining the age of superannuation is not applicable for the appointment on the post of ad-hoc Principal.

Case law discussed:
2003(3) AWC 1709, 2007(1)UPLBEC 479

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

1. Heard Sri R.K.Ojha, the learned counsel for the petitioner and Sri Ashok Khare, the learned senior counsel appearing for respondent no.5. Since no factual controversy is involved in the present writ petition, the same is being disposed of at the admission stage itself without calling for a counter affidavit.

2. The respondent no.5 was appointed as an adhoc Principal in the institution managed by respondent no.4. The said respondent reached the age of superannuation and the Committee of Management resolved to appoint the petitioner as an ad-hoc Principal. The committee of management forwarded the papers to the District Inspector of Schools for, approval. The District Inspector of Schools by the impugned order directed the Committee of Management to permit respondent no.5 to continue as an ad-hoc Principal till the end of the academic session, i.e., till 30.6.2008. The petitioner, being the senior most teacher and being entitled to be appointed as an ad-hoc Principal has filed the present writ petition.

3. The learned counsel for the petitioner submitted that the controversy involved in the present writ petition is squarely covered by two Division Bench judgments, namely, in the case of **Raja Ram Chaudhary vs. Satya Narain Gupta and others**, 2003(3) AWC 1709, and in the matter of **Hari Om Tatsat Brahma Shukla vs. State of U.P. and others**, 2007(1)UPLBEC 479, wherein it has been held that a teacher continuing till the end of the academic session is not entitled to continue as an ad-hoc Principal after attaining the age of superannuation. The benefit of continuing to avail the benefit of the academic session after attaining the age of superannuation is not applicable for the appointment on the post of ad-hoc Principal. On the other hand, the learned counsel for the respondent no.5 made a feeble attempt to distinguish the aforesaid judgments contending that the said judgments pertain to the post of Principal in the Degree College, in which the Rules and Regulations were different

from that of the post of Principal in an Intermediate college.

4. In my opinion, the submission made by the learned counsel for the opposite party is bereft of merit. Regulation 21 of Chapter III of the Regulations framed under the Intermediate Education Act, 1921 relates to the extension of service which reads as under:-

"21. Superannuation age of Principal, Headmaster, Teacher and other employees would be 60 years. If above said superannuation age of any Principal, Headmaster and Teacher falls on any date in between 2nd July and 30th June, except in the condition when he himself, before two months of the date of superannuation, furnishes in writing the information for not seeking extension of service, extension of service upto 30th June shall be deemed to be conferred on him so that after summer vacation, substitute can be arranged in the month of July. In addition to this, extension of service could be granted only in such special cases, which may be decided by the State Government.

If date of superannuation of any clerk or fourth class employee falls in the middle of any month, his extension of service would be deemed to be given up to the last date of that month. But if the date of appointment of any employee falls on the first date of any month, he shall be retired on the last date of the preceding month."

The said provision has been interpreted in the case of Hari Om Tatsat Brahma Shukla (supra), in which the Court held-

"We have considered the submissions and perused the record. In so far as the preposition that when a teacher is continuing till the end of academic session after attaining the age of superannuation he is not entitled for any appointment on a post other than his substantive is well settled. After attaining the age of superannuation neither higher post can be conferred nor an incumbent can claim promotion on a higher post. The preposition will both apply for appointment on substantive basis or appointment on ad hoc basis. The ad hoc appointment under Section 18 of the U.P. Act No.5 of 1982 is the appointment as a Principal on a higher post in a different grade. During the period a person is continuing to avail the benefit of academic session after attaining the age of superannuation he is not entitled for appointment even on ad hoc basis. The said preposition finds full support for Division Bench judgments reported in 2000(1)E.S.C. 645, Committee of Management, Jagdish Saran Rajvansi Kanya Inter College and another vs. Joint Director of Education; 2003(2)E.S.C. 956, Raja Ram Chaudhary vs. Satya Narain Gupta and others and Division Bench judgment of R.C.Gupta (Dr.) vs. State of U.P. and others, (2002)1 UPLBEC 767."

Similarly in the case of Raja Ram Chaudhary (supra), the Court held-

"The contention is totally misconceived. The purpose of extension till the end of the academic session after attaining the age of superannuation is only to secure the benefit in favour of the students and the institution as clarified by this Court in the aforesaid two decisions.

The fact that the appellant has already attained the age of superannuation is not in dispute. Further, the fact that question of seniority has not yet been determined and on account of the appellant having attained the age of superannuation, it has lost all its significance is also not disputed. These additional factors also do not justify an interference in the discretion exercised by the learned single judge."

5. The ratio of the decision of the aforesaid two judgments is squarely applicable to the present facts and circumstances of the case.

6. In view of the aforesaid the impugned order cannot be sustained and is quashed. The writ petition is allowed. The District Inspector of Schools is directed to pass consequential orders on the resolution sent by the committee of management within two weeks from the date of presentation of a certified copy of the order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2007

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 53062 of 2006

Smt. Qamar Jahan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri P.N. Dwivedi

Counsel for the Respondents:
Sri Dinesh Chandra Tripathi
S.C.

Constitution of India, Art. 226, Art. 21-Service Law Revised family pension-petitioner's husband died after 31 years satisfactory service-1991 family pension fixed Rs.966/-while in Moti Lal Agarwal case-family pension should not be less than Rs.1275/-respondent itself accepted the claim-only reason of financial security can not be ground-once the court adjudicated in rem considering particular legal aspect-body expected to implement the same forcing the individual to approach the court amounts multiplicity of litigation-necessary direction issued with 8% interest.

Held: Para 14 & 17

Thus, retiral benefits are not bounty but a right earned by the employer and being deferred wages payable to a Government servant in lieu of considerable length of service rendered by an employee to the employer cannot be denied on the ground of financial scarcity or lack of funds.

Once on a particular legal aspect dealing with service condition of the employees, the matter is decided by a Court of law, such body is expected to implement the same without forcing its all the employees similarly placed to approach the Court individually as that would amount not only to multiply litigation wasting avoidable public time and money but would also be against all spirit of a 'Welfare State' with which the respondents are expected to work.

Case law discussed:
1996 (2) ESC-612, 1983 (1) SCC-305, AIR 2003 SC-2189, AIR 1983 SC-803, AIR 1958 SC-578, AIR 1963 SC-1332, 2003 (1) SCC-184, W.P. 33804/04 decided on 6.12.05.

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

1. A harassed widow, who has already suffered on account of death of her husband, having met an indifferent

treatment in the hands of the respondents with respect to payment of post death retiral benefits of her husband/family pension, has invoked extraordinary equitable jurisdiction of this Court under Article 226 of the Constitution of India by means of the present writ petition seeking a writ of mandamus commanding respondents 2 and 3 to determine revised family pension and pay difference thereof since 4.3.1991 till date and pay her along with arrears.

2. The facts in brief, giving rise to the present writ petition are that the petitioner's husband Late Rajjab Ali was appointed as Revenue Inspector in Nagar Nigam, Allahabad and after rendering service of more than 30 years, died on 3.3.1991. The respondents determined family pension at Rs.480/- per month and started payment thereof in July 1991 though with effect from 4.3.1991. A Division Bench of this Court vide judgment dated 24.3.1988 passed in Civil Misc. Writ Petition No. 15309 of 1984 Moti Lal Agarwal & others Vs. State of U.P. & others directed Allahabad Nagar Mahapalika to pay similar amount of pension including dearness allowance and family pension etc. as admissible to the State Government's employee or the employees of Kanpur Nagar Mahapalika since 2.7.1981. It was clarified that the relief would not extend to payment of gratuity. The matter went in appeal before the Apex Court, which remanded the matter vide judgment dated 9.8.1988 passed in SLP (Civil) No. 7917 of 1988, permitting the parties to address High Court on the remaining points which they intend to raise in the matter. On remand, the aforesaid matter was again decided by a Division Bench vide judgment dated 19.2.1996 reported in **1996 (2) ESC 612** and this Court issued following directions to Allahabad Nagar Mahapalika:

"In view of the aforesaid discussion, we direct the respondents to pay the dearness allowances to the petitioners at par with the employees of Municipal Corporation, Kanpur immediately as envisaged in G.O. No. 866A/ AA-NA-VI 0.7.84-10K/19 dated 28th February, 1984 contained in Annexure-6 to the writ petition. We further direct the respondent to pay the pension also to the petitioners at par with the employees of the State (Municipal Corporation, Kanpur) within 4 months failing which it shall carry interest at the rate of 13% per annum"

3. It is true that though the directions contained in the aforesaid judgment were confined to the petitioners in that case, but the issue decided therein applies to all similarly placed employees of Nagar Mahapalika, Allahabad. Consequently, the petitioner made several representations to the respondents requesting to pay family pension on the basis of revised pay scale in the light of the judgment of this Court in **Moti Lal Agarwal (supra)** but having failed to get any response from the respondents, the present writ petition has been filed.

4. The respondents no. 2 and 3 have filed counter affidavit, which is sworn by Sri G.N. Shukla, Addl. Municipal Commissioner, Nagar Nigam, Allahabad. He has not disputed entitlement of the employees of Nagar Nigam regarding revised dearness allowance, pension and family pension as held by this Court in **Moti Lal Agarwal (supra),** but what has been said is that Nagar Nigam, Allahabad passed a resolution in September' 2001 requesting the State Government to bear

the expenditure but the same has been declined by the State Government. It is further said that the petitioner had filed Writ Petition No. 6329 of 2007 seeking a similar relief, but the same has been dismissed on 7.2.2007 and, therefore, the petitioner is not entitled for any relief.

5. The petitioner, in her rejoinder affidavit, has stated that she did not file any writ petition earlier. On the contrary, the writ petition no. 6329 of 2007 was filed by one Gya Prasad. Against the judgment dated 7.2.2007 passed by Hon'ble Single Judge, dismissing his writ petition, he filed a Special Appeal No. 282 of 2007, which was allowed by the Division Bench on 12.3.2007 setting aside the judgment of the Hon'ble Single Judge and remitting the matter to the Hon'ble Single Judge to decide the writ petition on merits afresh. A copy of the Government Order dated 23.12.1997 has also been placed on record as Annexure RA-2, which provides that minimum family pension amount should be 1275/- per month. It is also said that another writ petition no. 25673 of 2006 Sangam Lal Yadav Vs. State of U.P. & others involving a similar issue has been decided by this Court following **Moti Lal Agarwal (Supra).**

6. Learned counsel for the petitioner submits that though the issue is already settled by this Court in Moti Lal Agarwal (supra) and in view thereof, the petitioner was entitled for dearness allowance and family pension on revised rates, but despite the judgment having been rendered by this Court more than a decade back and even several representations made by the petitioner, no action has been taken by the respondents till date and the petitioner is being paid family pension presently at the rate of Rs. 966/- per month, which is ex facie inadequate and insufficient for even bare sustenance of herself and her children, hence, is violative of Article 21 of the Constitution of India. He contended that pension is not a bounty but a right earned by the employee after rendering service for a particular length with the employer. It amounts to deferred wages payable after retirement to the employee or to the family of the employee after his death in accordance with rules in recognition of his/her long service. .

7. On behalf of the respondents, though entitlement of the petitioner for revised rate of family pension is not disputed, but it is said that due to poor financial condition of Nagar Nigam, Allahabad, and, its proposal having been turned down by the State Government, it is not possible to pay revised family pension to the petitioner.

Heard learned counsel for the parties and perused the record.

8. From the pleadings of the parties, it is evident that claim of the petitioner for revised family pension and her entitlement for the same is not disputed by the respondents no. 2 and 3 as is apparent from para-6 and 7 of the counter affidavit, the relevant extract whereof is reproduced as under:

"6. .....It is stated that for relief sought by the petitioner the Nagar Nigam Allahabad has already passed the resolution No. 49 dated 18.09.2001 requesting the state Government to bear the expenditure but the same was stayed by State Government vide Government vide order dated 03.02.2004.....

7. .....It is stated that the Nagar Nigam, Allahabad has been recommended for the relief sought by the petitioner through it resolution dated 18.09.2001 but the same was stayed by the State Government vide Government Order dated 03.02.2004."

9. The only reason for non payment appears to be the alleged lack of funds and financial scarcity with the respondents no. 2 and 3 and refusal by the State Government for bearing financial burden. Whether this can be a ground to deny a right to the petitioner to get revised family pension is the moot question to be considered hereat.

10. Pension and retiral benefits of an employee or his family is a right and cannot be said to be bounty is now well settled. The Apex Court, in **D.S. Nakara Vs. Union of India 1983 (1) SCC 305** held as follows:

"pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. (Para 20).

In the course of transformation of society from feudal to welfare and as socialistic thinking acquired respectability, State obligation to provide security in old age, an escape from underserved want was recognized and as a first steps pension was treated not only as a reward for past service but with a view to helping the employee to avoid destitution in old age. The guid pro quo was that when the employee was physically and mentally alert, he rendered not master the best, expecting him to look after him in the fall of life. A retirement system therefore exists solely for the purpose of providing benefits. In most of the plans of retirement benefits, everyone who qualifies for normal retirement receives the same amount. (Para 22).

Pensions to civil employees of the Government and the defence personnel as administered in India appear to be a compensation for service rendered in the past. (Para 28).

Summing up it can be said with confidence that pension is no only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when you give your best in the hey-day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered. (Para 29)" (emphasis added)

11. That being so, non payment of pension or family pension to an employee or his family in accordance with law to the extent he/she is entitled amounts to denial of right to earn livelihood enshrined under article 21 of the

Constitution. The expression 'right to life' in Article 21 of the Constitution does not denote a mere physical or animal existence. The 'right to life' includes 'right to live with human dignity'. In **A. K. Bindal and another Vs. Union of India and others AIR 2003 SC 2189** it was held that 'right to life' enshrined under Article 21 means something more than bare survival or animal existence. The Court referred to it earlier decision in **State of Maharashtra Vs. Chandrabhan AIR 1983 SC 803** where payment of very small subsistence allowance to an employee during suspension was held wholly insufficient to sustain his living and, was held to be violative of Article 21 of the Constitution.

12. For the purpose of payment of due wages necessary for bare sustenance or minimum wages, the financial capacity of the employer has not been held to be a valid consideration by Constitution Bench of the Apex Court in **Express Newspaper (Private) Ltd. Vs. Union of India AIR 1958 SC 578, Hindustan Times Ltd., New Delhi Vs. Their Workmen AIR 1963 SC 1332. In S.K. Mastan Bee Vs. General Manager, South Central Railway & another 2003 (1) SCC 184**, the Court held that 'right to life' included right to family pension and right to earn livelihood under Article 21 of the Constitution. In **Moti Lal Agarwal (supra)** also a similar defence appears to have been taken by Nagar Mahapalika, Allahabad (now Nagar Nigam, Allahabad) which has been considered by the Court in para-17 of the judgment and has been rejected.

13. A similar argument earlier was also raised on behalf of Nagar Nigam, Kanpur before this Court in **Writ Petition No. 33804 of 2004 Samal Chand Tiwari Vs. State of U.P. & others** decided on 6.12.2005 and was rejected, holding :

"Similarly financial crunch or shortage of funds would not be a valid defence for the State where it is bound to discharge its duties which are statutory or constitutional is also the view taken by the Apex Court in the case of Secretary, Ministry of Chemicals & Fertilizers, Government of India Vs. Cipla Ltd. and others, 2003 (7) SCC page 1 and The State of Gujarat and another Vs. Shri Ambica Mills Ltd., Ahmedabad and another, 1974 (4) SCC 656 para 54 to 63 and AIR 1987 SC 157, para 92, 93 and 99."

14. Thus, retiral benefits are not bounty but a right earned by the employer and being deferred wages payable to a Government servant in lieu of considerable length of service rendered by an employee to the employer cannot be denied on the ground of financial scarcity or lack of funds.

15. The respondents have admitted that the complaint of the petitioner was found to be genuine and they resolved as long back as on 18.9.2001 for payment thereof by requesting the State Government to bear the expenditure but the State Government did not care to bore the said liability. The question as to whether the State Government was justified in refusing to bear the expenditure or not is not relevant for the purpose of the present case, since, in my view, the husband of the petitioner being employee of a statutory authority, a local body like Nagar Nigam, Allahabad, it was the responsibility of respondents no. 2 and 3 to discharge its burden with respect to

salary, wages or pension of its employees and the fact that it was not extended financial help by the State Government or somebody else cannot be a reason justifying non payment of the aforesaid dues to its employees.

16. Once the respondents found in 2001 that the employees like petitioner were entitled for revised pension, there was no reason for not paying the same immediately thereafter or within a reasonable period thereafter. Moreover non payment of any amount by revising family pension even after filing of this Writ petition in 2006 is clearly and apparently arbitrary and discriminatory. It is strange that the respondents felt satisfied by paying a merge sum of Rs.966/- per month to the petitioner towards family pension as if the same would be sufficient for sustenance of herself and her children. Judicial cognizance can be taken of the fact that about Rs.32/- per day, which the petitioner is being paid towards family pension, can not be sufficient even to bear two times' meal for a single person during these days, what to say of a family which consisted of more than one person. The attitude of the respondents by not resolving the problem of arranging funds and making payment towards pension to the retired employees or their family in the light of the judgment of this Court in **Moti Lal Agarwal (supra)** cannot be appreciated and must be contemned in strongest words.

17. It is true that ultimate direction contained in **Moti Lal Agarwal (supra)** was with respect to the petitioners in that case, but the law laid down therein is a judgment in rem, applicable to all the employees of Nagar Nigam, Allahabad similarly situated and it was not expected from a statutory body like Nagar Nigam, Allahabad not to extend benefit of the said judgment to all similarly placed persons on its own and instead to compel those persons to approach the Court, obtain order and thereafter, it would act upon. A statutory body or the State Government is expected to act as a model employer. Once on a particular legal aspect dealing with service condition of the employees, the matter is decided by a Court of law, such body is expected to implement the same without forcing its all the employees similarly placed to approach the Court individually as that would amount not only to multiply litigation wasting avoidable public time and money but would also be against all spirit of a 'Welfare State' with which the respondents are expected to work.

18. In **Workmen of Bhurkunda Colliery of Central Coalfields Ltd. Vs. Bhurkunda Colliery of Central Coalfields Ltd. 2006 (3) SCC 297**, the Apex Court observed that the State should be a model employer, should not exploit employees nor take advantage of helplessness of either unemployed persons or the persons concerned as the case may be. The dictum is fully applicable to the present case also where a destitute widow has been forced to approach the Court of law for enforcement of her legal right of receiving family pension on revised scale, which has not been heeded by the respondents despite the law laid down by a Division Bench of this Court as long back as in 1996. In **Balram Gupta Vs. Union of India & another 1987 (suppl.) SCC 228**, the Court held:

"As a model employer the government must conduct itself with high probity and candour with its employees"

19. In view of the above discussions, the writ petition is allowed. The respondents are directed to revise and fix family pension of the petitioner in the light of the judgment of this Court in **Moti Lal Agarwal (supra)** within a period of four months and continue to pay current the amount as determined above as and when it falls due. The petitioner shall also be entitled for interest on the arrears of family pension at the rate of 8% with effect from 22.9.2006, i.e., the date of filing of the writ petition till the said amount is paid. The petitioner shall also be entitled to cost which is quantified to Rupees ten thousand payable by respondents no. 2 and 3.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.12.2007

BEFORE
THE HON'BLE SHIV SHANKER, J.

Criminal Appeal No. 636 of 1995

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

Counsel for the Appellant:
Sri Pt. Mohan Chandra
Sri. S.K. Tyagi
Sri. M.P. Rai
Sri. A.K. Rai
Sri. V.K. Jaiswal

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

N.D.P.S. Act Section 50-provision of section 50-held mandatory-non compliance thereof vitiate whole trail-trail court committed great illegality by convicting the appellant.

Held: Para 24 & 25

In the present case it was asked from the appellant by P.W. 1 Veersain and P.W. 2 Sultant Singh that " Jamatalashi Rajpatrit Adhikari Ke Samaksh Chalkar Lene Ke Liye Kaha To Kahane Laga Ki Aap He Jamatalashi Le Len."

Therefore, there was no complete compliance of section 50 of N.D.P:S. Act and merely on that basis trial could be vitiated. However, trial,court has committed error in convicting the appellant for the said charge.

Case law discussed:
2005(3) SCC 59, 1998(8) SCC 449, 2007(58) ACC 723, 1999(39) Supreme Court 349, 2007(1) SCC 433, 1996(6) SCC 172

(Delivered by Hon'ble Shiv Shanker, J.)

1. This criminal appeal has been preferred against the judgement and order dated 31.3.1995 passed by VI Addl. Sessions Judge, Ghaziabad in Sessions Trial No. 29 of 1993 convicting and sentencing the appellant to undergo 10 years R.I. and a fine of Rs. 1,00,000/-and in default of payment of fine to further undergo two and half years R.I. under section 22 of N.D.P.S. Act.

2. Brief facts arising out of this criminal appeal is that on 16.11.92, S.I. Sultan Singh (P.W.2) was returning after making enquiry of the application and stopped at Loni crossing where informer (Mukhbir) met with him and had given information to him that one person is likely to come from the side of railway station Loni having illegal smack, upon which he had tried to take the public witnesses but none was prepared to

become a witness. Therefore, constable 2 C.P. Veersain and constable 1294 C. P. Omprakash were taken with him who were deputed on picket duty at Loni crossing. After giving information regarding the informer (Mukhbir) to them, search was taken amongst them. No illegal article was found in possession of any of them. Thereafter, all have proceeded along with informer and reached near the crossing situated at Banthala railway gate, where one person was seen at the crossing coming from front of them. The informer pointed out that he is the man who is having illegal smack. Thereafter the informer (Mukhbir) has returned. After seeing the police personnel, above person had turned and tried to run away fastly upon which he was challenged and he was apprehended at station road at about 8.30 P.M. at the distance of 20 steps from the said Tiraha. He has disclosed his name as Asfaq. Thereafter **"Jamatalashi Rajpatrit Adhikari Ke Samaksh Chalkar Lene Ke Liye Kaha To Kahane Laga Ki Aap Hee Jamatalashi Le Len."** Thereafter, 20 puriyas smack, wrapped in the packet were found in the right side pocket of his paint at his search. It was asked from him ,as to from where it has been received. He did not give any satisfactory reply. Thereafter, the recovered smacks were kept in white clothes in polythin (panni) and after sealing it, Fard Ext. Ka-1 was prepared in the torch light and electric light. Signature was obtained from the police official upon the Fard and its copy was given to the accused after obtaining his signature upon it. After taking accused and recovered contraband article, Fard was submitted in the concerned police station, where accused was put in the lock up and chick F.I.R. Ext. Ka- 4 was prepared and case under section 22/32 of N.D.P.S. Act was registered. Investigation of this case was entrusted to S.1. Sri Ram Sewak Upadhyaya (P. W.3).

3. During the course of investigation, recovered contraband article was sent for chemical examination, from where chemical report was received. It reveals that heroin was found from the said contraband article. After completion of investigation, charge sheet Ext. Ka 3 was submitted against the accused above in the concerned court. Accused Asfaq above was charged for the offence under section 22/32 of N.D.P.S. Act who pleaded not guilty and claimed to be tried.

4. Prosecution examined three witnesses namely P.W.1 Veersain. He is fact witness who stated prosecution story and proved recovery memo Ext. Ka-1 and 20 puriyas smack.

5. P.W.2 Sultan Singh is an arresting officer, who stated about prosecution story. P.W.3 S.I. Ram Sewak Upadhyaya is Investigating Officer of this case. He proved site plan Ext. Ka-2. The charge sheet was filed against accused Ext. Ka-3, Chick F.I.R. was registered Ext. Ka-4 and the is copy of case Kayami G.D. Vide Ext. Ka-5.

6. Statement of accused under section 313 Cr.P.C. was recorded who denied all the questions asked from him and stated that he was arrested by the police from the house of one Veer Singh and implicated falsely in this case by showing police activities.

7. After considering the submissions of learned counsels for both the parties and perusing the whole evidence on record, the accused above was found

guilty for the offence under section 22 of N.D.P.S. Act. Therefore, he was convicted and awarded sentence for 10 years R.I. and a fine of Rs. 1 lakh. Feeling aggrieved by it accused appellant has preferred the present appeal.

8. Heard learned counsel for the appellant and learned A.G.A. and perused the whole evidence on record as well as impugned judgement and order passed by the trial court.

9. Learned counsel for the appellant has submitted that no sample was taken from the alleged recovered contraband article and the same was sent to the chemical examiner for its examination. Therefore, in absence of not taking sample from the recovered contraband article, it is not believable that the said contraband article was only sent to the chemical examiner for its examination. It is further contended that section 50 of N.DPS. Act was not complied in taking personal search of the appellant which is mandatory provision and non-compliance of the said provision, the whole trial is vitiated. It is further contended that contraband article was not forwarded according to rules. Therefore, it is not certain that only recovered contraband was sent to chemical examiner. It is further contended that after search and seizure, no report was sent by arresting officer to his higher authorities regarding it. He has also not complied with section 57 of N.D.P.S. Act. In such circumstances, the trial court has committed error in convicting the appellant for the said charge and he is liable to be acquitted by allowing his appeal.

10. On the other hand, learned A.G.A. has urged that section 50 of N.D.P.S. Act has been complied with at the time of taking search and seizure. There is no averment regarding noncompliance of section 50 of N.D.P.S. Act. Compliance has been made by the arresting officer regarding the above section. Therefore, trial cannot be vitiated and accused cannot be acquitted. It is further contended that the whole recovered contraband was sent to the chemical examiner for its examination. There is no illegality in not taking sample from it. It was sent in the same manner without any tampering to the chemical examiner. Therefore, it is not liable to be deemed that the seal of recovered contraband was tampered. It is further contended that section 42 and 57 of N.D.P.S. Act are not mandatory but directory. There will be no effect in not complying these sections. It is further contended that P.W. 1 Veersain and P.W.2 Sultan Singh have supported the prosecution case in their deposition and case was fully proved against the appellant. Therefore, the trial court has rightly convicted the appellant according to law and he is not liable to be acquitted and this appeal is liable to be dismissed.

11. P.W.1 constable Veer Sain has been challenged on behalf of appellant at the time of his cross examination that he was arrested by the police from the house of one Veer Singh. In such circumstances, the prosecution was bound to prove that P.W.1 and P.W.2 had proceeded from the concerned police station and reached at the place of incident where he was allegedly arrested. In this regard, nothing has been mentioned in the recovery memo Ext. Ka-1, by which G.D. P.W.1 Veersain and P.W.2 Sultan Singh had proceeded.

Similarly they have not stated in their depositions regarding it. Case Kayami G.D. Ext.Ka-5 also does not reveal that G.D. Number of Ravanagi was mentioned in it. In absence of not producing of Rawanagi G.D, in evidence regarding P.W.1 and P.W .2, presence of both the witnesses at the place of incident have become suspicious. When the presence of both witnesses at the place of incident has become suspicious, in such circumstances, search and seizure of contraband article from the possession of appellant is also liable to be suspicious.

12. It is worthwhile to mention here that there is no public witness in this incident. Only police personnel P.W.1 and P.W.2 have been adduced in evidence. It does not mean that evidence of police personnel only cannot be believed provided their evidence inspired confidence. The informer has already given information regarding accused/appellant at the crossing of Loni. In such circumstances, some persons may pass through the crossing and anyone could be made witness as public witness by P.W.1 and P.W.2. It has been stated by P.W.1 Veersain and P.W.2 Sultan Singh that they have tried to take public witness but none was prepared for the same. This shows that both the witnesses P.W.1 Veersain and P.W.2 Sultan Singh have contacted some public persons but they have not stated anywhere by disclosing the name of such person who did not prepare to become public witnesses and in not disclosing the name of such person, only inference can be drawn that they have not tried to take any public witness after receiving information from the informer. If the public witness will be taken by them regarding alleged search and seizure, they could not support the prosecution case. Therefore, no any public witness was made in the case. In such circumstances, in absence of public witness, testimony of both the police personnel is not liable to be believed.

13. It is also worthwhile to mention here that the alleged contraband article was recovered on 16.11 .92 It was kept in Malkhana of the concerned police station, from where P.W. 3 Ram Sewak Updhyay who is Investigating Officer, took the said bundle and sent it to the chemical examiner for its examination on 24.11.92. The same was received in the office of chemical examiner on 26.11.92. Its report dated 7.8.93 was received in the court, where as the charge sheet dated 10.12.92 against the appellant was already filed in the concerned court. Therefore, charge sheet was filed without chemical examination report in the court when the recovered contraband was kept in Malkhana of G.D. of police station after recovery and sent to the chemical examiner for its report but no evidence has been adduced on behalf of prosecution by proving that recovered bundle of contraband article was kept in the lock up of police station intact till giving to the Investigating officer and it was the same intact received in the office of the chemical examiner. It could be proved by producing malkhana register or G.D. of lock up and producing the concerned police officials who took such article in intact condition to the office of chemical examiner. It is also worthwhile to mention here that sample of seal has not been produced in evidence on behalf of prosecution.

14. It has been observed in decision of Apex Court **in case of State of Rajasthan Vs. Gurmail Singh reported**

in (2005)3 Supreme Court Cases 59 that "Infirmities in prosecution case-Though the seized article claimed to have been kept in malkhana on 20.5.1995 till it was taken over on 5.6.1995, but malkhana register not produced in support thereof-No sample of seal sent along with the sample to Excise Laboratory for comparing with the seal appearing on sample bottles and thus there was no evidence to prove that the seals found were the same as were put on the sample bottles immediately after seizure of the contraband-Held, link evidence adduced by prosecution not satisfactory in view of the loopholes in the prosecution case, High Court rightly acquitted the accused-respondent".

15. It has also been observed in decision of Apex Court **in case of State of Rajasthan Vs. Gopal reported in (1998) 8 Supreme Court Cases 449** that "Seal on sample sent to the Analyst not produced in court for verification- Article seized on the railway platform and seal of station master used but stationmaster not examined to prove the seal-Accused not given an option to exercise his discretion for being searched in the presence of a magistrate or gazetted police officer-Held, in the circumstances order of acquittal calls for no interference by the Supreme Court.

16. Therefore, both the decision of Apex Court are fully applicable in the case. In such circumstances, no any link evidence was produced on behalf of prosecution.

17. It is also worthwhile to mention here that there was no compliance of sections 42, 43, 57 of N.D.P.S. Act. There is no evidence on record that information regarding search and seizure was sent to the higher authorities within 48 hours for complying provisions of section 57 of N.D.P.S. Act, although sections 42 and 57 are not mandatory but directory. It is also worthwhile to mention here that section 52 of N.D.P.S. Act was also not complied as reasons of arrest was not shown to the accused appellant. Section 52 of N.D.P.S. Act is also directory.

18. It has been observed in decision of this Court **in case of Roshan Lal Vs. State of U.P. reported in (2007 (58)ACC 723)** that "Sections 20(b) (ii), 57 and 50-Conviction-Sustainability-Recovery of 7 kgs of charas from the appellant from a public place-Nothing tangible to show that any endeavour was made to joint independent witness of search and seizure-Requirements of sections 52 and 57 not complied with-Appellant arrested without informing him of the ground of arrest- No evidence led to show that soon after the arrest and seizure the immediate superior officer was made to know about the details of such search and seizure-Prosecution unable to prove that the contraband was recovered from appellant-possibility of plantation of the contraband not ruled out-Conviction and sentence set aside."

19. Therefore, the trial cannot be vitiated merely in not complying provisions of sections 42, 52 and 57 of N.D.P.S. Act. However, it does not mean that it should be given a complete go by as that will make section 57 otiose. It is a cardinal principle of law that if a thing is required to be done in a particular manner then that thing should be done in that manner or not at all. Nonobservance of the section 57 of the N.D.P.S. Act does not by itself diminishes the recorded

conviction but it certainly diminishes the value of evidence led in the trial by the prosecution".

20. It is also worthwhile to mention here that section 50 of N.D.P.S. Act is mandatory and in violation of it, trial can be vitiated. In the present case, section 50 of N.D.P.S. Act was attracted as it was not a chance recovery and the alleged recovery was made from the pocket of appellant, although P.W.1 and P.W.2 have given evidence that section 50 of N.D.P.S. Act was complied with at the time of taking its search and seizure.

21. Learned counsel for the appellant has attracted my \ attention towards the decision of Apex Court **in case of State of Punjab Vs. Baldev Singh reported in 1999(39) (Supreme Court) page 349**. consisting of five Judges Bench including Chief Justice of India, in which it has been observed at para 23 of this judgement that "It would, thus, be seen that none of the decisions of the Supreme Court after Balbir Singh's case have departed from that opinion. At least none has been brought to our notice. There is, thus, unanimity of judicial pronouncements to the effect that it an obligation of the empowered officer and his duty before conducting the search of the person of a suspect on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted Officer or a Magistrate and that the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the concerned person requires, on being so informed by the empowered office or otherwise, that his search be conducted in the presence of a Gazetted Officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would also render the search illegal and the conviction and sentence of the accused bad."

22. It has been observed in the decision of Apex Court i**n case of Vijaysinh Chandubha Jadeja Vs. State of Gujarat reported in (2007)1 Supreme Court Cases 433** consisting of three Judges Bench including Chief Justice of India that "As per decision of Constitution Bench in Baldev Singh, (1999)6 SCC 172, it is not enough that the accused be told that whether he would prefer to be searched in the presence of a gazetted officer or a Magistrate-He must be told of his right to be searched in the presence of a gazetted officer or a Magistrate-However, in view of some conflicting decisions rendered by Supreme Court in this regard, matter requires some clarification by a larger Bench-Hence, directed to be placed before Chief Justice of India for further action."

23. Therefore, the above pronouncement of Constitutional Bench in case of **Baldev Singh, (1999) 6 SCC 172** has not been overruled till now. Therefore, it is to be followed.

24. In the present case it was asked from the appellant by P.W. 1 Veersain and P.W. 2 Sultant Singh that " **Jamatalashi Rajpatrit Adhikari Ke Samaksh Chalkar Lene Ke Liye Kaha To Kahane Laga Ki Aap He Jamatalashi Le Len.**"

25. Therefore, there was no complete compliance of section 50 of N.D.P:S. Act and merely on that basis trial could be vitiated. However, trial court has committed error in convicting the appellant for the said charge.

26. In view of above discussions, there is no force in the submissions made by learned A.G.A. and the trial court has committed error in convicting the appellant for the above charge and he is liable to be acquitted by allowing this appeal.

27. Therefore, the appeal succeeds and is allowed. The conviction and sentence of the appellant for the charge levelled against him is hereby set aside. The accused appellant is hereby acquitted. He is on bail. His bail bonds are cancelled and sureties are discharged. The amount of fine, if deposited by the appellant, shall be refunded to him. The recovered contraband article, as above, be confiscated.

28. Record of the court below be remitted back immediately along with copy of this judgement. Appeal Allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.11.2007

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

Criminal Revision No. 1626 of 2001

Virendra Pal Singh ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri V. Singh

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

Code of Criminal Procedure-Section-457- Power of Magistrate-release of vehicle loaded with solvent-vehicle standing open place for the last 6 years-only reason disclosed for non release-only the District Collector empowered in the offence of E.C. Act-held-illegal-direction issued for release after appropriate bond with sureties.

Held: Para 11

The Criminal Courts have jurisdiction under Section 451 of the Code of Criminal Procedure to pass appropriate orders with regard to the custody and disposal of the property pending trial. The vehicle loaded with so1vent is standing in the open place at the police station premises for the last about six years. The vehicle will become junked with passage of time.

Case law discussed:
2003 (Crl.) SCC-1943, 1977 (4) SCC-358, 1990 (2) ACC-480

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

1. This Criminal revision. is directed against the order dated 19.6.2001 passed by the Additional Chief Judicial Magistrate, Court No. 10, Azamgarh in Case Crime No. 155 of 2001 under Section 420 I.P.C. and Section 3/7 of the Essential Commodities Act, Police station Deo Gaon, District Azamgarh whereby declining to release the Tanker and solvent loaded therein.

2. Heard Sri V. Singh, learned counsel for the revisionist, learned A.G.A. and have perused the record.

The facts giving rise to this revision put briefly are these:

3. On 27.5.2001 the applicant and co-accused were found selling solvent adulterated petrol. The applicant was driver on Tanker No. U.P.65-D/0375 in which 12000 litres solvent was loaded. The Tanker carrying solvent was seized.

4. An application for release of the Tanker was moved under Section 457 Cr.P.C. by the applicant on the grounds that challan for offences under the Essential Commodities Act and prosecution were stopped with immediate effect by Government order dated 19.12.2000. It was alleged that the solvent was loaded from the licensed firm M/s Abhijeet Techno-chemicals Limited, Kanpur for transportation to licensed firm Earth Chemical Industries, Diyana Road, Mahgo, Jamsedpur. The applicant held valid driving licence, R.C. road permit and other documents.

5. The Court below rejected the application for release on the ground that the jurisdiction to confiscate the Tanker and goods vested with District Collector and during confiscation proceedings the Criminal Court had no jurisdiction to release vehicle and goods loaded in it.

6. The impugned order has been assailed on the grounds that no proceeding or notice as contemplated under Section 6-A of the Essential Commodities Act was served upon the applicant. The Court below has not taken into consideration the aspect of decay of vehicle which is standing in the open place.

7. The learned counsel for the revisionist placing reliance on the decision in ***State of Madhya Pradesh and others Vs. Rameshwar Rathore- 1990 (2) ACC 480***, argued that the jurisdiction of the Criminal Courts is not completely ousted in this matter.

Sections 451 and 457 of the Code of Criminal Procedure which empower the Criminal Courts to pass appropriate orders with regard to custody and disposal of property read as follows:

"451. Order for custody and disposal of property pending trial in certain cases- When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation-For the purposes of this section, "propeI1y" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody.

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

* * *

457. Procedure by police upon seizure of property(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such propel1y or the delivery of such property to the person entitled to the possession thereof,

or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

8. Section 451 empowers the Court to pass appropriate order with regard to the custody and disposal of property pending conclusion of inquiry or trial. The power under Section 451 Cr. P.C. is to be exercised judiciously. The Apex. Court in the case of ***Basavva Kom Dyamangouda Patil Vs. State of Mysore(1977)4 SCC 358***, has observed as under:

"The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is *seized by the police it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary.* As the seizure of the property by the police amounts to a clear entrustment of the property to a government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. *There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice*. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the court or should be in its custody. *The object of the Code seems to be that any property which is in the control of the court either directly or indirectly should be disposed of by* the court and a just and proper order should be passed by the court regarding its disposal. In a criminal case, the police always acts under the direct control of the court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the court exercises an overall control on the actions of the police officers in every case where it has taken cognizance."

9. In the case of ***Sunderbhai Ambalal Desai Vs. State of Gujrat- 2003 SCC (Cri.) 1943***, the Apex Court has issued direction for exercising powers under Section 451 Cr.P.C. in relation to valuable articles, vehicles and currency notes kept in police custody pending trial.

10. The case of ***State of Madhya Pradesh (Supra)*** related to the release of the truck seized for alleged contravention of Essential Commodities Act. The Apex Court repelling the contention that in view of the provisions of Section 6-A and Section 7 of the Essential Commodities Act, the Criminal Court had no jurisdiction held that the Criminal Court retained jurisdiction and was not completely ousted of the jurisdiction. In view of the Apex Court's decision the

Magistrate took an erroneous view that the jurisdiction of Criminal Court was completely ousted by the provisions of Section 6-A of the Essential Commodities Act.

11. The Criminal Courts have jurisdiction under Section 451 of the Code of Criminal Procedure to pass appropriate orders with regard to the custody and disposal of the property pending trial. The vehicle loaded with so1vent is standing in the open place at the police station premises for the last about six years. The vehicle will become junked with passage of time.

12. In view of these facts and circumstances, allowing the revision the impugned order dated 19.6.2001 is set aside. The seized Tanker and goods loaded in it shall be released by the Magistrate concern in favour of the revisionist on his furnishing appropriate bonds with sureties and guarantee for the production of the vehicle if required by the Court at any point of time. Revision Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2007

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE VINEET SARAN, J.

Habeas Corpus Writ Petition No. 49099 of 2007

Islamuddin ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Mrs. Swati Agarwal

Counsel for the Respondents:
Sri. Arvind Tripathi
A.G.A.

Constitution of India Article 226-Habeas Corpus Petition-detention order challenged-on the ground of single incident-may be personal attack but no disturbance of public life-held-molesting the daughter of informant-on public place attack with knife and sword-displaying blood sustained sword-presence of large number of villagers-due to terror no villager came forward to provide help-consequently died-held-even single incident may disturb the public order-subjective satisfaction of detaining authority duly recorded-cannot be interfered.

Held: Para 14

In the aforesaid facts, in our opinion, although the order is based on a single incident of murder based on personal enmity, but the same having the effect of terrorising the public present and affecting the even tempo of life of, the community in such place, would constitute an act of disturbance of "public order".

Case law discussed:
1993 SCC(Crl) 684, 1992(19) ACC 143, AIR 1990 SC 1068, AIR 1990 SC 516, 2007(59) ACC 385, AIR 1970 SC 1228, 2004(II) UP.Cr.R 667, 2002(44) ACC 757, 1994 Cr.L.J 480, AIR 1988 SC 208.

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

1. The main question for determination In this habeas corpus writ petition which is directed against the detention order dated 29.3.2007 passed by District Magistrate, Bijnor is whether a solitary incident can amount to disturbance of public order or not.
FACTS:

2. The grounds of detention as mentioned in the impugned order dated 29.3.2007 are to the effect that on 4.3.2007 an incident had taken place in which the petitioner and his associates had molested the daughter of Jamir Ahmad, whereafter in the evening the father and brothers of the girl reached the shop of the petitioner to complain of the same to Habib, father of the petitioner. The said Habib as well as the petitioner and his relatives misbehaved with Jamir Ahmad and his sons and threatened them of dire consequences and asked them to return back. Thereafter they got excited and the petitioner took out a knife and his accomplice Saleem took out a sword and started attacking Jamir Ahmad and his sons. The petitioner Islamuddin attacked Jamir Ahmad on his chest with a knife and his accomplice Saleem attacked said Jamir Ahmad in his stomach with a sword. There were a large number of villagers on the spot but because of their terror, no one could dare to oppose the petitioner and his associates, who thereafter left the spot displaying their blood stained weapons and threatening the villagers. After they had left the place, the sons of Jamir Ahmad and other villagers came forward to help Jamir Ahmad, who was in the last stage of his life. He was then taken to Bijnor and was declared dead in the hospital. A case was initially registered under sections 307, 323, 504, 506, 34 IPC which was later on converted to section 302 IPC.

3. In the detention order it has also been stated that said Jamir Ahmad was attacked by the petitioner openly in the crowded market of the village at about 7.30 p.m. and because of the terror of the petitioner and his associates, no one was even ready to give information or evidence against them. It has further been mentioned that the petitioner was arrested on 11.3.2007 and the knife as well as the sword which were used in the offence had been recovered; that the police reported that the villagers had terrorised thereby affecting the normal life in the area; that the said incident was reported in the local newspaper Amar Ujala because of which also the residents of the area were terrorised of the petitioner and his associates; and that after having been arrested, the petitioner was sending threats to the local residents that after he was released on bail he would take action against those who oppose him and that because of the incident there was disturbance in the area due to which additional police force had to be sent to the village.

4. We have heard Mrs. Swati Agrawal learned counsel for the petitioner who has rendered full assistance to this Court and has placed the case in a succinct manner which is worthy of appreciation. We have also heard Sri Arvind Tripathi, learned AGA and have perused the record.

5. THE SUBMISSIONS:

The submission of the learned counsel for the petitioner is two fold:

(i) There is violation of section 11 of the National Security Act as the approval/report submitted by the Advisory Board was after the prescribed period of seven weeks.

(ii) The incident in question, if at all, may amount to disturbance of "law and order" and not "public order".

6. 1st SUBMISSION: Approval/ Report of advisory Board - within time.

From the record it is clear that the detention order was passed on 29.3.2007. Though the same was communicated by the Deputy Secretary on 21.5.2007, the Advisory Board had submitted its opinion/report well within seven weeks, which was on 14.5.2007. As such, there is no violation of section 11 of the National Security Act and the first submission of the learned counsel for the petitioner does not have force.

7. 2nd SUBMISSION:- Single incident may relate to disturbance of "public order"

The learned counsel for the petitioner has vehemently submitted that the detention order has been passed on the basis of a solitary incident which relates to personal dispute between two parties and would thus, if at all, be a case of disturbance of law and order and not public order. In support of her submission she has placed reliance on **Dipak Bose alias Naripada Vs. State of West Bengal** 1973 SCC (Cri) 684; **Smt. Victoria Fernades Vs. Lalmal Sawma and others** 1992 (19) ACC 143 (SC); **Mrs. T. Devaki Vs. Government of Tamil Nadu and others** AIR 1990 SC 1068; **Anand Prakash Vs. State of U.P. and others** AIR 1990 SC 516 and **Ram Pratap Singh Vs. Union of India and others** 2007 (59) ACC 385.

8. On the other hand Sri Tripathi, learned AGA has submitted that even a single incident which may disturb the tranquility of the area may amount to disturbance of public order and that since the incident in the present case had taken place in a public place, because of which the residents of the area were terrorised, the same would amount to disturbance of public order. In support of his submission he has placed reliance on **Arun Ghosh Vs. State of West Bengal** AIR 1970 SC 1228; **State of U.P. and another Vs. Sanjai Pratap Gupta alias Pappu and others** 2004 (II) U.P.Cri.R. 667; **Rana @ Parvindra Vs. Union of India and others** 2002 (44) ACC 757; **Apda Haran Singh Vs. Union of India and others** 1994 Cri.LJ 480 and **State of U.P. Vs. Kamal Kishore Saini** AIR 1988 SC 208.

9. It is true that a solitary case would normally not amount to disturbance of public order and may remain confined to law and order problem but the same cannot be generalised and the impact of the incident has to be considered in the facts of each individual case. The Apex Court in the case of *State of U.P. v. Sanjai Pratap Gupta (supra)* has, in paragraph 14, observed that *"a single act cannot be considered sufficient for holding that public order was affected is clearly without substance. It is not the number of acts that matters. What has to be seen is the effect of the act on the even tempo of life, the, extent of its reach upon society and its impact."*

10. There are border line cases where there could be a very fine distinction between what amounts to disturbance of "public order" and "law and order". In a given set of circumstances, the same act may amount to disturbance of law and order, which is a much wider term. However, in separate set of facts and circumstances, the same incident can amount to disturbance of public order. Every incident which forms the basis of passing of the detention order, cannot be seen in isolation and has to be considered in the light of the attending circumstances. The true distinction lies not merely in the nature or quality of the

act, but in the degree and extent of its reach and effect upon society. A Division Bench of this Court in the case of *Apda Haran Singh vs. Union of India (supra)* while dealing with a case of an incident of murder relating to an individual based on personal enmity, held the same to be one relating to public order as the facts of the said case supported such decision.. Thus there cannot be a straight jacket formula by which a particular incident can be classified as one relating to "law and order" or "public order".

11. It is true that every assault in a public place resulting in the death the victim is likely to cause horror and panic among the spectators but the same may not necessarily amount to causing disturbance of public order. It the impact of the incident on the mind and lives of the public which is to considered for determining whether the same amounts to disturbance public order or law and order.

12. The facts in the present case are that the petitioner and his associate had molested the daughter of the deceased, regarding which the deceased along with his sons, had gone to the shop of the petitioner for lodging the protest. Although the learned counsel for the petitioner has submitted that it is a case of old enmity relating to about four years back when the marriage of the niece of the deceased Jamil Ahmad was initially settled with the petitioner and was thereafter broken, and thus the deceased and his family members had been agitating and creating problems in the family of the petitioner, but this question could be relevant for the Advisory Board to consider and not in this Habeas Corpus petition. Nevertheless, we have looked into this also and do not find any merit, as there is no evidence to show that the deceased had gone to the petitioner's shop, well prepared for any untoward incident. The story of the petitioner is not supported by any document, except one first information report which also was lodged on the basis of an application under section 156 (3) Cr.P.C., much after the incident which had taken place on 4.3.2007.

13. Admittedly the incident is of a public place. The deceased had suffered knife and sword injuries, which are attributed to the petitioner and his accomplice Saleem. All this had been executed in a busy village market and after the incident, the petitioner and his associates are said to have threatened the public at large and left the place displaying their blood-stained weapons, which all would certainly amount to creating terror in the minds of the public at large. The clear case as set out in the detention order is that no one from the public could dare to come to the rescue of the deceased and it was only after the petitioner and his associates left the place of incident that they came to help him. Thereafter also, no person could gather courage to inform the police or give evidence against the petitioner and his associates.

14. In the aforesaid facts, in our opinion, although the order is based on a single incident of murder based on personal enmity, but the same having the effect of terrorising the public present and affecting the even tempo of life of, the community in such place, would constitute an act of disturbance of "public order".

15. CONCLUSION:

We, therefore, hold that:

1. There was sufficient compliance of section 11 of the National Security Act;

2. A single incident may relate to disturbance of "public order", as has been found in the facts of the present case;

3. The subjective satisfaction of the detaining authority has been duly recorded;

16. This Court does not find any good ground to interfere with the impugned order. In view of the conclusions, the Habeas Corpus Writ Petition is thus devoid of merits and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2007

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 38170 of 2005

Janardan Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Sunil Kumar Srivastava
Sri D.K. Tripathi

Counsel for the Respondents:
Sri R.K. Tiwari
S.C.

U.P. Regularisation of Daily Wages Appointment on Group 'D' posts Rules 2001-Rule 4 (1)-Regularisation-Daily wagers appointed prior to 29.6.91 and continuing on 21.12.01-entitled for Regularisation-provided possess minimum required qualification condition of continuous working found no place in Rules-can not be basis for denied of Regularisation.

Held: Para 8

Since the Rules are applicable only to daily wage employees, the Rules framing authority was aware that such employee could not have worked continuously throughout and, therefore, has clearly provided that the engagement must be before 29.6.1991 and he is continuing as such on the date of commencement of the Rules. If a daily wage engagement has been made before 29.6.1991 and was continuing on 21.12.2001, meaning thereby the daily wage engagement remained necessity of the department or the requirement thereof for more than 10 years, for such a person only, the benefit of regularization under 2001 Rules has been provided, and it nowhere requires further that the incumbent must have worked continuously from the date of initial engagement till the commencement of these Rules and to read these words would amount to legislation, which is not permissible in law. While interpreting the statute, it is well settled that neither any word shall be added nor be subtracted but if a plain reading of the statute is clear and unambiguous, the same has to be followed as such. This Court does not find any ambiguity in Rule-4(1) providing as to which kind of persons would be entitled for regularization and it nowhere requires that the incumbent must have worked throughout from the date of initial engagement till the date of commencement of the Rules.

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

1. Heard Sri D.K. Tripathi, holding brief of Sri Sunil Kumar Srivastava, learned counsel for the petitioner and learned standing counsel for the respondents.

2. The facts in brief are that the petitioner was engaged as a daily wage Class-IV employee in Forest Department in July 1984 and has been continuing. On the promulgation of Rules, "U.P. Regularization of Daily Wages Appointment on Group "D' Posts Rules, 2001" (hereinafter referred to as "Rules 2001') his matter was considered for regularization by the competent authority but vide impugned order dated 10.9.2004, his claim for regularization has been rejected on the ground that in the year 1993-94, 98, 99, 2000 and 2001, he worked for certain period which did not amount to continuous working in service throughout though under Rules 2001 he was required to work continuously.

3. Learned counsel for the petitioner submits that the impugned order is totally illegal and has misapplied Rule 2001 inasmuch the only requirement to attract regularization under Rules 2001 are those conditions as provided under Rule 4(1), but the respondents in rejecting the claim of the petitioner have incorporated a condition which did not exist in the said Rules.

4. The respondents have filed counter affidavit wherein the facts as stated are not disputed, but it is said for the purpose of attracting regularization under Rules 2001, one must have worked continuously throughout and the only break permissible is holidays and not otherwise. In this view of the matter, it is said that the claim of the petitioner has rightly been rejected.

5. Since the facts are not is dispute and it is also not disputed that the petitioner was engaged on daily wage basis in 1984, i.e., before 29.6.1991 and was also working on the date of commencement of Rules 2001, i.e., on 21.12.2001, thus it is evident that he was entitled to be considered for regularization under the said Rules. The only question up for consideration is whether the said Rules require continuous service throughout, i.e., from the date of initial engagement till the commencement of the Rules. In my view, there is no such requirement under the Rules as is apparent from perusal thereof. Rule 4(1) of Rules 2001 is reproduced as under:

"4. Regularisation of daily wages appointments on Group "D' posts.- *(1) Any person who-*

(a) was directly appointed on daily wage basis on a Group "D' post in the Government service before June 29, 1991 and is continuing in service as such on the date of commencement of these rules; and

(b) possessed requisite qualification prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, shall be considered for regular appointment in permanent or temporary vacancy, as may be available in Group "D' post, on the date of commencement of these rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders."

6. The only requirement under Rule 4(1)(a) are that the incumbent was directly appointed on daily wage basis on a Group 'D' Post in a Government Service before 29.6.1991 and is continuing in service as such on the date of

commencement of the said Rules. The further requirement under Clause (b) of Rule 4(1) is that he must have possessed requisite qualification required for regular appointment on that post at the time of such employment on daily wage basis.

7. Respondents have not disputed the existence of all the said three conditions but their further presumption is that the Rules also contemplate continuous service throughout from the date of initial engagement till the date of commencement of the Rules and only then a person appointed on daily wage basis would be entitled for regularization. It is also the stand of the respondents, which is evident from para-20 of the counter affidavit, which reads as under:

"20. That the contents of para 23 of the writ petition is not correct and denied. As stated the petitioner is continuously working relates to, the working of a daily wager without any break as there is no break mentioned in the regularization rules. The petitioner or a daily wager has to work through out year except on the national holiday."

8. The said stand is contrary to the Rules and it amounts to reading certain words in Rule 4 (1) which is not provided therein by the Rule framing authority. The rule framing authority has not framed the aforesaid Rules in manner as are being read by the respondents. Since the Rules are applicable only to daily wage employees, the Rules framing authority was aware that such employee could not have worked continuously throughout and, therefore, has clearly provided that the engagement must be before 29.6.1991 and he is continuing as such on the date of commencement of the Rules. If a daily wage engagement has been made before 29.6.1991 and was continuing on 21.12.2001, meaning thereby the daily wage engagement remained necessity of the department or the requirement thereof for more than 10 years, for such a person only, the benefit of regularization under 2001 Rules has been provided, and it nowhere requires further that the incumbent must have worked continuously from the date of initial engagement till the commencement of these Rules and to read these words would amount to legislation, which is not permissible in law. While interpreting the statute, it is well settled that neither any word shall be added nor be subtracted but if a plain reading of the statute is clear and unambiguous, the same has to be followed as such. This Court does not find any ambiguity in Rule-4 (1) providing as to which kind of persons would be entitled for regularization and it nowhere requires that the incumbent must have worked throughout from the date of initial engagement till the date of commencement of the Rules.

9. In the result, the writ petition succeeds and is allowed. The impugned order 10.9.2004, Annexure-5 to the writ petition, is quashed. The respondents are directed to re-consider the case of the petitioner for regularization in accordance with 2001 Rules and the observations made hereinabove, afresh, and pass appropriate order within three months from the date of production of certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 54573 of 2007

Krishna Kumar Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Anoop Trivedi

Counsel for the Respondents:
Sri K.K. Chand
S.C.

Constitution of India-Art. 226-Seniority-appointment on adhoc/Temporary basis-without following the procedure for appointment-subsequently regularized-whether the period of working prior to regularized be counted for determining the seniority?-held-'No' as per dictum of Full Bench decision.

Held: Para 9

The criteria for determination of seniority in accordance with the U.P. Government Service Seniority Rules, 1991 is from the date of-substantive appointment. The date of substantive appointment of the petitioner has rightly been treated as 8th January, 1981 after his regularisation in services, which does not suffer from any error.

Case law discussed:
(1990) 2 S.C.C. 715, (2000) 8 S.C.C. 25, 2005(1) E.S.C. 161

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

1. Heard Sri Anoop Trivedi learned counsel for the petitioner and Sri K.K Chand, learned standing counsel.

2. By this writ petition, the petitioner has prayed for a writ of certiorari quashing the order dated 8th March, 2007 passed by the Additional Director of Education (Madhyamik), Uttar Pradesh rejecting the representation of the petitioner dated 6th October, 2004 claiming addition of period of his ad-hoc appointment from 8.1.1975 till 7th April, 1981 for seniority. A writ of mandamus has also been sought commanding the respondents to prepare a fresh seniority list computing the seniority of the petitioner from the date of initial joining, i.e., with effect from 8th January, 1975.

3. Brief facts necessary for deciding the writ petition are; the petitioner was appointed as Assistant Teacher (L.T. Grade) in Government Inter College, Arakot (Uttarkashi) on temporary basis by order of the Director of Education dated 24th December, 1974 in pursuance of which he joined on 8th January, 1975 as Assistant Teacher. Petitioner's services were regularised by an order dated 8th April, 1981 in accordance with the provisions of U.P. Regularisation of Ad-hoc Appointment (On Posts within the purview of the Public Service Commission) Rules, 1979. His substantive appointment has been treated with effect from 8th April, 1981 and on that basis he has also been granted promotion on the post of lecturer. The petitioner filed a writ petition being Writ Petition No.14553 of 2005 claiming seniority from 8th January, 1975, which was disposed of by this Court vide its order dated 8th December, 2006. In pursuance of the order of this Court, the Additional Director of Education rejected the representation taking the view that petitioner was working only on ad-hoc basis as L.T. Grade Teacher from

8.1.1975 till his services were regularised, hence his seniority can be reckoned only from the date of his substantive appointment, i.e., 8th April, 1981.

4. Learned counsel for the petitioner, challenging the impugned order, contended that petitioner is entitled to reckon his seniority from 8th January, 1975, i.e., his date of initial appointment since he was regularised under the 1979 Rules, as aforesaid. Learned counsel for the petitioner has placed reliance on a judgment of the Apex Court reported in (1990) 2 S.C.C. 715; ***Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra and others***. Learned counsel for the petitioner has relied on direction 47(A) of the said judgment. He has also placed reliance on judgment of the Apex Court reported in (2000) 8 S.C.C. 25; ***Rudra Kumar Sain and others vs. Union of India and others***.

5. Learned standing counsel replying the submissions of the petitioner's counsel, contended that petitioner's initial appointment dated 8th January, 1975 was an ad-hoc appointment and made de-hors the rules and the petitioner having been regularised under 1979 Rules he can treat his substantive appointment only from the date of regularisation and as per the U.P. Government Servant Seniority Rules, 1991 the seniority is to be given only from the date of substantive appointment, which for the petitioner is 8th April, 1981. Learned standing counsel further contended that the issues raised in the writ petition are covered by the Full Bench judgment of this Court reported in 2005(1) E.S.C. 161; ***Farhat Hussain Azad vs. State of U.P. and others***.

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

7. A copy of the initial appointment order of the petitioner has been as Annexure-2 to the writ petition. From a perusal of the said annexure it is clear that the petitioner was given a temporary appointment, which was terminable at any time by one month's notice. Petitioner's case in the writ petition, as stated in paragraph 5, is that services of the petitioner were regularised under 1979 Rules. Petitioner's regularisation is made with effect from 8th April, 1981 under 1979 Rules, which date has been treated as date of his substantive appointment. In the writ petition there is no foundation laid to the effect that petitioner's temporary appointment was made following the procedure as prescribed for appointment. The Apex Court in ***Direct Recruit's*** case (supra), which has been relied by counsel for the petitioner, laid down following in paragraph 47:-

*"**47**. To sum up, we hold that:*

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till

the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

8. The issue as to whether the petitioner's case is covered by corollary of direction (A) or by direction (b). The Full Bench judgment of this Court in ***Farhat Hussain's*** case (supra) had occasion to consider the similar issues. The writ petitioners in the said case were also appointed on ad-hoc basis initially, who were regularised under 1979 Rules. It was claimed that the period during which the appointment was ad-hoc/temporary should be reckon for seniority in view of the judgment of the Apex Court in ***Direct Recruit's*** case (supra). The Full Bench laid down, after considering large number of judgments of the Apex Court including the ***Direct Recruit's*** case, that such cases are covered by corollary 2, direction 47(A). Following was laid down by the Full Bench of this Court in paragraphs 42 and 46 of the said judgment:-

*"**42.** Thus, the law stands crystallised that a person appointed on ad hoc basis on a post de hors the rules or without following any procedure prescribed by law, cannot; claim the benefit of reckoning the period of service rendered by him as such for purpose of seniority or promotion. The case of an individual person claiming such a relief is to be examined in the light of the propositions 'A' and 'B' propounded by the Hon'ble Apex Court in Direct Recruit Engineers' case reading it along with the explanation given in paragraph 13 of the said judgment, as also explained subsequently by the Hon'ble Apex Court time and again in Keshav Chandra Joshi and others (supra) and Aghore Nath Dey and others (supra). The appointment should be made after considering the suitability of all eligible candidates in strict compliance of the statutory rules. A minor deficiency in following the procedure prescribed under the rules may be ignored but, if the appointment is to be made in consultation with the Commission, such a deficiency cannot be ignored as the appointment itself would be de hors the rules....."*

*"**46**. Rules 4 and 7 of Rules 1979 dealing with regularisation of ad hoc appointment and seniority provide that an ad hoc employee appointed by direct recruitment before 1st January, 1977 and continuing in service on the commencement of the said rules, if possessed the requisite qualification and eligibility at the time of initial appointment for the post, and had completed three years continuous service would be considered for regular appointment against permanent or temporary vacancy as may be available after assessing his suitability, following the reservation policy framed by the State. His seniority shall be considered only from the date of order of substantive appointment after selection in accordance with the said rules. The said Rule 7 reads as under:-*

"Seniority. - (1) A person appointed under these rules shall be entitled to seniority only from the date of the order of appointment after selection in accordance with these rules and shall, in all case, be placed below the persons appointed in accordance with the relevant service rules, or as the case may be, the regular prescribed procedure, prior to the appointment of such person under these rules. "

9. Thus the Full Bench has clearly laid down that at ad hoc services prior to regularisation under 1979 Rules cannot be reckon for seniority. The Full Bench judgment in ***Farhat Hussain's*** case (supra) squarely covers the present case and in view of the said judgment no infirmity is found in the order impugned rejecting the claim of the petitioner. The judgment of the Apex Court in ***Rudra Kumar Sain's*** case (supra) was a case considering different set of rules, namely, Delhi Higher Judicial Service Rules, 1970 where ad-hoc appointment was made on the recommendation of the High Court and due to the above, the Apex Court laid down that ad-hoc services of Additional District Judges be also reckon for seniority. The above case is clearly distinguishable and does not help the petitioner in the present case. The criteria for determination of seniority in accordance with the U.P. Government Service Seniority Rules, 1991 is from the date of-substantive appointment. The date of substantive appointment of the petitioner has rightly been treated as 8th January, 1981 after his regularisation in services, which does not suffer from any error.

10. No error has been committed by the Additional Director of Education in rejecting the claim of the petitioner of seniority from the date of his initial ad-hoc/temporary appointment. No good ground is made out to interfere with the impugned order.

The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2007

BEFORE
THE HON'BLE SUSHIL HARKAULI, J.
THE HON'BLE RAKESH SHARMA, J.

Civil Misc. Writ Petition No. 1676 (Tax) of 2007

M/s Emami Limited ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar
Sri Praveen Kumar

Counsel for the Respondents:
S.C.

U.P. Trade Tax Act, 1948-Section-10 (8)-words and phrases word-satisfaction of the assessing authority-demand of Bank guarantee/cash-commercial establishment continuing part several years-assessee suffers from blockage of capital-held-neither beneficial to trade tax department nor government for utilization-direction issued for security other than cash or bank guarantee.

Held: Para 4

However, where the assessee has an established commercial concern of substantial size, continuing over past several years and is an existing tax payer, demanding of bank guarantee may not be desirable except where there are cogent reasons for requiring bank guarantee as security. The reason is that most Banks require pre-deposit of equivalent amount of cash for giving of Bank-guarantee. Thus while the assessee suffers due to blockage of his business capital, a bank guarantee does not give any advantage, benefit or gain to the trade tax department/Govt., in as much as the money is not available to

the trade tax department/Govt. for utilization.

(Delivered by Hon'ble Sushil Harkauli, J.)

1. We have heard both sides and we are of the opinion that this writ petition can be finally disposed of at this stage itself.

2. By Section 10 (8) of the U.P. Trade Tax Act, 1948, the Assessing Authority has been given the right to demand "***adequate***' security to ***''its satisfaction''.***

3. What **security** would be ***adequate***, and what security would *satisfy* the Assessing Authority would obviously be in the discretion of the Assessing Authority. But no such discretion can be arbitrary or whimsical; it must be exercised on logical considerations. Also it would appear to be desirable on part of the Assessing Authority to mention those reasons, at least briefly, in the order if the order requires giving of cash or bank guarantee as security.

4. By way of example, where the assessee, for the reasons indicated in the order of the Assessing Authority, is considered not very reliable because of which it appears to be necessary to protect the Revenue's interest more securely, the Assessing Authority may be justified in demanding bank guarantee by way of security, which is definitely a more reliable security than the other forms of securities. Cash security may be justified, if the Assessee is totally untrustworthy. However, where the assessee has an established commercial concern of substantial size, continuing over past several years and is an existing tax payer, demanding of bank guarantee may not be desirable except where there are cogent reasons for requiring bank guarantee as security. The reason is that most Banks require pre-deposit of equivalent amount of cash for giving of Bank-guarantee. Thus while the assessee suffers due to blockage of his business capital, a bank guarantee does not give any advantage, benefit or gain to the trade tax department/Govt., in as much as the money is not available to the trade tax department/Govt. for utilization.

5. Judged on these parameters we are of the opinion that on the facts of the present case the Assessing Authority was not justified in demanding bank guarantee as security.

6. We, therefore, dispose of this writ petition finally after hearing the learned counsel for the petitioner and the learned Standing Counsel with the direction that the security to be furnished under Section 10(8) by the petitioner will be to the satisfaction of the Assessing Authority, but will be other than cash or bank guarantee.

Let a certified copy of this order be issued to the parties on payment of requisite charges within 48 hours.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2008

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Misc. Application No. 28969 of 2007

Awadhesh Kumar & others ...Applicants
Versus
State of U.P. and another...Opp. Parties

Counsel for the Applicants:
Sri R.S. Ram
Sri Paras Nath Bind

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

Code of Criminal Procedure-Section 2 (d)-Explanation-complaint-charge sheet under 323/504 IPC-fined-non cognizance offence-Magistrate to proved treating as complaint case-order impugned-not sustainable.

Held: Para 4

Therefore, on the basis of aforesaid Explanation, which has been interpreted in a single Judge decision of this Court in Dr. Rakesh Kumar Sharma vs. State of U.P. and another, 2007 (9) ADJ 478, it has been held that when the charge-sheet is only of non cognizable offences, in view of the aforesaid provision, the charge-sheet should be treated as a complaint. The argument is well founded and the order taking cognizance is set aside.

Case law discussed:
2007 (9) A.D.J.-478

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

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

2. Learned A.G.A. concedes that no useful purpose would be served in issuing notice to the opposite party No. 2, as it would only lead to delay of disposal of this application and prays that the application may be decided at this state after hearing learned counsel for the applicants and State.

3. An order dated 6.9.2007 taking cognizance has been challenged in this case and it is argued that charge sheet has only been submitted under Sections 323, 504 I.P.C. Reliance has been placed on the Explanation of Section 2 (d) of Code of Criminal Procedure, which reads as follows:-

"Explanation-A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complaint."

4. Therefore, on the basis of aforesaid Explanation, which has been interpreted in a single Judge decision of this Court in Dr. Rakesh Kumar Sharma vs. State of U.P. and another, 2007 (9) ADJ 478, it has been held that when the charge-sheet is only of non cognizable offences, in view of the aforesaid provision, the charge-sheet should be treated as a complaint. The argument is well founded and the order taking cognizance is set aside. Now the Magistrate may pass an order taking cognizance if, he so chooses, by proceeding in this matter as a complaint case under Chapter XV of the Code of Criminal Procedure. He can also keep this fact in mind that in view of Proviso (a) to

Section 200 Cr.P.C., which reads as follows:-

"Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in discharge of his official duties or a Court has made the complaint."

5. That is if the complainant who gives the information in writing is a public servant, who is acting in discharge of its official duties, it may not be necessary to examine the complainant and the witnesses.

6. With these observations, this application is allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.01.2008

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 29098 of 2007

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

Counsel for the Applicant:
Sri Rajesh Kumar Srivastava

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

Code of Criminal Procedure Section 439-Bail Application-offence under Section 302, 364A, 201-allegations of kidnapping-demand of ransom-on non fulfillment-deceased killed-case based on complete chain of circumstance evidence-recovery of dead body as painted out by accused-scarf used for commission of offence also no covered from the possession of accused-considering gravity of offence-not entitled for Bail.

Held: Para 6

Considering the facts, circumstance of the case, submission made of learned counsel for the applicant, learned A.G.A. and from the perusal of the record it appears that the present case is based on circumstantial evidence but chain of the circumstance is complete, the deceased was kidnapped the the applicant and other co-accused for the purpose of ransom, demand of ransom was made, on non fulfillment of demand of ransom the deceased was killed, the dead body of the deceased was recovered at the pointing out of the applicant and other co-accused and one scarf used in the commission of alleged offence was also recovered from the possession of the applicant, gravity of offence is too much and without expressing any opinion on the merit of the case, the applicant is not entitled for bail. The prayer for bail is refused.

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

This bail application has been filed by the applicant Kalua with a prayer that he may be released on bail in case crime No. 31 of 2007 under sections 302, 364-A, 201 IPC, P.S. Jagner, District Agra.

2. The facts in brief of this case are that the FIR has been lodged by Vinod Kumar Sharma on 8.2.2007 at 0.15 A.M. in respect of the incident which had occurred on 30.1.2007 at about 6.00 P.M. The applicant is named in the FIR. It is alleged that the son of the first informant namely Rahul aged about 18 years was

kidnapped for the purpose of ransom ultimately he was killed. The dead body of the deceased has been recovered at the pointing of the applicant and other co-accused. The cause of death was due to suffocation because of ante mortem injuries. The applicant applied for bail before learned Special Judge, D.A.A. Agra, who rejected the same on 10.10.2007. Being aggrieved from the order dated 10.10.2007 the present bail application has been moved by the applicant.

3. Heard Rajesh Kumar Srivastava, learned counsel for the applicant and learned A.G.A. for the State of U.P.

4. It is contended by learned counsel for the applicant that in the present F.I.R. is delayed by two days. There is no plausible explanation of delay in lodging the F.I.R. It is further contended by learned counsel for the applicant that applicant is named only on the basis of doubt and suspicion because he was friend of the deceased and the deceased was seen in the company of the applicant when they were going towards the road. The allegation that the deceased was kidnapped, thereafter demand of Rs. Two lacs was made by the miscreants on a telephone, the sound was appeared as of applicant. It can not be a credible evidence against the applicant. There is no eye witness account and no transaction of ransom has taken place. But during investigation the I.O. arrested the applicant on the basis of information given by the Mukhbir and recorded the statement of the applicant, in which he confessed that he along with co-accused Vinod, Omkar and Bhola kidnapped the deceased for realizing the ransom. Thereafter the co-accused Vinod Thakur, Omkar and Bhola were also arrested by the police on 8.2.2007 at 1.45 P.M. the alleged confessional statement in fact has not been made by the applicant, it has been recorded by the I.O according to his desire. Subsequent recovery of the dead body at the pointing out of the applicant and three other co-accused persons is also planted. It is having no evidential value because the recovery has been made at the joint pointing out of the applicant and other co-accused persons. The alleged recovery has not been supported by any independent witness. It is alleged that the dead body was recovered after digging at about 3.40 P.M. from the field, it was an open place. It is further contended that the recovery of scarf (Angauchha) has also been planted by the I.O., the alleged scarf was used in the commission of the murder of the deceased. The present case is based on circumstantial evidence but the chain of the circumstance is not complete. The applicant is not having any criminal antecedent. He may be released on bail.

5. In reply of the above contention, it is contended by learned A.G.A. that applicant is not named in the F.I.R., he was seen in the company of the deceased, he demanded Rs. Two lacs as a ransom on a telephone, his voice was identified by the first informant. The dead body of the deceased has been taken out from a pit by the applicant and other co-accused person after digging mud and the scarf used in the commission of the alleged offence has been recovered from the possession of the applicant. The chain of the circumstance is complete, therefore the applicant may not be released on bail.

6. Considering the facts, circumstance of the case, submission made of learned counsel for the applicant,

learned A.G.A. and from the perusal of the record it appears that the present case is based on circumstantial evidence but chain of the circumstance is complete, the deceased was kidnapped the applicant and other co-accused for the purpose of ransom, demand of ransom was made, on non fulfillment of demand of ransom the deceased was killed, the dead body of the deceased was recovered at the pointing out of the applicant and other co-accused and one scarf used in the commission of alleged offence was also recovered from the possession of the applicant, gravity of offence is too much and without expressing any opinion on the merit of the case, the applicant is not entitled for bail. The prayer for bail is refused.

7. According this application is rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2008

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.8600 of 2001
Connected with
Civil Misc. Writ Petition No.44383 of 2001

Shambhoo Prasad ...Petitioner
Versus
Authorised Controller, Sarva Hitaishi Inter College, Ghaziabad & others ...Respondents

Counsel for the Petitioner:
Sri R.B. Singhal
Sri M.K. Rajvanshi
Sri Dinesh Chandra Srivastava

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

(A) U.P. Secondary Education Service Commission Act 1982-as amended by U.P. Secondary Education Service Commission Amendment Ordinance-1998 promulgated in U.P. Gazette on 20.4.1998-Section 33-Regularisation-Adhoc L.T. Grade teacher appointed on 19.10.92 regularised on 18.08.99-whether the petitioner regularization be treated with retrospectively or prospectively-held- prospective basis.

Held: Para 14

In view of aforesaid settled legal position and statutory backdrop of the case, in my considered opinion, the services of petitioner cannot be treated to be regularised earlier to 18.8.1999, and his substantive appointment can also not be treated to be made earlier to the aforesaid date.

(B) U.P. Intermediate Education Act-1921-regular appointment-not defined in the Act-definition given in Baleshwar Das Case-regular appointment' means-appointed on substantive capacity it may be either temporary or permanent post.

Held: Para 38

From a close analysis of decision of Hon'ble Apex Court in Baleshwar Das's case (supra) it is clear that where the appointments are made on temporary posts after fulfilment of all the test for regular appointment, such appointments have been held to be in substantive capacity, irrespective of facts that such appointments made against temporary post or permanent post. It follows that merely because the person is a temporary appointee it cannot be said that he is not substantively appointed, if he fulfils the necessary conditions for regular appointment, such as probation and consultation with the Public Service Commission and once these formalities are complete, the incumbents can be taken as holding post in substantive capacity and entire officiating service

can be counted for the purpose of seniority.

(C) U.P. Secondary Education Service Selection Boards Rules 1998-Rule 11, 2 (a)(d)-Substantive appointment-Promotion on the post Lecturer in English vacancy caused on 30.06.98-first day of recruitment 1997commence from 1.7.97 to 1.7.98-petitioner being appointed on 19.10.92 an Adhoc basis in L.T. grade-regularised on 18.8.00-five year regular Service' not completed-held-not eligible for promotion.

Held: Para 49

Thus, aforesaid discussion leaves no room for doubt to hold that the services rendered by the petitioner on ad hoc basis from the date of his joining as L.T. grade teacher w.e.f. 3.11.1992 till his regularisation on 18.8.1999 cannot be taken into account for computing his 5 years continuous regular service for the purposes of Rule 14(1) of 1998 Rules. It is only on or after 18.8.1999, on his regularisation on the post of L.T. grade teacher his services can be counted for continuous regular service to be considered for his promotion on the post of Lecturer under existing rule 14(1) of 1998 Rules.

Case law discussed:

1996 (3) E.S.C. 155 (All), 2001 (3)E.S.C.1326 (All), 2003 (2) U.P.L.B.E.C. 1570, (1998)8 S.C.C., 690, A.I.R. 1981 S.C., 41, A.I.R. 2000 S.C. 3020, A.I.R. 2000 S.C. 3020, 1996 (3) E.S.C. 155 (All.), AIR 1978 S.C. 897, 2001 (3) E.S.C. 1326, 2002 (3) UPLBEC 2665, 2003(2) UPLBEC 1570, 2002 (3) UPLBEC 2665

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

In these two above noted petitions filed by the petitioner, the facts of Writ Petition No.44383 of 2001 would also include the facts of Writ Petition No.8600 of 2001 earlier filed by the petitioner. Earlier writ petition would be termed as first and later writ petition would be termed as second writ petition.

2. By means of these writ petitions, the petitioner has sought relief of mandamus directing the respondent no.3 of first writ petition to comply with the order passed by respondent no.1 on application of petitioner dated 27.12.2000 contained in Annexure-10 of the writ petition and send the papers for promotion of petitioner on the post of Lecturer in English in the institution and also pay all consequential benefits w.e.f. 1st July 1998. In subsequent writ petition the petitioner has sought relief of certiorari for quashing the orders dated 25.6.2001 and 13.7.2001 passed by Joint Director of Education, Meerut Region, Meerut and District Inspector of Schools, Ghaziabad contained in Annexures-6 and 7 respectively to the writ petition and also for quashing the order of promotion of Sri Pritam Singh Lecturer in Economics in the institution in question.

3. The relief sought for in the writ petitions rests on the assertions of fact that vide order dated 19.10.1992 passed by District Inspector of Schools, Ghaziabad, the petitioner was appointed as Assistant teacher in L.T. Grade on ad-hoc basis against substantive vacancy in the institution in question. The selection for aforesaid appointment was made by duly constituted District level Selection Committee under Section 18 of U.P. Secondary Education Services Selection Boards Act 1982 'hereinafter referred to as the Act of 1982'. In pursuance of appointment the petitioner has joined the post of teacher in L.T. Grade teacher in the institution on 3.11.1992 and since then he has been continuously working on the aforesaid post. Vide order dated

23.11.1992 the appointment of petitioner was also approved by the District Inspector of Schools, Ghaziabad for the purpose of payment of salary. Later on vide order dated 18.8.1999 the services of petitioner have been regularised under the provisions of Section 33-C of the Act 1982. A copy of order dated 18.8.1999 is already on record as Annexure-3 of first writ petition and as Annexure-5 of second writ petition.

4. It is stated that on 1.7.1998 the post of lecturer in English fell vacant on account of retirement of Sri Budh Prakash Sharma who was lecturer in English and retired on 30th June 1998. On 26.9.1998 the petitioner has moved an application before Authorised Controller of the institution stating therein that he is eligible to be promoted on the post of lecturer in English which has fallen vacant due to retirement of officiating principal on 30th June 1998. On the said application the Authorised Controller has directed the Principal of the institution to send the papers of petitioner for his promotion on 27.11.2000. Copy of application of petitioner along with endorsement of Authorised Controller is on record as Annexure-7 of first writ petition. It is stated that prior to the said order of Authorised Controller of the institution, the District Inspector of Schools, Ghaziabad had already directed him on 21.10.2000 to send the papers of petitioner for promotion on the post of lecturer in English. The copy of the order passed by District Inspector of Schools, Ghaziabad dated 21.10.2000 is already on record as Annexure-8 of first writ petition. Again vide order dated 2.12.2000 the District Inspector of Schools has directed the authorised controller to send the papers of petitioner for promotion on the post of lecturer in English. Copy of order of District Inspector of Schools, Ghaziabad dated 2.12.2000 is on record as Annexure-9 of first writ petition.

5. It is further stated that one post of lecturer in Economics fell vacant on 8.8.1998 in the said institution and the papers have been sent by the Principal of said college for promotion to the post of lecturer in Economics. Similarly one more post of lecturer in Civics has fallen vacant on 1.7.2000 and the papers have been sent by the Principal of the institution to the District Inspector of Schools for promotion on the post of lecturers in Economics and Civics respectively. It is further stated that though the post of lecturer in English has fallen vacant on 1.7.1998 earlier to the vacancies of Lecturers in Civics and Economics but the papers for promotion of petitioner have not been sent despite several reminders and order passed by Authorised Controller and District Inspector of Schools. It is further stated that such action and inaction on the part of the Principal of the institution was just to defeat the claim of promotion of petitioner on the post of lecturer in English and to give undue advantage to other persons, as such feeling aggrieved against the aforesaid action, the petitioner has filed first writ petition before this Court. Thereafter in order to defeat the claim of promotion of petitioner, two persons namely Sri Pritam Singh and Sri Ved Pal Singh have been promoted in 50% quota of promotion on the post of lecturers on 25.6.2001. Sri Pritam Singh has been promoted on the post of lecturer in Economics and Sri Ved Pal Singh has been promoted on the post of lecturer in Civics in the institution in question, hence the petitioner has filed second writ

petition challenging the aforesaid orders of promotions of Sri Pritam Singh and Sri Ved Pal Singh and sought relief of writ of certiorari for quashing the said orders.

6. In the light of assertions made in the pleading of writ petition, learned counsel for the petitioner has submitted that since the petitioner's services have been regularised on 18.8.1999, therefore, should be treated to be regularised with effect from the date of his initial appointment on the post of Assistant teacher on ad hoc basis and at any rate since the regularisation of his services has been done under Section 33-C of the Act 1982 which was enforced by Government Order dated 20.4.1998, therefore, his services shall be treated to have been regularised from the aforesaid date, and being qualified for the post of Lecturer in English, he has also rendered 5 years continuous service on the next lower post of L.T. Grade teacher, therefore, he was fully eligible for promotion on the post of English Lecturer on the date of occurrence of vacancy i.e. on 30.6.1998. In case the petitioner would have been promoted well within time, there would have been no occasion to promote Sri Pritam Singh and Sri Ved Pal on the post of lecturer in Economics and Civics in the institution in the aforesaid 50% quota for promotion. While placing reliance upon Rule 14 of the Uttar Pradesh Services Selection Boards Rules 1998, learned counsel for the petitioner has submitted that the words 'five years continuous regular service' should not be equated or confused with five years continuous substantive service in the next lower grade. The requirement of law would be satisfied on mere completion of five years continuous regular service which would also include ad hoc services. In support of his contention he has placed reliance upon certain decisions of this Court rendered in ***Ram Swaroop Vs. State of U.P. and others 1996 (3) E.S.C. 155 (All), Committee of Management, B.D. Bajoria Inter College, City and District Saharanpur and others Vs. Director of Education (Secondary) U.P. and others 2001 (3)E.S.C.1326 (All), Nand Kishore Vs. Joint Director of Education, Allahabad Region, Allahabad and others 2003 (2) U.P.L.B.E.C. 1570 and Krishna Pal Vs. Director of Education (Madhyamik) U.P. and others decided on 20.7.2006***

7. Two detailed counter affidavits have been filed by the respondents in both the writ petitions. Learned Standing Counsel has attempted to justify the action of respondents by placing relevant averments contained in aforesaid counter affidavits. In a detailed counter affidavit filed by the Authorised Controller of the institution in Writ Petition No.8600 of 2001, the stand taken in para 3 to 7 is as under:-

"3. That prior to making any comments made by the petitioner in his writ petition, brief history of the case is being enumerated for proper adjudication of the case in which respect it is submitted that the Institution in question namely Sarva Hitaishi Inter College Bhadshyana District Ghaziabad is a recognised and aided Inter College in which 8 posts of lecturer Grade are sanctioned. Out of which 4 posts are to be filled by way of direct recruitment and remaining 4 posts are reserved for promotion under 50% reservation quota of promotion.

4. That out of said 8 posts 4 posts of Lecturers of Math, Physics, Chemistry and English were already filled by way of

direct recruitment. Accordingly the remaining 4 posts of lecturer in Science, Geography, Hindi and Economics were to be filled by way of promotion.

5. That at this moment it is clarified here that the post of lecturer in English was substantially fell vacant on account of retirement on 30.6.1998 and post of lecturer of Civics was also substantially fell vacant on account of retirement on 30.6.2000. As mentioned above, out of said 2 posts one was to be filled by way of direct recruitment and the other was to be filled by way of promotion. At this moment it is also clarified here that there has been no categorisation in view of subjectwise. The categorisation in respect of Direct Recruitment and promotion is to the number of posts.

6. That although the said post of lecturer of English was fell vacant on 30.6.1998 but as at that time there was no qualified teacher working in the Institution on L.T. Grade as such no promotion from the post of L.T. Grade to lecturer could be made. So far as the present petitioner is concern on the date of occurrence of vacancy i.e. 30.6.1998 he has not been a confirmed regular teacher as he was appointed on L.T. Grade on 3.11.1992 on adhoc basis and was confirmed as Assistant teacher in L.T. Grade on 18.8.1999, as such according to the rules he may become eligible for further promotion after completion of his 5 years services as a regular confirmed assistant teacher which comes on 18.8.2004. Prior to 18.8.2004 the petitioner has got no right and authority to claim for his promotion from the post of L.T. Grade to lecturer. Accordingly he has not been promoted, At this moment it is also clarified that as in the Institution there has been no qualified teacher for promotion as lecturer in English and said post was to be filled by way of promotion, therefore, the same has been still kept vacant for promotion and has not been filled by any one.

7. That in the meantime the post of lecturer in Civics fell vacant on 30.6.2000. As the said post of lecturer in English could not be filled by way of promotion due to lack of qualified teacher as such the said post of lecturer of Civics has been properly filled by way of promotion under 50% proposed quota. As one Ved Pal Singh Assistant Teacher was available in the Institution and was well qualified to be promoted as lecturer from L.T. Grade. Accordingly has been promoted on 25.6.2001 by the Joint Director of Education Meerut, who is absolutely competent to do so. Now the post of lecturer in English can not be filled by way of promotion and the same will be filled by way of Direct recruitment according to the rules as the promotional quota has already been exhausted as mentioned above."

8. In a detailed counter affidavit filed by the Office of District Inspector of Schools in Writ Petition No.44383 of 2001, the stand taken by the State respondents is clear from averments contained in paras 7, 8, 9, 10, 14, 15 and 16 of the counter affidavit. The same are extracted as under:-

"7. That in reply to the contents of paragraph nos. 8 and 10 (paragraph no.9 has been omitted in the writ petition) it is stated that the petitioner was regularly appointed as a Assistant Teacher in L.T. Grade against a substantive post with effect from 18.8.1999 only. It is wrong to contend that he was given the benefit of regularisation of service with effect from 20.4.1998. The Government Order to

accord the benefit of regularisation to adhoc teachers was issued on 20.4.1998 but was enforced with effect from 27.7.1998. Therefore, there was no question of the petitioner's being regularised with effect from 20.4.1998. On the basis of the aforesaid Government Order, the services of the petitioner as Assistant Teacher were regularised from 18.8.1999. A true copy of the Government Order dated 20.4.1998 is being filed and marked as Annexure CA-1.

8. That in reply to the contents of paragraph no.11 of the writ petition it is stated that on the retirement of Budh Prakash Sharma, a substantive post of lecturer in English feel vacant at the institution on 30.6.1998. The petitioner on the said date was not eligible to be promoted as lecturer as he had not completed 5 years of substantive service in the next lower grade i.e. as Asstt. Teacher L.T. Grade. In fact, at the time of the occurrence of the said vacancy on 30.6.1998, the petitioner had not been appointed on a substantive post of Assistant Teacher and as such was not entitled to be considered for promotion.

9. That the contents of paragraph no.12 of the writ petition are not admitted. The petitioner was not entitled to be promoted as lecturer in English at the institution. According to Chapter 2 Regulation 5, it has been provided that 50% of the total number of the sanctioned post in the lecturer grade shall be filled up by promotion from amongst teachers available and eligible at the institution. Regulation 6 provides the necessary qualification for the purposes of promotion. It provides that all teachers working in the L.T. Grade having minimum 5 years continuous substantive service to their grade on the date of occurrence of the vacancy shall only be considered for promotion to the lecturer grade. Therefore, as the petitioner had not rendered substantive service of continuous 5 years in the L.T. Grade as on 30.6,1998, he was not entitled to be considered for promotion. The petitioner on 30.6.1998 was working on adhoc basis only.

10. That the contents of paragraph no.13 of the writ petition are misconceived and not admitted. It is incorrect to state that the petitioner was regularised with effect from 20.4.1998. The Government Order dated 20.4.1998 was enforced with effect from 27.7.1998, according to which the benefit of section 33(C) was to be accorded. The benefit of regularisation of adhoc teachers was to be accorded by a selection committee. Therefore, it is not possible to accord the benefit of regularisation to the petitioner from 20.4.1998. The benefit of regularisation has been given to the petitioner only with effect from 18.8.1999 on the recommendation of the selection committee.

14. That in reply to the contents of paragraph no.18 of the writ petition, it is stated that since the petitioner was not eligible for promotion, his case was not considered. The petitioner do not fulfills the necessary criteria of 5 years continuous service in L.T. Grade in substantive capacity. The petitioner is teaching English and as such is not entitled to be promoted on the post of lecturer in Civics.

15. That the contents of paragraph nos.19 to 23 of the writ petition are misconceived and not admitted. On the date of occurrence of the vacancy for the post of lecturer in English i.e. on 30.61998, the petitioner was not qualified

for promotion. Therefore, no promotion has been given to him. No illegality has been committed and the respondent no.4 has rightly been promoted.

16. That in reply to the contents of paragraph nos.24, 25 and 26 of the writ petition it is stated that the respondent nos. 4 and 5 were both eligible for promotion and as such have rightly been promoted on the post of lecturer English and Civics respectively. The petitioner who was not eligible for promotion has no locus standi to challenge the appointment of the selected/promoted candidates i.e. respondent nos. 4 and 5. No prejudice has been caused to the petitioner."

9. I have heard learned counsel for the petitioner and learned Standing Counsel for State respondents. The order which I propose to pass in the writ petitions, I need not to hear the private respondents.

10. Having heard rival submissions of learned counsel for the parties and on perusal of records, the first question which arises for consideration of this Court is as to whether in given facts and circumstances of the case, the services of petitioner shall be treated to be regularised with effect from the date of his initial appointment on ad hoc basis or with effect from the date on which the U.P. Secondary Education Service Commission Amendment Ordinance 1998 was promulgated by Governor and published in U.P. Gazette dated 20th April 1998 or with effect from the date on which the order of regularisation of petitioner's services on the post of Assistant teacher in L.T. Grade has been passed by the Competent Authority?

11. In this connection, in order to find out accurate answer to the aforesaid question it is necessary to point out that the U.P. Secondary Education Service Commission Amendment Ordinance 1998 has been promulgated by the Governor on 20th April 1998 and it was published in U.P. Gazette on 20th April 1998. By Section 10 of the aforesaid Ordinance, the provisions of new Section 33-C and 33-D after Section 33-B have been inserted in Principal Act of 1982. The provisions of Section 33-C are only relevant for the purpose of present controversy which reads as under:-

"33-C. Regularisation of certain more appointments.- *(1) Any teacher who,-*

(a)(i) was appointed by promotion or by direct recruitment on or after May 14, 1991 but not later than August 6, 1993 on ad hoc basis against substantive vacancy in accordance with section 18, in the Lecturer grade or Trained Graduate grade;

(ii) was appointed by promotion on or after July 31, 1988 but not later than August 6, 1993 on ad hoc basis against a substantive vacancy in the post of a Principal or Headmaster in accordance with section 18;

(b) possesses the qualifications prescribed under, or is exempted from such qualifications in accordance with the provisions of the Intermediate Education Act, 1921;

(c) has been continuously serving the Institution from the date of such appointment up to the date of the commencement of the Uttar Pradesh Secondary Education Services Commission (Amendment) Act, 1998;

(d) has been found suitable for *appointment in a substantive capacity by*

a Selection committee constituted under sub-section (2);
shall be given substantive appointment by the management.

(2) (a) For each region, there shall be a Selection Committee comprising,-
(i) Regional Joint Director of Education (Secondary) who shall be member;
(ii) Regional Deputy Direction of Education (Secondary) who shall be member;
(iii) Regional Assistant Director of Education (Basic) who shall be member;
In addition to above members the District Inspector of Schools of the concerned district shall be Co-opted as member while considering the cases for regularisation of that district.
(b) The procedure of selection for substantive appointment under sub-section (1) shall be such as may be prescribed.
(3) (a) The names of the teachers shall be recommended for substantive appointment in order of seniority as determined from the date of their appointment.
(b) If two or more such teachers are appointed on the same date, the teacher who is elder in age shall be recommended first.
(4) Every teacher appointed in a substantive capacity under sub-section (1) shall be deemed to be on probation from the date of such substantive appointment.
(5) A teacher who is not found suitable under sub-section (1) and a teacher who is not eligible to get a substantive appointment under that sub-section shall cease to hold the appointment on such date as the State Government may by order specify.
(6) Nothing in this section shall be construed to entitle any teacher to substantive appointment, in on the date of commencement of the Ordinance referred to in clause (c) of sub-section (1) such vacancy had already been filled or selection for such vacancy has already been made in accordance with this Act."

12. From a plain reading of the provisions of Section 33-C of the Act 1982 as inserted by the aforesaid Ordinance it is clear that any teacher who was appointed by promotion or by direct recruitment on or after May 14, 1991 but not later than 6th August 1993 on ad hoc basis against substantive vacancy in accordance with Section 18, in the Lecturers grade or trained graduate (L.T) grade, possesses the qualification prescribed under or is exempted from such qualification in accordance with the provisions of Intermediate Education Act, and has been continuously serving the institution from the date of such appointment upto the date of commencement of Amendment Act 1998 and further has been found suitable for appointment in a substantive capacity by Selection Committee constituted under sub Section (2), shall be given substantive appointment by the Management. The procedure for substantive appointment under sub Section (1) shall be such as may be prescribed under the rules. Sub Section 4 of Section 33(C) provides that every teacher appointed in a substantive capacity under sub Section (1) shall be deemed to be on probation from the date of such substantive appointment. Thus, from the aforesaid provisions of the Act it is clear that the ad hoc appointee after being regularised under the aforesaid provisions of the Act cannot claim his substantive appointment from retrospective effect i.e. either with effect from the date of his initial appointment on

ad hoc basis or from the date of commencement of amending Ordinance or Act but in my considered opinion, his substantive appointment is treated to be made only from the date of such substantive appointment made by the Management after due selection made by Selection Committee constituted under sub Section 2 of Section 33-C of the Act 1982. Thereupon he shall be deemed to be on probation from the aforesaid date of substantive appointment. Therefore, the submission of learned counsel for the petitioner, in this regard, appears to be wholly misplaced and cannot be accepted. Having regard to the scheme of statute in question, there can be no scope for doubt to hold that the petitioner's substantive appointment has to be operative not with retrospective effect either from the date of his initial ad hoc appointment or from the date of commencement of the provisions of Section 33-C of the Act, under which the regularisation has been done, rather his substantive appointment shall be treated to be made with effect from the date on which the Management of the institution has issued formal order of appointment on or after 18.8.1999 in pursuance of the aforesaid order of Joint Director of Education, Meerut and not earlier to it.

13. The aforesaid view also finds support from the decision of Hon'ble Apex Court rendered in ***Registrar General of India and another Vs. V. Thippa Setty and others (1998)8 S.C.C., 690***, wherein Hon'ble Apex Court has held that regularisation of service should ordinarily be prospective and not with retrospective effect. The pertinent observation made by Hon'ble Apex Court in this regard is as under:-

"2. We have heard counsel for both sides and perused the orders of the Tribunal dated 16.12.1991 and 19.2.1993. By the previous order, the Tribunal's direction was to regularise the respondents with effect from the date of promulgation of the recruitment rules or from the date of their appointment, depending on the seniority list. That was a direction which was a flexible one leaving it to the management to consider from what date regularisation should take effect. In pursuance of the said direction, on the new recruitment rules being promulgated on 11.5.1985, the regularisation was given effect from that date. However, in the subsequent order passed by the Tribunal on 19.2.1993, the Tribunal has directed that they should be treated as having been conferred regular status with effect from 5.2.1981, that is, the date of their entry into service as Investigators. It must be remembered that they had entered as ad hoc appointees and the question was whether they should be regularised in service since they had worked as ad hoc employees for a sufficiently long time. If the ad hoc service is regularised from the back date in this manner, it will disturb the seniority of regularly appointed employees in the cadre and, therefore, ordinarily the regularisation must take effect prospectively and not retrospectively. It must also be borne in mind that ad hoc appointees, casual labour and daily-rated persons are not subject to strict discipline of service and it is a matter of common experience that their attendance is very often not regular and at times they do not even meet the qualification for appointment since they are taken on ad hoc basis. These deficiencies are overlooked by way of granting of relaxation and, therefore, care must be

taken to see that they do not upset the seniorities of regular appointees. Whether they qualify in a given case or not is not relevant but what is relevant is that regularisation should be prospective and not retrospective as the chances of their upsetting the seniorities cannot be overlooked. The Tribunal must take care to see that when they pass orders of regularisation from retrospective dates, those who are likely to be affected on account of that order are not before that court and unwittingly their careers are not adversely affected. Ordinarily, therefore, the regularisation must be prospective."

14. In view of aforesaid settled legal position and statutory backdrop of the case, in my considered opinion, the services of petitioner cannot be treated to be regularised earlier to 18.8.1999, and his substantive appointment can also not be treated to be made earlier to the aforesaid date.

15. Now next question which arises for consideration is as to whether the petitioner was eligible and qualified for promotion on the post of lecturer in English on first day of year of recruitment due to occurrence of vacancy on 30.6.1998? In this connection, it is necessary to point out that it is not in dispute that the post of lecturer in English became vacant on account of retirement of English lecturer Sri Budha Prakash Shamra who was retired on 30.6.1998. In view of Section 32 of Act 1982 since the procedure and eligibility condition for promotion on the post of lecturer has been differently prescribed under the rules framed under the Act 1982 than that of regulations framed under U.P. Intermediate Education Act, 1921, therefore, the provisions of Regulation 6 of Chapter 2 shall not be attracted instead thereof rules framed under Act 1982 shall apply.

16. Now, it is necessary to examine the petitioner's eligibility under the provisions of the Act 1982 and rules framed thereunder. Section 2 (l) of Act 1982 defines "year of recruitment" which means a period of 12 months commencing from the first day of July of a calendar year. Since the vacancy of Lecturer in English came into being on 30th June 1998 i.e. the last day of year of recruitment commencing from 1st July 1997 to 30th June 1998 and on that day the provisions of Uttar Pradesh Secondary Education Services Selection Boards Rules 1995 hereinafter referred to as '1995 Rules' was in force and U.P. Secondary Education Services Selection Board Rules 1998 hereinafter referred to as '1998 Rules' came in force w.e.f. 8.8.1998, therefore, it is necessary to examine the eligibility of petitioner under the provisions of 1995 Rules.

17. Rule 2 (c) of 1995 Rules defines the expression **"substantive appointment"** which means an appointment not being an ad hoc appointment on the post of teacher made in accordance with the provisions in the Act and rules made thereunder and includes appointments regularised under Section 33-A or 33-B of the Act, as by that time the provisions of Section 33-C was not inserted under that Act. Rule 5 deals with academic qualifications which provides that a candidate for appointment to a post of teacher must possess the qualification specified in Regulation 1 of Chapter 2 of regulations made under Intermediate Education Act, 1921.

18. Rule 10 of 1995 Rules provides source of recruitment, which read as under:-

"***10 Source of recruitment.-*** *Recruitment to various categories of teachers shall be made from the following sources:*

(a) Principal of an Intermediate College or Head Master of a High School	*By direct recruitment*
(b) Teachers of lecturers grade	*(i) 50 per cent by direct recruitment;*
	(ii) 50 per cent by promotion from amongst the substantively appointed teachers of the trained graduates (L.T.) grade;
(c) Teachers of trained graduates	*(i) 50 per cent by direct recruitment;*
	(ii) 50 per cent by promotion from amongst the substantively appointed teachers of the Certificate of Tea- ching (C.T.) grade;

Provided that if in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the posts may be filled in by direct recruitment:

Provided further that if in calculating respective percentages of posts under this rule there comes a fraction then the fraction of the posts to be filled by direct recruitment shall be ignored and the faction of the posts to be filled by promotion shall be increased to make it one post."

19. Rule 11 of 1995 Rules deals with the determination and notification of vacancies, which reads as under:-

"11. Determination and notification of vacancies.- *[(1) The Management shall determine the number of vacancies in accordance with sub-section (1) of Section 10 of the Act and notify them through the inspector, to the Commission in the manner hereinafter provided.*

(2) The statement of vacancy for each category of post to be filled in by direct recruitment or by promotion, including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment, shall be sent separately in quadruplicate in the proforma given in Appendix 'A' by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subject-wise in respect of the vacancies of lecturers grade, and group-wise in respect of vacancies of trained graduates (L.T.) grade. The consolidated statement so prepared shall, along with copies of statement received from the Management, be sent by the Inspector to the Commission by July 31 with a copy thereof to the Deputy Director."

20. Rule 14 of 1995 Rules provides procedure for recruitment by promotion and also eligibility conditions for promotion which reads as under:-

"14. Procedure for recruitment by promotion.- *(1) Where any vacancy is to be filled by promotion all teachers*

working in trained graduates (L.T.) grade or Certificate of Teacher (C.T.) grade, if any, who possess the qualifications prescribed for the post and have competed five years continuous service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates (L.T.) grade, as the case may be, without their having applied for the same.

Notes - For the purposes of this sub-rule, regular service rendered in any other recognised institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in sub-rule (1), and forward it to the Commission through the Inspector with a copy of seniority list, service records, including the character rolls, and statement in the proforma given in Appendix "A".

4. Within three weeks of the receipt of the list from the management under sub-rule (3), the Inspector shall verify the facts from the record of his office and forward the list to the Commission.

5. The Commission shall consider the cases of the candidates on the basis of the records referred to in sub-rule 3 and may call such additional information as it may consider necessary. The Commission shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Deputy Director.

6. Within ten days of the receipt of the panel from the Commission under sub-rule (5), the Inspector shall send the name of the selected candidate to the management of the institution which has notified the vacancy and the management shall accordingly on authorisation under its resolution issue the appointment order in the proforma given in Appendix 'E' to the such candidate."

21. From a plain reading of Rule 10 of the said Rules, it is clear that 50% post of lecturers grade is liable to be filled by direct recruitment and 50% by promotion ***from amongst substantively appointed teachers of Trained Graduates (L.T.) Grade***. It is not in dispute that the petitioner having possessed M.A. degree in English on the date of occurrence of vacancy i.e. 30th June 1998 inasmuch as on the first day of year of recruitment commencing from 1st July 1997 to be ended by 30th June 1998, was fully qualified to be appointed and promoted on the post of lecturer in English, but further questions remain to be decided as to whether the post of English lecturer in the institution was to be filled up by promotion or by direct recruitment and as to whether the petitioner was eligible for the post on the first day of year of recruitment?

22. In this connection it is necessary to point that Rule 11 (1) of the said Rules requires that the Management shall determine the number of vacancies in accordance with sub-section (1) of Section 10 of the Act and notify them through the Inspector to the Commission in the manner hereinafter provided. Sub rule (2) of Rule 11 further provides that the statement of vacancy for each category of post to be filled in by direct recruitment or by promotion including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment shall be sent separately in quadruplicate in the proforma given in Appendix 'A' by the Management to the

Inspector by 15th July of year of recruitment. In this connection it is necessary to point out that at the relevant point of time, it appears that Committee of Management of the institution was suspended/superseded/replaced by Authorised Controller, who was to discharge the duties and responsibilities cast upon the Committee of Management of the institution under the aforesaid provisions of the Act and rules framed thereunder. From perusal of paragraphs 3 and 4 of the counter affidavit filed on behalf of Authorised Controller in the first Writ Petition No.8600 of 2001 filed by the petitioner it is clear that statements of fact have been made to the effect that in the institution in question there are 8 sanctioned posts of lecturers. Out of which 4 posts are to be filled by way of direct recruitment and remaining 4 posts are to be filled by way of promotion under 50% quota earmarked for promotion. Out of 8 posts of lecturers, 4 posts of lecturers of Math's, Physics, Chemistry and English were already filled by way of direct recruitment and the remaining 4 posts namely Science (incorrectly mentioned instead of Civics), Geography, Hindi and Economics were to be filled by way of promotion, thus, the vacancy upon which the petitioner has claimed his promotion was earmarked or determined by the Committee of Management of the institution to be filled by direct recruitment not by promotion, therefore, in my opinion the petitioner could have hardly any claim for promotion on the post of lecturer in English in the institution and his petitions can be dismissed on this short and limited ground alone. But for the sake of argument I would deal with other issues raised by learned counsels for rival parties and also arise out of pleadings of the parties.

23. Now coming to the next point I find that it is not in dispute that petitioner has been appointed as Assistant teacher in L.T. Grade vide order dated 19.10.1992 passed by District Inspector of Schools, Ghaziabad on ad hoc basis. His appointment was made against substantive vacancy after due selection made by District Level Selection Committee constituted under Section 18 of the Act 1982. In pursuance of his aforesaid selection and appointment he has joined the post as Assistant Teacher in L.T. grade in the institution on 3.11.1992 on ad hoc basis and since then he has been continuously working on the aforesaid post in the institution in question. It is not in dispute that petitioner's services have been regularised vide order dated 18.8.1999 passed by Joint Director of Education and I have already held that earlier to the aforesaid date the petitioner's appointment was not on substantive basis and he could not be treated as substantively appointed on the post of Assistant teacher in L.T. grade earlier to the aforesaid date, therefore, in view of rule 10 (b) (ii) of 1995 Rules since the petitioner was not substantively appointed teacher of trained graduates (L.T.) grade either on the date of occurrence of vacancy or on the first day of year of recruitment commencing from 1st July 1997, therefore, in my opinion he was not eligible at all to be considered for promotion on the post of lecturers' grade. He was also not eligible to be considered for promotion in subsequent year of recruitment commencing from 1st July 1998 to be ended by 30th June 1999, thus his writ petitions are liable to be dismissed on this ground also.

24. Further under Rule 14 (1) of 1995 Rules, it is provided that where any

vacancy is to be filled by promotion all teachers working in trained graduates (L.T.) grade or Certificate of Teacher (C.T.) grade, if any, who possess the qualifications prescribed for the post and have competed five years continuous service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates (L.T.) grade, as the case may be, without their having applied for the same. The notes appended to sub-rule (1) further provides that for the purposes of this sub-rule, regular service rendered in any other recognised institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post. Now further question arises for consideration that as to whether the petitioner has completed five years continuous service on the first day of year of recruitment or not? In this connection, it is to be noted that even assuming for the sake of argument that in absence of specific reference to the nature of services rendered by teacher, the ad hoc services rendered by the petitioner shall also be counted towards the length of service for the purpose of Rule 14 of the aforesaid rules, even then five years continuous service on ad hoc basis could be completed on 3.11.1997 from the date of joining of his post and it could not be completed on the first day of year of recruitment i.e. on 1st July 1997. Therefore, on this count also he was not eligible to be considered for the said promotion. It is no doubt true that in the next year of recruitment commencing from 1st July 1998, he had completed five years continuous service on ad hoc basis but since by that time he could not meet the other requirement of having been substantively appointed teacher in L.T. grade as contemplated by Rule 10(b) (ii) of 1995 Rules, therefore, in my opinion he cannot be held to be eligible for promotion under the said Rules and in such situation it is not necessary to examine as to whether he was senior most teacher in L.T. grade and satisfied the criteria of "seniority subject to rejection of unfit" for promotion or not.

25. Now having regard to the submission of learned counsel for the petitioner and the proviso (2) of Rule 11 of 1998 Rules, which deals with the vacancies existing on the date of commencement of 1998 Rules as well as vacancies that were likely to arise on 30th June 1998, it is necessary to examine the case of petitioner's eligibility for promotion on the post of lecturer under 1998 Rule also for the simple reason that vacancy of Lecturer in English of the institution came into being on 30th June 1998 and was existing on the date of commencement of 1998 Rules, which came into force from the date of publication in Gazette published on 8.8.1998. In this connection it is to be pointed out that Rule 2 (d) of 1998 Rules defines the expressions 'substantive appointment' which means appointment not being ad hoc appointment on the post of teacher made in accordance with the provisions of Act and rules made thereunder and includes appointments regularised under Section 33-A or Section 33-B or Section 33-C. Rule 5 prescribes academic qualification in verbatim as prescribed under Rule5 of 1995 Rules. Rule 10 of 1998 Rules prescribes source of recruitment in verbatim as prescribed under Rule 10 of 1995 Rules. Rule 11 of 1998 Rules are also almost in verbatim of Rule 11 of 1995 Rules with slight variance under the proviso (2) of Rule 11 (2).

26. For better appreciation the provisos of Rule 11 (2) (a) of 1998 Rules are extracted as under:-

"Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment:

Provided further that in respect of the vacancies existing on the date of the commencement of these rules as well as the vacancies that are likely to arise on June 30, 1998, the Management shall, unless some other dates are fixed under the preceding proviso, send the statement of vacancies by July 20, 1998 to the Inspector and the Inspector shall send the consolidated statement in accordance with this sub-rule to the Board by July 25, 1998."

27. From a plain reading of proviso 1 and 2 of the Rule 11 (2) (a) of 1998 Rules it appears that if the State Government is satisfied that it is expedient so to do, it may by order in writing fix other date of notification of vacancies to the Board in respect of any particular year of recruitment. Proviso 2 further stipulates that in respect of vacancies existing on the date of commencement of these rules as well as vacancies that are likely to arise on 30th June 1998 the Management shall unless some other dates are fixed under the preceding proviso, send the statement of vacancies by 20th July 1998 to the Inspector and the Inspector shall send the consolidated statement in accordance with this rule to the Board by 25th July, 1998. It transpires that vacancy arisen on 30th June 1998 can also be covered for the purpose of recruitment under 1998 Rules, therefore, I would like to examine the claim of petitioner's promotion under this rule also for the sake of arguments raised by the learned counsel for the petitioner.

28. Rule 14 of 1998 Rules provides procedure for recruitment by promotion which reads as under:-

"14. Procedure for recruitment by promotion :- *(1) Where any vacancy is to be filled by promotion all teachers working in trained graduates grade or Certificate of Teaching grade, if any, who possess the qualifications prescribed for the post and* ***have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade*** *or the trained graduates grade, as the case may be, without their having applied for the same.*

Notes.- For the purposes of this sub-rule, regular service rendered in any other recognised institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.

2. The criterion for promotion shall be seniority subject to the rejection of unfit.

3. The Management shall prepare a list of teachers referred to in sub-rule (1), and forward it to the Inspector with a copy of seniority list, service records including the character rolls, and a statement in the proforma given in Appendix 'A'.

4. Within three weeks of the receipt of the list from the Management under sub-rule (3), the Inspector shall verify the facts from the record of his office and forward the list to the Joint Director.

5. The Joint Director shall consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and

may call for such additional information as it may consider necessary. The Joint Director shall place the records before the Selection Committee refereed to in sub-section (1) of Section 12 and after committee's recommendation, shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Management.

(6) Within ten days of the receipt of the panel from the Joint Director under sub-rule (5), the Inspector shall send the name of the selected candidates to the Management of the institution which has notified the vacancy and the Management shall accordingly on authorisation under its resolution issue the appointment order in the proforma given the Appendix 'F' to such candidate."

29. From a plain reading of the provisions of Rule 10 (b) (ii) of 1998 Rules it is clear that under the source of recruitment 50% post of lecturers are to be filled by promotion from amongst the substantively appointed teachers of trained graduate grade and since I have already held that the petitioner was not substantively appointed teacher of trained graduate grade either on the date of occurrence of vacancy on 30th June 1998 or on the first day of year of recruitment 1997 commencing from 1st July 1997 to be ended by 30th June 1998 and subsequent year of recruitment commencing from 1st July 1998 to be ended by 30th June 1999, therefore, he was not eligible to be considered for promotion on the aforesaid post of lecturer in English but in order to deal with the submission of learned counsel for the petitioner, it is necessary to examine the content and import of Rule 14 (1) of 1998 Rules also.

30. In this connection, it is to be pointed out that under Rule 14 (1) of 1998 Rules it is provided that where any vacancy is to be filled by promotion all teachers working in trained graduate grade who possess qualification prescribed for the post and have completed five years continuous **regular service** on the first day of year of recruitment shall be considered for promotion to the lecturers grade. In 1998 Rules besides the requirement of having been substantively appointed teacher in next lower grade as prescribed under rule 10 (b) (ii) of 1998 Rules as indicated hereinbefore, the requirement of completion of **5 years continuous regular service** on the post of Assistant teacher in L.T. grade has also been made essential condition precedent to be considered for promotion on the post of lecturer as distinguished from earlier Rule 14 of 1995 Rules, which provided only five years continuous service without any reference to the nature of service, therefore, the content and import of expressions ' five years continuous regular service' has to be examined.

31. The expressions 'regular service' has not been defined either under the provisions of the Act or rules framed thereunder or under U.P. Fundamental Rules contained in Chapter 2 Vol. 2 Part II to IV of Financial Handbook, which defines various general conditions of Government service, therefore, it is necessary to examine the content and import of the aforesaid expressions by taking help of dictionary meaning assigned to the aforesaid expressions and other recognised mode of interpretation of statute.

32. In Law of Lexicons the expression 'regular' and 'regular services' have been assigned meanings at page 1638-1639 as under:

*"**Regular** - Webster defines "regular" to mean conformable to a rule; methodical; periodical.*

"REGULAR" is derived from "regular", meaning "rule", and its first and legitimate signification, according to Webster, is "conformable to a rule' agreeable to an established rule, law, or principle, to a prescribed mode, or according to established, customary forms."

***Regular**- Conformable to rule; periodical; recurring or repeated at fixed times or uniform intervals; properly constituted; normal; marked by steadiness or uniformity of action, procedure or occurrence.*

***Regular services-** The expression 'regular forces' mean officers and soldiers who by their commission, terms of enlistment, or otherwise are liable to render continuously for a term military service to His Majesty in every part of the world or in any specified part of the world. R.v. Governor of Wormwood Scrubbs Prison, (1948) 1 All ER 438, 441 (KBD). [Army Act. S. 190(8)]"*

33. From a bare reading of the dictionary meaning of aforesaid expressions, it appears that expression 'regular' has been assigned various meanings, therefore, it is very difficult to find out appropriate meaning of the expressions 'regular service' from dictionary meaning so as to enable the court to come to a definite conclusion. The proper course in such cases is to search out and follow the true intent of the legislature and to adopt that sense of the word which harmonises best with the context and advance the object of the legislature. While determining as to the meaning of particular word in a particular statute it is, therefore, permissible to consider two aspects; viz (I) the external evidence derived from the circumstances such as previous legislation and decided cases and (II) internal evidence derived from the statute itself.

34. Now first of all, I would deal with the issue from decided cases. In this connection it is necessary to point out that although there are catena of decisions wherein the expression 'regular service' has received consideration of Hon'ble Apex Court from time to time wherein the aforesaid expression has been used normally in contradistinction to the ad hoc, officiating and temporary services but it would be sufficient to refer only few of them.

35. In ***Baleshwar Das and others Vs. State of U.P. and others A.I.R. 1981 S.C., 41***, while dealing with the case of seniority of Assistant Engineers under U.P. Services of Engineers, Irrigation Branch Rules 1936, the pertinent observations made by Hon'ble Apex Court in para 26 and 34 of the decision are as under:-

"26. We see no reason to hold that when engineers are appointed to temporary posts but after fulfilment of all the tests for regular appointments, including consultation with the Public Service Commission, they are not appointments in a substantive capacity. In Service terminology, perhaps, eyebrows may be raised when we say so, but then, we must remember that the State itself in its counter-affidavit has construed R.17 of

the Rules as providing " that all persons appointed to the Service who are not already in the permanent employment of the Irrigation Department shall be placed on probation for four years" (since reduced to two years). This means that persons who are not permanently appointed but only temporarily appointed are also placed on probation and officers are not put on probation unless they are on their way to membership in the Service on completion of probation. That is to say, although they are temporary appointees, if their probation is completed and other formalities fulfilled, they become members of the Service. ***It follows that merely because the person is a temporary appointee it cannot be said that he is not substantively appointed if he fulfils the necessary conditions for regular appointment such as probation and consultation with the Public Service Commission etc. From this stand of the State Government it follows that the temporary appointees, whose appointments have received the approval of the Public Service Commission and who have run out the two years of probation, must be deemed to be appointed in a substantive capacity.***

34. Government will ascertain from this angle whether the capacity in which posts have been held was substantive or temporary. If it is not, the further point to notice is as to whether the appointments are regular and not in violation of any rule, whether the Public Service Commission's approval has been obtained and whether probation, medical fitness etc., are complete. Once these formalities are complete, the incumbents can be taken as holding posts in substantive capacities and the entire officiating service can be considered for seniority. For other purposes they may remain temporary."

36. In ***State of Haryana Vs. Haryana Veterinary and A.H.T.S. Association and another A.I.R. 2000 S.C. 3020,*** Hon'ble Apex Court has held that the service rendered by an ad hoc appointee dehors service Rules who subsequently gets appointed on regular basis without any interruption in the service cannot be treated as regular service. Such ad hoc service cannot be tagged on to service rendered by appointee after regular appointment for computing the period of 12 years of regular service fixed under Government Circular for earning the benefit of selection grade/revised pay. The pertinent observations made in para 5 of the decision are as under:-

"5, ... The aforesaid two Circulars are unambiguous and unequivocally indicate that a Government servant would be entitled to the higher scale indicated therein only on completion of 5 years or 12 years of regular service and further the number of persons to be entitled to get the selection grade is limited to 20% of the cadre post. This being the position, we fail to understand how services rendered by Rakesh Kumar from 1980 to 1982, which was purely on ad hoc basis, and was not in accordance with the statutory rules can be taken into account for computation of period of 12 years indicated in the Circular. The majority judgment of High Court committed serious error by equating expression ***"regular service" with "continuous service".*** *In our considered opinion under the terms and conditions of the Circulars dated 2nd June, 1989 and 16th May, 1990, the respondent Rakesh Kumar*

would be entitled for being considered to have the Selection Grade on completion of 12 years from 29th January, 1982 on which date he was appointed duly against a temporary post of Assistant Engineer on being selected by the Public Service Commission and not from any earlier point of time. The conclusion of the majority judgment in favour of Rakesh Kumar, therefore, cannot be sustained."

37. In ***State of Punjab and others Vs. Gurdeep Kumar Uppal and others A.I.R. 2001 SC 2691***, Hon'ble Apex Court has held that only "regular service" is to be counted towards seniority. Period of ad hoc services cannot be included. The pertinent observations made in para 5 and 6 of the decision are as under:-

"5. ..... On a plain reading of the circular it is clear that the instruction contained therein were based on the decision of the Punjab and Haryana High Court taking the view that ad hoc service should to be taken into account for the purpose. This circular in our view can no longer form the basis of the contention in view of the recent decision by this Court in State of Haryana V. Haryana Veterinary and AHTS Association (2000 AIR SCW 3301: AIR 2000 SC 3020: 2000 Lab IC 3127) (supra). Undisputedly the respondent at the time of their appointment were governed by the Punjab Civil Medical Services Class II (Recruitment and Conditions of Service)Rules, 1943. In Clause (5) of Rule 7 of the said Rules it is provided that the seniority of the members, in each branch shall be determined by the dates of their confirmation in service. Further, in the orders appointing the respondents on ad hoc basis, it was specifically stated that they will be governed by the aforementioned Rules. It was further stated in paragraph III of the appointment letter that the appointees seniority will be determined only by merit in which he or she is placed by Punjab Public Service Commission. Thus it is clear that ***only regular service is to be counted towards seniority****.*

6. We do not feel it necessary to delve further into merits of the case in view of the decision in view of the decision of this Court in State of Haryana v. Haryan Veterinary AHTS Association (supra). We are satisfied that the ratio in that case applies to the cases in hand. The resultant position that emerges is that the judgment/orders passed by the High Court in calculating the period of service for giving the higher scale of pay are unsustainable and has to be vacated. Accordingly, the appeals are allowed and the judgments/orders of the High Court under challenge are set aside."

38. From a close analysis of decision of Hon'ble Apex Court in Baleshwar Das's case (supra) it is clear that where the appointments are made on temporary posts after fulfilment of all the test for regular appointment, such appointments have been held to be in substantive capacity, irrespective of facts that such appointments made against temporary post or permanent post. It follows that merely because the person is a temporary appointee it cannot be said that he is not substantively appointed, if he fulfils the necessary conditions for regular appointment, such as probation and consultation with the Public Service Commission and once these formalities are complete, the incumbents can be taken as holding post in substantive capacity and entire officiating service can be counted for the purpose of seniority. In

State of Haryana Vs. Haryana Veterinary and A.H.T.S. Association's case (supra) it was held that a Government servant would be entitled to higher pay scale indicated in circulars in question only on completion of five years or 12 years of regular service. It was held that the service which was purely on ad hoc basis and was not in accordance with statutory rules, cannot be taken into account for computation of period of 12 years in the circular. The judgment of High Court equating the expression 'regular service' with 'continuous service' was held erroneous. The aforesaid view has been reiterated by the Hon'ble Apex Court in Gurdeep Kumar Uppal's case also and there appears no detraction from the aforesaid proposition in any subsequent decision of Hon'ble Apex Court.

39. In view of aforesaid settled legal position, I have no doubt in my mind that expressions 'regular service' used in the Rule 14(1) of 1998 Rules connotes the services rendered by regularly or substantively appointed teacher. It does not connote continuous uninterrupted service which may include the ad hoc service, therefore, it should not be equated with continuous uninterrupted service which may include the ad hoc service. In common parlance, regular appointment means, appointment made after following procedure prescribed for substantive appointment, whereas contrary to it, ad hoc, officiating and temporary appointments are normally made without following procedure prescribed for regular appointment, instead thereof such appointments are usually made dehorse the rules of recruitment on stop gap arrangement basis in exigencies of service either for fixed period or to be ended till regular or substantive appointment on the post. However, if the officiating or temporary appointments are made after following the procedure prescribed under rules of recruitment, such appointments are termed as substantive appointment and are regular in nature as held by Hon'ble Apex Court in Baleshwar Das's case (supra). In case of teachers appointed after due process of selection by following procedure prescribed under the Act 1982 and Rules framed thereunder, the appointments are termed as substantive or regular appointment. It is no doubt true that ad hoc appointment of teacher is also made under the provisions of Act and Rules framed thereunder but the procedure for ad hoc appointment substantially and qualitatively differs from the procedure of regular appointment and both the procedures cannot be equated with each other. The ad hoc appointee does not independently hold the post for indefinite period, instead thereof he holds the post for definite period and for the period only till the regular appointment is made on said post. It is also true that after regularisation of services of ad hoc appointee his appointment becomes substantive appointment but not earlier to such regularisation. As defined under Rule 2 (d) of 1998 Rules, the services of ad hoc teacher becomes substantive only after regularisation of such services but such teacher cannot be held to be substantively appointed prior to the date of order of regularisation of his services. Therefore, the services rendered by ad hoc teacher cannot be held to be "regular service" and the same cannot be taken into account in computation of 5 years continuous regular service and services rendered by such ad hoc teacher after regularisation of his services can only be counted for the

purpose of Rule 14(1) of 1998 Rules. In other words service rendered by ad hoc teacher prior to the date of his regularisation cannot be tagged with the services rendered by him after regularisation, instead thereof such ad hoc services shall be excluded for computation of 5 years continuous regular service.

40. Now, the matter can be examined from another angle also. From the historical background of rules, it is to be seen that under Rule 9 of the U.P. Secondary Education Services Commission Rules, 1983, hereinafter referred to as 1983 Rules, one of the eligibility condition for promotion from the post of C.T. Grade to L.T. grade teacher and from L.T. grade teacher to Lecturers grade, besides other conditions, was completion of "five years continuous service" as teacher without any specific reference to the nature of service. In aforesaid statutory backdrop, it would be quite reasonable to hold that in absence of specific reference to the nature of five years continuous service, necessary for promotion on the next higher post, there would be no justification to exclude the services rendered by teacher on adhoc basis while computing the requisite length of service for such promotion. Later on, the aforesaid 1983 Rules had been replaced by 1995 Rules. In Rule 14(1) of 1995 Rules also, besides other eligibility conditions for promotion on the next higher post, one of the requisite condition for promotion was completion of "five years continuous service" on the next lower post on the first day of year of recruitment. Having regard to the Rule 10 of 1995, if the teacher was substantively appointed on the next lower post, possess the qualification prescribed for the higher post and have completed five years continuous service on the next lower post, he was to be considered for promotion. In absence of any specific reference to the nature of service, the services rendered by teacher on adhoc basis were also liable to be taken into account while computing the requisite length of service for promotion on the next higher post.

41. Now 1995 Rules have been replaced by 1998 Rules. Under Rule-10 of this Rules, one of the condition to become eligible for promotion is that the teacher must be substantively appointed on the next lower post. Apart from it, under Rule 14 (1) of 1998 Rules such teacher is also required to possess qualification prescribed for the post to be filled by promotion and other eligibility condition is that he must have completed five years continuous **regular service** on the next lower post on the first day of year of recruitment. It is first time under Rule-14 (1) of 1998 Rules as distinguished from earlier Rule-9 of 1983 Rules and Rule 14(1) of 1995 Rules, the requirement of five years continuous regular service on the next lower post has been made as essential condition to be considered for promotion on the next higher post by keeping intact of other essential conditions for promotion. Therefore, in my opinion, the expression **'regular service'** deliberately used by Rule making authority under Rule 14(1) of 1998 Rules, which was not used in earlier Rules must receive consideration by this court.

42. In this connection, it is necessary to point out that in case, the rule making authority would have intended to prescribe completion of merely five years continuous service, which may legitimately include adhoc services also,

there would have been no occasion to use the expression 'regular ' as adjective before the word 'service' used in the said rules, therefore, the expression 'regular' must have its significance under the rule in question and the words used in the statute cannot be treated to surplus and superfluous without any meaning assigned to it. It is also well settled rule of construction of statute that unless it is unavoidable a construction renders a provision superfluous must be rejected. In **Polester and Co. Ltd. Vs. Addl. Commissioner, Sales Tax, New Delhi AIR 1978 S.C. 897** Hon'ble Apex Court has held that a statutory enactment must ordinarily be construed according to plain and natural meaning of its language and no words should be added, altered or modified unless it is plainly necessary to do so in order to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with rest of the statute. Thus, rule of literal construction is firmly established and it has received judicial recognition in numerous cases. Therefore, in view of such settled legal position, I am of considered opinion that the expression 'regular service' must be given different meaning from mere continuous uninterrupted service. It should not be equated with the continuous service. Further the expression 'regular service' should also not be equated with the services rendered by adhoc appointee as in that event of the matter, there would have been no occasion for the rule making authority to use the expression 'regular service' instead of merely using the expression 'continuous service' as used in the earlier Rules indicated herein before. This view does neither lead to any anomalous result nor lead to any absurdity and also finds support from the decision rendered by Hon'ble Apex Court in **Haryana Veterinary and A.H.T.S. Association's case** (supra) and **Gurdeep Kumar Uppal's case** (supra), therefore, I am unable to understand how the interpretation which was given to the Rule-9 of 1983 and Rule 14 of 1995 Rules shall also be given to the Rule 14(1) of 1998 Rules when the expressions employed under these Rules are substantially and qualitatively different from each other.

43. Now it is necessary to deal with the cases relied upon by learned counsel for the petitioner. In ***Ram Swaroop Vs. State of U.P. 1996 (3) E.S.C. 155 (All.)*** the controversy involved was that as to whether for promotion of a teacher from C.T. Grade to L.T. Grade or Lecturer, five years of continuous service in substantive capacity is necessary in view of the provisions contained in Rule 9 of Uttar Pradesh Secondary Education Services Commission Rules, 1983? Under the Rule 9 of 1983 Rules completion of only five years continuous service as a teacher on the date of occurrence of vacancy was required along with the other criteria for promotion without any specific reference to the nature of service, therefore, in that statutory backdrop of the case in para 15 of the judgement this Court has held that the completion of five years continuous service in substantive capacity as a teacher from the date of occurrence of vacancy is not requirement of rule in question. Thus the aforesaid case is quite distinguishable from the facts and statutory backdrop of the case in question as the aforesaid decision was rendered in different statutory backdrop.

44. In ***Committee of Management, G.D. Bajoria Inter College, City and***

District Saharanpur and others Vs. Director of Education (Secondary) U.P. Lucknow and others 2001 (3) E.S.C. 1326, for the purpose of qualification contained in Appendix 'A' Regulation 1 Chapter II of Intermediate Education Act 1921 for the post of head of institution four years teaching experience was required as one of the eligibility conditions besides other educational qualification without any specific reference of nature of service in the aforesaid period of four years. In that context this Court has taken the view that in absence of specific reference to the nature of service, the requisite teaching experience in prescribed courses even on ad hoc basis is treated to be sufficient compliance of requirement of law and reliance was also placed upon earlier decision rendered in ***Ram Swaroop Vs. State of U.P.*** referred above. Therefore, this case is also distinguishable on facts and statutory context.

45. In ***Kusum Lata Ujalayan Vs. Joint Director of Education, Saharanpur, 2002 (3) UPLBEC 2665*** this court has considered the case of adhoc promotion of Assistant Teacher from C.T. Grade to the post of Assistant Teacher in L.T. Grade under Rule 9 (B) of Uttar Pradesh Secondary Education Services Commission Rules, 1983, wherein one of the essential conditions for promotion on the post was completion of five years continuous service was under consideration before this court and requirement of regular service for requisite period was not there in the aforesaid rules, therefore, the decision rendered by this court is clearly distinguishable from the facts of instant case and can be of no assistance to the case of the petitioner.

46. In ***Nand Kishore Vs. Joint Director, Allahabad Region, Allahabad 2003(2) UPLBEC 1570***, although the interpretation of Rule 14 of U.P. Secondary Education Services Selection Boards' Rule 1998 was involved in the aforesaid case wherein the petitioner was appointed as Assistant Teacher in L.T. Grade on adhoc basis and approval was granted by District Inspector of Schools w.e.f. 15.12.1990. Subsequently in view of Ordinance I of 1993 the services of petitioner were regularized w.e.f. 7.8.1993. One post of Lecturer fell vacant on 31.3.1991and the petitioner worked on that post. The Committee of Management vide its resolution dated 20th July 1998 resolved to promote the petitioner on that post and sent its recommendation to the District Inspector of Schools. On receipt of the aforesaid proposal the District Inspector of Schools sought further information which was provided by the management, who thereupon sent the proposal to the Joint Director of Education. The Joint Director of Education by his order dated 30.1.2002 rejected the proposal of promotion of petitioner on the ground that the petitioner did not have five years continuous regular service in L.T. Grade on the date of occurrence of vacancy. Thus, in his view the petitioner was not eligible for promotion to the post of Lecturer in Biology. In this case the court has placed reliance upon ***Kusum Lata Ujalayan Vs. Joint Director of Education, Saharanpur and others 2002 (3) UPLBEC 2665***, which was a case of adhoc promotion and was not a case of regular promotion, but in para 4 of the decision it was held that from the date of regularization i.e. from 7.8.1993 the petitioner of aforesaid case has also completed five years continuous regular service as L.T. grade teacher on

30.1.2002 on which date Joint Director has turned out the proposal of promotion of the petitioner of the aforesaid case. Besides this, the court did not lay down any law on the basis of interpretation of Rule 14 of 1998 Rules. Therefore, in my opinion, the aforesaid decision should be understood in context of the facts of the aforesaid case, cannot be taken to assistance to the case of petitioner.

47. Now so far as decision of this court rendered in case of ***Krishna Pal Vs. Director of Education (Madhyamic) U.P. Allahabad and others*** decided on 20.7.2007 is concerned, it is to be pointed out that in this case the petitioner was appointed as Assistant Teacher in L.T. grade on ad hoc basis on 7.11.1992 in pursuance thereof he joined the said post on 13.11.1992. His ad hoc appointment was also approved. While he was continuing on the said post, one post of Lecturer in Geography fell vacant due to death of Lecturer of aforesaid subject on 5.9.2001. The Committee of Management proposed to promote the petitioner on said post and sent its resolution on 5.5.2003 to Joint Director of Education which was turned down by him on the ground that petitioner could not complete five years continuous regular service as required under Rule 14 (1) of 1998 Rules on the date of occurrence of vacancy. It was also noted that the petitioner's services had been regularised by Regional Committee on 26.6.2000. On placing reliance on judgment rendered in Writ Petition No.45510 of 2004 Smt. Suman Bhatnagar Vs. State of U.P. and others and Nand Kishore (supra), this Court has held that since the petitioner was working continuously from the date of initial appointment, though an order has been passed for regularisation on 26.6.2000 by Regional Committee but as the appointment of petitioner was on clear vacancy and same has been approved by Regional Committee subsequently, therefore, the ad hoc working of the petitioner will be treated to be as regular service.

48. In my considered opinion the observation made by this Court in aforesaid case that ad hoc services shall be treated to be as regular service runs counter to the observation made by Hon'ble Apex Court in Baleshwar Das's case (supra), Haryana Veterinary and A.H.T.S. Association's case (supra) and Gurdeep Kumar Uppal's case (supra), therefore, cannot be held to be binding upon this Court because of the simple reason that the decision has been rendered in ignorance of binding precedent and law declared by Hon'ble Apex Court under Article 141 of the Constitution of India in aforesaid cases. In such a situation, the aforesaid decision of this court has to be held, rendered in per curiam and has no effect of binding precedent upon this court. In this case, the court has placed reliance upon **Nand Kishore's case (supra)** in respect of which, I have already held that the aforesaid decision did not lay down law on the question in issue and should be understood in context of the facts of the aforesaid case. Another case upon which reliance was placed was the case of **Smt. Suman Bhatnagar**, wherein the observation that continuous services rendered by ad hoc teacher has to be treated as regular services is also contrary to the dictum of Hon'ble Apex Court. Therefore, in my opinion the aforesaid decision also has to be held per incuriam, and have no effect of binding precedent. In view of these facts and circumstances of the case, with due

respect to the Hon'ble Judge, I am not persuaded to take the same view as taken by Hon'ble Single Judge in **Karishna Pal's** case referred hereinbefore.

49. Thus, aforesaid discussion leaves no room for doubt to hold that the services rendered by the petitioner on ad hoc basis from the date of his joining as L.T. grade teacher w.e.f. 3.11.1992 till his regularisation on 18.8.1999 cannot be taken into account for computing his 5 years continuous regular service for the purposes of Rule 14(1) of 1998 Rules. It is only on or after 18.8.1999, on his regularisation on the post of L.T. grade teacher his services can be counted for continuous regular service to be considered for his promotion on the post of Lecturer under existing rule 14(1) of 1998 Rules. Therefore, I have no hesitation to hold that the petitioner was not eligible to be considered for promotion either on the date of occurrence of vacancy of English Lecturer on 30.6.1998 or on the first day of year of recruitment i.e. on 1.7.1997 on account of occurrence of vacancy on 30.6.1998 or on the first day of subsequent year of recruitment i.e. 1st July 1998 and thereafter till completion of 5 years continuous regular service subsequent to his regularisation. It is not in dispute that till he completes 5 years continuous regular service, 50% quota of promotion on the post of lecturer was already filled in the institution. Therefore, on this count also the writ petitions are liable to be dismissed.

50. In view of foregoing discussions, both the writ petitions are devoid of merit and are liable to be dismissed. Accordingly, the same are hereby dismissed.

51. There shall be no order as to cost. The parties shall bear their own cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2008

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

Civil Misc. Writ Petition No. 76461 of 2005

Ram Rakhan Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.P. Sharma

Counsel for the Respondents:
Sri R.B. Pradhan
Sri R.K. Saxena
Sri C.B. Yadav
S.C.

Civil Services Rules-Art. 351-A-Disciplinary Proceeding-initiation after 4 years of retirement-without permission of Governor-held-Non-est.

Held: Para 7 & 11

In view of the facts, as noted herein above, it is apparent that the petitioner has been served with the charge-sheet subsequent to his retirement without there being an order of the Governor permitting the initiation of the departmental enquiry against the petitioner. It is further established that on the date, the Governor is stated to have granted the permission under Article 351-A of the Civil Services Regulations i.e. 22-11:2005 the period of more than four years after retirement of the petitioner had already lapsed.

In view of the law, as laid down by the Hon'ble Supreme Court, the

departmental proceedings initiated against the petitioner are *non est.*
Case law discussed:
2007 UPLBEC (2) 1329, 2007 (1) UPLBEC-56,

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

1. The petitioner was appointed as Assistant Sales Tax Officer in the Trade Tax Department of the State of Uttar Pradesh. It is stated that the petitioner attained the age of superannuation and actually retired on 31-01-01. On 18th January, 2002, the petitioner was served with a charge-sheet bearing the date as 29th December, 2001. On receipt of the charge-sheet, the petitioner made an application dated 20th September, 2002 stating therein that the enquiry proceedings were liable to be revoked.

2. However, the disciplinary proceeding initiated against the petitioner were continued and on 15/16th January, 2003 a show cause notice was issued to the petitioner along with an enquiry report dated 8th March, 2002. The petitioner submitted his reply dated 18th January, 2003 to the second show cause notice and vide letter dated 5th April, 2003, he has requested for revocation of the entire proceedings.

3. By means of the impugned order dated 22nd November, 2005 the petitioner has been informed that the Governor of U.P. in exercise of powers under Article 351-A of Civil Services Rules has been pleased to grant permission for continuation of the disciplinary proceedings against the petitioner, even after his retirement. It is against this order and for quashing the departmental proceedings that this petition has been filed.

4. On behalf of the petitioner, it is contended that permission to continue the disciplinary proceedings under Article 351-A of Civil Services Rules against a government servant can be granted by the Governor only in respect of an incident which has taken place not more than four years prior to the date of retirement of the government servant. He clarifies that having regard to the date of retirement i.e. 31st January.2001 and the date on which the Governor is said to have granted the permission, as communicated under letter dated 22nd November, 2005, it is apparently clear that this prescribed period of four years has expired in between. In the alternative he submits that under explanation to Article 351-A of the Civil Services Rules, the departmental proceedings are said to have been initiated on the service of the charge-sheet. The service of the charge-sheet itself had been affected upon the petitioner subsequent to his retirement i.e. 31st January, 2001 to be precise on 18th January, 2002 only and that to without there being any approval of the Governor of the State as required under Article 351-A of Civil Services Rules. Therefore, the entire departmental proceedings are vitiated and are liable to be quashed by this Court.

5. Learned Standing Counsel in reply submits that permission to initiate the departmental enquiry against the petitioner was obtained from the Minister concerned in accordance with the Business Regulation on 11-01-01, this sanction of the Minister is deemed to be on behalf of the Governor, in view of the Business Rules/Regulation, no further permission from the Governor in the facts of the case was required. It is, therefore, submitted that the letter dated 22nd November, 2005 is superfluous and the

proceedings initiated against the petitioner do not warrant any interference. Reliance for the purpose has been placed upon the judgement of the Hon'ble Supreme Court reported in (2007) 1 UPLBEC 56; State of U.P. & others Vs. Harihar Bhole Nath.

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

7. In view of the facts, as noted herein above, it is apparent that the petitioner has been served with the charge-sheet subsequent to his retirement without there being an order of the Governor permitting the initiation of the departmental enquiry against the petitioner. It is further established that on the date, the Governor is stated to have granted the permission under Article 351-A of the Civil Services Regulations i.e. 22-11:2005 the period of more than four years after retirement of the petitioner had already lapsed.

8. Consequently on simply reading of Regulation 351-A the Governor could not have granted permission for any departmental proceedings being instituted against the petitioner, as has been done in the facts of the case.

9. Legal position in this regard has been settled under the judgement and order of Hon'ble Supreme Court in the case of State of U.P. Vs. Sri Krishna Pandey; AIR 1996 SC 1656, and in the case of State of U.P. Vs. R.C. Misra; 2007 UPLBEC (2) 1329.

10. The Hon'ble Supreme Court in the case of Sri Krishna Pandey (supra), has held in paragraph 6 as under:

"6. It would thus be seen that proceedings are required to be instituted against a delinquent officer before retirement. There is no specific provision allowing the officer to continue in service nor any order passed to allow him to continue on re-employment till the enquiry is completed, without allowing him to retire from service. Equally, there is no provision that the proceedings be initiated as disciplinary measure and the action initiated earlier would remain unabated after retirement. If Rule 351-A is to be operative in respect of pending proceedings, by necessary implication, prior sanction of the Governor to continue the proceedings against him is required. On the other hand, the rule also would indicate that if the officer caused pecuniary loss or committed embezzlement etc. due to misconduct or negligence or dereliction of duty, then proceedings should also be instituted after retirement against the officer as expeditiously as possible. But the events of misconduct etc. which may have resulted in the loss the Government or embezzlement, i.e., the cause for the institution of proceedings, should not have taken place more than four years before the date of institution of proceedings. In other words, the departmental proceedings must be instituted before lapse of four years from the date on which the event of misconduct etc. had taken place. Admittedly, in this case the officer had retired on March 31, 1987 and the proceedings were initiated on April 21, 1991. Obviously, the event of embezzlement which caused pecuniary loss to the State took place prior to four years from the date of his retirement. Under these circumstances, the State had disabled itself by their deliberate omissions to take appropriate action

against the respondent and allowed the officer to escape from the provisions of Rule 351-A of the Rules. This order does not preclude proceeding with the investigation into the offence and taking action thereon. "

The Hon'ble Supreme Court in Sri State of U.P. Vs. R.C. Mishra (supra) in paragraph 5 has laid down as under:

"5. ....

The Substantive part of Regulation 351-A confers the power upon the Government of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right or ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement. There is a proviso appended to the Regulation which circumscribes the power conferred by the substantive part of the Regulation. Clause (a) of the proviso with which we are concerned here uses the expression if not instituted while the officer was on duty either before retirement of during reemployment. Clause (a) of the proviso will, therefore, get attracted only when the departmental proceedings are instituted against the officer after his retirement or when he is not in re-employment. If the departmental proceedings are instituted before an officer has attained the age of superannuation and before his retirement, proviso (a) can have no application. In order to remove any doubt regarding the date of institution of enquiry or the judicial proceedings an Explanation has been appended after the proviso. According to Explanation (a), departmental proceedings shall be deemed to have been instituted (i) when the charges framed against the officer are issued to him, or (ii) if the officer has been placed under suspension from an earlier date, on such date. By incorporating the explanation, the rule framing authority has notionally fixed two dates as the date on which the departmental proceedings shall be deemed to have been instituted against an officer. A combined reading of the proviso and the explanation would show that there is no fetter or limitation of any kind for instituting departmental proceedings against on officer if he has not attained the age of superannuation and has not retired from service. If an officer is either placed under suspension or charges are issued to him prior to his attaining the age of superannuation, the departmental proceedings so instituted can validly continue even after he has attained the age of superannuation and has retired and the limitations imposed by sub-clause (i) or sub clause (ii) of clause (a) of proviso to Regulation 351-A will not apply. It is only where an officer is not placed under suspension of charges are not issued to him while he is in service and departmental proceedings are instituted against him under Regulation 351-A after he has attained the age of superannuation and has retired from service and is not under re-employment that the limitations imposed by sub-clauses (i) and (ii) of proviso (a) shall come into play."

11. In view of the law, as laid down by the Hon'ble Supreme Court, the

departmental proceedings initiated against the petitioner are *non est.*

12. At this stage, we may also refer to the judgement relied upon by the Standing Counsel in the case of State of U.P. Vs. Harihar Bhole Nath (2007) 1 UPLBEC 56 which according to the facts involved herein is clearly distinguishable for the following reasons:

13. In the aforesaid case, as noticed by Hon'ble Supreme Court in paragraph 12 of the judgement, the employee had been placed under suspension, before he attained the age of superannuation. Departmental proceedings were not only initiated against the petitioner, an Enquiry Officer was also appointed, subsequently the order of suspension was stayed under a judicial order.

14. The Hon'ble Supreme Court, therefore, proceeded to hold that the legal fiction created with regard to the point of time when the enquiry proceedings would be deemed to have been commenced, was not affected.

15. The Hon'ble Supreme Court proceeded to hold that under the facts and circumstances of the case, the proceedings stand initiated and other permission of the Governor is not required to be obtained for continuation of such proceedings. Therefore, in paragraph 14 of the said judgement the Hon'ble Supreme Court proceeded to clarify as follows:-

"*Proviso appended to Regulation 351-A merely controls the main proceedings. The same would apply in the exigencies of the situation envisaged therein, namely, even the proceedings were initiated after retirement and nor prior thereto."*

16. The writ petition is allowed. The order dated 22nd November, 2005 as also disciplinary proceedings initiated against the petitioner are hereby quashed. Respondents are directed to ensure the payment of all retiral benefits including the arrears thereof strictly in accordance with the law at the earliest possible.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2007

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE R.N. MISRA, J.

Civil Misc. Writ Petition No. 56218 of 2007

M/s Om Contractors ...Petitioner
Versus.
State of U.P and others ...Respondents

Counsel for the Petitioner:
Sri I.P. Singh

Counsel for the Respondents:
Smt. Sarita Singh
S.C.

Minor and Mineral Rule (Concession) Rules 1963–Payment of Royalty–petitioner purchased stone bolder through agent from different leaseholder demand of Royalty-held–illegal subject to satisfaction of the authority on production of receipts.

Held: Para 5

There is no provision in the aforesaid Act and Rules regarding payment of royalty by the purchaser of stones from the lease holder of mines. This is for the lease holder to pay royalty to the Government. Nowhere, it has come that

any lease was granted in favour of the petitioner. The purchaser of products of mines is not obliged to pay royalty. The respondent no.3 is duty bound to scrutinize the receipt and Rawannas, if submitted by the petitioner and to release his payment. If there was any lacuna in the bills, the petitioner should have been asked to remove it.

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

1. By way of this writ petition the petitioner has prayed for a writ, order or direction in the nature of certiorari quashing the impugned order dated 4.10.2007, passed by respondent no.3 which is filed as Annexure-3 to the writ petition, by which the respondents have demanded royalty from the petitioner on the supply of Stones and similar relief in the nature of mandamus directing the respondents not to with-hold payment of the petitioner in pursuance of the said letter.

2. We have heard Sri I.P. Singh, learned counsel for the petitioner and Smt. Sarita Singh, learned Standing Counsel appearing for respondents.

3. From the contents of the writ petition, it appears that the petitioner is a registered Contractor in District Bulandshahr. The Executive Engineer (Flood Division), Irrigation Department invited tenders for supply of the stone bolders for the construction of " Chandanpur Husainpur Tatbandh". The tender of the petitioner was accepted and in pursuance of the order he supplied stone bolders to the Irrigation Department. He purchased stone bolders through agents and paid the price. This fact is not disputed that the petitioner being registered contractor was given work order by the respondent no.3 and he supplied the materials. By the impugned order/letter dated 4.10.2007, the Project Manager U.P. Projects Corporations Limited, Bareilly has demanded the royalty at the rate of Rs. 30 per cubic meter on the supply of the stone bolders from the petitioner. The petitioner has urged that he has purchased the stone bolders from the mining lessee through their agents and have paid the price and had got the receipts. He is not liable to pay royalty because the royalty is to be paid by the license holder of the mines.

A very substantial question of law has been raised by the petitioner in this writ petition regarding liability to pay royalty on the stones taken out from the mines. Section 9 of Mines and Mineral (Regulation and Development) Act 1957 lays down provisions for payment of royalty. For ready reference, section 9 is quoted below:

Section 9: Royalties in respect of mining lease-(l) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of (any mineral removed by or consumed by him or by his agent, manager, employee, contractor or sub-lease) from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2) The holder of a mining lease granted on or after commencement of this Act shall pay royalty in respect of (any mineral removed by or consumed by him or by his agent, manager, employee, contractor or sub-lessee) from the leased area t the rate for the time being specified

in the second schedule in respect of that mineral.

(2A) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulations and Development) Amendment act, 1972 shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one third of a tonne per month).

(3) The Central Government may, by notification in Official Gazette amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of (three years)".

4. Rule 21 of U.P. Minor Minerals(Concessions) Rules, 1963 also lays down provision for royalty which is quoted below:

Royalty- (1) The holder of a mining lease granted on or after the commencement of these rules shall pay royalty in respect of any mineral removed by him from the leased area at the rates for the time being specified in the First schedule to these rules.

(2) The State Government may, by notification, in the Gazette amend the First Schedule so as to include therein or exclude there from or enhance or reduce the rate of royalty in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the State Government shall not enhance the rate of royalty in respect of any mineral for more than once during any period of three years and shall not fix the royalty at the rate of more than 20 per cent of the pit's mouth values.

(3) Where the royalty is to be charged on the pit's mouth value of the mineral the State Government may assess such value at the time of the grant of the lease and the rate of royalty will be mentioned in the lease deed. It shall be open to the State Government to re-assess not more than once in a year the pit's mouth value, if it considers that an enhancement is necessary".

5. As is evident from the contents of writ petition and the affidavit filed in support thereto that the petitioner is not a lease holder of mine but he has purchased the stone bolders through agents namely M/s Amar Stone Company, M/s Naina Devi Stone Supplier, M/s Archana Stone Company, M/s Rekha Stone Company, M/s Atendra Traders and M/s Balbir Stone Company Fatpur, Agra. There is no provision in the aforesaid Act and Rules regarding payment of royalty by the purchaser of stones from the lease holder of mines. This is for the lease holder to pay royalty to the Government. Nowhere, it has come that any lease was granted in favour of the petitioner. The purchaser of products of mines is not obliged to pay royalty. The respondent no.3 is duty bound to scrutinize the receipt and Rawannas, if submitted by the petitioner and to release his payment. If there was any lacuna in the bills, the petitioner should have been asked to remove it.

6. In view of above legal position, we are of the view that the demand by respondent no.3 from the petitioner to pay

royalty on the supply of the stone bolders is not in accordance with law.

7. Accordingly, the writ petition is finally disposed of with the direction to the respondent no.3 to consider the case of the petitioner after getting bills and Rawannas and make his payment without delay. If there is any lacuna in the bills or Rawannas the petitioner may be asked to remove it. The petitioner shall file details of bills and Rawannas before the respondent no.3 within fifteen days from today and respondent no.3 will decide his payment within a further period of six weeks by passing a detailed and reasoned order.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.01.2008

BEFORE
THE HON'BLE V.D. CHATURVEDI, J.

Criminal Misc. Application No. 149 of 2008

Devendra ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Applicant:
Sri Shashi Dhar Pandey

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

Code of Criminal Procedure-Section 173 (2)-Re-investigation first charge sheet submitted disclosing offence under Section 354 IPC-on re-investigation charge sheet u/s 376 IPC filed-Held-Magistrate committed no illegality-no error in direction for re-investigation.

Held: Para 7 & 8

In view of what has been discussed above, I find no illegality in the order directing re-investigation nor I find any illegality in the investigation wherein the statement of a witness was re-recorded by the I.O.

The Magistrate committed no error in taking the cognizance on a police report submitted under Section 173 (2) Cr.P.C. The petition is devoid of merits. It is therefore dismissed.

Case law discussed:
2006 (55) ACC-180 distinguished, AIR 1999 SC-2332 relied on.

(Delivered by Hon'ble V.D. Chaturvedi, J.)

1. Learned counsel for the petitioner contends that in Case Crime No.197 of 2007, under Section 376 IPC the I.O. earlier submitted a charge sheet under Section 354 IPC but the Circle Officer by his order dated 8.8.2007 directed for re-investigation hence, the I.O. re-investigated the case, re-recorded the statement of the prosecutrix and submitted the subsequent charge sheet under Section 376 IPC. Learned counsel for the petitioner relied upon the judgement given by the another single bench of this Court in the case of **Krishna Kumar Gupta Vs. State of U.P. reported in 2006(55) ACC 180**.

2. The earlier charge sheet dated 6.6.2007 for offence under Section 354 IPC did not reach the Court when the Circle Officer passed the order dated 8.8.2007. The Court took the cognizance on the charge sheet dated 15.8.2007 and not on the charge sheet dated 6.6.2007. Thus, the Magistrate took the cognizance on a police report submitted under Section 173 (2) Cr.P.C. The charge sheet consisted of the statements of the prosecutrix recorded times under Section

161 Cr.P.C. and also the statement of the prosecutrix recorded under Section 164 Cr.P.C.

3. The provisions contained in Sub-section (3) and Sub-section (8) of Section 173 Cr.P.C. empowers for further investigation. But on its basis it cannot be construed that the I.O. has no power to re-record the statement of any witness.

4. There is no bar for the I.O., in Cr.P.C., to re-record the statement of any witness if the circumstances so require. The re-examination of witnesses even by the trial Court is permitted under the Evidence Act. Therefore, there is nothing to hold that the I.O. may not re-record the statement of any witness. The record reveals that an objection was raised against the I.O. hence I.O. was changed and re-investigation was ordered. The circumstances, in which the I.O. was changed and the statements of the witnesses were re-recorded, were appropriate circumstances. There is nothing in the code of Criminal Procedure which may restrict the Investigating Officer to record the statement of a witness only once.

5. The prosecutrix in her second statement has supported the F.I.R. and has given the explanation for concealing in her first statement the fact of rape upon her. She has supported the allegation of rape in her statement recorded under Section 164 Cr.P.C. also.

6. A matter came before Hon'ble the Supreme Court in B.S.S. V.V. Vishwandadha Maharaj Vs. State of Andhra Pradesh reported in AIR 1999 S.C. 2332 wherein the Investigating Officer earlier submitted a final report. The Magistrate ordered on 2.8.1995 for "re-investigation of the case."

Pursuant to the said order, the police re-investigated and filed a report on 15.9.1997 holding that the appellant has committed the offence under Section 420 of the I.P.C. The Magistrate took cognizance of the offence on the receipt of the said report and issued warrant of arrest. The Hon'ble Supreme Court found no illegality in the order nor in the re-investigation made by the Investigating Officer. The case reported in AIR 1999 S.C. 2332 also fortifies the view that there is nothing wrong if the case is re-investigated under Section 173(8) or under Section 173(3) Cr.P.C.

7. In view of what has been discussed above, I find no illegality in the order directing re-investigation nor I find any illegality in the investigation wherein the statement of a witness was re-recorded by the I.O.

8. The Magistrate committed no error in taking the cognizance on a police report submitted under Section 173 (2) Cr.P.C. The petition is devoid of merits. It is therefore dismissed.

9. The petitioner's counsel, after the above order is dictated, further argues that the police has no power to re-investigate and that I.O. has re-investigated the case.

10. The both of these points have met their reply in the discussion made above. No case to interfere. The petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2007

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No. 37849 of 2004

Hukum Chand ...Petitioner
Versus
State Services Tribunal, Indira Bhawan, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri L.P. Singh
Sri P.K. Sharma
Sri Veer Singh
Sri K.K. Pandey
Sri Manu Yadav

Counsel for the Respondents:
Sri B.K. Pandey
S.C.

Constitution of India, Art. 226-Service law-Dismissal order challenged on ground non supply of enquiry report-No show cause notice-as well as on quantum of punishment-before tribunal copy of enquiry report supplied-full opportunity given-No prejudice shown for non supply of enquiry report disciplinary authority considered past conduct of the petitioner-found habitual of marpit with other employees as well as officers-considering the charges-of assault on his superior officer found proved-punishment of dismissal-can not be disproportionate.

Held: Para 31, 34 & 42

Having examined the material on the said record and having considered the submissions made by the learned counsel for the parties, we are of the view that even if the copy of the Inquiry Report was supplied to the petitioner, the same would have made no difference to the ultimate findings of the Inquiry Officer and the punishment given to the petitioner.

We are of the view that the Disciplinary Authority did not commit any illegality in taking into account the past history in regard to work, behaviour and conduct of the petitioner for deciding the quantum of punishment to be imposed on the petitioner.

Keeping in view the aforesaid facts and circumstances, it is evident that the Disciplinary Authority was justified in imposing the punishment of dismissal from service on the petitioner.

Case law discussed:
AIR 1994 SC-1074, AIR 1962 SC-1130, AIR 2003 SC-1571, AIR 2005 SC-3417, AIR 2006 SC-2208

(Delivered by Hon'ble R.K. Agrawal, J.)

1. The present Writ Petition has been filed by the petitioner under Article 226 of the Constitution of India, interalia, praying for issuance of writ, order or direction in the nature of certiorari quashing the order dated 6.10.1999 (Annexure-6 to the Writ Petition), the order dated 16.5.2000 (Annexure-8 to the Writ Petition), the order dated 3.10.2003 (Annexure-11 to the Writ Petition) and the order dated 4.8.2004 (Annexure-13 to the Writ Petition), and further, for issuance of writ, order or direction in the nature of mandamus directing the respondents to reinstate the petitioner in service with all consequential benefits to which he is entitled.

2. As per the averments made in the Writ Petition, the petitioner was appointed on the post of Palledar (Class-IV) by the Assistant Commissioner Shasakiya/ respondent no.3; and that the post of

Palledar is now re-designated as 'Sewak'; and that the petitioner was confirmed on the said post by the Competent Authority.

3. By the order dated 21.9.1998, the petitioner was placed under suspension by the respondent no.5. Disciplinary proceedings were initiated against the petitioner, and a charge-sheet dated 18.3.1999 was served on him. Copy of the said charge-sheet has been filed as Annexure-1 to the Writ Petition.

4. A perusal of the said charge-sheet shows that Charge no.1 against the petitioner was regarding assaulting R.S. Gangwar, Assistant Commissioner (Vi.Anu.Sha.), Dwitiya Ikai, NOIDA with fist on 18.9.1998 thereby causing injury in the hand of the said R.S. Gangwar.

5. Charge no.2 was regarding tampering with the attendance register when the petitioner came late or was absent.

6. Charge no.3 was regarding the petitioner being habitual of such misconduct and indiscipline. Reference was made to the order dated 12.3.1985 whereby the petitioner was given 'Censure' entry and his two annual increments were stopped with cumulative effect condemning his work and conduct.

7. Charge no.4 was regarding the acts of the petitioner in getting Form No. 31 passed in wrongful manner during the year 1992-93 when he was posted at Check Post, Mohan Nagar, which resulted in stoppage of three increments of the petitioner with cumulative effect. The petitioner was accordingly charged for being habitually indisciplined and doing wrongful acts.

8. After giving opportunity to the petitioner, the Inquiry Officer submitted his Inquiry Report dated 13.9.1999.

9. It may be mentioned that during the course of hearing of the present Writ Petition, learned Standing Counsel produced the original record regarding the enquiry against the petitioner.

10. We have perused the Inquiry Report available on the said record produced by the learned Standing Counsel.

11. A perusal of the Inquiry Report shows that the Inquiry Officer in the said Report, interalia, concluded that as per the own admission of the petitioner, he had altercation with the said R.S. Gangwar on 18.9.1998. The Inquiry Officer further noted that the said R.S. Gangwar lodged First Information Report against the petitioner on 18.9.1998, and got himself medically examined also. Copies of the First Information Report as well as the medical examination report were produced before the Inquiry Officer.

12. The Inquiry Officer further noted the past conduct of the petitioner as indicated in various charges mentioned in the charge-sheet and concluded that the behaviour of the petitioner was not normal and he was quarrelsome by nature. The conduct of the petitioner (Sewak) was not such as could be expected of any Class-IV employee, and it was absolutely necessary that the petitioner be punished for his conduct.

The Inquiry Officer suggested punishment of stoppage of three increments with cumulative effect.

13. The Disciplinary Authority [respondent no.5-Assistant Commissioner (Admin.), Trade Tax, NOIDA] on a detailed consideration of the Inquiry Report awarded punishment of dismissal from service to the petitioner by the order dated 6.10.1999. Copy of the said order dated 6.10.1999 has been filed as Annexure-6 to the Writ Petition.

14. It further appears from the averments made in paragraph 17 of the Writ Petition that the petitioner made an application praying for supply of copy of the Inquiry Report before the respondent no.5. However, the respondent no.5 by the letter dated 29.11.1999 (Annexure-7 to the Writ Petition) declined to supply copy of the Inquiry Report to the petitioner.

15. It further appears that the petitioner filed an Appeal/ Representation against the said order dated 6.10.1999 whereby he had been dismissed from service.

16. The respondent no.4 - Deputy Commissioner (Karmik), Trade Tax, NOIDA Sambhag, NOIDA by his order dated 16.5.2000 rejected the said Appeal/ Representation filed by the petitioner.

Copy of the said order dated 16.5.2000 has been filed as Annexure-8 to the Writ Petition.

17. Thereafter, the petitioner filed a Claim Petition before the U.P. State Public Services Tribunal, Lucknow (hereinafter also referred to as "the Tribunal"). The said Claim Petition was numbered as Claim Petition No. 843 of 2000.

18. By the judgment and order dated 3.10.2003, the Tribunal dismissed the said Claim Petition filed by the petitioner. Copy of the said judgment and order dated 3.10.2003 has been filed as Annexure-11 to the Writ Petition.

19. Thereupon, the petitioner filed a Review Petition before the Tribunal. By the order dated 4.8.2004, the said Review Petition was dismissed by the Tribunal. Copy of the said order dated 4.8.2004 has been filed as Annexure-13 to the Writ Petition.

Thereafter, the petitioner has filed the present Writ Petition seeking the aforesaid reliefs.

20. We have heard Shri Veer Singh, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents, and perused the record.

21. Shri Veer Singh, learned counsel for the petitioner has made the following submissions:

1. In the present case, the Inquiry Officer and the Disciplinary Authority were different and, therefore, after submission of the Inquiry Report, the Disciplinary Authority was required to supply copy of the Inquiry Report to the petitioner. However, copy of the Inquiry Report was not supplied to the petitioner, and, therefore, the order dismissing the petitioner from service was vitiated. Reliance has been placed on the decision of the Supreme Court in ***Managing Director, ECIL, Hyderabad etc. etc. v. B. Karunakar, etc. etc., AIR 1994 SC 1074***.

2. The Disciplinary Authority took past conduct of the petitioner into account

while imposing punishment. This could not be done by the Disciplinary Authority.

3. A perusal of the Inquiry Report shows that the Inquiry Officer recorded finding that the petitioner had an altercation with R.S. Gangwar in whose Office the petitioner was posted. However, the Inquiry Officer did not find the charge of hitting of R.S. Gangwar by the petitioner as proved. In the circumstances, the Inquiry Officer recommended for imposing punishment of stoppage of three increments only. However, the Disciplinary Authority imposed the punishment of dismissal from service which was too harsh.

In reply, the learned Standing Counsel appearing on behalf of the respondents has made the following submissions:

1. No prejudice has been shown by the petitioner on account of non-supply of the copy of the Inquiry Report by the Disciplinary Authority. Copy of the Inquiry Report was placed before the Tribunal as Annexure R-7. The petitioner made his submissions against the findings recorded by the Inquiry Officer before the Tribunal, and the Tribunal rejected the said submissions after due consideration. In the circumstances, the order of dismissal of the petitioner from service is not vitiated.

2. The past conduct of the petitioner could be considered by the Disciplinary Authority in order to take appropriate decision as regards the quantum of punishment keeping in view the totality of the facts and circumstances of the case.

3. It was not incumbent on the Disciplinary Authority to accept the recommendation of the Inquiry Officer as regards punishment. The Disciplinary Authority on a consideration of the entire facts and circumstances imposed punishment of dismissal from service, and the same was not harsh keeping in view the facts and circumstances of the present case.

4. No show-cause notice was required to be given to the petitioner by the Disciplinary Authority in regard to the quantum of the proposed punishment.

We have considered the submissions made by the learned counsel for the parties.

22. Let us take-up the first submission made by the learned counsel for the petitioner regarding non-supply of copy of the Inquiry Report.

It is evident from a perusal of the letter dated 29.11.1999 (Annexure-7 to the Writ Petition) that copy of the Inquiry Report was not supplied to the petitioner. However, it is further evident from a perusal of paragraph 6 of the judgment and order dated 3.10.2003 passed by the Tribunal (Annexure-11 to the Writ Petition) that copy of the Inquiry Report was filed before the Tribunal at the time of hearing, and the same was Annexure-R-7.

23. It is further evident from a perusal of paragraph 10 of the said judgment and order dated 3.10.2003 passed by the Tribunal that the learned counsel for the petitioner before the Tribunal referred to the Inquiry Report and made his submissions assailing the

findings recorded by the Inquiry Officer. The said submissions made by the learned counsel for the petitioner were rejected by the Tribunal after due consideration.

24. In paragraph 11 of the said judgment and order, the Tribunal has noted that the procedure prescribed by the Rules was followed in the enquiry and the petitioner was given ample opportunity to defend himself.

25. In order to appreciate the submission made by the learned counsel for the petitioner regarding non-supply of copy of the Inquiry Report, it is relevant to refer to the decision of the Supreme Court in ***Managing Director, ECIL, Hyderabad etc. etc. v. B. Karunakar, etc. etc., AIR 1994 SC 1074*** (supra). In the said decision, their Lordships of the Supreme Court held as under (paragraph 7 of the said AIR):

"7.....Since the Government of India Act, 1935 till the 42nd Amendment of the Constitution, the Government servant had always the right to receive report of the Inquiry Officer/authority and to represent against the findings recorded in it when the Inquiry Officer/authority was not the disciplinary authority. This right was however, exercisable by him at the second stage of the disciplinary proceedings viz., when he was served with a notice to show cause against the proposed penalty. The issuance of the notice to show cause against the penalty necessarily required the furnishing of a copy of the inquiry Officer's report since, as held by the Courts, the right to show cause against the penalty also implied the right to represent against the findings on the charges. This was considered to be an essential part of the reasonable opportunity, incorporated earlier in Section 240 (3) of the GOI Act and later in Article 311(2) of the Constitution as originally enacted. The right to receive the Inquiry Officer's report and to show cause against the findings in the report was independent of the right to show cause against the penalty proposed. The two rights came to be confused with each other because as the law stood prior to the 42nd Amendment of the Constitution, the two rights arose simultaneously only at the stage when a notice to show cause against the proposed penalty was issued. If the disciplinary authority after considering the Inquiry Officer's report had dropped the proceedings or had decided to impose a penalty other than that of dismissal, removal or reduction in rank, there was no occasion for issuance of the notice to show cause against the proposed penalty. In that case, the employee had neither the right to receive the report and represent against the finding of guilt nor the right to show cause against the proposed penalty. The right to receive the report and to represent against the findings recorded in it was thus inextricably connected with the acceptance of the report by the disciplinary authority and the nature of the penalty proposed. Since the 42nd Amendment of the Constitution dispensed with the issuance of the notice to show cause against the penalty proposed even if it was dismissal, removal or reduction in rank, some courts took the view that the Government servant was deprived of his right to represent against the findings of guilt as well. The error occurred on account of the failure to distinguish the two rights which were independent of each other.

While the right to represent against the findings in the report is part of the

reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report. the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the 42nd Amendment.

The reason why the right to receive the report of the Inquiry Officer is considered an essential part of the reasonable opportunity it the first stage and also a principle of natural justice is that the findings recorded by the Inquiry Officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions.....

The position in law can also be looked at from a slightly different angle. Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry Officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. What is further, when the proviso to the said Article states that "where it is proposed after such inquiry to impose upon him any such penalty such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed", it in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the Inquiry Officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the Inquiry Officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry. The second stage follows the inquiry so carried out and it consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the Inquiry Officer. The latter right was always there. But before the 42nd Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the 42nd Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry Officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its

conclusion with regard to his guilt or innocence of the charges.

Hence it has to be held that when the Inquiry Officer is not the disciplinary authority, the delinquent employee has right to receive a copy of the inquiry Officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.....

.....When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to a "unnatural expansion of natural justice" which in itself is antithetical to justice.

Hence, in all cases where the Inquiry Officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court! Tribunal, and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court., Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should nut mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short-cuts. Since it is the Courts/ Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Courts/ Tribunals find that the furnishing of the report would have made a: difference to the result in the case that

should set aside the order of punishment Where after following the above procedure the Courts/Tribunals sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority, management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law....."

(Emphasis supplied)

26. The following propositions, amongst others, have, thus, been laid down in the above decision of the Supreme Court.

1. If the Inquiry Officer and the Disciplinary Authority are not the same, the delinquent employee should be supplied with a copy of the Inquiry Officer's Report before the Disciplinary Authority arrives at its conclusions with regard to the guilt or innocence of the employee in respect of the charges levelled against such employee.

2. The right to get copy of the Inquiry Report and to make representation against the findings of the Inquiry Officer in cases falling under proposition no. 1 above, is distinct and apart from the right to get notice and to show cause against the proposed penalty. The latter right, namely, right to get notice and to show cause against the proposed penalty has been taken away by the 42nd Constitutional Amendment but the former right, namely, right to get copy of the Inquiry Report and to represent before the Disciplinary Authority against the findings recorded by the Inquiry Officer is still subsisting.

3. If in a case falling under the proposition no.1, copy of the Inquiry Report is not supplied to the delinquent employee, the delinquent employee is required to show as to what prejudice has been caused to him on account of non-supply of the copy of the Inquiry Report. For deciding this question, the Court/Tribunal will cause the copy of the Inquiry Report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show as to how his case has been prejudiced because of non-supply of the Inquiry Report. In case, after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the Inquiry Report would have made no difference to the ultimate findings and the punishment

given, the Court / Tribunal should not interfere with the order of punishment.

Reverting to the facts of the present case, it has been noted above that even though copy of the Inquiry Report was not supplied to the petitioner, the same was made available to the petitioner during the course of hearing of the case before the Tribunal. Thus, the Tribunal gave opportunity to the petitioner to show as to how his case had been prejudiced on account of non-supply of the copy of the Inquiry Report. The submissions raised on behalf of the petitioner before the Tribunal assailing the findings recorded by the Inquiry Officer were considered by the Tribunal as is evident from a perusal of paragraph 10 of the judgment and order dated 3.10.2003 passed by the Tribunal. In paragraph 11 of the said judgment and order, the Tribunal further concluded that the petitioner had been given ample opportunity to defend himself.

27. In view of the above, it is evident that the Tribunal made copy of the Inquiry Report available to the petitioner and gave the petitioner opportunity to show as to how he had been prejudiced on account of non-supply of the copy of the Inquiry Report. The petitioner failed to show any prejudice and the Tribunal, therefore, upheld the order of dismissal of the petitioner from service.

28. In the present Writ Petition before this Court, the petitioner has made grievance regarding non-supply of copy of the Inquiry Report to him before imposing penalty of dismissal from service, as is evident from a perusal of paragraphs 14,15,16,17 and 18 of the Writ Petition. However, the petitioner has not made any specific allegation regarding prejudice which he might have suffered on account of non-supply of copy of the Inquiry Report. During the course of hearing also, the learned counsel for the petitioner has not been able to show as to how the petitioner was prejudiced on account of non-supply of copy of the Inquiry Report.

29. As no prejudice has been established by the petitioner, the order of dismissal of the petitioner from service cannot be said to be vitiated on account of non-supply of copy of the Inquiry Report.

30. As noted above, the original record of the enquiry proceedings has been produced before us by the learned Standing Counsel.

31. Having examined the material on the said record and having considered the submissions made by the learned counsel for the parties, we are of the view that even if the copy of the Inquiry Report was supplied to the petitioner, the same would have made no difference to the ultimate findings of the Inquiry Officer and the punishment given to the petitioner.

In the circumstances, no interference is called for with the order of dismissal of the petitioner from service.

32. Coming now to the second submission made by the learned counsel for the petitioner regarding taking into account the past conduct of the petitioner while imposing penalty, it is noteworthy that one of the main charges against the petitioner was that he was habitual in committing misconduct and indiscipline and in committing wrongful acts, and

various instances were mentioned in the charge-sheet in regard to the same. Having examined the facts and circumstances in the light of material on record, the Inquiry Officer concluded that the behaviour of the petitioner was not normal and he was of quarrelsome nature, and the conduct of the petitioner (Sewak) was not such as could be expected of any Class-IV employee, and it was absolutely necessary that the petitioner be punished for his conduct.

33. The Disciplinary Authority examined in detail the charges levelled against the petitioner and the findings recorded by the Inquiry Officer and concluded that it was a case of serious misconduct on the part of the petitioner. In order to decide as to what punishment be imposed on the petitioner, the Disciplinary Authority took into consideration the past history regarding work, behaviour and conduct of the petitioner as emerging from the service record and thereafter imposed the penalty of dismissal from service keeping in view the totality of the facts and circumstances of the case.

34. We are of the view that the Disciplinary Authority did not commit any illegality in taking into account the past history in regard to work, behaviour and conduct of the petitioner for deciding the quantum of punishment to be imposed on the petitioner.

35. Coming now to the third submission made by the learned counsel for the petitioner regarding the punishment of dismissal from service imposed by the Disciplinary Authority despite the fact that the Inquiry Officer had recommended punishment of stoppage of three increments only, we are of the view that the quantum of punishment was to be decided by the Disciplinary Authority keeping in view, interalia, the findings recorded by the Inquiry Officer in regard to various charges levelled against the petitioner. The Disciplinary Authority was not bound by the suggestion/ recommendation made by the Inquiry Officer, and it (Disciplinary Authority) was required to take its own decision on the question of quantum of punishment. Reference in this regard may be made to the decision of the Supreme Court in ***A.N. D'Silva v. Union of India, AIR 1962 SC 1130***.

36. As noted above, the Disciplinary Authority on a detailed consideration of the charges levelled against the petitioner and the findings recorded by the Inquiry Officer in regard to such charges and also keeping in view the past history of the petitioner in regard to his work, behaviour and conduct, concluded that the petitioner had committed serious misconduct and the petitioner was habitual in repeatedly committing misconduct during his service and there was no possibility of any improvement in his conduct, and continuing the petitioner in service would adversely affect other disciplined employees also. In the circumstances, the Disciplinary Authority imposed punishment of dismissal from service on the petitioner.

37. In our opinion, the Disciplinary Authority did not commit any illegality in not accepting the suggestion/ recommendation of the Inquiry Officer in regard to the quantum of punishment and in imposing the punishment of dismissal from service on the petitioner.

38. As regards the submission made by the learned counsel for the petitioner that the punishment of dismissal from service imposed by the Disciplinary Authority was too harsh, we are of the view that having regard to the facts and circumstances mentioned above, the punishment of dismissal from service imposed by the Disciplinary Authority cannot be said to be harsh.

39. The Inquiry Officer in his Report, as mentioned hereinbefore, concluded that as per the own admission of the petitioner he had altercation with the said R.S. Gangwar on 18.9.1998. The Inquiry Officer further noted that the said R.S. Gangwar lodged First Information Report against the petitioner on 18.9.1998, and got himself medically examined also.

40. The Inquiry Officer further noted the past conduct of the petitioner as indicated in various charges mentioned in the charge-sheet and concluded that the behaviour of the petitioner was not normal and he was quarrelsome by nature. The conduct of the petitioner (Sewak) was not such as could be expected of any Class-IV employee, and it was absolutely necessary that the petitioner be punished for his conduct.

41. It is noteworthy that no reasonable explanation was given by the petitioner regarding his altercation with R.S. Gangwar on 18.9.1998. The petitioner has not alleged any malafide against the said R.S. Gangwar.

42. Keeping in view the aforesaid facts and circumstances, it is evident that the Disciplinary Authority was justified in imposing the punishment of dismissal from service on the petitioner.

43. There is another aspect of the matter also.

It has been laid by the Supreme Court in various decisions that the punishment imposed by the Disciplinary Authority or the Appellate Authority should not be subjected to judicial review unless the same is shocking to the conscience of the Court/Tribunal. Reference in this regard may be made to the following decisions:

1. ***Chairman and Managing Director, United Commercial Bank and others v. P.C. Kakkar, AIR 2003 SC 1571*** *(paragraphs 1,12,13 and 14).*
2. ***V. Ramana v. A.P.S.R.T.C. and others, AIR 2005 SC 3417*** *(paragraphs 12,13 and 14).*
3. ***General Secretary, South Indian Cashew Factories Workers Union v. Managing Director, Kerala State Cashew Development Corporation Ltd. and others, AIR 2006 SC 2208*** *(paragraph 16).*
4. ***Union of India and others v. Dwarka Prasad Tiwari, (2006) 10 SCC 388*** *(paragraphs 10,11,15,16 and 17).*

44. The punishment of dismissal from service imposed in the present case cannot, in our opinion, be said to be such as is shocking to the conscience of the Court. Therefore, no interference is called for with the order imposing the said punishment on the petitioner.

45. In view of the above discussion, we are of the opinion that the Writ Petition lacks merits, and the same is liable to be dismissed. The Writ Petition

is accordingly dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2007

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

Civil Misc. Writ Petition No. 59703 of 2007

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

Counsel for the Petitioner:
Sri C.L. Pandey
Sri Manoj Kumar

Counsel for the Respondents:
Sri M.C. Tripathi
S.C.

U.P. Govt. Servant (Discipline and Appeal) Rules 1999-Rule-4-applicability of CCA Rule upon employees of Nagar Palika-of centerlised services-suspension order without contemplation of disciplinary proceeding or pending-nothing whisper in impugned order of suspension-contention of standing counsel the regarding preparation of charge sheet worthless-held-once validity of an order under challenge only the contention are material it can not be supplemented by subsequent explanation-order can not sustained-with liberty to pass fresh order if required.

Held: Para 7, 11 & 17

The order of suspension impugned in this writ petition also suffers from the same illegality and, therefore, in our view it cannot be sustained in view of the law laid down in the case of Meera Tiwari (Supra).

Thus, the law is well settled that an order has to be tested on its own without taking the aid of any affidavit or other material as if it is supplementing the reasons for validating the executive order.

In the result, the writ petition succeeds and is hereby allowed. The order dated 12th of September 2007 impugned in this petition is quashed. However, it is made clear that the respondents shall be at liberty to pass a fresh order, if they so decide in respect to suspension of petitioner, in accordance with law. No order as to costs.

Case law discussed:
2001 (3) UPLBEC-2057, AIR 1952 SC-16, AIR 1978 SC-851, 2005 (7) SCAVE-386, 2005 J.T. (6) SC-60, 2007 (2) SCC-640, 1965 AIR SC-304, AIR 2007 SC-1168, Spl. Appeal No. 180 of 2007 decided on 27.2.2007, W.P. 58427 of 2007 decided on 3.12.2007

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

1. Heard learned counsel for the parties. The learned counsel for the parties agree that considering the legal issues raised in this writ petition it may be heard and decided finally at this stage. The learned counsel for respondents also states that he does not propose to file counter affidavit, though opposed the writ petition by making oral submission, and, therefore, the writ petition has been heard and is being disposed of finally at this stage under the Rules of the Court.

2. The petitioner being aggrieved by the order dated 12.09.2007 passed by the Vice-Chairman, Kanpur Development Authority placing him under suspension, has come to this Court under Article 226 of the Constitution of India, seeking a writ

of certiorari for quashing the aforesaid order of suspension.

3. Sri C.L. Pandey, learned Senior Advocate assisted by Sri Manoj Kumar appearing for the petitioner has contended that under Rule 4 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 *(hereinafter referred to as the "1999 Rules"),* which is also applicable to the petitioner who is a member of a centralised service, an employee can be placed under suspension if a disciplinary inquiry is in contemplation or is pending or in respect to a criminal charge an inquiry, investigation or trial is pending. He submits that from the impugned order it is evident that none of the aforesaid conditions are existing, and on the contrary the order shows that on certain allegations the petitioner has been suspended, meaning thereby that it is by way of punishment. He further submits that the impugned order of suspension nowhere shows that it has been passed either in contemplation of disciplinary proceedings or pendency of such proceedings and, therefore, the impugned order is illegal having not been passed on any of the grounds on which it could have been passed.

4. On the contrary, Sri M.C. Tripathi, learned counsel appearing for respondents no. 2 to 4 submits that as per instructions received by him, the chargesheet is under preparation and the impugned order of suspension has been passed in contemplation of disciplinary proceedings, though it is not mentioned in the impugned order of suspension. He further submits that the instructions received by him be taken so as to validate the impugned order of suspension and it should be deemed that the same has been passed in contemplation of disciplinary proceedings.

5. Learned counsel for the parties have not disputed that a member of centralised service of Development Authority can be placed under suspension under Rule 4 (1) of 1999 Rules which reads as under:-

"4. Suspension.-(1) A Government Servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the Appointing Authority:

Provided that suspension should not be resorted to unless the allegations against the Government Servant are so serious that in the event of their being established may ordinarily warrant major penalty :

Provided further that concerned Head of the Department empowered by the Governor by an order in this behalf may place a Government Servant or class of Government Servants belonging to Group "A' and "B' posts under suspension under this rule :

Provided also that in the case of any Government Servant or class of Government Servant belonging to Group "C' and "D' posts, the Appointing Authority may delegate its power under this rule to the next lower authority."

6. A perusal of Rule 4 (1) shows that a government servant can be placed under suspension against whose conduct an inquiry is contemplated or is proceeding. A perusal of the entire order of suspension impugned in this writ petition nowhere shows that an inquiry was in

contemplation or pending warranting suspension of the petitioner in the present case. Suspension order has been passed without mentioning as to whether the incumbent is being placed under suspension in contemplation of disciplinary proceedings or pendency thereof. The question whether such an order of suspension would be valid, came up for consideration before a Division Bench of this Court in **Meera Tiwari (Smt.) v. The Chief Medical Officer and others, (2001) 3 UPLBEC** 2057, in which one of us (Hon'ble S.R. Alam, J.) was a member, and it was held as under :

"3. From the said rule it appears that a Government Servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry. The impugned order of suspension does not refer to any contemplated inquiry or the fact that any inquiry is pending."

"4. In that view of the matter, we are of the view that the order of suspension is against the provisions of Rule 4 of the U.P. Government Servant (Discipline & Appeal Rules, 1999 and the same cannot be sustained....."

7. The order of suspension impugned in this writ petition also suffers from the same illegality and, therefore, in our view it cannot be sustained in view of the law laid down in the case of **Meera Tiwari (Supra).**

8. So far as the contention of learned counsel for the respondents that as per instructions charge sheet is under preparation and, therefore, it should be deemed that the impugned order of suspension was in contemplation of disciplinary proceedings, is concerned, suffice it to mention that the validity of an order has to be judged for the reasons, if any, contained in the order itself and not for any material which may be supplied by way of an affidavit or after receiving instructions etc. The order otherwise invalid cannot be validated by furnishing reasons in the shape of affidavit or otherwise. In **Commissioner of Police, Bombay Vs. Govardhan Das Bhanji, AIR 1952 SC 16**, the Apex Court held as under:

".....We are clear that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

9. The Apex Court in the case of **Mohinder Singh Gill v. Chief Election Commissioner, AIR 1978 SC 851**(para 8) has laid down that the reasons cannot be supplemented and held as under:

"When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to the court on account of a challenge, get

validated by additional ground later brought out."

10. The dictum laid down in **Govardhan Das Bhanji (supra)** has been followed in a catena of cases recently in **Hindustan Petroleum Corporation Ltd.** *versus* **Darius Shapur Chenai and others, (2005) 7 SCALE 386; Bangalore Development authority and others** *Versus* **R. Hanumaih and others, (2005) 8 SCALE 80; Bahadur Singh Lakhubhai Gohil** *Versus* **Jagdish Bhai Kumalia and others JT (2005) 6 SC 60; K.K. Bhalla Versus State of M.P. And others (2006) 3 SCC 581; R.S. Garg** *Versus* **State of U.P. and others (2006) 6 SCC 430 and Ashoka Smokeless Coal India Pvt. Ltd. and others Versus Union of India and others (2007) 2 SCC 640** .

11. Thus, the law is well settled that an order has to be tested on its own without taking the aid of any affidavit or other material as if it is supplementing the reasons for validating the executive order.

12. There is another legal principle which is applicable in such case. When a power is required to be exercised in a particular manner, the same has to be exercised **in that manner only** or **not at all**. In **Kothamasu Kanakarathamma and others Vs. State of A.P. and others, AIR 1965 SC 304** the Apex Court held that "*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...*"

13. The aforesaid law has been followed recently in **Hotel and Restaurant Association and others Versus Star India Pvt. Ltd. and others AIR 2007 SC 1168** (*para 49*).

14. A similar dispute came up for consideration before this Court by another Division Bench in **Special Appeal No. 180 of 2007, Hari Shankar Misra Vs. State of U.P. and others, decided on 27.2.2007** wherein one of us (Hon'ble S. Rafat Alam, J.) was a member and following the law laid down in **Meera Tiwari (supra)** and **Mohinder Singh Gill (supra)**, the order of suspension was set aside therein, since it was nowhere mentioned in that case also that the order of suspension was passed either in contemplation of disciplinary proceedings or pendency thereof.

15. This Bench has also taken a similar view following **Meera Tiwari (supra) in Dr. Pradeep Pandey Vs. State of U.P. and others (writ petition no. 58427 of 2007)** decided on **3.12.2007.**

16. In view of the aforesaid discussion, the impugned order of suspension dated 12th of September 2007 cannot sustain.

17. In the result, the writ petition succeeds and is hereby allowed. The order dated 12th of September 2007 impugned in this petition is quashed. However, it is made clear that the respondents shall be at liberty to pass a fresh order, if they so decide in respect to suspension of petitioner, in accordance with law. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.4747 of 2008

Dhara Singh Girls High School, Ghaziabad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. Satyam Singh
Sri. Shiv Nath Singh

Counsel for the Respondents:
Sri. S.K. Tyagi
S.C.

Right to Information Act 2005-Section 2(h)-Private School-run through management duly recognized, within the purview of grant in aid-discharging public duty-bound to give required information-necessary direction issued.

Held: Para14 & 19

Though the institution may be a private institution but if it is substantially financed directly or indirectly by the State Government such as by grant-in-aid for payment of salary of the teachers ,and staff under the control of the 'public authority' as to monitor the expenses provided by the State Government in this regard as given in the objects and reasons of the Act, it will fall under the purview of the Right to Information Act.

It is directed that the institution will provide information to respondent no.5 through the DIOS, Ghaziabad within a period of 15 days as already much time has been consumed by the institution for not supplying the required information within the time prescribed under the Act

(Delivered by Hon'ble Rakesh Tiwari J.)

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

2. This writ petition has been filed for issuance of a writ, order or direction in the nature of mandamus commanding the respondents not to compel the petitioner's institution to give information as sought by respondent no.5.

3. Further a writ of mandamus is also sought for restraining the respondents from taking any action against the petitioner's institution for not giving information to respondent no.5 as directed by the District Inspector of Schools, Ghaziabad.

4. The ground on the basis of which the relief sought is that the petitioner is a private institution which has been recognized by the Madhyamik Shiksha Parishad receiving grant-in-aid by the State Government does not fall within the ambit of Section 2(g) of the Right to Information Act, 2005, hereinafter referred to as the Act, hence the institution cannot be compelled to give information which has been sought by respondent no.5 by moving an application to the DIOS and no action can be taken against the petitioner under the aforesaid Act. Reliance has been placed by the learned counsel for the petitioner upon an interim order dated 12.9.2007 passed by this Court in Writ Petition No. 41818 of 2007 which is as under:

"Connect with Writ Petition No. 13211 of 2007.

Learned Standing Counsel has accepted notice for the respondent nos. 1 and 2.

Issue notice to the respondent no.3 fixing a date immediately after six weeks.

All the respondents may file counter affidavit by the next date.

In the connected writ petition, it has been contended that the Committee of Management of private institution which has been recognized by Madhyamik Shiksha Parishad and is receiving grant-in-aid from the State Government does not answer description of ' public authority' as per Section 2(h) of Right to Information Act as such institution in question cannot be compelled to answer before the aforementioned authority.

As the issue raised in the present writ petition is identical to the issue raised in the aforementioned writ petition, as such, the petitioner is also entitled to grant of interim order as has been granted in the connected writ petition.

Accordingly, it is provided that till the next date of listing no action shall be taken against the petitioner under the Right to Information Act, 2005."

5. He has urged that in another similar writ petition No. 13231 of 2007, C/M Sri Gandhi Smarak and another Vs. State of U.P. and others this Court has also passed an order dated 13.3.2007 on the point whether such private institutions fall within the ambit of 'public authority' as defined under Section 2(h) of the Right to Information Act, 2005, though they may have been recognized by the Madhyamik Shiksha Parishad and are receiving grant-in-aid from the State Government, the Court has held that such institutions as aforesaid do not answer description of 'public , authority' as defined under Section 2(h) of the Act. The order dated 31.3.2007 is also an interim order of this Court which has been appended as Annexure-7 to the writ petition.

6. A perusal of the two interim orders aforesaid dated 13.3.2007 and 12.9.2007 show that the Court has noted the contentions of learned counsel for the petitioners that the private institutions have been recognized by the Madhyamik Shiksha Parishad and are receiving grant-in-aid did not conform description as of 'pubic authority' as defined in Section 2(h) of the Right to Information Act which was only issue raised by the petitioner at the time of admission. An interim order which is passed at the time of admission pending proceedings to be complied with in order to balance the equities during the pendency of the petition is not a final adjudication of dispute. It is not a judgment and has no persuasive value.

7. It appears from the record that respondent no.5 had sought certain information from the petitioner's institution regarding appointment of Principal of "Deepmala" and with regard to the income and expenditure etc. Since the nature of information sought is relevant, the letter of respondent no.5 seeking information under the Right to Information Act, 2005 appended as Annexure-1 and Annexure-3 are quoted below.

Annexure No.1

सेवा में,

श्रीमान् जिला बेसिक शिक्षा अधिकारी,
गाजियाबाद।

विषयः- जन सूचना अधिकार अधिनियम के अंतर्गत सूचना प्राप्त करने के संबंध में।

महोदय,

1. धारा सिंह गर्ल्स जूनियर हाईस्कूल गऊशाला रोड़ गाजियाबाद में प्रधानाध्यापक पद पर दीपमाला की नियुक्ति किस दिनांक को हुई।
2. प्रधानाध्यापक के पद की विभाग द्वारा रिक्त पद पर नियुक्ति के लिए जगह किस दिनांक को निकाली गयी?
3. प्रधानाध्यापक का पद किसकी जगह रिक्त हुआ? नियुक्ति के समय प्रधानाध्यापक का अनुभव कितने वर्ष होना चाहिए एवं प्रधानाध्यापक की उम्र कितनी होनी चाहिये?
4. प्रधानाध्यापक दीपमाला की नियुक्ति के समय स्कूल प्रबंधक कमेटी के चयन समिति में कौन-कौन पदाधिकारी थे?

5. प्रधानाध्यापक दीपमाला की नियुक्ति के समय शिक्षा विभाग के पदाधिकारी कौन-कौन थे?
6. प्रधानाध्यापक दीपमाला का प्रधानाध्यापक पद का अनुमोदन शिक्षा विभाग के नियमानुसार किस अधिकारी के हस्ताक्षर से किस दिनांक को किया गया?
7. प्रधानाध्यापक की नियुक्ति के समय दीपमाला का बी०एड० के बाद अनुभव कितने वर्ष का था? एवं किस स्कूल का अध्यापक अनुभव था एवं उम्र क्या थी?
8. दीपमाला के प्रधानाध्यापक पद पर नियुक्ति होने से पहले किसकी नियुक्ति प्रधानाध्यापक पद पर थी? उसका किस दिनांक को त्याग पत्र दिया गया दीपमाला का प्रधानाध्यापक पद पर नियुक्ति संबंधी बायोडाटा देने की कृपा करें।

प्रार्थी जन सूचना अधिकार अधिनियम के सभी नियमों का पालन करने को तैयार है।

प्राथी

संलग्न : 10 रूपयें का पोस्टल आर्डर

ह०/.

नं० 61 ई 514309

(बलराज सिंह पुत्र श्री प्रेम सिंह)
144 माधोपुरा, गाजियाबाद।

Annexure-3

सेवा में,
श्रीमान् जिला बेसिक शिक्षा अधिकारी,
गाजियाबाद।

विषयः- जन सूचना अधिकार अधिनियम 2005 के अंतर्गत सूचना प्राप्त करने के संबंध में।

जिसकी निर्धारित शुल्क 10/- रूपये पोस्टल आर्डर संख्याः 66 ई 265235 10.07.07 दिनांक संलग्न है।

1. धारा सिंह गर्ल्स जूनियर हाईस्कूल गऊपुरी गाजियाबाद की छात्राओं से फीस के रूप में रेडक्रास की धनराशि ली जाती है। प्रति वर्ष छात्राओं की संख्या का विवरण वर्ष 1988 से 2007 तक।
2. छात्राओं से लिया गया रेडक्रास की धनराशि स्कूल के किस बैंक खाते में जमा होती है।
3. छात्राओं से लिया गया रेडक्रास की धनराशि उक्त स्कूल बैंक खाते में वर्ष 1988 से 2007 तक जमा प्रतिवर्ष धनराशि का विवरण।
४. उक्त स्कूल बैंक खाते में जमा रेडक्रास की धनराशि प्रतिवर्ष कितनी धनराशि किस-किस दिनांक को निकाली गयी धनराशि का विवरण।

प्रार्थी को जन सूचना अधिकार अधिनियम 2005 के अन्तर्गत सूचना प्राप्त कराने की कृपा करें आपकी अति कृपा होगी।

प्राथी,
ह०/.
(बलराज सिंह पुत्र श्री प्रेम सिंह)
144 माधोपुरा, गाजियाबाद।

प्रतिलिपि-श्रीमान जिलाधिकारी गाजियाबाद।
दिनांकः 10.07.2007

8. The DIOS on the aforesaid request under the Right to Information Act, 2005 had directed the institution to provide information required by respondent no.5. The institution did not comply with the directions of District Basic Education Officer, Ghaziabad and submitted the interim orders passed in the two petitions i.e. 41818/2007 and 13231/2007. The DIOS, Ghaziabad thereafter informed the petitioner that the interim orders aforesaid pertain to other institutions and not to the petitioner's institution as such he should supply the information required.

9. Aggrieved the petitioner has come up in this writ petition for restraining the DIOS from giving the information sought by respondent no.5 and not to take any coercive action against the institution.

10. Before adverting to the controversy involved in the present writ petition the necessary provisions of the Right to Information Act, 2005 may be referred.

11. According to its objects and reasons the Right to Information Act, 2005 is an Act " to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a 'Central Information Commission and Stale Information Commissions and for matters connected therewith or incidental thereto." It was in the context with objects and reasons that the parliament enacted the Right to Information Act, 2005.

12. Section 2(a)(f)(h)(i) and (j) define" appropriate Government, Competent authority, Information, Public authority and Right to Information Act." which are as under:

(a) "appropriate Government" means in relation to a public authority which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly

(i) by the Central Government or the Union territory administration, the Central Government;

(ii) by the State Government, the State Government;

(f) "information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force;

(h) "public authority" means any authority or body or institution of self government established or constituted

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government,

and includes any-

(i) body owned, controlled or substantially financed;

(ii) non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government;

(i) "records" includes

(i) any document, manuscript and file;

(ii) any microfilm, microfiche and facsimile copy of a document;

(iii) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and

(iv) any other material produced by a computer or any other device;

(j) " right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to

(i) inspection of work, documents, records;

(ii) taking notes, extracts or certified copies of documents or records;

(iii) taking certified samples of material;

(iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode

or through printouts where such information is stored in a computer or in any other devices."

13. Section 3 provides for right to information to all the citizens subject to the provisions of the Act. Section 4 puts an obligation on the public authority to maintain all its records for providing information. Section 6 provides that the request for obtaining information is to be made in writing to be accompanied with such fee as prescribed. Section 7 provides procedure for disposal of request whereas Section 8 provides for exemption from disclosure of information. The exemption is provided only with regard to information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interest of 'the State, relation with foreign State or lead to incitement of an offence; the information which has been expressly forbidden to be published by any Court of law or tribunal or the disclosure of which may constitute contempt of Court; information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature; and information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that a larger public interest warrants the disclosure of such information and so on.

14. From perusal of the objects and reasons for enacting the Right to Information Act, 2005 it is apparent that the Government desired to establish a practical regime of right to information for citizens to have accessed to information under the control of public authorities, in order to promote transparency and accountability in their working. Though the institution may be a private institution but if it is substantially financed directly or indirectly by the State Government such as by grant-in-aid for payment of salary of the teachers and staff under the control of the 'public authority' as to monitor the expenses provided by the State Government in this regard as given in the objects and reasons of the Act, it will fall under the purview of the Right to Information Act.

15. Such institutions do not ousted Section 2(h)(d)(ii) of the Act. It is not denied by the petitioner that information sought by respondent no.5 is not exempted information under Section 8 of the aforesaid Act, 2005 It applies to a non-government organization substantially financed directly or indirectly by funds provided by the appropriate Government by which the petitioner is covered.

16. Admittedly, the petitioner is financed by the State, Government substantially and is receiving grant-in-aid from the State Government, therefore, the District Basic Education Officer has rightly sought information from the petitioner which can not be denied only on the pretext that since respondent no.5 has filed a number of complaints against him and there is inter-se litigations between the parties, hence the institution is not obliged to provide information.

17. Sri S.K. Tyagi, learned counsel appearing for respondent no.5, submits that there is another aspect of the matter which may be looked into by the Court i.e. in many of the institutions the petitioner has appointed his men by taking

money and is squandering government funds, therefore, respondent no.5 has sought information under the Right to Information Act in order to bring to the notice of the authority the fact that the petitioner is not working in a democratic manner, in accordance with the status and is squandering government money. He submits that the Management of any institution can not be permitted to put a word over the eyes of the public in the garb of protection from the Right to Information Act on the ground that it is a private institution and is not amenable to Right to Information Act which in fact is otherwise as such protection would frustrate the very object of the Act of transparency and accountability of public authority and private bodies in their functioning from public eye.

18. In my opinion, whenever there is even an ,iota of nexus regarding control and finance of public authority over the activity of a private body or institution or an organization etc. the same would fall under the provisions of Section 2(h) of the Act. The provisions of the Act have to be read in consonance and in harmony with its objects and reasons given in the Act which have to be given widest meaning in order to ensure that unscrupulous persons do not get benefits of concealment of their illegal activities or illegal acts by being exempted under the Act and are able to hide nothing from the public. The working of any such organization or institution of any such private body owned or under control of public authority shall be amenable to the Right to Information Act. The petitioner being an institution recognized under the provisions of U.P. High School and Intermediate Education Act, 1929 and receiving grant-in-aid from the State Government is therefore, covered under the aforesaid Act.

For the reasons stated above, the writ petition is dismissed.

19. It is directed that the institution will provide information to respondent no.5 through the DIOS, Ghaziabad within a period of 15 days as already much time has been consumed by the institution for not supplying the required information within the time prescribed under the Act.

20. Let a certified copy of this order be supplied to the learned Standing counsel for information to the DIOS, Ghaziabad on free of cost.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.12.2007

BEFORE
THE HON'BLE SUSHIL HARKAULI, J
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Appeal No. 2289 of 1982

Bateshwari and others ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri. P.N. Mishra
Sri. Kamal Krishna
Sri. S.D.N. Singh
Sri. Krishna Kapoor
Sri. Dilip Kumar
Sri. Rajeev Gupta

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Criminal Appeal-offence under Section 302(34

I.P.C.) conviction-challenged on the ground-the witness being interested witness-their presence itself being doubted as no effort made to save the deceased-held-human behaviour depends upon man to man reaction in particular manner-cannot be ground for discarding the evidence-conviction warrant no interference-appeal dismissed.

Held: Para 15 & 21

In view of the aforesaid it cannot be said that the eyewitnesses reacted in an abnormal way or their statement cannot be trustworthy only for the reason that they did not react in the manner as suggested or expected on behalf of the accused or someone else.

As pointed out above, neither the deceased nor the witnesses had any serious motive to falsely implicate the accused, leaving out the real assailants. On the other hand, the accused did have a serious motive for carrying out the assault. Further,as we have already stated above, we have carefully examined the testimony of the eyewitnesses including their detailed cross-examinations and we do not find any thing substantial therein to cast any serious doubt upon the testimony of these eyewitnesses.

Case law discussed:
2003(46) ACC 584, 1983(3) SCC 327, 2002(8) SCC 125, AIR 1953 SC 364, 1974(3) SCC 698, AIR 1965 SC 202, 2005(Crl) SCC 1260.

(Delivered by Hon'ble Sushil Harkauli, J.)

1. All the three appellants have been convicted under Section 302/34 I.P.C. and have been sentenced to undergo life imprisonment by the impugned judgment and order dated 8.9.1982, passed by the VIII Additional Sessions Judge, Agra, in Sessions Trials No. 327 of 1980, 452 of 1980 and 441 of 1981 by a common judgment.

2. In brief, the prosecution story is that on 18.1.1980 at about 6.00 P.M. when the deceased, Mauji Ram, was returning to his house from the local market, he was stopped and caught hold of by accused Ram Babu and Shyam Sabu and assaulted with knives by both the accused. Simulaneously, the father of the aforesaid two accused, viz. Bateshwari, and accused Gyan Singh son of Jinshi came up from behind the deceased and they also assaulted the deceased with knives. The deceased died on the spot as a result of the multiple injuries received on his person, and the accused ran away Shyam Babu, accused, has died. The remaining three accused have been tried and sentenced, as stated above.

3. The incident was witnessed by the daughter of the deceased, Vidya,who was accompanying the deceased and who at that time was aged about 11-12 years. The incident was also witnessed by Subedar, nephew of the deceased, who was also accompanying the deceased.

4. The F.I.R. of the incident was lodged at 8.10 P.M. on the same day at police station located at a distance of about 2 miles to the west of the spot of incident. The Investigating Officer went to the spot at night but could not continue investigation because there was no light. The inquest report was prepared at about 7.30 A.M. the next morning, i.e. on 19.1.1980 and the body sent for post-mortem. The post-mortem was conducted the next day, i.e. on 20.1.1980. In the post-mortem examination the follow mg injuries were found on the body of the deceased:

1. Incised wound 3/4" x 2/10" x 1/10" on the left side head 3-1/2" above left ear.

2. Incised wound 1/4" x 2/10" x muscle deep on the front of left forearm 3/4" below elbow.

3. Incised wound 2" x 9/10" x ulna bone (cut) on the back and inner of left forearm 4" below elbow.

4. Incised wound 1-1/2" x 4/10" x muscle deep on the front of right thigh 1-1/2" above knee.

5. Incised wound 1-1/2" x 3/10" x muscle deep on the inner side of left thigh 2-1/4" above knee.

6. Stab wound 1" x 4/10" x abdomen cavity deep on the left side upper abdomen, just below subcostal margin, upper end is contused, lower end is acute nearby vertical.

7. Stab wound 2" x 3/4" x abdomen cavity deep on the front of left side abdomen 3/4" inner to injury no. 6, upper end contused, lower acute angle, loops of intestines coming out.

8. Stab wound 1" x 4/10" x abdomen cavity deep on left side abdomen 1-1/2" outer to umbilicus, upper end is contused, lower end is acute, loops of intestine coming out.

9. Stab wound 1-1/2" x 3/4" x abdomen cavity deep on the left side abdomen 1/2" outer to umbilicus, upper end is contused, lower end is acute, loops of intestine coming out.

10. Stab wound 1" x 2/10" x abdomen cavity deep on the upper abdomen at its midline 2-1/2" above umblicus, obliquely transverse, intestine abdomen 6-1/2" long obliquely from right side front of chest going the upper end of stab wound.

11. Stab wound 2" x 4/10" x abdomen cavity deep on the right side abdomen 1-1/2" outer to injury No. 10 upper end is contused, lower end is acute, intestine loops are coming out.

12. Incised wound 4/10" x 1/10" x muscle deep on the right side abdomen 3/4" middle lower to injury no. 11.

13. Stab wound 1" x 4/10" abdomen cavity deep on right side front lower abdomen just above, right side anterior superior ulna spine.

14. Incised wound 1" x 3/4" x muscle deep on the outer part of left shoulder, 1" below its top.

15. Incised wound 3/10" x 1/10" x skin deep on the back of left lip upper third.

5. The Investigating Officer prepared a site plan and after completing investigation a charge-sheet was submitted. Apart from blood stained earth and plain earth being collected from the spot, a bicycle and a blanket left behind by the accused while running away were also recovered by the Investigating Officer and a recovery memo was prepared.

6. The informant, Niranjan, was examined as P.W. 1, the eyewitness daughter of the deceased, Vidya, was

examined as P.W. 2 and the other eyewitness Subedar was examined as P.W. 3. Dr. S.P. Misra, who conducted the post-mortem, was examined as P.W. 4. The affidavit of the Constable Raja Ram, who took the dead body to mortuary for post-mortem, was filed as P.W. 5 and the Investigating Officer was examined as P.W. 6. All the evidence was recorded in leading S.T. No. 327 of 1980. In S.T. No. 441 of 1981 Constable Raja Ram was examined as P.W. 5 and NarsinghYadav was examined as P.W. 6 to prove the F.I.R. and the General Diary entry about registration of the case. In S.T. No. 441 of 1981 the Investigating Officer was not examined.

The accused did not give any evidence in defence.

7. The first three witnesses, viz. P.W.l to P.W.3, have supported the prosecution story and so far as we have been able to see nothing worthwhile has been elicited from any of these witnesses during cross-examination so as to create any serious doubt on their testimony with respect to the essential and main facts of the incident.

8. During arguments in this appeal, learned counsel for the appellants submitted that the F.I.R. appears to be ante-timed pursuant to an attempt by the prosecution to shift back the time of incident to the alleged 6.00 P.M. During arguments, the suggestion of learned counsel for the appellants was that the deceased was assaulted later in that evening sometime during the darkness and that is why the inquest report was prepared the next morning and the post-mortem was delayed. In the month of January darkness must have fallen at around 7.00 P.M. leaving visibility poor. In fact the informant PW I was given repeated suggestions in an attempt to make out such a case, but the PW I has remained firm throughout the cross examination in his denials. We think, that in the light of the denials by PW I and the explanation by the Investigating Officer PW 6 for not being able to carry out the inquest proceedings at night, it is not possible to believe the defence theory about ante-timing of the incident.

9. Learned counsel also submitted that the motive for the crime is also not serious, viz. some altercation during a marriage ceremony where the deceased had been invited by the accused.

10. The last argument regarding motive, referred above, is misconceived and also factually incorrect. Apparently, the real motive for the offence, as mentioned in the F.I.R. itself, was a suspicion on the part of the accused that the deceased had been instrumental in trying to get the sons of accused Bateshwari, viz. accused Ram Babu and Shyam Babu, arrested by the Delhi police. Thus, the motive was to take revenge against a suspected informer.

11. The nature and number of injuries, which were found on the body of the deceased indicate that the assault could not have been by a single individual. There also does not appear to be any good reason why the real assailants should be let off by the daughter and nephew of the deceased and instead they would falsely implicate the appellants. The appellants had reason to bear a serious grudge against the deceased but apparently the informant or other witnesses did not have any serious reason

to bear this kind of grudge against the accused. Learned counsel for the appellants also submitted that lack of any injury on the body of eyewitnesses indicates that they did not make any attempt to save the deceased during the assault, and therefore there presence at the scene of crime should be doubted. For this purpose reliance was placed from the side of the appellants upon the decision of the Supreme Court in **State of Punjab v. Such a Singh and others** *(2003 (46) A.C.C. 584)* and this Court's judgment in **Jagdeo Singh and others v. State** (*1979 A.Cr.R. 377).*

12. Having examined the decisions we are of the opinion that no such blanket proposition of law has been laid down therein. Whether an attempt to save the deceased from the assault is likely to be made by the eyewitnesses or not depends upon several factors, viz. the closeness of relationship, the nature of relationship, the capacity of the witnesses to come out of the shock after witnessing the incident, the basic courage and selflessness of the witnesses, etc. In the present case one of the witnesses is the 11 year old daughter, who, in the normal course of things, would have been dumb-struck by the nature and rapidity of the assault upon her father, by four persons armed with knives. The other eyewitness is the nephew of the deceased, whose relationship. is not as close as the relationship of father or mother to their offspring. The third eyewitness again is the brother of the deceased, who has his own family to protect instead of sacrificing his own life also. Moreover, it was obvious that the brother, by himself, could hardly be in a position to put up a fight against the four persons armed with knives.

13. Learned counsel for the appellants submitted that it is unlikely that the witnesses, particularly the informant, would have walked to the police station instead of going there on a bicycle. Hence the FIR should be held to be delayed. This argument does not appeal to us. Upon witnessing an incident of this nature the whole body and mind naturally falls in the grip of shock and in such a condition a person does not think very logically and in such a state of shock the informant may not have trusted himself to ride a bicycle.

14. We may further observe that the aforesaid argument on behalf of the appellants are more in the nature of conjectures, ignoring the fact that human behaviour may vary from person to person. There is no set rule of reaction. Everyone reacts in his own special way and in what way a witness would have reacted cannot be predicted. In **Rana Pratap v. State of Haryana, (1983) 3 SCC 327**, the apex Court in para 6 of the judgment held as under :

"6. Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of

natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way. "

In **Bachittar Singh v. State of Punjab, (2002) 8 SCC 125**, observing on human behaviour, the apex Court held:

"12. Human behaviour vary from man to man. Different people behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each case. How a man would behave in a particular situation, can never be predicted. In the given circumstances, the behaviour of Joginder Singh, PW 4 sleeping on the roof of the house of Sukhwant Singh, after seeing the accused armed with weapons and hearing the firing, jumping from the roof and running towards his Village Mastewala to inform his father and family members instead of loitering around in the Village Dholewala and informing somebody risking his life, is quite natural. One should not forget that the incident had happened at 1.00 a.m. and that at that odd time, nobody would be readily available to be informed without loss of time. In the process, the life of the witness would be at great risk. "

15. In view of the aforesaid it cannot be said that the eyewitnesses reacted in an abnormal way or their statement cannot be trustworthy only for the reason that they did not react in the manner as suggested or expected on behalf of the accused or someone else.

16. The Investigating Officer has given a plausible reason for not being able to proceed with the investigation, i.e. the inquest, at night due to lack of light. He has repelled the suggestion that light could have been obtained from the nearby places. Therefore, the inquest conducted at 7.30, next day, in the morning during the winter of January cannot be said to suffer from any undue delay.

17. The repeat learned counsel for the appellants also argued that there is no independent witness and all the three eyewitnesses are related to the deceased. Mere relationship of a witness to the deceased or complainant would not suffice to discredit his evidence. The law is well settled in this regard. The apex Court in **Dalip Singh v. State of Punjab, AIR 1953 SC 364**, in para 26 of the judgment has laid down as under:

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has caused, such an enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule.

Each case must be limited to and be governed by its own facts. "

18. The above decision has been followed in **Guli Chand v. State of Rajasthan, (1974) 3 SCC 698**.
In **Masalti v. State of V.P., AIR 1965 SC 202**, the apex Court held:

"But it would, we think, be reasonable to contend that evidence given by witness should be discarded only on the ground that it is evidence of partisan or interested witnesses……. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct. "

19. In **Israr v. State of U.P., (2005) SCC (Crl.) 1260**, rejecting the concept of discarding a witness on the ground of relationship the Supreme Court in para 12 of the judgment held as under:

".....Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."

20. Witnesses are the eyes and ears of justice. Eyewitnesses' account would require a careful independent assessment and evaluation for their credibility and must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness box; their power of observation. Merely because a witness is an interested witness is not by itself sufficient to disbelieve him. What is to be examined is whether the eyewitness who has been produced is trustworthy and his statement is consistent with the undisputed facts.

21. As pointed out above, neither the deceased nor the witnesses had any serious motive to falsely implicate the accused, leaving out the real assailants. On the other hand, the accused did have a serious motive for carrying out the assault. Further, as we have already stated above, we have carefully examined the testimony of the eyewitnesses including their detailed cross-examinations and we do not find any thing substantial therein to cast any serious doubt upon the testimony of these eyewitnesses.

22. In these circumstances, we are of the opinion that the appellants have been rightly convicted and sentenced. Accordingly, the appeal is dismissed. The conviction and sentence awarded by the court below is maintained. The accused-appellants are on bail. Their bail is cancelled. They will be taken into custody forthwith to serve out the remaining part of their sentence. Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2007

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 34966 of 2001

The Chairman, District Board, Bulandshahr and another ...Petitioners
Versus
Labour Court-II, U.P., Ghaziabad and another ...Respondents

Counsel for the Petitioners:
Sri. Suresh Chandra Dwivedi
Sri. W.H. Khan
Sri. Gulrez Khan, Sri J.H. Khan.

Counsel for the Respondents:
Sri. Siddarth, S.C.

U.P. Industrial Dispute Act-1947-Section 23-Rule 12-onus of proof-working of 240 days-wrongly shifted upon employer-neither workman nor the presiding officer summoned the documents nor examined the witness-held-award given by the labour court suffers apparent error on the face of record.

Held: Para 13

In my opinion, the award of the labour court suffers from an error apparent on the face of record and illegality in shifting the burden on the employer to prove that the workman had not worked for 240 days. It was the workman who has come in the adjudication proceedings therefore in accordance with settled principles of law, it was the workman to prove his case.

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

1. Heard Sri Gulrez Khan, Advocate, holding brief of Sri W.H. Khan, counsel for the petitioners and Sri Siddharth, counsel for the respondents.

2. This writ petition has been filed arising out of the award dated 4.9.2000 (published on 21.5.2001), passed by the labour Court -II, U.P. Ghaziabad in adjudication case No. 243 of 1994.

3. The undisputed facts of the case are that the workman respondent was engaged as a daily-wager in the petitioners' establishment during the span of period 16-.12.1990 to 30.9.1991. The workman was disengaged w. e. f. 30.9.1991.

4. Aggrieved by his disengagement, the workman raised an industrial dispute which was registered as C.P. Case No. 76/92. The conciliation proceedings between the employer and the employees having failed, the following matter of the U. P Industrial Disputes Act, 1947 in exercise of power under Section 4-K by the State Government was referred to the labour Court-II U.P. Ghaziabad where it was registered as adjudication case No. 243/94.

5. The case of the workman before the Labour Court was that during the aforesaid span of his working during 16.12.1990 to 30.9.1991, he had worked for 260 days continuously in the establishment of the employers and that he had been disengaged without compliance of Section 6-N of the U.P. Industrial Disputes Act, whereas the case of the employer before the labour Court was that workmen though admittedly had worked for the aforesaid period as claimed by him but he had not continuously worked for 240 days or more, as such, Provisions of Section 6-N

of the U.P. Industrial Disputes Act are not applicable.

6. The parties led oral evidence before the labour Court but no documentary evidence was filed by either of the parties in support of their case regarding actual working of continuous service by the workman.

7. The labour Court relying upon the oral evidence of the workman that he has worked for 260 days held that disengagement of his service was illegal for non-compliance of Section 6-N of the U.P. Industrial Disputes Act 1947. The labour Court came to this conclusion on the basis that the employer's witness had stated that the workman had not worked for 240 days of continuous service in 12 calendar months based upon his seeing of the records but he had not brought their records before the labour Court.

8. Admittedly, the burden of proof of continuous working of at least 240 days or more in the establishment is upon the workman, as has been held by the Apex Court in catena of decisions. In case the employer had any documentary evidence of actual working of the workman concerned in his possession the workman could have moved an application for summoning those records and ought to have proved his case before the labour Court. No reason has been given by the labour Court for simply relying upon the statement of workman that he has worked for 260 days and disbelieving the employer's witnesses.

9. The question of fact whether the workman had actually worked at least for 240 days or more or not, therefore, could not have been decided on mere statements of the witnesses to raise by the labour Court on the basis of documentary evidence under U.P. Industrial Disputes Act, 1947 and under Rule 12 framed in exercise of powers under Section 23 of the U.P. Industrial Disputes Act. 1947. The procedure to proceed in adjudication of case has been provided the Presiding Officer is vested with power to entry and inspection under Rule 17 of the aforesaid Act. Moreover, Rule 21 provides for:-

"Power of labour Courts. Tribunal and Arbitrators:- In addition to the powers conferred by the Act, Labour Courts, Tribunals and Arbitrators shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure 1908 (Act V of 1998) , when trying a suit, in respect of the following matters, namely
(a) discovery and inspection;
(b) granting of adjournment; and
(c) reception of evidence taken on affidavit;
and the Labour Court or Tribunal or Arbitrator may summon and examine any person whose evidence appears to it/him to be material"

10. Neither the documents were got summoned by the workman in support of his case for discharging his burden of proof nor the labour Court itself summoned any witnesses or the documents or exercise its power under Industrial Disputes Act, 1947 and Rules framed thereunder, hence the labour Court committed an illegality in shifting the onus as well as burden of proof of actual working upon the employers.

11. It may be noted that the parties are represented before the labour Court by authorised representative and not by

qualified advocates, therefore, the burden to do justice and to show that justice is being done is upon the Court. If the parties are not well conversant with the procedure, they must be informed by the Court about the procedure or exercise its power under Rules where it is necessary and expedient in the interest of justice.

12. For the reasons aforesaid and for the fact that the labour Court has not given any basis for disbelieving of the employer's witness and relying upon the workman evidence for the purpose of arriving at the conclusion that workman had worked for 240 days or more continuously, the evidence is not sufficient basis for the award in deciding the reference in favour of the workman.

13. In my opinion, the award of the labour court suffers from an error apparent on the face of record and illegality in shifting the burden on the employer to prove that the workman had not worked for 240 days. It was the workman who has come in the adjudication proceedings therefore in accordance with settled principles of law, it was the workman to prove his case.

14. For the reasons stated above, writ petition is allowed. The impugned order is quashed. The matter is remanded back to the labour Court to decide the matter afresh in accordance with law within a period of six months from the date of production of certified copy of this order by either of the parties before it.

15. Consequently, the recovery notice dated 13.8.2001 passed in pursuance of the award aforesaid is also quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2008

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 63373 of 2007

Chote Lal ...Petitioner
Versus
The Life Insurance Corporation of India and others ...Respondents

Counsel for the Petitioner:
Sri Siddhartha Srivastava

Counsel for the Respondents:
Sri Govind Saran
Sri Vivek Singh
Sri Prakash Padia
Sri R.C. Shukla
Sri V.K. Chandel
Sri Sanjeev Singh

Constitution of India, Art. 226-Service Law-writ petition-dealing with service matter of L.I.C. and Railways-not maintainable-preliminary objection regarding jurisdiction-be decided first-held-in view of L. Chandra Kumar Case-writ petition not maintainable.

Held: Para 10 & 33

In view of the above legal position the High court has no jurisdiction to entertain writ petitions directly in service matters of the employees in respect to whom tribunals have been constituted and the tribunals so constituted alone shall have the jurisdiction in the matters as the courts of first instance.

Thus, in the totality of circumstances the preliminary objection raised on behalf of the Railways and the LIC is sustained and it is held that such dispute is in respect of a service matter and the same

is not entertainable by the High Court directly in exercise of writ jurisdiction and in view of the ratio of *L. Chandra Kumar's case.*

Case law discussed:

AIR 1997 SC-1125, 2004 (2) SCC-274, 2002 (4) SCC-145, 2003 (6) SCC-581, 2003 (6) SCC-675, 2006 (2) SCC-269, AIR 2000 SC-43, 2001 (9) SCC-87, 1999 AWC-958, 1999 (6) SCC

(Delivered by Hon'ble Pankaj Mithal, J.)

1. This batch of writ petitions under Section 226 of the Constitution of India involves a similar controversy based upon identical facts and as such are being taken up together with the consent of the respective counsel appearing for the contesting parties.

2. The brief background leading to the filing of these petitions is that the Life Insurance Corporation of India (in short LIC) for promotion of its business interest launched a "salary saving scheme," particularly, for the salaried class of people viz., government and semi government employees and the employees of the various corporations etc. The scheme provides for the payment of monthly premium by the assured employees. The scheme is optional and under it the employees subscribing to the scheme have an option to pay the LIC premium either directly or through their respective employers to the LIC on monthly basis. The employees in making such a payment through the employer have a definite advantage of rebate of 5% on payment of such premium. Apparently, there is no advantage to the employers in taking the responsibility of deducting the LIC premium from the monthly salary of its employees and to make the *lump sum* payment to the LIC. It appears that as deduction of LIC premium on authorization of the employees is legally permissible from the wages of the employees in view of Section 7 (d) of the Payment of Wages Act, 1936 (in short Wages Act), most of the employers initially agreed for making such deduction and in making payment of *lump sum* premium to the LIC on behalf of the employees, but later, on account of the amount of extra work and accounting involved in it, they realised the mistake and evolved methods to withdraw from the responsibility.

3. The petitioners in this batch of writ petitions are all employees of Railways. All of them have individually taken the above policy from the LIC and has authorized the Railways to make deduction of the LIC premium from their monthly salary for payment to the LIC. The Railways till now had been making the deduction and paying the premium to the LIC collectively on behalf of its employees. However, by the impugned order dated 30th April 2007 followed by the consequential order dated 2/3.7.2007 the Railways have decided not to make such a deduction in future from the monthly salary of its employees including the petitioners for payment to the LIC. It is against this action of the Railways that the petitioners have individually come up before this Court in writ jurisdiction.

4. I have heard Sri Siddhartha Srivastava, learned counsel for the petitioners, Sri Govind Saran and Sri Vivek Singh for the Railways and Sri Prakash Padia, Sri R.C. Shukla, Sri V.K. Chandel and Sri Sanjeev Singh for the LIC.

5. A preliminary objection has been raised jointly on behalf of the Railways

and the LIC that the Court has no jurisdiction to entertain these writ petitions directly without first relegating the petitioners to the Central Administrative Tribunal, in as much as, the matter relates to the service of the employees of the Indian Railways. In support reliance has been placed upon ***L. Chandra Kumar Vs. Union of India and others, AIR 1997 SC1125***. To meet the above preliminary objection, Sri Siddhartha Srivastava learned counsel appearing for petitioners has argued that first of all it is not a service matter as defined under Section 3(q) of the Administrative Tribunals Act,1985 (herein after referred to as Tribunals Act). Secondly, even if it happens to be a service matter, the jurisdiction of the High Court under Article 226 is not completely ousted and the High Court is within its jurisdiction to entertain such petitions, if they fall within the 3 exceptional categories, particularly when no factual dispute is involved, namely;

(i) where the order is completely without jurisdiction;
(ii) it has been passed in violation of the principles of natural justice; and
(iii) where it is apparently on order passed contrary to any provision of a statute.

In the light of the submissions made on the preliminary objection two points as under arises for determination:-

1. Whether the High Court has jurisdiction to directly entertain writ petitions, concerning the 'service matter' of the Railway employees; and
2. Whether the action of the Railways in refusing to make deduction of LIC premium from the monthly salary of its employees would fall within the ambit of the 'service matter' as defined under Section 3 (q) of the Tribunals Act.

6. Administrative Tribunals Act, (Act No. 13 of 1985) was enacted in exercise of powers under Article 323-A and 323-B of the Constitution of India, which were introduced by way of 42nd amendment of 1976 with effect from 3rd January 1977. The object for enacting the said act was to constitute tribunals as alternative forum for the purpose of due consideration of the matters relating to the service of persons appointed to public service and posts in connection with the affairs of the Union of India or any State or any local or other authority within the territory of India or under control of Government of India or of any corporation owned or controlled by the Government of India. The object was to minimise the work load of the High Courts in deciding matters concerning the above area of law under Article 226 of the Constitution of India. Article 323-A of the Constitution specifically provides that the parliament may while enacting such law make provision for the exclusion of the jurisdiction of all courts with respect to the matters concerning the above area of law except that of the Supreme Court under Article 136 of the Constitution of India. Accordingly, Section 28 of the Tribunals Act also provide that on and from the date the jurisdiction and the powers under the said Act are exercisable by tribunals matters concerning the above area of law shall exclusively be dealt with by the tribunals and not by any other court except the Supreme Court. The validity of the above enactment was upheld by the 5 Judges Bench of the Supreme Court in the case of ***S.P. Sampat Kumar Vs. Union of India and others AIR 1987 SC 386***. The

Apex Court held that parliament is competent to provide and make effective alternative institutional mechanism or arrangements for judicial review. Therefore, the enactment providing for such an alternative institutions or tribunals as additional forums barring the jurisdiction of the High Court can not be faulted with. In **L. Chandra Kumar's case (supra)**, the 7 Judges bench of the Supreme Court concluded that the power of the High Court under Article 226/227 of the Constitution of India does not stand completely ousted with the enforcement of the Tribunals Act or with the establishment of Central Administrative Tribunals in as much as all decisions of the tribunals shall be subject to scrutiny before a Division Bench of the High Court. The tribunals shall act as courts of first instance in respect of the areas of law for which they have been constituted and it will not be open for the litigants to directly approach the High Court under Article 226/227 of the Constitution without first going to the court of first instance i.e., the tribunals, even in cases involving the vires of statutory legislation (except where legislation which creates the tribunal itself is under challenge) by over looking the jurisdiction of the concerned tribunal. The conclusions of the aforesaid verdict of the Supreme Court has been summarised in paragraphs 93 and 99 of the judgment which are being reproduced herein below:-

93"Before moving on to other aspects, we may summarise our conclusions of the jurisdictional powers of these Tribunals. The Tribunals are competent to hear the matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional setup, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these tribunals rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division bench of their respective High Court. We may add that the Tribunals will, however, continue to act as the only Courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for the litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal.

99. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the

areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the cornered Tribunal. Section 5 (6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

7. In ***Samrendra Das Vs. State of West Bengal and others 2004 (2) SCC 274*** a dispute arose before the Apex Court as to whether the posts of Assistant Public Prosecutor appointed in a Magistrate court by the Governor of the State was a civil post and the matter falls within the purview of Section 15, 4(2) and 2(c) of the Tribunals Act. The Court held that the employment was under the State Government of West Bengal, therefore, the learned Single Judge of the High Court had no jurisdiction to entertain, try and dispose of the matter under Article 226 of the Constitution of the India.

8. In another case relating to the service matter concerning the employees of ***2002 (4) SCC 145 Kendriya Vidyalaya reported in Kendriya Vidyalaya and another Vs. Subhash Sharma*** the Supreme Court in paragraphs 12 and 13 laid down as under:-

12. "The Constitution Bench of this Court has clearly held that tribunals set up under the Act shall continue to act as the only courts of first instance "in respect of areas of law for which they have been constituted." It was further held that it will not be open for litigants to directly approach the High Court even in cases where they question the vires of statutory legislation (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

13. In view of the clear pronouncement of this Court the High Court erred in law in directly entertaining the writ petitions concerning service matters of the employees of Kendriya Vidyalaya as these matters come under the jurisdiction of the Administrative Tribunal. We, therefore, hold that the High Court committed an error by declining to transfer the writ petition tot he Central Administrative Tribunal. Consequently, we set aside the impugned orders and direct the High Court to transfer both the writ petitions to the Central Administrative Tribunal. Chandigarh Bench which may, in its turn, make over the case to the Circuit Bench in the State of Jammu and Kashmir for disposal in accordance with law."

9. A plain reading of the aforesaid judgments of the Supreme Court makes it clear in no ambiguous terms that in respect of service matters in relation to the services contemplated by Article 323-A of the constitution and the Tribunals Act no litigant is authorised to approach the High Court directly invoking the writ jurisdiction and the tribunal shall act as the court of first instance. It is only after a decision has been rendered by the tribunal that the matter can be taken to the High Court for judicial review under Article 226/227 of the Constitution of India.

10. In view of the above legal position the High court has no jurisdiction to entertain writ petitions directly in service matters of the employees in respect to whom tribunals have been

constituted and the tribunals so constituted alone shall have the jurisdiction in the matters as the courts of first instance.

Sri Siddhartha Srivastava on behalf of the petitioners placed reliance upon ***T.K. Rangrajan Vs. Government of Tamil Nadu and others, 2003 (6) SCC 581, Suraj Deo Rai Vs. Ram Chadnra Rai and others, 2003 (6) SCC 675, L.K. Verma Vs. HMT Limited and another 2006 (2) SCC 269 and U.P. State Spinning Company Limited Vs. R.S. Pandey and others 2005 (8) SCC 264.***

11. The rulings cited on behalf of the petitioners referred to above are practically decisions which lays down that under certain given circumstances even where statutory alternative remedy is provided, a litigant may approach the High Court in writ jurisdiction without exhausting the alternate remedy. Meaning thereby, that alternate remedy is not an absolute bar in entertaining a writ petition in a given set of circumstances. However, we must not over look that the question of alternate remedy and the question of jurisdiction of the Court are two different aspects altogether. It may be in the discretion of the High Court to entertain a writ petition instead of dismissing it on the ground of availability of alternate remedy but this discretion would not at all be available where the High Court has no jurisdiction at all to entertain the writ petition directly. In such cases where the jurisdiction of the High Court to entertain a petition directly is excluded, the order if any passed would be a nullity being without jurisdiction.

12. Out of the aforesaid rulings cited, much emphasis has been placed upon the judgment of the Division Bench of the Supreme Court reported in ***T.K. Rangrajan Vs. Government of Tamil Nadu and others, 2003 (6) SCC 581*** to canvass that High Court can proceed to hear a writ petition under Article 226 of the Constitution of India even though the petitioners have not approached the tribunal which is a court of first instance and an alternative forum provided under the Tribunals Act. In this regard paragraphs 5, 6 and 10 of the aforesaid judgment are relevant which lay down that the High Court is empowered to exercise its extraordinary jurisdiction to meet an unprecedented situation having no parallel. The jurisdiction of the High Court under Article 226 of the Constitution is a part of inviolable basic structure of the Constitution and it can not be said that such tribunals are effective substitute of the High Courts in discharging powers of judicial review. In paragraph 10 of the same judgment it has been said that there can not be any doubt that the aforesaid judgment of the larger Bench ***(L. Chandra Kumar's case)*** is binding upon this Court and we respectfully agree with the same. Thereafter, it proceeds to record that because of very exceptional circumstances as the Court was of the opinion that the Administrative Tribunal would not be in a position to render justice to the case, it was held that the High Court was not justified in not entertaining the petitions on the ground of alternative remedy. This was so as the tribunal was non functional.

13. The aforesaid judgment arose out of an unprecedented situation which was caused due to *en mass* termination by the Tamil Nadu Government of service of the employees who had resorted to strike.

The Supreme Court held that the employees had no fundamental right, not even a legal or a statutory right or any moral or equitable justification for going on strike but as most of the employees had been reinstated the Supreme Court directed for the reinstatement of service of the remaining employees on their giving unconditional apology and an undertaking that in future they would maintain the discipline and abide by the rules. Paragraphs 25 and 26 of the aforesaid judgment clearly shows that it was passed in the peculiar facts and the exceptional circumstances of that case on equitable principles and when the tribunal was not functioning. In short, the Supreme Court held when tribunal is not functioning the employee can not be denied right to invoke writ jurisdiction of the High Court otherwise they will be rendered remedy less. However, even the aforesaid judgment no where states that the ratio of ***L. Chandra Kumar's case*** (supra) was not binding and that the litigant can approach the High Court directly under Article 226 of the Constitution of India bypassing the Central Administrative Tribunal in respect of the areas of law for which they have been constituted. Thus in the circumstances petitioners derive no benefit even out of the aforesaid judgment. The aforesaid judgment appears to be a judgment in persona only which is confined to the peculiar facts of case whereas the judgment in ***L.Chandra Kumar's case*** (Supra) is of universal application ie., a judgment in rem. The true import of ***L. Chandra Kumar's case*** (supra) is to the effect that though tribunals do not substitute the High Court but they act as additional forums of redressal of dispute in respect of the areas of law for which they have been constituted. The litigant can not approach the High Court in respect of such matters directly and the tribunals would supplement the High Court and act as the courts of first instance and it is only thereafter that the decision of the tribunal would stand scrutiny by the division bench of the High Court. In this way, the jurisdiction of the High Court to exercise the writ jurisdiction in mattes relating to areas of law for which tribunals have been created has completely been excluded. Therefore, once it has been laid down that the High Court has no jurisdiction to even entertain a writ petition in relation to subject matters covered by the tribunals, the High Court is not competent to exercise the said jurisdiction even though alternate remedy may not have been set up as a defence or a ground to refuse the writ.

14. It is a question of jurisdiction and not the availability of alternate remedy which is crucial in the present case. Since in view of ***L. Chandra Kumar's case*** (supra) this Court has no jurisdiction to exercise writ jurisdiction directly, the present writ petitions are not entertainable even though availability of alternate remedy may not be an absolute bar in as much as exercise of discretion in this regard pails into insignificance when the court lacks inherent jurisdiction. This view of mine also finds support from an unreported judgment of the single judge of this Court dated 14.7.1998 passed in writ petition No. ***26743 of 1995 B.S. Bhaskar Vs. General Manager, Northern Railways and others.***

This takes me to the second point.

15. According to the learned counsel for the petitioner the matter with regard to deduction or non deduction of the LIC

premium from the monthly salary of the petitioners is not a 'service matter' and as such the Central Administrative Tribunal has no jurisdiction in this regard.

16. The answer to the above question though appears to be simple is not that simple. Petitioners are all employees of the Railways. They are asking for a relief against the Railways independently and not against the LIC or any agent of LIC. In a way, they want to compel the Railways to make deduction of LIC premium from their monthly salary and to pay the same in *lump sum* to LIC as authorized by them. This burden is being thrust upon the Railways by the petitioners only on account of their employer and employees relationship otherwise they have no authority of law to insist upon the same. Therefore, the dispute has naturally arisen in context with the employer and employees relationship between the Railways and the petitioners and as such is a service matter.

17. It is also acknowledged legal position that no employer can make any deduction from the salary/wages of its employees which do not have the sanction of the law. The deductions which may be made from the salary/wages have been enumerated in section 7 of the Payment of Wages Act, 1936. Section 7 (d) of the Wages Act permits the employers to make deduction of the LIC premium from the salary/ wages of its employees on the authorization of the employees and not otherwise. Therefore, such a deduction by the Railways from the salary of its employees may nor may not be unlawful nevertheless it is a matter concerning salary of the employees. In the normal understanding of a common man therefore such a matter falls basically within the ambit of 'service matter'. Therefore, legal technicalities apart, it would be a matter concerning service in the eyes a prudent man.

18. In ***Delhi Electric Supply Undertaking Vs. Basanti Devi & another AIR 2000 SC 43*** the Supreme Court while dealing with this very scheme of the LIC held that the employer while making such deduction from the salary of its employees for payment of LIC premium may not be acting in a strict sense as a licensed agent of the LIC under Section 42 of Insurance Act, 1938 and the provisions of the LIC of India Agents Regulations, 1972 but nonetheless it renders the services of an agent to the LIC as contemplated by Section 182 of the Indian Contract Act, 1872. Now whether in this case the Railways is acting as an agent of the LIC or not is not material. What is material is whether the action of the Railways falls within the scope of ' Service matter' as per Section 3 (q) of the Tribunals Act.

19. Section 14 of the Tribunals Act provides that Central Administrative Tribunal shall exercise all jurisdiction powers and authority exercisable by all courts except the Supreme Court in relation to;

A) recruitment, and matters concerning recruitment to any all India Service.....;
B) ***all service matters*** *concerning;*

a)
b)
c)

20. Thus from the above, the tribunal has jurisdiction and power in

respect of all service matters. Service matters have been defined in Section 3 (q) of the Act as under:-

"Service matters", in relation to a person, means all matters relating, to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the government of India, or, as the case may be, of any corporation [or society] owned or controlled by the Government, as respects-
(i) remuneration (including allowances), pension and other retirement benefits;
(ii) tenure including confirmation, seniority promotion, reversion, premature retirement and superannuation;
(iii) leave of any kind;
(iv) disciplinary matters; or
(v) ***any other matter whatsoever****;*
Note: emphasis supplied

21. It is couched in the widest possible language. The term "any other matter whatsoever" is wide enough to include within its ambit any matter which arises out of the relation-ship of employer and employee.

22. In a judgment of 3 Judges of the Supreme Court reported in ***Union of India V. D.C. Pandey 1992 AWC 1795*** it has been observed that the scope of Article 323-A is very wide and the Administrative Tribunals Act covers a very wide field and there is nothing to suggest that the provisions dealing with the jurisdiction of the tribunal should receive a narrow interpretation. It was accordingly held that the High Court had no jurisdiction to entertain the claim of the employees.

23. Reliance has been placed from the side of petitioners upon the rule of *"ejusdem generis"* and a decision of the Supreme Court in ***Grasim Industries Limited Vs. Collector of Custom, Bombay 2002 (4) SCC 297***. According to the aforesaid rule when general words follow the words of particular and specific meaning in that case general words are not to be construed in their widest extent and are to be applied only in respect of kind or class of things mentioned. The rule however, does not necessarily require that the general provision be limited in its scope to identical things specifically mentioned. Nor does it apply when the context manifests a contrary intention. This is what has been explained by the Supreme Court in paragraph 12 of the above judgment with a word of caution. It says that the above rule is to be applied with great care and caution. It is not an inviolable rule of law but it is only a permissible inference. There is no room for application of this rule of *"ejusdem generis"* where the words are clearly wide in their meaning and aught not to be qualified on the ground of their association with other words.

24. A conjoint reading of Section 14 and 3(q) of the Tribunals Act reveals that the words used are "all service matters" and "any other matter whatsoever" both these terms are of widest amplitude used independently and does not qualify the terms used earlier in the provision. "Any other matter whatsoever" used in the 3(q) (v) refers to all "service matters" used in Section 14 of the act and not only in connection with the conditions of service, remuneration, pension, retirement benefits, tenure, confirmation, seniority, promotion, reversion, pre-mature retirement, superannuation, leave are

disciplinary matters. The word "whatsoever", also has its own significance and has not been used superfluously. Therefore, Rule 3 (q) (v) of the Tribunals Act can not be said to be of a general nature qualifying the service conditions of service enumerated earlier in the provision. It is in itself an independent rule and is not dependant on the first four rules enumerated in Section 3(q) of the Tribunals Act and is wide enough to cover every aspect of the service. Therefore, the phrase "any other matter whatsoever" though of general nature but has been used independent of the terms used in Section 3(q) (i) to (iv) of the Act.

25. Besides, the rule of *"ejusdem generis"* is merely a rule of construction and not a substantive law and is hardly applicable where general words such as "any other matter whatsoever" does not intend to take colour from the specific words used earlier. The intention of establishing Central Administrative Tribunal is also to cover all service matters arising from the employer and employees relationship and therefore it would not be apt to give any restricted meaning to the phrase "any other matter whatsoever" and to confine the application of the Act only to recruitment and conditions of service.

26. Therefore, it would not be proper to apply the rule of *"ejusdem generis"* in the interpretation of the 'service matter' in context with the jurisdiction of the Central Administrative Tribunals.

27. In view of the above, it is difficult to comprehend how the present matter can be excluded from the ambit of the service matter.

28. Learned counsel for the petitioner has placed reliance upon a decision of the Supreme Court in ***Secretary Central Board of Direct Taxes and others Vs. B. Shaym Sundar 2001 (9) SC 87*** for the purpose establishing that the matter in dispute is not a 'Service matter'. I have carefully gone through the aforesaid judgment. The said decision relates to the employee of the revenue department under the Ministry of Finance, Government of India. The Central Board of Direct Taxes by a scheme decided to reward the officers and the staff of the Income Tax Department by placing them into various categories. One of the employee was not given the award. Therefore, the matter was taken to the Tribunal. The Tribunal allowed the claim and directed the department to grant award as prayed by the respondent employee. The Supreme Court in such a situation without any discussion observed that the matter was outside the purview of the tribunal as under Section 14 the tribunal only had jurisdiction in respect of service matter. The facts of the above case are totally different and are not applicable to the facts and circumstances of the present case. There the matter was with regard to grant of reward which was purely ex gratia payment. Accordingly, the aforesaid judgment is of no help to the petitioners. On the other hand Sri Padia placed reliance upon a Division Bench decision of the ***Andhra Pradesh High Court 1995 Labour and Industrial Cases 767 B. Narsimha & others Vs. Commanding Officer & others***. In this case the dispute was with regard to deduction of loan amount from the salary of the employees. The Court held it to be

a service matter outside the purview of the writ jurisdiction of the High Court & the petition was held to be not maintainable. It supports my view to a great extent.

29. There is another angle of examining the above aspect of the matter. The petitioners have themselves chosen to file these writ petitions under the category "service matter" before the High Court and the office also reported these petitions to be service matters as such. Undoubtedly, therefore the petitioners also impliedly accepted in one way or the other that the matter relates to the service matter. If that be the position, the petitioner can not say that the cause is partly concerning a service matter in some respects and not a service matter in so far as the jurisdiction of the tribunal is concerned.

30. In view of the above position, the dispute involved in the writ petition is nothing but a dispute regarding the 'service matter' of the employees of the Railways.

31. Lastly, learned counsel for the petitioners has placed reliance upon certain interim orders passed by this Court in similar and identical writ petitions.

32. I have gone through the said orders. In none of them the basic controversy about the jurisdiction of the Court to entertain the writ petition was raised or was considered. The said interim orders though time bound appears to have been passed in ignorance of the question of jurisdiction of the Court. It is well settled that an interim order is not a precedent. A reference may be had to a Full Bench of this Court in the case of ***S.C. Shukla Vs. G.B. Singh 1999 AWC 958.*** Therefore, where the Court has no jurisdiction to entertain the writ petition merely because few petitions have been entertained and an interim order has been passed therein would not compel me to follow the suit and pass a similar interim order. It is also settled position that where a preliminary objection about the maintainability of the proceedings/ writ petition or of the jurisdiction of the court has been raised it is incumbent upon the Court to first decide the same before proceeding on the merit of the case. This is the view expressed in ***T.K. Lathika Vs. Seth Karsandas Jamnadas 1999 (6) SCC 632 and Manubhai ji Patel & another Vs. Bank of Baroda and others 2000 (10) SCC 253***.

33. Thus, in the totality of circumstances the preliminary objection raised on behalf of the Railways and the LIC is sustained and it is held that such dispute is in respect of a service matter and the same is not entertainable by the High Court directly in exercise of writ jurisdiction and in view of the ratio of ***L. Chandra Kumar's case.***

34. Accordingly, all the writ petitions are dismissed as not maintainable with liberty to the petitioners to approach the Central Administrative Tribunal, if so advised. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2008

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

Civil Misc. Writ Petition No. 53064 Of 2006

B.C. Malviya and others ...Petitioners
Versus
State of UP and others ...Respondents

Counsel for the Petitioners:
Sri Rajeev Mishra

Counsel for the Respondents:
Sri B.D. Mandhyan
Sri S.C. Mandhyan
Sri Ghanshyam Dwivedi
S.C.

Local Fund Audit Subordinate Rules 1985-Seniority-claiming seniority as per feeding cadre-admittedly respondent no. 4 is senior in feeding cadre of auditor-but due to adverse entry promoted on the post of senior Auditor in 1985 while junior were already promoted in 1983-held-respondent no. 4 can be given the benefit of seniority on promotional post from the date on which juniors promoted-e.g. 1983 while there was no existence of respondent No. 4 on the promotional post.

Held: Para 9

In view of the above whatever might be the interpretation of the Rules 1985, any order granting seniority to the said respondent no. 4 over and above the petitioners would amount to granting promotion from the date the petitioners had been so promoted (even if notionally) which as already recorded above would be contrary to the judgement of this Court dated 23-02-1992, and hence legally not permissible. An issue which has attained finality cannot be re-opened in collateral proceeding.

Case law discussed:
(1981) 4 SCC 716, AIR 1986 SC 1859

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

1. This writ petition has been filed for quashing the impugned order dated 4th April, 2006 (Annexure-25) by which the respondent no. 4 has been granted seniority over and above the present petitioners.

2. The facts and circumstances giving rise to this case are that the petitioners as well as the respondent no. 4 had been working as Auditor. The respondent no. 4 was senior to the present petitioners as he had been appointed prior to them on the post of Auditor. The respondent no. 4 was promoted on ad-hoc basis as Senior Auditor but was reverted to the post of Auditor because of the adverse entries given to him. During regular selection for promotion to the post of Senior Auditor he was found unsuitable and therefore superseded. The present petitioners who were junior to the said respondent no. 4 in the feeding cadre were selected and appointed on 03-05-1983 on the post of Senior Auditor on the recommendation of the Departmental Promotion Committee on regular basis. The respondent no. 4 being aggrieved challenged the adverse entries by filing a claim petition before the UP Public Service Tribunal. However, the tribunal refused to quash the adverse entries vide its judgement and order dated 1st March, 1982. Being aggrieved he preferred the Writ Petition No. 2147 of 1982. The same was decided vide judgement and order dated 22-02-1989. While deciding the

said case, High Court directed the respondents-State to consider his case for regular promotion from the date persons junior to him i.e. petitioners were promoted within the stipulated period. In pursuance to the said judgement and order of this Court dated 22-02-1989, the case of the respondent no. 4 for promotion with back date was considered by the Departmental Promotion Committee on 06-08-1985. He was however granted promotion w.e.f. 6-8-1985 only. Being aggrieved the said respondent no. 4 filed Writ Petition No. 6074 of 1989 seeking promotion from back date. Petition was dismissed by this Court vide its judgement and order dated 23rd March, 1992. The said judgement and order was not challenged further and attained finality.. It appears that the respondent no. 4 subsequently made some representation for determining his seniority as per the Uttar Pradesh (Local Fund) Audit Subordinate Rules, 1985 (hereinafter called the 'Rules 1985') and not on the basis of Uttar Pradesh (Local Fund) Audit Subordinate Rules, 1969 (hereinafter called the 'Rules 1969). As the Rules 1985 provided that on being promoted on the post of Senior Auditor the inter se seniority of the officers shall be maintained as per their inter se seniority in the feeding cadre. This representation has been allowed vide impugned order hence this writ petition.

3. Sri Rajeev Mishra, learned counsel for the petitioners has submitted that in view of the fact that the petitioners' writ petition seeking promotion from the back date had been rejected and it attained finality as the said judgement and order dated 23-03-1992 has not further been challenged, the Statutory Authorities were incompetent to give seniority to the respondent no. 4 from a date prior to date of his birth in the cadre of Senior Auditor. The petitioners had been promoted in substantive capacity in 1983 and the said respondent no. 4 had been promoted only in 1985. The question of disturbing the seniority could not arise as it would amount to promoting the respondent no. 4 w.e.f 1983 for which he had lost his battle in the Court and thus the order impugned is liable to be quashed.

4. On the other hand, Sri B.D. Mandhyan, learned Senior Counsel and Standing Counsel appearing for the respondents tried to defend the impugned order on the ground of 1985 Rules which provide for fixation of seniority by making reference to the seniority of the feeding cadre qua the officers promoted under the Rules. As there had been great injustice to the said officer, the UP State Backward Commission intervened and passed orders to grant relief to him. The order impugned has been passed in conformity thereof.

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

6. The Rules 1985 clearly provides that inter se seniority of persons appointed directly on the result of anyone selection shall be the same as determined by the Commission. So far as the inter se seniority of the promotees is concerned, as per Rule 22 (3), the Rules 1985 it is to be fixed as referable to the seniority in the cadre from which they have been promoted. Provision of the said Rule require to be interpreted harmoniously in such a manner that they may not lead to absurd result or arbitrariness. The formula provided therein would apply provided all

the promotions are made in the same selection. At the moment, respondent no. 4 could claim the relief provided he was appointed with effect from the date petitioners had been appointed i.e. 03-05-1983. Respondent no. 4 was given promotion w.e.f. 06-08-1985.

7. The respondent no. 4 had filed writ petition seeking his promotion from 03-05-1983 i.e. the date from which the petitioners had been promoted claiming that petitioners were junior to him in tile feeding cadre. The writ petition has been dismissed and relief prayed for had been denied by the Court for reasons recorded in the judgement. It is not open to the authority to nullify the said judgement and order by sitting in appeal over the same.

8. It is settled legal proposition that a person cannot be granted seniority from a date prior to his birth in the cadre. In Dr. S.P. Kapoor Vs. State of H.P. & others, (1981) 4 SCC 716; Shitala Prasad Shukla Vs. State of .UP & Others, AIR 1986 SC 1859, the Apex Court held that a person cannot claim seniority over and above the persons lawfully appointed in the mainstream prior to his joining in the said cadre.

9. In view of the above whatever might be the interpretation of the Rules 1985, any order granting seniority to the said respondent no. 4 over and above the petitioners would amount to granting promotion from the date the petitioners had been so promoted (even if notionally) which as already recorded above would be contrary to the judgement of this Court dated 23-02-1992, and hence legally not permissible. An issue which has attained finality cannot be re-opened in collateral proceeding.

10. In view of the above, the petition succeeds and is allowed. The impugned order dated 04th April, 2006 is hereby quashed.

No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2007

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

Special Appeal No. [1000] of 2007

Zila Panchayat, Kaushambi and another ...Appellants
Versus
Lalti Devi and another ...Respondents

Counsel for the Appellants:
Sri Ramendra Pratap Singh

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

U.P. Recruitment of Dependent of Govt. Servant Dying in Harness Rules, 1974-Rule-2 (c)-word 'family'-provision inclusive-daughter-in-law-held- within the definition of family-after death of her father-in-law if no other heir survive-entitled for compassionate appointment-held-learned Single Judge rightly accepted the claim.

Held: Para 6

In this view of the matter, the daughter in law, who becomes a member of the family of her husband, in our view, is included in the definition of 'family' of father in law and after his death, in the

absence of any other legal heir, she is entitled to claim compassionate appointment provided all other conditions as required in law for such recruitment are fulfilled. We make it clear that the aforesaid right of daughter in law would not be available, if she has remarried or repatriated to her parents place and in such case the position would be different. However, we need not to go into this aspect further in detail since the Hon'ble Single Judge vide judgment under appeal has passed an innocuous order directing the petitioners to consider the claim of respondent no.1 in the light of the judgment of the Hon'ble Single Judge in Sanyogita Rai Vs. State of U.P. (2006(2) UPLBEC 1972. Learned counsel for the appellants could not point out, on facts, that the aforesaid judgment has no application to the facts of the present case. Thus, we do not find any legal or factual error in the judgment of the Hon'ble Single Judge.

Case law discussed:

1999 ACJ-545, 2000 (2) ESC-967, 2006 (2) UPLBEC-1972

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

1. This intra Court appeal, under the Rules of the Court, is preferred against the judgment of the Hon'ble Single Judge dated 9.2.2007 in Civil Misc. Writ Petition No. 7273 of 2007.

2. We have heard learned counsel for the appellants, Mr. Akhileshwar Singh, learned counsel appearing for respondent no.1, and the learned Standing Counsel for the State respondent no.2.

3. It appears that respondent no.1, Smt. Lalti Devi, filed the aforesaid writ petition for issuance of a writ of mandamus commanding the appellants to provide her compassionate appointment under the U.P. Recruitment Departments of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as the Rules). It further that the request of the petitioner-respondent no.1 was not accused to by the appellant, on the ground, that the daughter in law does not come within the meaning of 'family' as mentioned in the Government Order relating to compassionate appointment.

4. Learned counsel for the appellant tried to argue that the definition of 'family' contained in Rule 2(c) is exhaustive though we do not find any substance therein. From a bare reading thereof, it is evident that the said definition is inclusive and it is reproduced as under:

"2(c) "family" shall include the following relations of the deceased Government servant;
(i) Wife or husband;
(ii) Sons;
(iii) Unmarried and widowed daughters;"

5. We are fortified in taking the aforesaid view that Rule 2(c) is inclusive from the Division Bench judgment of this Court in the case of **State of U.P. VS. Rajendra Kumar & others** reported in **1999 All. Civil Journal, 545.** Similar view has been taken by the Hon'ble Single Judge in the case of **Manoj Kumar Saxena vs. The District Magistrate Bareilly & others**, reported in **2000(2) E.S.C. 967 (All)** and in **Smt. Urmila Devi vs. U.P. Power Corporation Ltd.** reported in **2004 (2) E.S.C. (All) 180** and we are in respectful agreement with the view expressed therein. Learned counsel for the appellant could not show that the aforesaid rules are not applicable to Zila Panchayat and on the contrary the G.O. No. U.O.-113D/33-2-32-B(1)/84 dated 5th July,1984 and G.O. No.58661/33-2-2005 dated 2.12.2005 show that for the purpose

of compassionate appointment the decision was taken and 1974 Rules have been made applicable to the employees of Zila Panchayat. However, the aforesaid Rules have been made applicable only to such employees, who are not within the purview of the Commission.

6. In this view of the matter, the daughter in law, who becomes a member of the family of her husband, in our view, is included in the definition of 'family' of father in law and after his death, in the absence of any other legal heir, she is entitled to claim compassionate appointment provided all other conditions as required in law for such recruitment are fulfilled. We make it clear that the aforesaid right of daughter in law would not be available, if she has remarried or repatriated to her parents place and in such case the position would be different. However, we need not to go into this aspect further in detail since the Hon'ble Single Judge vide judgment under appeal has passed an innocuous order directing the petitioners to consider the claim of respondent no.1 in the light of the judgment of the Hon'ble Single Judge in **Sanyogita Rai Vs. State of U.P. (2006(2) UPLBEC 1972.** Learned counsel for the appellants could not point out, on facts, that the aforesaid judgment has no application to the facts of the present case. Thus, we do not find any legal or factual error in the judgment of the Hon'ble Single Judge.

7. The appeal, being without merit, is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.01.2006

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 2270 of 2008

Ravi Prakash Singh @ Kakkoo
...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Somesh Khare
Smt. Komal Khare

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

Code of Criminal Procedure-Section 439-Grant of Bail-offence under Section 302, 201-specific role of causing injury-FIR promptly lodged-prosecution story fully corborated by post mortem examination-not deserve for bail.

Held: Para 6

Considering the facts, circumstance of the case, submissions made by learned counsel for the applicant, learned A.G.A. and learned counsel for the complainant, and without expressing any opinion on the merit of the case the applicant is not entitled for ball, because the role of causing injuries to the deceased is assigned to the applicant also. The FIR was promptly lodged. The prosecution story is fully corroborated by the post mortem examination report, therefore, the applicant does not deserve for bail, the prayer for bail is refused.

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

1. This bail application has been filed by the applicant Ravi Prakash Singh @ Kakkoo with a prayer that he may be released on bail in case crime No. 507 of 2007 under sections 302, 201 IPC, P.S. Badlapur, district Jaunpur.

2. The facts In brief of this case are that the FIR of this case has been lodged by Ram Singh et P.S. Badlapur on 16.8.2007 at 8.10 P.M. in, respect of the incident which had occurred on 16.8.2007 at about 6.15 P.M., the distance of the police station was about 3 kilometers from the alleged place of occurrence. The applicant, co-accused Amit Kumar @ Rinku Singh, co-accused Sunil Kumar Tripathi and co-accused Awadhesh Tripathi are named in the FIR. It is alleged that on 12.8.2007 at about 4.00 P.M. there had been some quarrel between the deceased and co-accused Sunil Kumar Tripathi in respect of parking of vehicle. On 16.8.2007 at about 6.00 P.M. the first informant and his brother deceased Shyam Singh were going on a motorcycle No. MH 03/X-8041 to their village Kaderepur from Badlapur after purchasing the medicines. But in the way near the bridge of Bhaluahi village at about 6.15 P.M. the applicant and other co-accused persons intercepted the motorcycle of the first informant and the deceased. Thereafter applicant and some other co-accused persons assaulted the deceased by using rod and hockey blows and he along with his motorcycle was thrown into water by the assailants. Thereafter the assailants escaped from the place of occurrence. The first informant with the help of other persons took out the deceased from the water by that time he had died. According to the post mortem examination report the deceased has sustained nine ante mortem injuries in which injuries 1,2,3,4,5 and 7 were lacerated wounds and injuries No. 6,8, and 9 were abraded contusions, the applicant applied for bail before learned Sessions Judge, Jaunpur, who rejected the same on 9.10.2007, being aggrieved from the order dated 9.10.2007 the applicant has filed the present bail application.

3. Heard Sri Somesh Khare and Smt. Komal Khare, learned counsel for the applicant, learned A.G.A. for the State of U.P. and Sri Kamal Krishna, learned counsel for the complainant.

4. It is contended by learned counsel for the applicant that;

I. The presence of the first informant at the alleged place of occurrence is highly doubtful because no attempt was made by the assailants to cause injury on his person even he himself had not made any attempt to save the life of his brother. The prosecution story itself shows that the first informant was not present because the deceased was thrown into water, in case the first informant was present at the alleged place of occurrence the assailant wound have escaped leaving the deceased at the place of occurrence.
II. The presence of other witnesses at the alleged place of occurrence was highly doubtful because the alleged occurrence has taken place in a lonely place.
III. According to the FIR there was general allegation of causing the injuries by using the rod and hockey blows, no specific weapon was shown in the hands of the applicant

but during investigation the statement of the first informant Ram Singh was recorded who stated that applicant, co-accused Sunil Tripathi and Awadhesh Tripathi were armed with iron rods and the co-accused Amit Kumar @ Rinku Singh was armed with hockey. It has been specifically alleged by the first informant that the, co-accused Rinku Singh @ Amit Kumar caused injuries on the person of the deceased by using the hockey blows in side the water also. It shows that first of all the deceased was thrown into water thereafter the injuries were caused by the co-accused Rinku Singh @ Amit Kumar by using the hockey blows, consequently the deceased succumbed to his injuries.

IV. The prosecution story is not corroborated by the post mortem examination report because the deceased has sustained all injuries caused by blunt object and cause of death as a result of ante mortem head injuries. It has not been specified as to who caused the head injuries.

V. That some material improvement has been made in the prosecution version during investigation. The applicant was having no motive or intention to commit the alleged offence.

VI. Even according to prosecution version he has no quarrel with the deceased. The house of the applicant was situated at the distance of about 12 kilometers from the alleged place of occurrence.

VII. The applicant is innocent, he is having no criminal antecedent. He is in jail since 27.7.2007. 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 deceased has been murdered in a pre-planed manner. The active role of causing injuries on the person of the deceased by using the iron rod has been assigned to the applicant. The prosecution story is fully corroborated by the post mortem examination report, the deceased had sustained nine ante mortem injuries caused by blunt object, in which injuries No. 1,2,3,4,5, were on the head region, there was a fracture on frontal bone of nose and the left parietal bond, five injuries were found on the head region and all the four accused including the applicant were caused the injuries by using the iron rod and hockey, and cause of death was head injury. FIR was promptly lodged which shows that the first informant and other persons had seen the alleged incident. According to the statement of the first informant Ram Singh recorded under section 161 Cr.P.C. it has been specifically alleged that first of all the injuries were caused on the person of the deceased by the applicant and other co-accused persons using the iron rod and hockey blows and in addition to eight injuries caused on the person of the deceased, the co-accused Rinku Singh @ Amit Kumar thrown the deceased into the water and caused the hockey blows. Therefore, it can not be said that the injuries were- caused only by co-accused Rinku Singh @ Amit Kumar. The bail application of the co-accused Sunil Kumar Tripathi has been rejected by the another bench of this court, in case the applicant is release on bail, he shall tamper with Kumar. The bail application of the co-accused Sunil Kumar Tripathi has been rejected by the another bench of

this court, in case the applicant is release on bail, he shall tamper with evidence.

6. Considering the facts, circumstance of the case, submissions made by learned counsel for the applicant, learned A.G.A. and learned counsel for the complainant, and without expressing any opinion on the merit of the case the applicant is not entitled for ball, because the role of causing injuries to the deceased is assigned to the applicant also. The FIR was promptly lodged. The prosecution story is fully corroborated by the post mortem examination report, therefore, the applicant does not deserve for bail, the prayer for bail is refused.

7. Accordingly this application is rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2007

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 7345 of 2001

M/s Hindustan Aeronautics Limited, Kanpur ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.D. Singh

Counsel for the Respondents:
Sri Shayam Narain
Sri Rajesh Kumar
Sri S.N. Dubey
S.C.

U.P. Industrial Dispute Act 1947–Section 4 K–Company engaged to manufacture of sophisticated Aircraft and other defence equipments-Labour court a creation of U.P. Act has no jurisdiction to try the dispute of except the Central Government–held-invalid–award given by labour Court quashed.

Held: Para 10

In my opinion, present writ petition can be allowed only on the ground that the reference made by the state Government under section 4-K of the Act was invalid. The controversy involved in the present case is squarely covered by the decision of the Apex Court in the case of the petitioner itself in Civil Appeal NO.5655 of 2006, Hindustan Aeronautics Ltd. Vs. Hindustan Aeronautics Employee's Union and another.

Case law discussed:
CA 5655 of 06 decided on 4.12.06, 1961 (2) FLR–583, 2002 (2) SCC465, 2005(5) SCC 91, 2002 (92) FLR 601, 2005 (7) SCC 764, 1987 (2) SCC 543, 1995 (Supp), 24–SCC-548, 1995 (Supp)(4) 549 Pra288, 2006 (108) FLR 201 AIR 1970 SC.82, AIR 1997 SC 645, 2001 FLR (91) 182, AIR 1977 SC392, 2001 (90) FLR 745, 2004 (103) FLR 102, AIR 1981 SC 1473, AIR 1987 SC. 2111,AIR 1988 SC 1473, 2003(4) SCC – 712, 1985 LIC 1683

(Delivered by Hon'ble Rajes Kumar. J.)

1. By means of present petition, the petitioner is challenging the award dated 10.10.2000 given by the Prescribed Authority Labour Court (III), U.P., Kanpur in Industrial Disputes Case No.1 of 1991 on the reference being made by the State Government under Section 4 K of the U.P. Industrial Disputes Act, 1947 (hereinafter referred to as the 'Act).

2. The petitioner is a Company incorporated under the Indian Companies Act, 1956 having its registered office at 15/1, Cubbon Road, Bangalore. It is claimed to be Government of India undertaking. The petitioner is engaged in

the manufacture of sophisticated Aircraft and other defence equipments and caters to the Ministry of Defence in India. The petitioner has several units all over India. The dispute relates to the unit at Chakeri, Kanpur. The Company claimed to have been incorporated in the year 1964. The respondent no. 3 claimed to have been appointed as a Fitter in the petitioner's Company in the year 1964. He worked till 1967. Since then, he remained absent and did not report for work at all. In the year 1988, the respondent no. 3 raised his claim before the Conciliation Officer and claimed that his services had been wrongly terminated with effect from 9.10.1967. The respondent no. 3 also moved an application for the condonation of delay on 29.9.1988 and filed objection in C.B. Case No.1124 of 1988. The petitioner received a notice dated 22.10.1988 and the petitioner also received an order/letter dated 30.4.1990 written by Joint Secretary, Labour Department, U.P. Government, Kanpur to Shri P.N. Tripathi, respondent no. 3 by which it was informed that the State Government has not considered the case proper for adjudication and the same has been consigned to record on the ground that the dispute has been raised delayed. However, vide letter dated 7.1.1991 it has been informed that Government has referred the dispute under Section 4 K of the Act to the Labour Court on the issue "Kya Sewayojakon dwara apne karmachari Prem Narain Tripathi putra Shri Ram Nath Tripathi Pad- Assembly Fitter ko dinank 9.10.67 se karya se prathak/banchit kiya jana anuchit evam avadihanik hai? Yadi ha, to sambandhit karmachari kya hitlabh/upsham pane ka adhikari hai tatha kis anya vivran sahit."

3. The petitioner challenged the aforesaid reference by means of Writ Petition No. 11821 of 1991 on the ground that it was made after 21 years. This Court passed an interim order staying the order of reference. However, the writ petition was finally decided vide order dated 18.5.99. This Court observed as follows:-

"The main ground of challenge in the present petition is that the dispute has been raised by respondent no. 3 after 21 years and, therefore, the reference should not be made by the State Government. It is now well settled that there is no limitation prescribed under the Industrial Dispute Act for referring the matter for adjudication. The Hon'ble Supreme Court in the case of **Ajab Singh Vs. Sirhind Co-operative Marketing-cum-Processing Service Society Limited and another reported in JT 1999 (3) SC, 38** had held that the provisions of the limitation Act, 1963 are not applicable in respect of proceeding arising under the Industrial Disputes Act. It is for the Labour Court to mould the relief according to the facts of the case. It shall be open to the petitioner to raise whatever objection it wants to raise before the Labour Court."

4. Thereafter the petitioner received the notice in Adjudication Case No.1 of 1991. On behalf of petitioner, Sri S.C. Saxena, Advocate appeared. Respondent no. 3 had filed his written statement on 5.3.1991. The petitioner filed its written statement on 2.8.2000. The petitioner raised various objections claimed to be as follows:

(a) The petitioner's Company belongs to the Central Government Public Sector and

was fully controlled and managed by the Central Government and, therefore, the State Government could not refer the matter under Section 4 K of the U.P. Industrial Disputes Act in view of the provisions of Section 2 (I) (i) and (ii) of the Act and it is the Central Government who can refer the matter.

(b) By the notification dated 3.7.1998 the Central Government had transferred power to the State Government to make reference under the Industrial Disputes Act. Such power would be exercised by the State Government only after 3.7.1998 and, therefore, the reference made by the State Government in 1991 was without jurisdiction.

(c) The Constitution of the Labour Court was under the U.P. Industrial Disputes Act and not under the Industrial Disputes Act (Central) and, therefore, it had no jurisdiction to try the case of the petitioner for which the appropriate Government was the Central Government.

(d) The reference made after 21 years was highly belated. The appointment of the Presiding Officer hearing the matter was not valid as he did not fulfil the condition under Articles 234 and 236 of the Constitution of India and also the provisions of Section 4 K of the U.P. Industrial Disputes Act.

5. A rejoinder statement was also filed by the petitioner on 13.8.2000. the respondent no. 3 moved an application on 2.8.2000 by which he objected the appearance of Sri S.C. Saxena, Advocate who was authorised representative of the Company and appearing since the year 1991. The petitioner filed the objection. However, vide order dated 14.8.2000 the Labour Court debarred the appearance of Sri S.C. Saxena, Advocate saying that he was a legal practitioner and could not appear in view of Section 6-1 of the U.P. Industrial Disputes Act. The petitioner challenged the aforesaid order by way of Writ Petition No. 42503 of 2000. The said writ petition claimed to be pending. After 14.8.2000, the petitioner's Company was prevented from representing its case through its authorised representative Sri S.C. Saxena, Advocate. After 14.8.2000, the date was fixed on 28.2.2000 for filing the documents and thereafter the date was fixed for 13.9.2000. On 13.9.2000, the petitioner filed an application seeking time to seek its remedy. However, the petitioner filed the documents in compliance of the order of the Court. He submitted that on that day it was not possible to cross-examine the workman's evidence and to produce its own evidence. Further on 13.9.2000 the Company filed two documents, namely certified standing orders of the Company and photocopy of the administrative instructions on the subject-maintenance of records. The petitioner's application for seeking time was rejected by the Court on 13.9.2000 and the award was given.

6. Heard Sri S. D. Singh, learned counsel for the petitioner, Sri Shayam Narain, Assisted by Sri Rajesh Kumar, learned counsel for the respondent no.3 and learned Standing Counsel appearing on behalf of opposite parties no. 1 and 2.

Learned counsel for the petitioner submitted as follows:-

1. The reference drawn by the State Government under the U. P. Industrial Disputes Act is invalid. He placed reliance on the judgement of this Court dated 29.9.1997 in Civil Misc. Writ Petition No. 13936 of 1995, **HAL Vs. State of U.P. and**

others A 12/99 at 113 and the decision of the Apex Court in **C.A. 5655 of 2006 HAL Vs. HAL Employees Union and others dated 4.12.2006.**

2. The dispute was raised after 21 years was highly belated. The delay was notproperly explained; no proof of illness claimed by respondent no. 3 exists on record. The respondent no. 3 did not disclose the date when he regained health.

Reliance is placed on the following decisions:-

1. **Inder Singh & Sons Ltd. Vs. Their Workmen (1961) 2 FLR583.**
2. **Chairman, Railway Board and others Vs. Chandrima Das (Mrs) and others (2002) 2 SCC-465.**
3. **Haryana State Coop. Land Development Bank Vs. Neelam (2005) 5 SCC-91.**
4. **Assistant Executive Engineer Vs. Sri Shivalinga [2002 (92) FLR 601].**

3. Award has been given ex-parte. The petitioner authorized representative was appearing since beginning Le. 28.2.1991. He was debarred on 14.8.2000. The petitioner's adjournment application for genuine grounds was rejected. The petitioner was totally denied opportunity to cross-examine respondent no. 3. The award was passed after two days before the date fixed in the writ petition challenging the order dated 14.8.2000.

4. The respondent no. 3 abandoned his service. He did not prove any justifiable reason for abandonment. His termination is valid.

Reliance is placed on the following decision:-

(i) Ajit Kumar Nag Vs. General Manager, reported in (2005) 7 SCC 764.

5- The award is wholly perverse. Admittedly, the petitioner's establishment came into existence in 1964. However, the Labour Court has held that the respondent no.3 was employed in 1962. There is no documentary evidence in support of the case of the respondent no. 3.

6- At any rate respondent no. 3 was not entitled to be reinstated with or without continuity either in 2000 or now, he having not worked for HAL since 1967. Reliance is placed on the following decisions:-

1.- **Ras Behari Vs. Haryana Agricultural University through Vice-Chancellor, Hissar and others reported in (1987) 2 SCC 543.**
2. **Gujarat State Road Transport Corpn. and another Vs. Mulu Amra, reported in (1995) Supp. (4) SCC 548.**
3. **Rolston John Vs. Central Government Industrial TribunalCum- Labour Court and others, reported in (1995) Supp (4) SCC- 549 (Para 2 & 8)**.

7- At any rate respondent is not entitled for back wages.

Reliance is placed on the following decision:-

(i)- **U.P. State Brassware Corporation Ltd. and another Vs. Udainarain Pandey, reported in [2006 (108) FLR 201].**

7. Learned counsel for the opposite party relied upon the decisions of the Labour Court and further placed reliance on the following decisions:

1- Heavy Engineering Mazdoor Union Vs. State of Bihar and others, reported in A.I.R. 1970 SC, 82 (Paras-4,5 & 6).
2- Air India Statutory Corporation etc. Vs. United Labour Union and others, reported in A.I.R. 1997 S.C. 645 (Para-28)
3- Steel Authority of India Ltd. and others Vs. National Union Water Front Workers and others, reported in [2001 (91) F.L.R. 182] (Para-43)
4- V.B. Patil and others Vs. Y.L. Patil, reported in A.I.R. 1977 SC.,392
5- Sapan Kumar Pandit Vs. U.P. State Electricity Board and others, reported in 2001 (90) F.L.R.754
6- M/s Nicks (India) Tools Vs. Ram Surat and aother, reported in [2004 (103) F.L.R.-102] (Para-11)
7- Gokaraju Rangaraju Vs. State of Andhra Pradesh, reported in A.I.R. 1981 SC, 1473 (Para-15)
8- M/s. Beopar Sahayak (P) Ltd. and others Vs. Vishwa Nath and others, reported A.I.R. 1987 SC-2111
9- State of Maharashtra Vs. Labour Law Practitioners' Association and others, reported in A.I.R. 1998 SC-1233
10- High Court of Gujarat and another Vs. Gujarat Kishan Mazdoor Panchayat and others, reported in (2003) 4 SCC-712 (Para-17)
11- M/s Poysha Industrial Company Ltd., Ghaziabad Vs. State of U.P. and others, reported in 1985 L.I.C.-1683.

8. Having heard learned counsel for the parties, I have perused the impugned order.

9. The petitioner company belong to Central Government Public Sector and was fully controlled and managed by the Central Government engaged in the manufacture of sophisticated aircraft and other defence equipments and caters to the Ministry of Defence in India.

10. In my opinion, present writ petition can be allowed only on the ground that the reference made by the state Government under section 4-K of the Act was invalid. The controversy involved in the present case is squarely covered by the decision of the Apex Court in the case of the petitioner itself in Civil Appeal NO.5655 of 2006, Hindustan Aeronautics Ltd. Vs. Hindustan Aeronautics Employee's Union and another. The decision of the Apex Court , read as follows:

"Leave granted.

The principal question which arises for consideration is as to whether the State of Uttar Pradesh was the appropriate Government for making a reference of the industrial dispute raised by the respondent-Union. The question is no longer res-integra in view of the Constitution Bench decision of this Court in Steel Authority of India Ltd. And Ors. Vs. National Union Waterfront Workers and Ors. 2001 7 SCC 1 as also a three-Judge Bench decision of this Court in appellant's own case versus Hindustan Aero Canteen K. Sangh and ors. -Civil Appeal No.3659/2002.

In view of the aforementioned pronouncements of this Courts we are of the opinion that the High Court was not correct in refusing to interfere with the award of the Industrial Tribunal. We, therefore, set aside the impugned

award as also the judgment of the High Court leaving the merit of the matter open. All the remedies of the respondent indisputably shall remain open.
The appeal is allowed.".

11. Learned Single Judge of this Court in Writ Petition No.13936 of 1995, Hindustan Aeronautics Ltd. Vs. State of U.P. And others in its order dated 29.09.1997 held as follows:

"In my view, therefore, the petitioner's contention that in the case of the petitioner the appropriate Government was the Central Government is correct and the Government of Uttar Pradesh had no jurisdiction to refer the dispute for adjudication by the Industrial Tribunal."

12. In view of the above, writ petition is allowed. The impugned award dated 10.10.2000 given by the Prescribed Authority Labour Court (III) U.P., Kanpur in Industrial Disputes Case No.1 of 1991 is quashed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ petition No.63906 of 2007

Ashok Kumar Jain ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Rama Kant Dubey

Counsel for the Respondents:
Sri Alok Kumar Srivastava
Sri Vikash Sahai
Sri Vinod Sinha
S.C.

Constitution of India Art. 226-Service Law-substantive vacancy of Principal caused on 20.6.98-senior most Lecturer appointed officiating-but subsequently suspended-petitioner in June 1999 given charge of officiating principal-resigned on 28.10.05 on the ground of ill health-another lecturer given charge as officiating principal who retired on 30.6.07-again the petitioner took charge as officiating Principal but D.I.O.S. directed the management to appoint another lecturer as officiating Principal-held-once Adhoc arrangement made officiating Principal-the substantive vacancy remained same only Adhoc arrangement came to an end-petitioner can not be appointed.

Held: Para 7

The substantive vacancy occurred on 30.6.1998 on the retirement of Ramesh Chandra Gupta and no fresh vacancy occurred upon the retirement of Girish Chandra Jain on 30.6.1997. It was the same vacancy which continued. Consequently, the vacancy which occurred on 30.6.1998 continued and continued to exist till 30.6.2007. The same post continued to remain vacant and no substantive appointment on the said vacancy was made. The mere fact that an adhoc arrangement of officiating Principal was made earlier on the said post which came to an end would not mean that a fresh substantive vacancy had again been created. The substantive vacancy remained the same and only an officiating arrangement had come to an end. This view was also held in the

aforesaid Division Bench judgment of Sundershan Kumar (supra), which is squarely applicable to the present facts and the circumstances of the case. The judgment cited by the learned counsel for the petitioner stands impliedly overruled in view of the decision of the Division Bench.

Case law discussed:

2004 (3) ESC-1884, Spl. Appeal No. 959/06 decided on 15.2.06 relied on.

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

1. Heard Sri Ashok Khare, the learned senior counsel assisted by Sri Rama Kant Dubey and Sri Vinod Sinha, the learned counsel for respondent no.5 and the standing counsel for respondent nos.1, 2 and 3. Since no factual controversy is involved in the present writ petition, the present writ petition is being decided without calling for a counter affidavit.

2. It transpires, that the Principal of the institution retired and a substantive vacancy came into existence on 20.6.1998. One Ram Babu Jain was granted an appointment as an officiating Principal but subsequently he was placed under suspension. Consequently, the petitioner, by virtue of being the senior most lecturer, was appointed as an officiating Principal of the institution in June 1999 and, the petitioner functioned in that capacity till 28.10.2005, on which date, the petitioner submitted his resignation citing family stress and ill health. This resignation was duly accepted by the authorized controller and the petitioner was relieved from the post of officiating Principal.

3. Consequent upon the occurrence of the vacancy in the office of the Principal by the resignation of the petitioner, another lecturer of the institution was given the task of the officiating Principal of the institution, namely, Girish Chandra Jain, who functioned till he retired on 30.6.2007. As a consequence of the retirement of Girish Chandra Jain, the post of officiating Principal again became vacant. The Manager of the institution by an order dated 30.6.2007 directed the petitioner to assume charge as the officiating Principal since he was the senior most teacher in the institution. It is alleged that the petitioner took charge. On 7.7.2007, the District Inspector of Schools passed an order directing the management to issue directions to Aditya Prakash Gupta, respondent no.5, to take charge as the officiating Principal of the Institution. The order dated 7.7.2007 as well as the earlier order of the District Inspector of Schools dated 29.6.2007 was challenged by the petitioner in Writ Petition No.31588 of 2007. Both the orders of the District Inspector of Schools were set aside by a judgment dated 17.7.2007 on the ground that no opportunity of hearing was provided to the petitioner. The Court further directed the Regional Joint Director of Education to hear both the parties including the committee of management and take a decision with regard to the entitlement of the parties on the post of officiating Principal. Based on the said directions of the Court, the impugned order was passed on 7.12.2007 by the Regional Joint Director of Education which was communicated by an order dated 10.12.2007 passed by the District Inspector of Schools whereby the claim of the petitioner to function as an officiating Principal of the institution was rejected. The petitioner, being aggrieved by the aforesaid decision, has filed the present writ petition.

4. The learned counsel for the petitioner submitted that upon the retirement of Girish Chandra Jain, the post of officiating Principal fell vacant again on 30.6.2007 and the said post was required to be filled up by a regular appointment. Since no names were recommended by the Board, the said post was required to be filled up by the senior most lecturer working in the institution. The learned counsel submitted that admittedly the petitioner was the senior most lecturer and the petitioner was liable to be given the charge of the officiating Principal, the moment the vacancy arose. In support of his submission, the learned counsel placed reliance upon a decision of the learned Single Judge of this Court in **Dhanesh Kumar Sharma vs. State of U.P. and others**, 2004(3)ESC 1884, wherein the Court held that the right of the senior most teacher to function as the officiating Principal cannot be defeated on the ground that at an earlier point of time, he had expressed his inability to continue as the officiating Principal on account of his ill health. The Court held that his right cannot be defeated, on the ground, that in the past he had expressed his inability to continue on the ground of illness and was entitled to be considered subsequently whenever the vacancy arose.

5. On the other hand, Sri Vinod Sinha, the learned counsel for the opposite party submitted that the petitioner, upon submitting his resignation, had forfeited his right for reconsideration on the said post and that he could only be considered in the event a substantive vacancy occurred at any point of time in the future. The learned counsel for the petitioner submitted that once a substantive vacancy on the post of Principal had fallen vacant and had not been filled up by a regular appointment, in that event, it has to be filled up by a senior most lecturer working in the institution, but once the senior most lecturer refused to officiate as a Principal and the substantive vacancy continued, in that event, he was not entitled to be offered the post of officiating Principal again on the retirement of the officiating Principal. In support of his submission the learned counsel placed reliance upon a decision of the Division Bench dated 15.9.2006 in **Sundershan Kumar v. State of U.P. and others** (Special Appeal No.959 of 2006), wherein the court held that no substantive vacancy occurred when an officiating Principal retired and consequently, when the senior most lecturer working in the institution having once refused to officiate as Principal could not be offered an officiating appointment again during the subsistence of the same vacancy.

6. In the present case, there is no dispute that a substantive vacancy on the post of Principal occurred on 30.6.1998 upon the retirement of Sri Ramesh Chandra Gupta. No regular appointment was made by the Board and the petitioner, being the senior most lecturer was allowed to officiate as the Principal till the date when he tendered his resignation, i.e., till 28.10.2005 after which the post of the officiating Principal was given to the next senior most lecturer who functioned till 30.6.2007. The question is whether after the retirement of Girish Chandra Jain on 30.6.2007, could the post of officiating Principal be again given to the petitioner by virtue of his being the senior most lecturer in the institution.

7. The substantive vacancy occurred on 30.6.1998 on the retirement of Ramesh Chandra Gupta and no fresh vacancy occurred upon the retirement of Girish Chandra Jain on 30.6.1997. It was the same vacancy which continued. Consequently, the vacancy which occurred on 30.6.1998 continued and continued to exist till 30.6.2007. The same post continued to remain vacant and no substantive appointment on the said vacancy was made. The mere fact that an adhoc arrangement of officiating Principal was made earlier on the said post which came to an end would not mean that a fresh substantive vacancy had again been created. The substantive vacancy remained the same and only an officiating arrangement had come to an end. This view was also held in the aforesaid Division Bench judgment of Sundershan Kumar (supra), which is squarely applicable to the present facts and the circumstances of the case. The judgment cited by the learned counsel for the petitioner stands impliedly overruled in view of the decision of the Division Bench.

8. Since the petitioner had declined to officiate as the Principal on the said vacancy, he could not be permitted at this stage to claim appointment on the post of officiating Principal. The petitioner is estopped under law from claiming an officiating appointment on the same substantive vacancy. In view of the aforesaid, this Court does not find any merit in the writ petition and is dismissed summarily.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2007

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

Civil Misc. Writ Petition No. 57960 of 2007

Raj Veer Singh ...Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Shashi Nandan
Sri Rahul Agarwal
Sri Udayan Nandan

Counsel for the Respondent:
S.C.

U.P. Civil Services (Classification control and Appeal) Rules–1939–Rule 49-A
Suspension–contemplation of preliminary enquiry by vigilance–keeping in view of contrary views of full bench decision Jai Singh Dixit–and Shahroj Anwar Khan - matter referred to larger bench.

Held: Para 19

For the reasons recorded above, we have doubt about the correctness of the law laid down by the Full Bench judgment of this Court in the case of Shahroj Anwar Khan (supra) and therefore direct that the papers of the present writ petition be placed before the Hon'ble the Chief Justice for constituting a Larger Bench for consideration of the following questions of law.

Case law discussed:
1975 ALR K- 64, 2007(2) UPLBEC 1582, AIR 1984 PAN 113

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

1. This matter has been placed before us by way of an order of the

Hon'ble Chief Justice nominating the Bench.

2. Petitioner is employed as Assistant Director (Toxicology) Forensic Science Laboratory, Agra. In a 'telecast by television news channel 'Star News' under the caption 'Kanoon Ke Killer' the petitioner was shown as stating that he can temper the forensic report on payment of illegal gratification. The petitioner was initially restrained from discharging his duties vide order dated 18.08.2007 passed by the Joint Director, Vidhi Vigyan Prayogshala Uttar Pradesh, Agra. Feeling aggrieved by the order so passed, the petitioner filed Writ Petition No. 40102 of 2007. This Court required the Standing Counsel to file a counter affidavit.

3. While the first petition was still pending before this Court, the State Government has passed the impugned order dated 18.09.2002 placing the petitioner under suspension. The order records that from the preliminary report of the Director, Vidhi Vigyan Prayogshala dated 20.08.2007 prima facie petitioner is found to be involved in corruption and therefore it is in the public interest that work may not be taken from such an officer and, for taking appropriate proceedings against the petitioner, an inquiry through vigilance department is contemplated. Accordingly, the petitioner is being placed under suspension.

4. This order of the State Government is being questioned by means of the present writ petition on the plea that from order impugned it is apparently clear that an inquiry from the vigilance department is contemplated for taking appropriate action against the petitioner. Counsel for the petitioner submits that such vigilance inquiry, as recorded in the impugned order, is not provided for under Rule 49-A of the U.P. Civil Services (Classification, Control and Appeal) Rules (hereinafter referred to as "C.C.A. Rules). Therefore, the suspension of the petitioner is contrary to the aforesaid statutory provision and illegal. Reference has been made to the Constitution Bench (Five Judges) judgment of this Court in the case of *State of U.P. v. Jai Singh Dixit; 1975 A.L.R. Page 64*.

5. Counsel for the petitioner clarifies that the inquiry referred to in Rule 49-A of the C.C.A. Rules is a formal departmental inquiry and not a fact finding inquiry which usually proceeds the formal inquiry. An inquiry by the vigilance department can be material for the purposes of taking criminal action against the petitioner but the same is totally foreign to the concept of departmental inquiry as contemplated by Rule 49-A of the C.C.A. Rules and, therefore, in contemplation of an inquiry by vigilance department, the State Government is not justified in exercising the power under Section 49A of the C.C.A. Rules to suspend the petitioner.

6. Standing Counsel on behalf of the State respondent, with reference to the Full Bench (Three Judges) judgment of this Court in the case of Shahroj Anwar Khan v. State of U.P. and Anr.; (2007) 2 UPLBEC 1582, contends that the authorities have the power to direct a fact finding inquiry/preliminary inquiry and may resort to suspension while initiating such a fact finding/preliminary investigation. It is, therefore, submitted that the contemplation of a vigilance inquiry against the petitioner, as recorded

in the impugned order, would not in any way restrict the competence of the State Government to keep the officer under suspension. It is further submitted that the rule does not prohibit passing of suspension order during the pendency of the fact finding/preliminary inquiry. The inquiry contemplated to be conducted by the vigilance department in the facts of the case stands at par with the preliminary inquiry/fact finding inquiry.

7. In rejoinder Sri Shashi Nandan Senior Advocate, assisted by Sri Udayan Nandan Advocate, raised following issues of law with regards to the Full Bench judgment of this Court in the case of Shahroj Anwar Khan (supra):

(a) that the Division Bench, which had made the reference in the case of Shahroj Anwar Khan and which has resulted in the judgment of the Full Bench of this Court reported in (2007) 2 UPLBEC 1582, had not even noticed the Constitution Bench(Five Judges) judgment of this Court in the case of State of U.P. v. Jai Singh Dixit. There being a Constitution Bench judgment of this Court on the subject squarely applicable, not noticed in the referring order, the Full Bench should have returned the reference unanswered after recording that the Division Bench was not justified in making the reference in ignorance of the Constitution Bench judgment of this Court.
(b) The Full Bench of this Court could not have diluted the law laid down by the Constitution Bench in the case of State of U.P. v. Jai Singh Dixit while answering the reference as made in the case of Shahroj Anwar Khan.
(c) In view of the Constitution Bench judgment of this Court in the case of State of U.P. v. Jai Singh Dixit, the question referred and as answered was specifically recorded in the operative portion of the order of the Constitution Bench. No Court has expressed any doubt in respect of the law so laid down, therefore, the reference giving rise to the Full Bench judgment itself was incompetent.
(d) The answer given by the Full Bench to the question referred in the case of Shahroj Anwar Khan (supra) is virtually in conflict with the opinion of the Constitution Bench in the case of State of U.P. v. Jai Singh Dixit.

8. It is, therefore, submitted that the Full Bench judgment of this Court in the case of Shahroj Anwar Khan does not lay down good law and is based on non-consideration of the exact answer given by the Constitution Bench of this Court with regards to meaning to be attached word 'inquiry' as contained in Rule 49-A of the C.C.A. Rules.

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

10. Before adverting to the legal issue raised on behalf of the present petitioner, it would be worthwhile to reproduce the following paragraphs of the judgment of the Constitution Bench in the case of State of U.P. v. Jai Singh Dixit:

"The question for consideration now in what is meant by the Words 'inquiry' and 'contemplated' used in Rule 49-A and Rule l-A?

The word 'inquiry' has also been used in Rules 55 and 55-A of the C. C.A. Rules. Rules 55 and 55-A relate to formal departmental inquiry where major

punishment of dismissal removal or reduction can be imposed. Such an inquiry is invariably preceded by framing of charges. It is of significance that in the other rules governing cases in which major punishment can be awarded the word 'inquiry' has been omitted and the rules merely provide for the award of punishment. It is true that most of the minor punishment shall be awarded after some inquiry, but when the rule-making authority intentionally avoided making a reference to this term in the other rules and used the word 'inquiry' in Rule 49-A and also Rules 55 and 55-A the underlying intention was that the inquiry contemplated by Rule 49-A is the one held under Rules 55 and 55-A. It must, therefore, be held that the power under Rule 49-A can be exercised only in those cases where one of the major punishment dismissal, removal or reduction shall ordinarily be imposed.

The inquiry contemplated by Rule 49-A cannot have reference to an informal preliminary inquiry or a fact finding inquiry preceding the actual disciplinary proceeding, otherwise it shall be permissible to suspend a Government servant pending such informal inquiry, but not after charges have been framed and regular departmental proceeding is pending. This shall lead to an anomalous situation. We are, therefore, of opinion that the 'inquiry' contemplated by Rule 49-A and Rule 1A has reference to the formal departmental inquiry and not to any informal preliminary or fat finding inquiry preceding the initiation of the formal disciplinary proceeding.

To put it in brief a departmental inquiry is contemplated when on objective consideration of the material, the appointing authority considered the case as one which would lead to a departmental inquiry, irrespective of whether any preliminary inquiry, summary or detailed has or has not been made or if made is not complete. There can therefore be suspension pending inquiry even before a final decision is taken to initiate the disciplinary proceeding, i.e. even before the framing the charge and the communication thereof to the Government servant.

……..

Naturally, it shall depend upon the fact and circumstances of each case whether, prior to the framing of the charge and communication thereof to the Government servant it can be said that a departmental inquiry is expected.

……..

In case the matter is considered in the manner already suggested by us above, there shall always be objective satisfaction of the appointing authority before the Government servant can be suspended pending inquiry. To suspend a Government servant on receipt of complaints containing allegation of dishonesty or of misconduct, without the appointing, authority being satisfied that the allegation made has any substance which would latter justify taking disciplinary proceeding shall be one subjective consideration and has to be disapproved by the courts of law. But where there exist circumstances to satisfy the appointing authority that the allegations made have substance suspension pending inquiry shall be on objective consideration and not subjective. It is a different thing that the appointing authority may like to have the matter investigated or further investigated so that the total material may come on the record and a proper departmental inquiry can be held.

……..

After the repeal of the Note the position is that Rule 49-A as well as Rule I-A conferred discretionary power to place an officer under suspension when an inquiry is contemplated or is proceeding. The power has not been confined on the appointing authority to his subjective satisfaction. It is exercisable only if on an objective consideration the appointing authority takes the view that an Inquiry is contemplated or is proceeding. This position being based on an objective consideration is open to judicial review.

……

We all agree that the inquiry that is meant in this rule a formal departmental inquiry and not a fact finding preliminary inquiry which usually proceeds the formal inquiry."

11. Lastly this Court may also reproduce the answer given to the question of law, which was referred to the Constitution Bench, which is being quoted below:

"D.S. Mathur, C.J. - In view of the majority opinions, the answer to the question of law involved is as below:

Suspension pending inquiry under Rule 49-A of the U.P. Civil Service (Classification Control and Appeal) Rules or Rule I-A of the U.P. Punishment and Appeal Rules can be ordered to any stage prior to or after the framing of charges. When on objective consideration the authority concerned is of the view that a formal departmental inquiry under Rule 55 and 55-A of the CC.A. Rules or Rules 5 and 6-A of the U.P. Punishment and Appeal Rules is expected or-such an inquiry is proceeding. At what stage the power under the above rules can be exercised shall always depend on the facts and circumstances of each case."

12. In view of the aforesaid conclusion arrived at by the Constitution Bench, two aspects of the matter are apparently clear. The word 'inquiry', as used in Rule 49-A, means a formal departmental inquiry under Rule 55 and 55-A of the C.C.A. Rules or Rules 5 and 6-A of the U.P. Punishment and Appeal Rules. Therefore, suspension in contemplation of inquiry in terms of Rule 49-A of the C.C.A. Rules would necessarily mean that (a) material on record would lead to formal departmental inquiry under Rules 55 and 55-A of the C.C.A. Rules or Rules 5 or 6-A of the U.P. Punishment and Appeal Rules and (b) At what stage the power under above Rule 49-A of the C.C.A. Rules is to be exercised shall always to be dependent on the facts and circumstances of each case.

13. The Full Bench in the case of Shahroj Anwar Khan (supra) has, however, in paragraph 21 of the said judgment, held as follows:

"21. In view of what is stated above, it is clear that the phrase 'when an inquiry is contemplated' will have to be read as meaning that an inquiry is under consideration or is thought of or is proposed. It cannot mean that a decision to hold an inquiry is arrived at. After that decision is arrived at, undoubtedly, a full-fledged departmental inquiry follows. Therefore, the phrase 'an inquiry is contemplated' will cover an earlier stage. It will certainly cover a stage when even a preliminary inquiry is under consideration. A preliminary inquiry cannot be excluded from the term 'inquiry' as covered under this clause. That would

place a fetter on the powers of the administration. As noted earlier, the authorities may be confronted with various situations and they ought to have the freedom to deal with those situations. It will be for them to decide what steps they ought to take. The authorities may, undoubtedly, initiate a preliminary inquiry, or may even be required to resort to suspension while initiating a preliminary investigation. It cannot be said that the authorities will hold the preliminary investigation or inquiry for quite sometime, allow the officer concerned, about whom there are serious grievances, to function in the meanwhile and thereafter will decide to suspend. Such restriction is not contemplated under the Rules."

And, therefore, proceeded to answer the question referred in paragraph 22, which reads as follows:

"22. In the circumstances, we answer the two questions, referred to for our determination as follows:
(1) Rule 17(1)(a) of the U.P. Police Officer of Subordinate Ranks (Punishment and Appeal) Rules, 1991, does not prohibit passing of a suspension order during the pendency of a preliminary inquiry.
(2) The Division Bench judgment rendered in Kripa Shanker Prasad (supra), does not lay down the correct law."

14. In our opinion the conclusion arrived at by the Full Bench, to the effect that preliminary inquiry cannot be excluded from the term inquiry as covered under Rule 17(1)(a) of the U.P. Police Officer of Subordinate Ranks (Punishment and Appeal) Rules, 1991, is not in accordance with the Constitution Bench judgment of this Court wherein it has been specifically held that the word 'inquiry' referred to in Rule 49-A of the C.C.A. Rules means a formal departmental inquiry contemplated by Rules 55 and 55-A of the C.C.A. Rules. It may also be recorded that the Full Bench of this court has specifically held that at what stage the power of suspension can be exercised shall always depend on the facts and circumstances of each case.

15. The said conclusion of the Constitution Bench of this Court stands practically nullified in view of the answer given by the Full Bench in the case of Shahroj Anwar Khan (supra), wherein it has been held that suspension can be directed during the pendency of a preliminary inquiry without recording further that such suspension has to be based on objective consideration of the material on record by the appointing authority for arriving at a satisfaction that the same would lead to a formal departmental inquiry.

16. We are conscious of the limitations prescribed for referring a matter to a larger Bench and as such it would be appropriate to refer to the law on this issue. The procedure provided for making a reference is contained in Rule 6 of Chapter V of the Allahabad High Court Rules and the Hon'ble Chief Justice on such a reference in exercise of the powers vested in him under the second proviso to Rule 2 of the same chapter may constitute an appropriate Bench as may be required for answering the reference. This Court in a Full Bench decision in the case of Rana Pratap Singh v. State of U.P. and Ors. following a Full Bench decision of the Punjab and Haryana High Court, reported in AIR 1984 P & H 113 held as follows:

"It would follow as a settled principle that the law specifically laid down by the Full Bench is binding upon the High Court within which it is rendered and any and every veiled doubt with regard thereto does not justify the reconsideration thereof by a larger Bench and thus put the law in a ferment afresh. The ratios of the Full Benches are and should be rested on surer foundations and are not to be blown away by every side wind. It is only within the narrowest field that a judgment of a larger Bench can be questioned for reconsideration. One of the obvious reasons is, where it is unequivocally manifest that its ratio has been impliedly overruled or whittled down by a subsequent judgment of the superior Court or a larger Bench of the same Court. Secondly, where it can be held with certainly that a co-equal Bench has laid down the law directly contrary to the same, and, thirdly, where it can be conclusively said that the judgment of the larger Bench was rendered per incuriam by altogether failing to take notice of a clear-cut statutory provision or an earlier binding precedent. It is normally within these constricted parameters that a similar Bench may suggest a reconsideration of the earlier view and not otherwise. However, it is best in these matters to be neither dogmatic nor exhaustive yet the aforesaid categories are admittedly the well accepted ones in which an otherwise binding precedent may be suggested for reconsideration."

17. The Full Bench further held as follows in para 18 of the judgment:

"18. Implicit, thus, in the disregard by a single Judge or a Division Bench of a binding judicial precedent of a larger Bench or seeking to doubt its correctness for reasons and in circumstances other than those spelt out in Pritam Kaur's case (supra) is what cannot but be treated as going counter to the discipline of law so essential to abide by, for any efficient system of law to function, if not it virtually smacking of judicial impropriety. In other words, it is only within the narrow compass of the rule as stated by the Full Bench in Pritam Kaur's case that reconsideration of a judgment of a larger Bench can be sought and as has been so expressively put there, such judgments are not "to be blown away by every side wind."

18. In the instant case, as pointed out herein above that the Full Bench decision in Shahroj Anwar Khan's case, the ratio of the earlier 5- Judges Bench appears to have been set at naught and hence keeping in view the norms of judicial discipline we find it necessary to refer this issue for an authoritative pronouncement.

19. For the reasons recorded above, we have doubt about the correctness of the law laid down by the Full Bench judgment of this Court in the case of Shahroj Anwar Khan (supra) and therefore direct that the papers of the present writ petition be placed before the Hon'ble the Chief Justice for constituting a Larger Bench for consideration of the following questions of law:

(a) Whether a reference made by a Division Bench, which has not noticed a Constitution Bench judgment of this Court comprising of larger number of Judges, squarely applicable on the subject, was liable to be returned unanswered by the Full Bench only on the ground that Constitution Bench judgment

has not been considered by the Division Bench while making the reference.

(b) Whether the Full Bench in the case of Shahroj Answar Khan (supra) is correct in recording in paragraph 21 that the word 'inquiry' as contemplated under Rule 17(1)(a) (*para materia* to Rule 49-A of the C.C.A. Rules) will include a preliminary inquiry to be precise whether the word 'inquiry' in the said Rules includes within its ambit preliminary inquiry inasmuch as the Constitution Bench of this Court in the case of State of U.P. v. Jai Singh Dixit (supra) has specifically held that the word 'inquiry', under Rule 49-A of the C.C.A. Rules, necessarily refer to formal departmental inquiry referable to Rule 55 and 56-A of the C.C.A. Rules or Rules 6 and 7 of the U.P. Police Officer of Subordinate Ranks (Punishment and Appeal) Rules, 1991.

(c) Whether, while directing preliminary inquiry, the power to suspend has to be exercised on objective consideration of material on record of each case and therefore it is for the State Government on a challenge being made to an order of suspension in contemplation of an inquiry to justify by such material on record that irrespective of preliminary inquiry the authority was satisfied that suspension was warranted in the facts of the case.

(d) Whether an order of suspension, in contemplation of a vigilance inquiry, would be within four corners of Rule 49-A.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2007

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

First Appeal No. 242 of 2007

Manaj Kumar ...Respondent-Appellant
Versus
Mohd. Saud and others
...Petitioner-Respondents

Counsel for the Appellant:
Sri Ravi Kant
Sri Ram Raj
Sri Gajendra Pratap Singh

Counsel for the Respondents:
Sri U.N. Sharma
Sri Ravi Shankar Prasad
Sri Chandan Sharma

U.P. Kshetriya Punchayat (Election of Pramukh and U.P. State and Settlement of Election Disputes) Rules, 1994-Rule-29-Declaration of result-out of 79 three voter found invalid-both candidate secured 38 votes-on tie-the A.R.O. on basis of lottery declared Mr. D. elected form VIII issued-R.O. in recounting found 2 votes invalid in favour of Mr. A-hence declared Mr. B. as elected-whether the A.R.O. competent to declare winner in absence of delegation of power by RO/D.M.?-held-'No'-even without complaint-the R.O. suo moto order for recounting-No order in writing for its satisfaction recorded-held-not fetal-'B' rightly declared elected-view taken by election Tribunal illegal-set aside.

Held: Para 26

In short, the conclusion derived from the above authority is that where the election result is declared unauthorisedly, the same is liable to be treated as null and void. In the instance case as the RO/DM has not delegated his

power to declare the election result in favour of the ARO, he was not the officer competent to declare the result and fill up the form VIII under Rule 29 of the Rules. Accordingly, the election result declared by the ARO was without jurisdiction and as such null and void which in no way conferred any right in favour of respondent No. 1 Mohd. Saud.

Case law discussed:

2003 (3) AWC-2271, 1995 AWC-1465, 2000 (3) UPLBEC-2097, 2004 AWC-2777, 2006 UPLBEC-372

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Under challenge is the judgment and order of the District Judge dated 30.7.2007 passed in Election Petition No. 3/70 of 2006 Mohd. Saud Vs. Manoj Kumar and another by which the election petition was allowed, the election of Manoj Kumar as Pramukh, Kshetriya Panchayat Mooratganj, district Kaushambi was set aside and Mohd. Saud was declared elected in his place.

2. The appellant Manoj Kumar and the respondent No. 1 Mohd. Saud both contested elections for the post of Pramukh, Kshetriya Panchayat Mooratganj as Other Backward Class (hereinafter in short OBC) candidates. The elections to the said post were held on 27.2.2007. All the 79 members of the Kshetriya Panchayat voted. Counting was done on the same evening. Three (3) ballot papers were rejected as invalid. Thus only 76 valid ballot papers remained for counting. On counting both the candidates secured 38 votes each and as such there was a tie. Accordingly, a lottery was drawn. On the basis of lottery respondent No. 1 Mohd. Saud was allegedly declared winner. However, the Assistant Returning Officer (in short ARO) with his report submitted the entire ballot papers to the Returning Officer/ District Magistrate (in short RO/DM) at the Vikas Bhawan Manjhanpur district Kaushambi. The RO/DM undertook recounting and found that out of the 38 votes polled by the respondent No. 1 Mohd. Saud two were invalid but were counted wrongly in his favour. On recounting therefore, the appellant Manoj Kumar was found to have secured 38 votes whereas respondent No. 1 Mohd Saud 36 votes. Thus with the consent of the observer appointed by the State Election Commission the appellant Manoj Kumar was finally declared as elected.

3. In the above scenario the respondent No. 1 Mohd. Saud who was first declared elected on tie by draw of lottery and subsequently having lost on recounting, preferred an election petition under Rule 35 of the U.P. Kshetriya Panchayat (Election of Pramukh and U.P. State and Settlement of Election Disputes) Rules,1994(hereinafter referred to in short Rules).

4. In the election petition, the respondent No. 1 Mohd. Saud apart from arraying appellant Manoj Kumar, as defendant No.1 also arrayed the RO/DM as the defendant No. 2. Both the defendants filed separate written statements. The respondent No.1 Mohd. Saud in the election petition categorically pleaded that the ARO acting for and on behalf of RO/DM after counting and determining the result had declared him elected and therefore the RO/DM was left with no jurisdiction to make a recount and to declare the appellant Manoj Kumar as elected. The appellant Manoj Kumar by his written statement pleaded that he was rightly declared elected by the RO/DM in accordance with the rules inasmuch as he

had secured 38 votes while the respondent No. 1 Mohd. Saud had only polled 36 votes. The declaration was followed by a certificate issued by the ARO dated 27.2.2006 to the above effect. The respondent No. 2 the RO/DM in his written statement admitted that 79 votes were polled out of which 3 ballot papers were rejected as invalid. The ARO after counting proceeded to determine the result in accordance with clause 4 of schedule II of the Rules, 1994 on the basis of lottery as both the candidates have polled equal number of first preference votes i.e., 38 each, and the respondent No. 1 Mohd. Saud was declared elected. He however stated that the ARO was not the competent person to declare the result. He could not have declared the result even otherwise in view of the instructions of the State Election Commission contained in the letter dated 25.2.2006 which provided for taking consent of the observer appointed by the Election Commission before declaring the result. Therefore when the ARO presented the papers along with his report to him, he recounted the ballot papers and with the concurrence of the observer declared appellant Manoj Kumar as having won by margin of two votes over Mohd. Saud respondent No. 1.

5. In the election petition no oral evidence was adduced by any of the parties. The court below on the pleadings of the parties framed as many as 8 issues as under:-

1. Whether the return of Shri Manoj Kumar, respondent No. 1 dated 27.2.2006 as Kshetra Panchyat Adhyaksha, Mooratganj, District-Kaushambi is void as pleaded in para 15 of the Election Petition?
2. Whether the petition is bad for non-joinder of necessary parties for not impleading A.R.O., and state of Uttar Pradesh as parties?
3. Whether A.R.O., is competent to exercise the powers of R.O., when R.O., available in the District?
4. Whether R.O., has power to recount the ballot papers?
5. Whether R.O., respondent No. 2 is empowered to peruse, vary , examine or recount the ballot papers after the counting was over on 27.2.2006 and From VIII of Rule 29 Kshetra Panchayat Samit Niyamawali had already been fulfilled as pleaded in paras 12,21,23 and 29 of the written statement filed by respondent No. 27?
6. whether the copies of the different News papers filed in the petition are admissible in evidence?
7. Whether on account of return of Manoj Kumar as panchyat Adhyaksha Mooratganj, District-Kaushambi being void petitioners Mohd. Saud himself is entitled to be declared legally elected Kshetra panchayat Adhyaksha, Mooratganj, District-Kaushambi?
8. Whether the petitioner is entitled to any other relief?

6. The Court decided issues No. 1,3,4 and 5 together and held that the ARO was a competent person to declare the election result for and on behalf of the RO/DM. Once he has declared the election result in accordance with Rule 29 and has filled up form VIII, the RO/DM has become functus officio so as to order a recount or to recount the ballot papers and to declare the other candidate as having won. The result declared by the ARO does not get affected by the alleged

circular dated 25.2.2006 issued by the Additional Commissioner State Election Commission U.P., Lucknow.

7. Thus the election petition was allowed and the election of the appellant Manoj Kumar was set aside and the respondent No.1 Mohd. Saud was declared elected as Pramukh, Kshetriyha Panchyat Mooratganj, District Kaushambi.

8. Aggrieved by the aforesaid judgment and order of the court below, the appellant Manoj Kumar has preferred this first appeal.

9. Heard Sri Ravi Kant, Senior Advocate assisted by Sri Gajendra Pratap Singh for the appellant Manoj Kumar and Sri U.N. Sharma, assisted by Sri Ravi Shankar Prasad for the respondent No.1 Mohd. Saud. Learned standing counsel appeared for respondent No. 2.

10. Now before examining respective contentions of the parties it would be better to be clear on facts. Admittedly, the appellant Manoj Kumar and the respondent No. 1 Mohd Saud were the only two contestant. The elections were held on 27.2.2007. Counting took place on the same day. Both the candidates secured 38 votes each after 3 ballot papers were rejected as invalid. Thus there was a tie. Accordingly, lottery was drawn as per clause 4 of schedule II of the Rules, 1994.

11. It is said that on the basis of lottery the ARO declared respondent No. 1 Mohd Saud as elected in accordance with Rule 29 of the Rules and form VIII was duly filled up. Now let me first examine whether in fact the ARO had declared the result of the election. The respondent No.1 Mohd. Saud in paragraph 15 of the election petition has stated that *"the Assistant Returning Officer acting for and on behalf the Returning Officer in the presence of contesting candidates proceeded to count the votes and as provided under Rule 26 carried out all the formalities and determined the result under Rule 27 and declared it under Rule 29*." The RO/DM in his written statement in paragraph 12 has sated *" however it is submitted that the ARO filled form VIII of Rule 29 wrongly*." Thus, from the aforesaid averment made in the election petition which had remained uncontroverted and the reply of RO/DM result of the election was declared as form VIII of Rule 29 was filled up by the ARO. This fact of declaration of result and filling up form VIII has not been denied by the appellant Manoj Kumar in his written statement. In replication respondent No.1 Mohd. Saud in paragraph 5 had further made a specific averment that counting concluded on 27.2.2006 at block Mooratganj and form VIII under Rule 29 was filled. The result was declared by the ARO and the petitioner was declared elected. No evidence to rebut the aforesaid statement was adduced. Thus from the above pleadings of the parties alone it is crystal clear that after the close of the election counting was done, the result was determined and was declared in accordance with Rule 29. Therefore, the finding recorded by the court below that form VIII under Rule 29 was filled up by the ARO and the result was declared suffers from no illegality or perversity.

12. Having come to a definite conclusion that the election result was declared by the ARO on 27.2.2006, it has

to be seen whether he was competent to do so in view of the circular/letter dated 25.2.2006 of the State Election Commission.

13. The submission of the learned counsel for the appellant is that in view of the circular letter dated 25.2.2006 of the Additional Commissioner State Election Commission U.P. Lucknow, the RO/ARO was not authorized to make any declaration of the result without the consent of the observer appointed by the Election Commission.

As far as this submission of Sri Ravi Kant that the ARO was not competent to declare the result in view of circular dated 25.2.2006, it is bereft of merit. The said circular/ letter is reproduced below:

निर्वाचन आयोग संख्या ११२६ स०नि०आ०अनु० व ११२६
प्रेषक,
विनय प्रिय दूबे,
अपर आयुक्त,
राज्य निर्वाचन आयोग, उ०प्र०,
पी०सी०एफ० भवन, ३२ स्टेशन रोड
लखनऊ
सेवा में,
जिलाधिकारी/जिला निर्वाचन अधिकारी (पं०),
सोनभद्र।
राज्य निर्वाचन..... लखनऊ, दिनांक २५ फरवरी, २००६

विषयः-क्षेत्र पंचायत प्रमुख/उप प्रमुखों के सामान्य निर्वाचन -२००६ के संबंध में।

महोदय,

कृपया उपर्युक्त विषयक अपने फैक्स पत्रांक सं०-७०४/ प०नि०/प्रम० निर्वा०/०२ दिनांकि २४ फरवरी २००६ के क्रम में आयोग की ओर से मुझे यह मुझे यह में स्पष्ट करने का निर्देश हुआ है कि क्षेत्र पंचायत प्रमुखों/उपप्रमुखों के निर्विरोध निर्वाचन के परिणाम की घोषणा आयोग की अनुमति के उपरान्त की जायेगी तथा मतगणना के पश्चात निर्वाचन परिणाम आयोग द्वारा तैनात किये गये प्रेक्षक की सहमति के उपरान्त ही जिलाधिकारी/निर्वाचन अधिकारी द्वारा घोषित किया जाय।

भवदीय
ह०अ०
(विनय प्रिय दूबे)
अपर आयुक्त
संख्या ११२६/स०नि०अ०अनु०४/११२६/२००६ तद दिनांक
प्रतिलिपिः- समस्त जिलाधिकारी/जिला निर्वाचन अधिकारी (पं०) उ०प्र० (सोनभद्र.....)सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित।

ह०अ०
(विनय प्रिय दूबे)
अपर आयुक्त

(emphasis supplied)

14. A careful reading of the aforesaid circular/letter reveals that the Election Commission by the said circular had only clarified that only the election result of Pramukh and Up-Pramukh, Kshetra Panchayat who are elected **unopposed** shall be declared by the Returning Officer after seeking consent of the observer appointed by the Election Commission. The said circular as such is applicable for declaring the election result of the candidates who are elected **unopposed** as contemplated under Rule 14 of the Rules and not to the results of contested elections.

15. Sri Ravi Kant has basically made two submissions; first ARO was not competent to declare the election result. It was only the RO/DM who could have declared the same with the concurrence of the observer appointed by the election commission. Secondly, the RO/DM had committed no jurisdictional error in recounting the ballot papers and declaring the appellant Manoj Kumar as elected thereafter.

16. Now therefore only two points remain in this appeal for determination:-

1. Whether the election result declared by the ARO is null and void as he

was not the competent officer authorized to make declaration; and

2. Whether RO/DM had the authority to order recount or to recount the votes, in the absence of any complaint in writing.

17. As regards the first point the provisions of Rule 3,4 and 5 of the Rules are relevant. Rule 3 defines Mukhya Nirwachan Adhikari (Panchyat) as officer appointed by the State government as required by the State Election Commission to perform all functions relating to the conduct of elections under the superintendence, direction and control of the Election Commission.

18. Rule 4 provides DM to be the RO for the purposes of conducting election under the Rules. Rule 5 provides for the appointments of ARO and their functions. Rule 5 which is very relevant and material reads as under:-

5. Assistant Returning Officer:

1. *The Returning Officer may appoint one or more persons as Assistant Returning Officers to assist him in the performance of his functions under these rules.*
2. *Every Assistant Returning Officer shall be competent to perform all or any of the functions of the Returning Officer.*
3. *The Returning Officer may take such assistance from such other staffs in a Government Department for conducting election as he may deem necessary.*
4. *The Returning Officer and the Assistant Returning Officer shall perform their functions and duties under the superintendence, direction and control of the State Election Commission.*

(emphasis supplied)

19. Thus the RO/DM is authorized to appoint as many AROs' as he considers appropriate to assist him in performance of his functions and every ARO is competent to perform all or any of the functions of the Returning Officer.

20. The RO/DM may or may not assign all his functions to the ARO. He is free to assign only limited functions and not all to the AROs'. Therefore, the ARO who is to assist the RO/DM in discharge of his functions is competent to perform only those duties/functions which are assigned to him by the RO/DM.

21. The functions assigned to the ARO can be ascertained by the order of the RO/DM dated 26.2.2006 paper No. 60 Ka/13 on record. The said order demonstrates that RO/DM had only delegated/assigned his limited powers under the Rules to the ARO starting from polling till the end of the closing of the counting. The letter of the RO/DM delegating his power to the ARO is reproduced below:-

कार्यालय जिला निर्वाचन अधिकारी (पं०) कौशाम्बी
पत्रांक १२५६/पं०निर्वा०/प्रमुख-उप प्रमुख/ज्येष्ठ क०/०५-०६
दिनांक २६.२.०६

आदेश

प्रमुख ज्येष्ठ उप प्रमुख एवं कनिष्ठ उप प्रमुख के संबंध में पूर्व निर्गत कार्यालय आदेश संख्या १२२४/पं०नि०/२००५-०६ दिनांक २१ फरवरी २००६ राज्य निर्वाचन आयोग के आदेश संख्या १११७/रा०नि०आ०अनु०-४/१११७/२००६, दिनांक २४ फरवरी २००६ के अनुपालन में एतद द्वारा संशोधित करते हुए मैं डा० एस०एन० पाठक, जिलाधिकारी/जिला निर्वाचन अधिकारी/ (पं०) कौशाम्बी निम्नलिखित अधिकारियों को उनके नाम के सम्मुख अंकित क्षेत्र पंचायतों के लिए सहायक निर्वाचन अधिकारी (प्रमुख पद हेतु) नियुक्त करता हूं। नियुक्त अधिकारीगण क्षेत्र पंचायत प्रमुख के निर्वाचन से संबंधित

मतदान एवं मतगणना प्रक्रिया की समाप्ति तक अपने अधिकार क्षेत्र के कार्यों को निष्ठापूर्वक व निष्पक्ष तथा शान्ति पूर्ण ढंग से सम्पन्न करायेंगे।

क्र०सं०	अधिकारी का नाम	पदनाम	संबंधित संबधित विकास खण्ड का नाम
१	श्रीमातादीन हंस	जिला विकास अधिकारी, कौशाम्बी	चायल
२	डा०यू०पी० सिंह	भूमि संरक्षण अधिकारी, कौशाम्बी	मंझनपुर
३	श्री राशि रंजन कुमार राव	सहायक निबन्धक सहकारी समितियां उ०प्र०	मूरतगंज
४	श्री एस०के० राय	परियोजना प्रबन्धक निर्माण शाखा, जल निगम यूनिट ३३ कौशाम्बी	कौशाम्बी
५	श्री ए०के० सिंह	अधिशाषी अभियन्ता जलनिगम, भरवारी कौशाम्बी	नेवादा
६	श्री आर०के० पाण्डे	अधिशाषी अभियंता सिंचाई खण्ड कौशाम्बी	कड़ा
७	डा०आर०एस० सिंह	मुख्यपशुचिकित्साधिकारी, कौशाम्बी	सिराथू

(डा० एस०एन० पाठक)
जिला मजिस्ट्रेट
जिला निर्वाचन अधिकारी (पं०)
कौशाम्बी

पत्रांक १२५६/पं०निर्वा०/प्रमुख-उप प्रमुख/ज्येष्ठ क०/०५-०६
दिनांक २६.२.२००६

प्रतिलिपि- निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु।

१. उपजिला निर्वाचन अधिकारी (पं०)/मुख्य विकास अधिकारी कौशाम्बी।
२. अपर जिलाधिकारी (वि०/रा०)/प्रभारी अधिकारी पंचा स्थानि चुनावालय, कौशाम्बी।
३. उपजिलाधिकारी चायन, मंझनपुर, सिराथू।
४. समस्त खण्ड विकास अधिकारी, कौशाम्बी।
५. सहायक निर्वाचन अधिकारी (पं०) कौशाम्बी।
६. संबंधित अधिकारियों को अनुपालनार्थ।

(डा० एस०एन० पाठक)
जिला मजिस्ट्रेट
जिला निर्वाचन अधिकारी (पं०)
कौशाम्बी

(emphasis supplied)

22. A plain reading of the aforesaid order demonstrates that the RO/DM had not delegated all his powers to the ARO. Only powers upto close of the counting were delegated or assigned to the ARO. Now it is to be examined whether the powers with regard to polling till the close of the counting covers the power to declare the result. In this regard the provisions of Rule 26,27,28 and 29 are relevant and material. These rules read as under:-

27.Determination of result-After all the valid ballot papers have been arranged in parcels according to the first preference recorded for each candidate, the Returning Officer shall proceed to determine the result of the voting in accordance with the instructions contained in Schedule II to those rules.

28.Recounting- The officer may, either on his own initiative or at the instance of any candidate recount the votes, whether once or more than once, when the Returning Officer is not satisfied as to the accuracy of the previous counting:

Provided that nothing herein contained shall make it obligatory on the Returning Officer to recount the same votes more than once.

29.Declaration of result- When the counting of the votes has been completed and the result of the voting has been determined, the Returning Officer shall in the absence of any direction by the State Election Commission to the contrary, forthwith-

(a) declare the result to those present;
(b) report the result to the District Magistrate, the State Election Commission and the State Government;
(c) prepare and certify a return of the election in Form VIII; and
(d) seal up in separate packets the valid ballot papers and the rejected ballot papers and record on each such packet a description of its contents.

23. According to the aforesaid rules the entire procedure after the close of polling till the declaration of result is divided into four parts. Rule 26 speaks about the procedure for counting. Rule 27 talks about determination of result. Rule 28 about recounting, if necessary and Rule 29 provides for declaring the result. Thus it is seen that counting, determination, recounting and declaration of result are four separate stages. Declaration of result comes only after the counting of ballot papers and the determination of result and thus is separate from counting. In fact it is a stage after counting and determination of result. Thus it is implicit from the language of Rule 29 that when the counting of the votes is completed and the result has been determined, the RO/DM shall declare the result and prepare a certificate of return of election in the form VIII and as such declaration of result is not part of counting.

24. Thus on the conjoint reading of the above provisions and the order of the RO/DM dated 26.2.2006 delegating some of his powers to the ARO it can safely be said that the power to declare the election result was not specifically delegated or assigned to the ARO. Accordingly, the ARO was not the person competent and authorized to declare the election result and to fill up form VIII. Therefore the action on his part of declaring the result and filling form VIII which is prescribed under Rule 9 was void altogether.

25. A Division Bench of this Court in a reported case of ***Ram Kishun Vs. State Election Commissioner and others 2003 (3) and AWC 2271*** while considering the same provisions observed that when the polling is closed, the RO/DM shall proceed to count the votes after rejecting invalid ballot papers and thereafter he shall determine the result. Thereafter, if necessary the recounting may be done either suo moto or at the instance of any candidate which means that the parties are entitled to raise objections with regard to acceptance and rejection of ballot papers, thus objections are to be disposed of first before proceeding to the last stage i.e., of declaring result. In other words, the declaration of result under Rule 29 can be made only after disposal of objections/application, if any, filed against the rejection or acceptance of ballot papers or recounting. Any election result which is declared without disposing of such application/objection would be nullity.

26. In short, the conclusion derived from the above authority is that where the election result is declared unauthorisedly, the same is liable to be treated as null and void. In the instance case as the RO/DM has not delegated his power to declare the election result in favour of the ARO, he was not the officer competent to declare the result and fill up the form VIII under Rule 29 of the Rules. Accordingly, the election result declared by the ARO was without jurisdiction and as such null and void which in no way conferred any right

in favour of respondent No. 1 Mohd. Saud.

27. Sri U.N. Sharma, Senior Advocate appearing for respondent No. 1 Mohd. Saud submitted that once the ARO had declared the election result, the RO/DM became functus officio to take up the matter again so as to recount the votes and to declare the result afresh. In support he has placed reliance upon certain Division Bench decisions of this Court reported in ***1995 AWC 1465 Smt. Ram Kanit Vs. DM and others, (2000) 3 UPLBEC 2097 Shyam Sakhi (Smt.) and others Vs. State Election Commission, U.P., (2004) AWC 2777 Shambhu Singh Vs. State Election Commission U.P., and others and others and (2006) UPLBEC 372 Sunita Patel (Smt.) and others Vs. State of U.P., and others***.

28. In all these authorities the Court held that once an election result is **duly** declared, recounting can not be done so as to declare the result afresh as the authority after declaring the result becomes functus officio so as to re open the matter. However, none of the aforesaid authorities apply in the facts and circumstances of the present case. In the case at hand the election result was never **duly** declared as the ARO who had declared the same was not competent to do so. The result declared by him was null and void. Therefore, the jurisdiction of the RO/DM had not ceased.

29. Now comes the submission whether the RO/DM had any power to order recount once the counting had been done and completed by the ARO. In this regard a glance at Rule 28 quoted above would make the situation clear. It provides and authorizes the RO/DM to recount the votes *suo moto* or at the instance of any candidate where he is not satisfied about the accuracy of the previous counting. Thus the RO/DM was competent to undertake recounting even on his own motion. However, on record there is no order which could reveal about the satisfaction of the RO/DM for holding the recounting. The recounting was done suo moto in view of the report of the ARO. The absence of the order recording satisfaction makes no difference as it is not the case of respondent No. 1 Mohd. Saud that the recounting was done without the satisfaction as to the accuracy about the previous counting. Thus the RO/DM was within its jurisdiction in recounting the votes as the election result before that had not been declared in accordance with law by the competent authority.

30. In the last a faint effort has been made by Sri U.N. Sharma, learned counsel for the respondent that the counting had commenced at the place of election and therefore it was not proper to change the said place of counting by removing the ballot papers from that place to the district headquarter. The submission has no merit. In a district there are generally several Kshetra Panchayats. Obliviously, election to all the Kshetra Panchayats in a district would be held at different places, but the result of the elections of all these Kshetra Panchayats had to be declared by the RO/DM. It is normally, not possible for the RO/DM to visit each Kshetra Panchayat at the same time for declaring the result. Therefore, it is but natural for the RO/DM to declare the results of all the Kshetra Panchyats at one place i.e., in his office at District headquarter. This is precisely what has been done by the RO/DM. As such no

illegality was committed by him in declaring the result from his office.

consider the effect of the order of the RO/DM by which he delegated only limited powers to the ARO and the legal position that declaration of result is separate and is not part of counting. Thus the court below manifestly erred in law in holding that as the result was validly declared by the ARO and the RO/DM has become *functus officio* to have ordered recounting and to make a different declaration in favour of the appellant Manoj Kumar.

32. Undisputedly, in the recounting appellant Manoj Kumar was declared elected and a certificate in form VIII was also issued in his favour by the RO/DM declaring him as elected over respondent No. 1 Mohd. Saud by a margin of two votes. Thus, he was rightly declared elected.

33. In view of the above, the appeal succeeds and is allowed. The judgment and order dated 30.7.2007 passed by the District Judge in Election Petition No. 3/70 of 2007 Mohd. Saud Vs. Manoj Kumar is set aside.

34. The parties shall bear their own costs.

Note:-Office to send a copy of this judgment and order to the State Election Commission, U.P., Lucknow and RO/DM, Kaushambi.

---

31. The court below while deciding issues No. 2,3,4 and 5 have failed to

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. [954] of 2007

Sanjay Mohan ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellants:
Sri Ashok Khare
Sri P.N. Ojha

Counsel for the Respondents:
Sri Girish Chandra Upadhyay
Sri R.P.Dubey
Sri Sanjay Kumar

Allahabad High Court Rules 1952, Chapter V Rule-14-Tied up Cases-pre admission stage-even after change of roster-such direction of Single Judge against the Law laid down by Apex Court in Jasbir Singh Case-apart from violation of Rules-14.

Held: Para 17

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).

Case law discussed:

2006 (8) SCC-294, 1998 (1) SCC-I, 1996 AWC-644 (DB)

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

1. Heard Mr. Ashok Khare, Senior Advocate assisted by Mr. P.N.Ojha appearing for the appellant, Mr. Girish Chandra Upadhyay, Standing Counsel for the State appearing for respondents no.1, 3 and 4 and Mr. R.P.Dubey appearing for respondent no.2. Mr. Sanjay Kumar appears for respondent no.5. All respondents are served.

2. The appeal was admitted by an order passed by a Division Bench, in which one of us (Hon. H.L.Gokhale, C.J.) was a party, on 1.11.2007. With the consent of the counsel appearing for the respondents the appeal is taken up for final hearing and is being disposed of.

3. This appeal arises out of writ petition no.9456 of 2007 filed by the respondent no.5 herein, one Puran Lal Sonkar, father of one Km. Sunaina Devi. The prayer in the petition was to direct the State of U.P. and the Additional Secretary, Madhyamik Shiksha Parishad to consider the request of the petitioner for providing examination centre at Mahatma Joti Rao Phule Vidya Ashram Higher Secondary School, Karadham, district Kaushambi, where the daughter of respondent no.4 was studying. The petition was filed on 19th February, 2007 and the examination was to be held in March, 2007. Inasmuch as the time to consider such a prayer was inadequate, the centre could not be allotted at that school. Meanwhile, the daughter of respondent no.4 appeared for the High School examination, from where she was allotted the centre and passed the examination. The mark-sheet is at Annexure-14 to this appeal. Mr. Sanjay Kumar appearing for respondent No.5 accepts this position. Now, what has happened is that the learned Single Judge, who was seized of the petition continued to retain and proceed with the matter which in fact thus had become clearly infructuous. He went on passing different orders. These orders are dated (i) 12.3.2007, (ii) 23.3.2007, (iii) 6.4.2007, (iv) 4.5.2007, (v) 2.7.2007, (vi) 9.8.2007, (vii) 17.9.2007, (viii) 12.10.2007 and one more order directing a C.B.I. enquiry.

4. The first order dated 12.3.07 records that certain black listed examination centres initially withdrawn were subsequently re-allotted and that required enquiry. The second order dated 23.3.2007 records that a preliminary enquiry had been done by the Chief Secretary into such 34 centres in that district detecting irregularities. The order thereafter directed that action be taken against the Sachiv, Madhyamik Shiksha Parishad and the Director of Education for their inaction within ten days on the basis of the report dated 22.3.2007 referred in that order. By the next order dated 6.4.2007 the learned Single Judge ordered for an enquiry by C.B.I. This order was challenged by filing a Special Appeal and that order was stayed. Subsequently, on 4.5.2007 the learned Single Judge directed the Chief Secretary to file his personal affidavit with respect to the steps being taken. This was followed by one more order dated 2.7.2007, which directs for issuance of charge-sheet. Meanwhile, new Chief Secretary had taken charge. He

was directed to serve charge-sheet upon the District Inspector of Schools, Kaushambi within 15 days. The order passed thereafter is dated 9.8.2007. It records that an I.A.S. Officer has been appointed as the Enquiry Officer for the enquiry contemplated by the learned Single Judge. On 17.9.2007 the learned Single Judge recorded that the progress made by the Government was too slow and the report of the Enquiry Officer be produced in original on subsequent date. It also directed that the Principal Secretary as well as the Enquiry Officer, an I.A.S. officer will remain present in the court. Lastly, on 12.10.2007 the matter was adjourned to 2.11.2007 and it was at this stage that the appeal was filed.

5. This appeal has been filed by the Director of Education (Secondary) challenging these eight orders passed on 12.3.2007, 23.3.2007, 6.4.2007, 4.5.2007, 2.7.2007, 9.8.2007, 17.9.2007 and 12.10.2007. As far as the order dated 6.4.07 is concerned, which directs for C.B.I. enquiry, the State filed an appeal and stay has been granted in that appeal. The appellant seeks to challenge that order also.

6. The appellant had applied for joining in the petition as respondent by moving an impleadment application. No orders have been passed on that application and the application remains pending. It is for this reason that leave to appeal was sought to file the appeal and that was granted on the last date.

7. Two principal grounds of challenge have been raised in this appeal. The first is that when the daughter of respondent no.4 had appeared at the examination and passed it, the petition was worked out. The petitioner had sought centre at the school where his daughter was studying for her convenience. She appeared at the centre which was allotted to her. Therefore nothing remained to be done further. Grounds no.5 and 6 of the appeal are that since the examination in question had already commenced and the results were declared nothing survived in the petition and the petition ought to have been disposed of. In ground no.7 it is specifically averred that the learned Single Judge ought to have confined himself to the pleadings and the prayers of the writ petition and each of the direction/observation of the learned Single Judge are totally beyond the scope of the petition.

8. The counsel for original petitioner, who is joined as respondent no.5, does not dispute these submissions of the appellant, nor any other counsel appearing for other respondents. In this behalf one must note that when a litigant files a petition in the court, the litigant approaches the Court for the particular relief, which he seeks in the petition. The learned Judge is expected to decide the prayer in the petition in the light of the averments made in the petition and the grounds taken therein after looking into the counter affidavit, which may be filed by the respondents and the rejoinder affidavit that maybe filed by the petitioner himself. The manner in which the learned Single Judge has gone into other aspects of the matter in the present case is not permissible in an adversary litigation. The learned Single Judge has gone into the question as to why the 34 examination centres cancelled at one point of time from being examination centre were revived and why action was not taken

against those responsible in this behalf. He has further gone to the extent of directing a C.B.I. enquiry. None of these questions were raised in the petition and the counsel for respondent no.5 has accepted that his petition had already been worked out. The orders passed by the learned Single Judge appear to have been passed in the interest of purity of examinations. However, these orders are in the nature of orders which are passed on a public interest litigation and that was not the jurisdiction of the learned Single Judge. The consequence has been that the learned Single Judge has gone on passing orders after orders and the petition that ought to have been disposed of in April/May, 2007 remained pending. The judicial time that would have been better utilised was spent on a petition that had already been worked out. There is enough substance in this ground of appeal as pointed out above.

9. The other ground raised in this appeal which is to be looked into is ground no.14. In this ground it is stated that the matter came up for consideration before the learned Single Judge at a point of time when he was seized of the jurisdiction with regard to education matters in the month of February/March, 2007. Thereafter what is stated in this ground is reproduced below:

"However, subsequent thereto there has been change of jurisdiction of the learned Single Judge on more than one occasion and His Lordship is no longer seized with jurisdiction pertaining to education matters. However, despite such cessation of jurisdiction the writ petition to be listed before the learned Single Judge treating the same to be part heard/tied up with the learned Single Judge."

10. Mr. Khare, learned Senior Counsel appearing for the appellant submitted that these orders were passed by the learned Single Judge when he had no jurisdiction to pass such orders. We have looked into the orders passed by the learned Single Judge. Firstly, in none of the orders it has been stated that the matter may be treated as tied up or part heard. He has all throughout stated that the matter may be listed or put up on a subsequent date for further orders. Even if he was to treat the matter as part heard or tied-up at the pre-admission stage, 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."

11. 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)

12. 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.

13. 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.

14. 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."

15. 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.

16. 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.

17. 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 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).

18. In these circumstances, we accept both the submissions of the appellant, namely, the petition had become infructuous once the daughter of the original petitioner had appeared at the examination from the centre that was allotted to her and secondly, 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.

19. In these circumstances, we allow this appeal and set aside the orders dated 12.3.2007, 23.3.2007, 6.4.2007, 4.5.2007, 2.7.2007, 9.8.2007, 17.9.2007 and 12.10.2007 passed by the learned Single Judge and the petition is also disposed of as worked out. The registry will make necessary entry.

20. In the circumstances of the case, obviously there will not be any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2007

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 34209 of 2005

Markandey Maurya ...Petitioner

Versus

State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri P.C. Sritvastava

Counsel for the Respondents:
Sri V.S. Shukla
Sri A.K. Bajpai
S.C.

Irrigation Department Munshi Service Rules 1954-Rule 5,12 and 13- Recruitment on the Post of Head Munshi-petitioner initially appointed on the Post of Sinchpal in 1979-promoted on the post of Munshi on 27.11.98, confirmed on 29.10.04-further promoted on 15.11.04 as Head Munshi-cancellation on the ground not having 10 years working experience as Munshi-held-illegal-on the date of promotion petitioner posses more than 10 years experience-particularly the private respondent being appointed as Mate in 1997 can not be promoted as head Munshi-legal aspect clarified.

Held: Para 11

Learned counsel for the respondent No. 5 submits that the promotion of the petitioner as head Munshi has rightly been cancelled as he was not qualified for such a promotion as under Rule 12 of the Rules, 1954.he has not put in at least 10 years continuous service on the post of Murshi I am not at all impressed by the above submission. A plain reading of Rule 12 and 13 indicates that for the promotion on the post of Munshi the Patrol or Tube-well Operator as the case may be apart from being in the required age group should have least 5 years of continuous service and should be willing to work as Munshi. As far as for the appointment on the post of head Munshi by promotion, the necessary eligibility conditions are that the candidates

should be confirmed Munshi with at least "10 years continuous service". The said rule no where stipulates in specific terms that 10 years of continuous service should be on the post of Munshi. Therefore, in the absence of such specification "10 years of continuous service" refers to service in the department whether it happens to be on the post of Munshi or any other inferior post. The petitioner is working in the department since 16.10.1979 and as such on the date of his promotion as head Munshi he had put in over 10 years service in the department. Since the petitioner has admittedly, put in over 10 years service and was working as a confirmed Munshi, on .the date of his promotion as head Munshi, it can not be said that he was not qualified or eligible to be promoted.

(Delivered by Hon'ble Pankaj Mithal. J.)

1. Heard learned counsel for the parties and the Standing counsel.

2. The petitioner has challenged the order dated 15.4.2005 (Annexure 8 to the writ petition) by which the promotion granted to him on the post of head munshi has been cancelled, order dated 15.4.2005 (Annexure·9 to the writ petition) by which the respondent No.5 has been promoted in his place as head munshi and the order dated 20.11.1998 (Annexure 2 to the writ petition) promoting the petitioner on the post of munshi. The challenge to the third order has been made after the application of the petitioner for amending the writ petition was allowed by the Court vide order dated 28.8.2006.

3. Learned counsel for the respondent No. 5 has tried to raise a preliminary objection that the petitioner can not be permitted in this writ petition which has been filed in the year 2005 to challenge the order dated 20.11.1998. The aforesaid objection in substance seeks to question the order of the Court allowing the amendment application permitting the petitioner to challenge the aforesaid order. However, the petitioner has not applied for the recall of the order dated 20.11.1998 allowing the amendment and the correctness of the said order can not be gone into by me as I am not sitting in appeal over the said order. Accordingly, the objection as raised by the learned counsel for the petitioner is rejected.

Now upon the merits.

4. The petitioner was appointed on the post of Seenchpal also known as patrol employee in the irrigation department on 16.10.1979. He was promoted to the post of Munshi vide order dated 27.11.1998 with effect from 20.11.1998. The petitioner was confirmed as Munshi on 29.10.2004 with effect from 1.4.2003. Finally, the petitioner was promoted to the post of Head Munshi vide order dated 15.11.2004. However, the said order has been cancelled vide the impugned order dated 15.4.2005 passed by the Superintendent Engineer.

5. On the other hand respondent No. 5 who was appointed initially as Meth was promoted as Munshi vide order dated 20.11.1998 and finally as head Munshi by the order dated 15.1.2005 after the promotion of the petitioner was cancelled.

6. Learned counsel for the petitioner contends that under the Irrigation Department Munshis Service Rules, 1954 which govern their services, there is no channel of promotion from the post of Meth to that of the Munshi and therefore, the order dated 20.11.1998 promoting the

respondent No. 5 as Munshi is wholly illegal and since the petitioner can not be promoted as Munshi he is also not entitle to be promoted and appointed as head Munshi.

In order to appreciate the above submission, it is proper to extract the relevant Rules 5,12 and 13 of the Rules, 1954.

"Sources of Recruitment- (I) Recruitment to the Service shall be made as follows:-

(a) Head Munshis...By promotion from amongst confirmed Munshis employed in Executive Engineer's Offices in a circle.
(b) Munshis...(i) By promotion from amongst Patrols employed in Canal Divisions and Tube-well Operators employed in Tube-well Division, and

(ii) By direct recruitment, if suitable Patrols and Tube-well Operators are not available.
(2) .....
12. Procedure for recruitment to he post of Head Munshi- (a) each Executive Engineer shall make preliminary selection from amongst all the confirmed Munshis in his division, who have put in at least ten year's continuous service (including the period of officiating or temporary service) and who are eligible under rule 8 (b), and send on June 1, every year the names of his nominees along with their character rolls and personal files, if any, to the Superintending Engineer. If any senior Munshi eligible for promotion under the Rules is left out in the recommendation of an Executive Engineer, he shall explain the reasons for such omission while sending his nominations to the Superintending Engineer. He shall also send to the Superintending Engineer the character rolls and personal files, if any, of such persons.
(b) ……
(c) ……
13. Procedure for recruitment to the posts of Munshi by promotion- (a) Recruitment to the posts of Munshis under Rule 5 (I) (b) (i) shall be made strictly on merit by the Committee from amongst confirmed Patrols in the Canal Divisions and the confirmed Tube-well Operators in the Tube-well Divisions as the case may be-
(i) who are eligible under rule 8(b).
(ii) who have put in at least five year's continuous service (including period of officiating or temporary service), and
(iii) who, are willing to work as Munshi.

(b) The Committee shall arrange the names of the selected candidates in order of preference the number in the list being a little larger than the number of vacancies be filled by promotion.

A plain reading of Rule 5 along with Rule 13 indicates that there are two sources of making appointment on the post of Munshis i.e.
(i) By promotion from amongst Patrols employed in Canal Divisions and Tube-well Operators employed Tube-well Division; and
(ii) By direct recruitment, if suitable Patrols and Tube-well Operators are not available.

7. It· also provides that for filling the post of Munshis recruitment shall be made strictly on merit from amongst the confirmed Patrols in the Canal Divisions and the confirmed Tube-well Operators of Tube-well Divisions as the case may be provided they are employed and have put in 5 years as continuous service and are willing to work as Munshis. Apart from

the above, there is no other mode of recruitment of the Munshis. Therefore, there is no channel of promotion from the post of Meth to the post of Munshi. Admittedly, the post of Meth is different to that of a Patrol employee.

8. In view of the above, I am of the opinion that the appointment of the respondent No. 5 by promotion as Munshi from the post of Meth was de-hors the rules and is liable to be set aside.

9. Since the appointment of the respondent No.5 as Munshi is de-hors the rules, he is not entitle to be promoted as head Munshi. Accordingly the order dated 15.4.2005 promoting him as head Munshi also falls to the ground.

10. Now let me examine the validity of the promotion of the petitioner as Head Munshi.

11. Learned counsel for the respondent No. 5 submits that the promotion of the petitioner as head Munshi has rightly been cancelled as he was not qualified for such a promotion as under Rule 12 of the Rules, 1954.he has not put in at least 10 years continuous service on the post of Murshi I am not at all impressed by the above submission. A plain reading of Rule 12 and 13 indicates that for the promotion on the post of Munshi the Patrol or Tube-well Operator as the case may be apart from being in the required age group should have least 5 years of continuous service and should be willing to work as Munshi. As far as for the appointment on the post of head Munshi by promotion, the necessary eligibility conditions are that the candidates should be confirmed Munshi with at least “10 years continuous service". The said rule no where stipulates in specific terms that 10 years of continuous service should be on the post of Munshi. Therefore, in the absence of such specification “10 years of continuous service” refers to service in the department whether it happens to be on the post of Munshi or any other inferior post. The petitioner is working in the department since 16.10.1979 and as such on the date of his promotion as head Munshi he had put in over 10 years service in the department. Since the petitioner has admittedly, put in over 10 years service and was working as a confirmed Munshi, on .the date of his promotion as head Munshi, it can not be said that he was not qualified or eligible to be promoted.

12. No other illegality in the promotion of the petitioner as head Munshi has been pointed out which could have instigated the cancellation of the promotion of the petitioner. Accordingly, the impugned order dated 15.4.2005 passed by the Superintending Engineer cancelling the promotion granted in favour of the petitioner is liable to be quashed.

13. In view of the aforesaid facts and circumstances, the writ petition succeeds and is allowed. The impugned orders dated 20.11.1998 (Annexure-2 to the writ petition), 15.4.2005 (Annexure-9 writ petition) promoting the respondent No.5 .as Munshi and as head Munshi respectively and the order dated 15.4.2005 (Annexure-8 to the writ petition) cancelling the promotion of the petitioner as head Munshi are quashed.

14. No order is passed as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2007

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE R.N. MISHRA, J.

First Appeal From Order No. 3133 of 2007

Santosh Kumar alias Tata
...Plaintiff-appellant
Versus
Smt. Meena Devi ...Defendant-Respondent

Counsel for the Appellant:
Sri. V. Singh
Sri. J.S. Pandey
Sri. Phaujdar Rai
Sri. Ranjay Kumar

Counsel for the Opposite Party:
Sri. Pradeep Kumar Rai

Code of Civil Procedure-Section 151 readwith Order 31 rule 1 and 2-Grant of injunction in favour of defendant-the order passed by the Trial Court-challenged beyond the ambit of the provision of the order 39 rule 1-held-Trial Court rightly exercised its power under section 151 C.P.C. warrant no interference

Held: Para 5 & 6

This plea is not acceptable that relief for injunction cannot be granted in favour of defendant because no court fee has been paid by her on the basis of principle of avoiding multiplicity of proceedings. In that case, the tenant had sought permission against landlord to carry out only repair in order to make premises habitable and the injunction was granted against the landlord because by granting injunction, he was not likely to suffer at all.

In view of our above discussions, we come to the conclusion that while passing the impugned order, the learned trial court has acted strictly on the basis of principles of law and the impugned order needs no interference in appeal and consequently, the appeal is summarily dismissed

Case law discussed:
2000(91) RD 615, 1972, 1972 ALJ 379, AIR 1989 Alld 164

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

1. This appeal has been preferred by the plaintiff-appellant Santosh Kumar alias Tata against the order dated 12.10.2007, passed by Sri Bachchu Singh, Civil Judge (Senior Division), Ballia in O.S. No. 276 of 2004, by which ad-interim injunction 6C-2 moved by the plaintiff-appellant has been rejected but the application 60C-2, moved by the defendant-respondent Smt. Meena Devi for the same purpose has been allowed and the plaintiff-appellant has been restrained till the pendency of the suit from interfering in any way with the title and possession of defendant-respondent in the property in dispute.

2. We have heard Sri Phaujdar Ral and Sri V. Singh, learned counsel for the plaintiff-appellant and Sri Pradeep Kumar Rai, learned counsel for the respondent.

3. The plaintiff-appellant filed a suit for injunction on the basis of a Will dated 6.3.2003, alleged to have been executed by Shambhoo Prasad, husband of defendant-respondent regarding his two immovable properties detailed in the Will, the copy of which is Annexure-3. These properties are the houses, one situated in District Ballia of Uttar Pradesh and

another in District Thane (Maharashtra). It has been alleged in the plaint that late Sambhoo Prasad gave right of ownership to the plaintiff-appellant by the Will and the respondent being widow has been given only right of residence and maintenance. The suit is being contested by the respondent on the ground that the alleged Will is a forged document and her husband never executed any Will in favour of plaintiff-appellant who is real nephew of the deceased Sambhoo Prasad. A registered Will has been executed in the year 1976 by deceased Sambhoo Prasad in favour of defendant-respondent and by virtue of that Will, the respondent is in possession of the properties in suit as owner. The plaintiff-appellant is a member of Nagar Palika, Ballia and misusing his position as such, he got his name mutated in place of deceased Sambhoo Prasad in Nagar Palika records. When the defendant-respondent came to know about this, she moved application before the Collector concerned and her prayer was accepted and mutation order was set aside. The Collector directed disposal of mutation application after giving opportunity to the respondent to be heard. Against said order, the plaintiff-appellant filed Civil Misc. Writ Petition No. 44119 of 2004 before this Court, which was dismissed and the order, passed by the Collector, Ballia was upheld. Learned trial court considered each and every aspect of the case and perused the papers on record and came to the conclusion that the plaintiff-appellant has no prima-facie case and rejected his ad-interim injunction application but allowed the application of defendant-respondent and gave the aforesaid direction.

4. The copy of plaint has been annexed as Annexurre-1 to the memo of appeal. A plain perusal of this plaint shows that the plaintiff-appellant has no where disclosed execution of Will by deceased Sambhoo Prasad in favour of defendant-respondent in the year 1976. Thus, he has concealed the material fact and has not come with clean hands. Before the trial court, the copy of Will in favour of defendant-respondent had been filed, that Will is a registered Will as is evident from the contents of impugned order. Learned trial court has observed that when the deceased had already executed a registered Will in favour of his wife, that could be replaced by only another registered Will. He has cited **2000 (91) RD 615 S. Saktivel Vs. M. Venugopal Pillai and others,** in which the Hon'ble Apex Court has observed that terms of a registered document can be altered, varied or rescinded only by subsequent registered document and not otherwise. We have perused the aforesaid judgement. The facts of that case were different. In that case, a settlement had arrived between the parties by a registered deed and later on, terms were changed by unregistered deed and in that case, the Hon'ble Apex Court gave the aforesaid opinion. But as regard Will is concerned, law is very clear. A Will needs not necessarily be registered and unregistered will can also be executed by any person having right to do so. The registered Will once executed in favour of some person, can be cancelled by another unregistered Will executed in favour of other person, but there must be cogent reason for the same. The Will under dispute is subjudice before learned trial court and its genuineness is to be decided after evidence. But prima- facie, It appears unreasonable because once deceased

executed registered Will in favour of his wife what was the occasion to execute another unregistered Will after a gap of about 27 years in favour of his nephew and by subsequent Will only right of maintenance and residence has been given to the widow. A person, who had no male or female issue and who earned money by own sources and constructed two houses at different places, could how ignore his widow by giving property to his nephew. This is a circumstance, which favours the defendant-respondent. As regard entries in the Nagarpalika record are concerned, it is evident from the order of learned trial court that the matter is still subjudiced and mutation record favour of plaintiff-appellant has been set aside by the Collector concerned and the plaintiff-appellant could also not get any relief from the High Court. The possession of defendant-respondent on the property in dispute is admitted in the plaint itself. Therefore, in such circumstances, this conclusion of learned trial court is quite reasonable that there is no prima-facie case in favour of plaintiff-appellant but definitely it is in favour of defendant-respondent. As regard the balance of convenience is concerned, that is also got favour to defendant-respondent being widow of deceased residing in the house in dispute. The plaintiff-appellant has no irreparable loss, if he succeeds in litigation on the basis of Will, he will get ownership of the property in dispute, in which admittedly defendant-respondent has been given right of residence and maintenance.

5. Learned counsel for the appellant has challenged power of learned trial court to grant ad-interim injunction in favour of defendant-respondent. He has contended that in a suit by the plaintiff-appellant, the defendant-respondent could not be granted injunction in her favour by the learned trial court. But we see no force in this contention because law is very clear on the point. In the case of **Dilip Kumar Vs. Chaudhary Ram Saran Vakeel; 1972 ALJ 379**, it has been clearly held that the court can grant injunction in favour of defendant under Section 151 C.P.C. In the case of **Shiv Ram Singh Vs. Smt. Mangara and others**; AIR 1989 Alld. 164, the position has been further clarified. It has been held that interim injunction in favour of defendant can be granted under section 151 Civil Procedure Code 1908 under inherent power of the court. There is no limitation under rule 1 and 2 of Order 39 C.P.C for granting injunction in favour of defendant under inherent power, but it should be granted in very rare cases and under exceptional circumstances. This plea is not acceptable that relief for injunction cannot be granted in favour of defendant because no court fee has been paid by her on the basis of principle of avoiding multiplicity of proceedings. In that case, the tenant had sought permission against landlord to carry out only repair in order to make premises habitable and the injunction was granted against the landlord because by granting injunction, he was not likely to suffer at all.

6. In view of our above discussions, we come to the conclusion that while passing the impugned order, the learned trial court has acted strictly on the basis of principles of law and the impugned order needs no interference in appeal and consequently, the appeal is summarily dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2007

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE R.N. MISRA, J.

Civil Misc. Writ Petition No. 59971 of 2007

Prahlad Kumar Gupta and another
...Petitioners
Versus
The State of U.P. & others...Respondents

Counsel for the Petitioners:
Sri Pradip Kumar
Sri Ashutosh Srivastava

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226-Order passed by district Consumer Forum-challenged-petitioners running business of deposit of money on interest-complainant invested huge money F.D. issued-but on production of receipts-petitioner's company denied the payment-Consumer Protection Act 1986-provides complete code-can not be interfered by writ court.

Held: Para 9

Learned counsel for the petitioner has argued .that business run by the petitioners could not be termed as Banking, but we do not agree with this contention. When the petitioners and their Companies were indulging in getting money deposited by the customers on interest and the F.D.R were issued, they were duty bound to make payments and such type bf transactions definitely terms as Banking.
Case law discussed:
2005 (3) AWC 4110, AIR 1994 Kerala-19

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

1. By invoking jurisdiction of this Court, under Article 226 of Constitution of India through this writ petition, the petitioners have challenged jurisdiction of District Consumer Forum Budaun in passing the order dated 2.2.2007 in Consumer Complaint No. 306 of 2002, by which the petitioners have been ordered to pay the amount of Fixed Deposit Receipts in favour of Km. Pragya Bharti, Rohit Kumar and Akshey Kumar, the complainants of the case and some other persons named in annexure-3.

2. We have heard learned counsel for the petitioners, learned Standing Counsel for respondent nos. 1 and 2 and learned counsel for respondent no.3.

3. The main grievance of the petitioners is that District Consumer Form (hereinafter called as Forum) has no jurisdiction to intervene in such matters, in which payment of money is involved. The complainants have remedy of filing civil suit for recovery of money, if any.

4. Surprisingly enough, the petitioners have not made party to the aforesaid complainants, in whose favour orders have been passed. It appears from the contents of writ petition that the Forum has passed the orders on different dates in favour of the persons named in the list Annexure-3 to the writ petition and recovery proceedings are being initiated by the respondents to execute those orders. The petitioners were running business of deposit of money on interest in the name and style of M/s Godavari Hire Purchase Pvt. Ltd, M/s Godawari Installments, Pvt. Ltd, M/s Bros Hire Purchase Pvt. Ltd and M/s Raj Financers

Registered. They were Directors of the said Companies. Said companies were engaged in the business of private financing. A number of persons deposited their money in the aforesaid Companies and said Companies issued F.D.Rs but when depositors /consumers presented their receipts for payment, the aforesaid Companies refused to make payment, therefore, customer approached the Forum and got orders in their favours. The copy of complaint filed by Km. pragya and two others before the Forum is Annexure-4 and the written statement filed by the petitioners is Annexure 4A. In para 6 of additional pleas of written statement, the petitioners have not even clearly admitted deposits. Contents of para 6 are quoted below:

"यह कि परिवादी ने आकर्षक ब्याज को देखते हुए अपने स्वार्थ के कारण तथा कथित रूपया जमा किया होगा।"

5. In para 7, it has been mentioned that business of aforesaid Companies have failed and the petitioners are not in a position to make payment to the customer. This shows that the customers were cheated by the petitioners and they collected huge amount from the innocent people and failed to make payment. This is a fraud and cheating on the part of petitioners and their Companies. This is no ground to refuse payment of customers that the business of petitioners has failed. No where, petitioners have been declared insolvent.

6. As regard jurisdiction of Forum is concerned, we are of the opinion that the Forum has jurisdiction to intervene in the said matters and give relief to the consumers. Section 2 (d) of Consumer Protection Act 1986, defines consumer as under:

2(d) **"consumer"** means any person, who

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such services for any commercial purpose".

7. It is evident from clause 2 of said Act that the petitioners and their Companies were beneficiary of deposits made by the customers and in lieu thereof, the petitioners and their Companies had promised to repay the deposits to the customers along with interest. The money deposited by the customers were utilized by the petitioners for their own benefit and took advantage of same, therefore, in not making the payment of depositors along with interest by the petitioners and their Companies, they lacked in service, which has been defined under Section 2(0) of said Act which runs as under:

2(0) service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free if charge or under a contract of personal service."

8. The definition given above includes provisions of facilities in connection with banking. The enforcement of payment of F.D.R against a Finance Company or Society doing business of banking can be ordered by the Forum. In the case of **Allahabad Bank Vs. Shiv Swaroop Srivastava; 2005 (3) A.W.e 4.110 (UPC)**, the State Consumer Disputes Redressal Commission U.P. Lucknow has clearly held that deficiency in service by the Banking Companies is still covered under the jurisdiction of Consumer Forum. In that case, the complainant had invested Rs.35,000/ with the appellant Bank in the shape of F.D.R but when receipt was presented for payment, the Bank refused on the ground that it had been obtained by fraud. The matter went to District Consumer Forum, who on the basis of evidence recorded findings that claim of the complainant was genuine and ordered for payment of F.D.R money. Against said order, the appeal was preferred to the State Consumer Forum under section 15 of the Act. The State Forum confirmed the jurisdiction of District Forum and dismissed the appeal preferred by the Bank.

9. Learned counsel for the petitioner has argued .that business run by the petitioners could not be termed as Banking, but we do not agree with this contention. When the petitioners and their Companies were indulging in getting money deposited by the customers on interest and the F.D.R were issued, they were duty bound to make payments and such type bf transactions definitely terms as Banking.

Learned Standing Counsel has challenged maintainability of this writ petition. The Kerala High Court in the case of **A.V. Georgekutty Vs. State of Kerala AIR 1994 Kerala 19**, clearly held that the question as to who is a consumer could be decided by the Consumer Forum itself.

10. From various decisions, it is clear that the High Court is not bound to entertain every such writ, but jurisdiction of High Court, under article 226 of the Constitution of India is not clearly barred. Whenever question of jurisdiction is raised, the High Court normally permits it under Article 226 of the Constitution and examines whether proceedings instituted before the Tribunal are within the jurisdiction, but the High Court has discretion to entertain such writ. The Consumer Protection Act has clearly made provisions for appeal. Any person aggrieved from the order of District Forum can prefer appeal to the State Forum under section 15 of the Act and any person aggrieved by the judgement/order-of State Forum can prefer appeal to National –Forum under Section 19 of the Act. The judgement of National Forum is final. The intention of legislature appears to provide for a speedy and efficacious remedy, for resolving

consumer disputes. The statement of objects and reasons clearly mentions that the Act is intended to provide speedy and simple redressal of consumer disputes by providing a self-contained quasi-judicial machinery. The Act has created a hierarchy of bodies under the Act with power to hear appeals at every stage. No one can say that the District, High Court or Supreme Court Judges who preside over the Consumer forums are not competent to decide the question of jurisdiction. They have long judicial experience to face such questions, however, complicated. They are not like executive authorities who have no judicial experience. It is well settled that such bodies are entitled to decide whether they have jurisdiction to decide a dispute and whether the complainant before them is a consumer within the meaning of Section 2(d). The intention of legislature would be defeated if at the initial stage itself, objections regarding the jurisdiction are permitted to be raised before the High Court because such proceedings are bound to cause delay an the very purpose of creating the new forum would be defeated.

11. The petitioners can not get any benefit of order dated 18.9.2007 shown to us by Hon'ble Single Judge in Writ Petition No. 45088 of 2007 against District Consumer Forum's order regarding jurisdiction. Only admission of said writ petition for hearing gives no benefit to any party.

In view of our above discussion, we are of the considered opinion that this writ petition is devoid of merits and is liable to be dismissed.

12. Accordingly, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2007

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 69235 of 2005

Smt. Shanti Devi ...Petitioner
Versus
Office of Insurance Ombudsman and others ...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Srivastava
Sri Anoop Baranwal

Counsel for the Respondents:
Sri Prakash Padia

Constitution of India, Art. 226-writ jurisdiction disputed question of facts-can not be ground for rejection-unless proved beyond doubt that can not be resolved by writ court-claim of insurancy policy rejected on pretext the policy holder suppressed the disease-death due to heart attack-working even after deposit of premium not denied-held-Insurance Act 1938 a beneficial legislation-denied of claim-not proper-direction issued to pay whole amount with 12% simple interest within one month.

Held: Para 3

According to us, the Insurance Act, 1938 with the latest amendment is a beneficial piece of legislation. Therefore, if a benefit which the petitioner is legally entitled has been refused, Court can not enter upon the arena to render equitable justice. The Court of equity can not shut out the eyes taking plea that there is

mere or bare disputed question of fact. The disputed question of fact ipso facto can not be ground for rejection unless or until it is proved beyond the doubt before Court of equity under Article 226 of the Constitution of India that the dispute is such that can not be resolved by the writ jurisdiction at all. If we place factum of case within the guidelines of the Supreme Court in Asha Goel (Supra), we shall have no doubt in our mind that the writ jurisdiction can be invoked in the circumstances.

Case law discussed:

2001 (2) SCC-160, 2007 (2) ESC-1026, Alld. (D.B.), AIR 1962 SC-814

(Delivered by Hon'ble Amitava Lala, J.)

1. The fact remains that the petitioner's deceased husband made a policy during his life time under the money back scheme of Life Insurance Corporation of India (hereinafter called as 'L.I.C.') in its local office. Number of the policy is 311465500 dated 31st January, 2002. The policy was lapsed due to non-payment of premium on 28th June, 2002 and 28th December, 2002. The policy was revived on full payment of premium on 15th February, 2003. However, the insured expired on the following day i.e. 16th February, 2003 due to heart attack. On 27th May, 2004 Senior Divisional Manager of the L.I.C., Allahabad had rejected the claim of his wife on account of her husband's death. On 18th January, 2005 Zonal Manager of the L.I.C. from its office at Kanpur had also rejected such claim. On 2nd February, 2005 wife of the insured was formally informed by the Divisional Office, Allahabad about the order of the Zonal Manager, Kanpur, from which an appeal was preferred before the Insurance Ombudsman. Ultimately the Insurance Ombudsman by his award dated 30th June, 2005 upheld the repudiation action taken by the insurer, in repudiating the claim under the Policy No. 311465500. Challenging the order/award dated 30th June, 2005 passed by the Ombudsman this writ petition has been filed by the wife of the deceased/insured.

2. Before entering into the dispute, we have to consider the scope and ambit of the writ jurisdiction as it has been held in **2001 (2) SCC 160 (life Insurance Corporation of India and others Vs. Asha Goel (Smt.)and another)**. Supreme Court held that the determination of the question under the writ jurisdiction will depend on consideration of several factors, like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues;-the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution can not be denied altogether, Court must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts.

3. According to us, the Insurance Act, 1938 with the latest amendment is a beneficial piece of legislation. Therefore, if a benefit which the petitioner is legally entitled has been refused, Court can not enter upon the arena to render equitable justice. The Court of equity can not shut

out the eyes taking plea that there is mere or bare disputed question of fact. The disputed question of fact ipso facto can not be ground for rejection unless or until it is proved beyond the doubt before Court of equity under Article 226 of the Constitution of India that the dispute is such that can not be resolved by the writ jurisdiction at all. If we place factum of case within the guidelines of the Supreme Court in **Asha Goel (Supra)**, we shall have no doubt in our mind that the writ jurisdiction can be invoked in the circumstances.

4. In this case it has been contended by the learned Counsel appearing for the petitioner that before the date of death the deceased attended his office to work. He was not under treatment for any disease to be treated by any Doctor. However, as per the certificate given by the particular hospital, the deceased was suffering from jaundice. In the common parlance different kind of jaundice and its several stages of suffering are available to which an expert can give any opinion. But it gradually develops and gradually diminishes. A person having jaundice normally can not attend his office to do the work just before one day of his death. Death occurred by heart attack. No specific denial is available whether the deceased was medically treated any where before his death. Nobody was examined on behalf of hospital. Only on the certificate of the Hospital "according to attendant he was suffering from jaundice", the concerned Ombudsman upheld the repudiation of insurance agreement. The petitioner has shown two Division Bench judgments of the High Court reported in **2007(1) ADJ 11 (DB) (Umesh Narain Sharma Vs. New India Assurance Co. Ltd. and others)** and **2007 (2) ESC 1026 (All) (DB) (Smt. Ram Kali Vs. Life Insurance Corporation. Allahabad)** to establish her case. In the first one, factum of heart attack and in the other factum of suffering of cancer is applicable. Both claims were allowed. We have gone through the facts of both the cases and found that factually this case in the hand is standing on a better footing than those cases.

5. Mr. Prakash Padia, learned Counsel appearing for L.I.C., cited before us a iudgment reported in **AIR 1962 SC 814 (Mithoolal Nayak Vs. Life Insurance Corporation of India)** to establish that second part of, Section 45 of the Insurance Act. 1938 applies in the following circumstances-- (a) the statement must be on a material matter or must suppress facts which it was material to disclose; (b) the suppression must be fraudulently made by the policy-holder; and (c) the policyholder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose.

6. According to us, second part of Section 45 of the Act can not be taken into account in isolation but in the context of first part which deals with fixation of a period of two years from the date on which the policy was effected. There is a reason behind insertion of such Section under the Act. If somebody makes a policy by misstatement that can be taken care of before making an agreement or within a reasonable period of two years after the execution of the agreement. Such period can not be extended as per the sweet will of the insurance company. In the case of **Mithoolal Nayak (Supra)** the insurance policy was executed on 18th October, 1945. The policy holder expired

on 12th November, 1946. The claim was repudiated for some reason or other on 10th October, 1947. Therefore, misstatement or falsity, if any, was taken care of by the authority within such period. In the instant case the agreement in support of the policy was executed on 31st January, 2002. The policy holder expired on 16th February, 2003. The decision on account of repudiation was made on 27th May, 2004 taking a plea that the insurance policy was revalidated only on 15th February, 2003. We are of the view that as soon as a policy is revalidated it relates back to the date of execution i.e. 31st January, 2002 herein. Thus, the period for repudiation is beyond the period as provided in first part of Section 45 of the Act and as such can not be sustainable.

7. Secondly, Section 45 speaks for **statement made in the proposal for insurance** etc. which has been specifically taken care of by the Supreme Court in **Mithoolal Nayak (Supra)** and also held as follows:

".....that the insured Mahajan Deolal had been guilty of deliberate mis-statements and fraudulent suppression of material information in answers to questions in the **proposal form** and the personal statement, which formed the basis of the contract between the insurer and the insured."

8. Hence, we are of the view that the incident subsequent to the execution of the document if not related to the execution of the policy and two years being the reasonable ground can not be a valid ground for the purpose of repudiation. A suffering or a disease or any death not arising out of any false or misstatement at the time of making the policy can not be a ground for repudiation by the insurance company as alleged or at all. It has to be related to the execution of the document.

9. From the paragraph 15 of the judgement referred above i.e. **Umesh Narain Sharma (Supra)** a Division Bench of this High Court made such aspect of the matter explicit on the basis of the terms and conditions of the insurance policy as quoted hereunder:

"Clause 4.1 of the terms and conditions of the insurance policy read as under:

"4. Exclusions.

……

4.1 Such diseases which have been in existence at the time of proposing this insurance pre-existing condition means any injury which existed prior to the effective date of this insurance. Pre-existing conditions also means any sickness or its symptoms which existed prior to the insured person had knowledge that the symptoms were relating to the sickness. Complications arising from pre-existing disease will be considered part of that pre-existing conditions."

10. Lastly, it is to be seen how the Ombudsman proceeded in this matter. The Ombudsman proceeded in this matter on the basis of the order of the earlier officers but at the same time out of his usual fairness quoted about an effort of mediation as follows:

"Efforts for mediation were made during Personal Hearing but since insurer's representative was not prepared to reconsider the claim, these did not succeed. In view of failure of mediation proceedings, I proceed to give my award in the matter as under."

11. According to us, fraud and equity can not run simultaneously. If it is a question of genuine fraud there is no scope of showing any equitable justice towards any insured but when at an occasion the authority made an effort for mediation it is to be understood that the insurance company was also not in a position to come to a definite finding about any falsity. Therefore, it can be safely presumed that the question of any falsity does not arise otherwise the Ombudsman could not have poised down to a position of making effort of mediation to render equitable justice.

12. Therefore, in totality we do not find that any such case has been made out on behalf of the Insurance Company to repudiate the agreement ignoring payment of the meagre amount of Rs.1.0 lakh (Rupees one lakh only) to the petitioner. Hence, we hereby quash the order of the Ombudsman dated 30.6.2005 as well as the orders dated 18.1.2005 and 27.5.2004 passed by the authorities of the L.I.C., being impugned in the present writ petition. As a result whereof we hold and say that the petitioner is entitled for the said sum which will be released by the Insurance Company in favour of the petitioner as early as possible but not beyond the period of one month from the date of communication of this order alongwith interest @ 12% per annum at a simple rate from the date of first refusal till the date of actual payment finding that the same is reasonable. Accordingly, the writ petition is allowed.

13. However, no order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2007

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 51653 of 2007

Sri Ram Pathak and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri P.K. Rai
Sri S.P. Rai

Counsel for the Respondents:
Sri Gajendra Pratap
S.C.

U.P. Intermediate Education Act 1921– Section 7AA-termination-part time teacher–earlier petition dismissed as infructous upon the statement of management- impugned order revoked– further termination on two counts– Firstly under Rule 3(2) of commission Rules 1983 No male teacher could be appointed in girls school, Secondly female teacher available in the concerned subject–both reasons lost its existence–management can not be allowed to take plea of such reason not disclosed in termination order–held– impugned order cannot sustain.

Held: Para 9

Thus, the submission of learned Counsel for the Respondent that the management even without reason can terminate the services of Part Time Teacher, cannot be accepted. In view of the above, the order impugned cannot sustain and hereby set aside.

Case law discussed:
A.I.R. 1979 SC. 429

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

1. Heard learned counsel for the petitioner and Sri Gajendra Pratap, learned Counsel for the respondent No.3.

2. Counter and rejoinder affidavits have been exchanged between the parties. With the consent of the learned Counsel for the parties, the writ petition is being disposed of at the admission stage itself.

3. By this writ petition, the petitioner has prayed for quashing the order dated 17.8.2007, passed by the Manager of the Committee of Management by which the petitioners services as Part Time Teacher have been terminated.

4. The petitioners case is that the petitioner No.1 was appointed as Part Time Lecturer in Commerce on 1.2.1999, the petitioner No.2 was appointed as Part Time Lecturer in Mathematics on 8.10.1999 and the petitioner No.3 was appointed as Assistant Part Time Teacher, Science on 3.9.2003 under section 7AA of U.P. Intermediate Education Act, 1921. The petitioners' case is that the new Committee of Management came into power in May, 2007 and a decision was taken to terminate the services of all the Part Time Teachers by resolution dated 30.5.2007, which order was challenged by means of a writ petition being Civil Misc. writ petition No. 27735 of 2007 in which this Court granted an interim order dated 20.6.2007. Subsequently on the statements of Committee of Management to the effect that notice dated 30.6.2007 has been withdrawn, this Court vide order dated 23.7.2007 dismissed the writ petition as infructuous. Thereafter by the impugned order dated 17.8.2007, the services of the petitioners have been terminated by giving following two reasons.

1) *According to Rule 3(2) of the U.P. Secondary Education Services Commission Rules, 1983, no male teacher shall be eligible for appointment in Girls School.*
2) *In the subjects for teaching of which the petitioners were appointed, female teachers have now become available.*

5. Learned counsel for the petitioners challenging the aforesaid two grounds mentioned in the impugned order, contended that the provisions of Rules 1983 are not applicable with regard to appointment of a Part Time Teacher. With regard to second ground, it is contended that no selection has been made of any female teacher therefore, the second reason is also non-existent. Learned Counsel for the respondents refuting the submission of the learned counsel for the petitioners, submitted that even though the 1983 Commission Rules are not applicable but there is prohibition for appointment of male teachers in girls institution. It has been further contended that appointment of the petitioners was not made in accordance with the relevant Government Orders regulating the service conditions of Part Time Teacher hence, the petitioners are not entitled for any protection. He further submits that earlier Government Order issued in 1986 regulated the service conditions and since the petitioners appointment was not made following the procedure prescribed under law, they cannot claim for any protection. It was further contended that those Part Time Teachers who have been appointed without following the procedure

prescribed, the Management is fully competent to terminate their services. Certain allegations against the male teachers have also been made in the counter affidavit filed on behalf of Committee of Management.

6. I have considered the submissions and perused the record.

7. The order terminating the services of the petitioners as Part Time Teacher gives only two reasons as noticed above. The first reason based on Rule 3(2) of 1983 Rules which is not applicable in view of Section 7-AB of U.P. Intermediate Education Act, 1921. Learned counsel for the respondents submits that even though Commission Rules are not applicable but there is prohibition on appointment of male teachers in girls institution. In support of the said submission, learned Counsel for the respondent management has neither been able to refer to any regulations framed under U.P. Intermediate Education Act, 1921 nor any Government Order. A copy of the letter issued by the Director of Education dated 6.9.1981 has been brought on record as Annexure C.A. 2 to the counter affidavit. The said letter was issued with regard regularisation of male teachers working in girls institution on temporary basis for long period. A perusal of the said letter does not indicate that the appointment of male teacher is prohibited in girls institution. Coming to the second reason given in the impugned order to the effect that the subjects for which the petitioners were appointed for teaching, the female teachers are now available, is also non-existent. No regular selection has been made by any competent authority for the subjects in which the petitioners are teaching the students. Much emphasis has been led by learned counsel for the respondent management that procedure for appointment of the petitioners as Part Time Teachers, was not followed hence, the management is free to terminate their services. It is relevant to note that the order impugned does not terminate the services of the petitioners on the ground that procedure was not followed. The reasons for termination have been expressly mentioned in the impugned order and it is not open for the respondent management to add any other reason which is not mentioned in the order terminating the services. Thus, the submission of learned Counsel for the management that the procedure was not followed in the appointment of the petitioners hence they were terminated, cannot be accepted. Learned Counsel for the respondents further contended that by virtue of para 10 of the Government Order dated 10.8.2001, management can terminate services of Part Time Teacher without there being any reason. Paragraphs 8,9 and 10 of the Government Order dated 10.8.2001 are relevant, which are being quoted herein below:

"-अनुशासनिक कार्यवाहीः- प्रबन्ध समिति निम्नलिखित कारणों से किसी भी अंशकालिक अध्यापक के विरूद्ध अनुशासिक कार्यवाही कर सकती है-

क- विद्यालय के नियमों का उल्लंघन करना तथा आज्ञा न मानना।
ख- सौंपे गये दायित्वों के निर्वाह में लापरवाही करना।
ग- विद्यालय के अभिलेख नष्ट करना अथवा क्षति पहुँचाना।
घ- विद्यालय की सम्पत्ति अथवा धन का दुरूपयोग करना।
च- विद्यालय में अस्त्र-शस्त्र लाना अथवा उनका प्रयोग करना अथवा धमकी देना।
छ- परीक्षा कार्य नियमानुसार न करना अथवा किसी अनुचित साधन हेतु प्रोत्साहन अथवा उसमें संलग्न होना।
ज- विद्यालय की गोपनीय पत्रावली वस्तु अथवा अभिलेख की गोपनीयता भंग करना।
झ- कक्षा कार्य अथवा गृहकार्य में लापरवाही करना।

9- सेवा समाप्तिः- यदि प्रबंधतंत्र को यह समाधान हो जाये कि कोइ भी अंशकालिक अध्यापक धारा-८ में वर्णित किसी नैतिक अधमता के अपराध में किसी सक्षम न्यायालय द्वारा दोषी सिद्ध कर दिया गया हो, तो वह इन अंशकालिक अध्यापकों की सेवाएं समाप्त कर सकता है।

क- किसी भी अंशकालिक अध्यापक की सेवाऐं समाप्त करने के पूर्व प्रबन्धतंत्र द्वारा आरोपी के विरूद्ध लगाये गये आरोपों की जांच, जांच अधिकारी से करायी जायेगी।

ख- जांच अधिकारी का तात्पर्य प्रबन्धतंत्र द्वारा नियुक्त अंशकालिक प्रधानाचार्य या किसी वरिष्ठ अंशकालिक अध्यापक से होगा।

ग- जांच अधिकारी की जांच आख्या एवं संस्तुति पर प्रबन्धतंत्र निर्णय के पूर्व प्रबन्धतंत्र द्वारा सम्बन्धित अंशकालिक अध्यापक को सुनवाई का अवसर दिया जायेगा और इसके उपरान्त ही निर्णय लिया जायेगा।

घ- यदि प्रबन्धतत्र के निर्णय से संबंधित अंशकालिक अध्यापक विक्षुब्ध हो, तो वह इस निर्णय के विरूद्ध संबंधित जिला विद्यालय निरीक्षक को अपील प्रबन्धतंत्र के निर्णय प्राप्ति के दो माह के भीतर प्रस्तुत कर सकता है। जिला विद्यालय निरीक्षक का निर्णय अन्तिम होगा।

च- जिला विद्यालय निरीक्षक द्वारा लिये गये निर्णय का पालन प्रबन्धतंत्र करेगा।

प्रबन्धतंत्र द्वारा जिला विद्यालय निरीक्षक द्वारा लिये गये निर्णय का पालन नहीं किया जाता है तो प्रबन्धतंत्र के विरूद्ध उ०प्र० माध्यमिक शिक्षा अधिनियम १९२१ से सुसंगत प्राविधानों के तहत कार्यवाही की जा सकेगी।

१०- त्यागपत्र/पद समाप्तिः-क- यदि कोई अंशकालिक अध्यापक किसी कारणवश विद्यालय से अलग हो ना चाहता है तो वह एक माह की पूर्व सूचना अथवा उसके बदले में एक माह की परिलब्धियों को जमा करके त्याग पत्र दे सकता है।

ख- माध्यमिक शिक्षा परिषद द्वारा विद्यालय या उससे किसी विषय की मान्यता को समाप्त करने, किसी अनुभाग को समाप्त करने अथवा किसी अन्य कारणवश, किसी अंशकालिक अध्यापक का पद समाप्त किया जा सकता है, तो प्रबन्धतंत्र द्वारा सम्बन्धित अंशकालिक अध्यापक को एक माह पूर्व सूचना या उसके बदले में एक माह की परिलब्धियां देकर सेवाएं समाप्त की जा सकेगी।

शासनादेश निर्गत होने की तिथि से उक्त सेवा शर्तें प्रभावी होंगी।

8. Paragraph 8 of the aforesaid Government Order provides for disciplinary action against Part Time Teacher, paragraph 9 provides for termination of employment of Part Time Teacher, paragraph 10 deals with resignation/ termination of Part Time Teacher. The present is not a case for invoking paragraphs 8 or 9. Although in the counter affidavit, it has been mentioned that there were allegations against the male Part Time Teachers but since learned Counsel for the respondents clarified that there was no specific allegation against the petitioners. In view of the above the said submission does not require any further scrutiny. Paragraph 10 of the aforesaid Government Order provides that the post of Part Time Teachers can be terminated. Clause 10 Kha of the Government Order dated 10.8.2001 provides that in case Madhyamik Shiksha Parishad has withdrawn the recognition of the institution or any subject or any section has been closed or for any other reason, the post of part time teacher is to be abolished, the Committee of Management by giving one month's notice or by giving one month's pay in lieu thereof can terminate their services. Learned Counsel for the respondents submits that the words "किसी अन्य कारणवश" used in clause Kha give ample power to the Committee of Management to terminate the services of a part time teacher as and when it desires. Clause 10 Kha, if read in the manner as contended by learned Counsel for the respondents shall clothe the management arbitrary power to to terminate a part time teacher even if there is no valid reason. The words any other reason mentioned in clause 10 Kha has to be read *"ejusdem generis"* with other reasons as mentioned in clause. Even if termination of a Part Time Teacher has to be on a valid reason. In case the submission is accepted that any reason management can terminate the services of a Part Time Teacher, such clause will be clothing the Management with arbitrary power which could be exercised on whims or caprice of the

management. The apex Court in the case **Vs. D.B. Belliappa**, reported in *AIR 1979 SUPREME COURT 429* held that accepting the submission that services have been terminated without any reason shall be nothing but accepting that the power has been exercised by the employer arbitrarily. Following was observed in paragraph 26:

" .....But it will be hazardous for us to base out decision on any such speculation, when the appellant, himself instead of taking any such plea, has, with obdurate persistency stuck to the position that the respondent's service has been terminated without any reason which comes perilously near to admitting that the power reserved to the employer under the conditions of the employment, has been exercised arbitrarily."

9. Thus, the submission of learned Counsel for the Respondent that the management even without reason can terminate the services of Part Time Teacher, cannot be accepted. In view of the above, the order impugned cannot sustain and hereby set aside.

10. With regard to the petitioner No.3, learned Counsel for the Management has submitted that the petitioner no. 3 has accepted notice amount without any protest and since he has accepted the amount without any protest, he is not entitled for any protection. Learned counsel for the petitioner has not been able to show any material that the said amount was accepted under protest. The notice amount having been accepted by the petitioner No. 3 without any protest, he is not entitled for any protection and so far as of **The Govt. Branch Press and another** writ petition with regard to the petitioner no. 3 is concerned, it is dismissed.

11. The writ petition is partly allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.10.2007

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

Criminal Misc. Application No. 12908 of 1988

Smt. Shashi Mathur ...Applicant
Versus
Chief Judicial Magistrate, Bareilly and another ...Respondents

Counsel for the Applicant:
Sri Dilip Kumar
Sri Rajiv Gupta

Counsel for the Respondents:
Sri Navin Sinha
A.G.A.

Uttar Pradesh Urban Planning & Development Act, 1973, Section-26 (2)- complaint by development authority Bareilly-for contravention of use of residential building-while the said building was already used in contravention prior to the commencement of Act-No offence made out-proceeding quashed.

Held: Para 13

The facts set out in the Criminal complaint are that a portion of residential premises of applicant was found in use for commercial purpose at the time of visit of the Junior Engineer of Bareilly Development Authority on 2.8.1984. The demised premises having been let out to United India Insurance Company prior to the notification of

constitution Bareilly Development Authority and enforcement of Master plan the use of building was not in contravention of provisions of Section 16 of the Act. The allegations made in the complaint taken as a whole do not constitute the offence under Section 26 (2) of the Act. In view of the foregoing discussion, the application is allowed. The above mentioned Criminal complaint and further proceedings in consequence thereof are quashed.

Case law discussed:

1992 Supp. (1) SCC (Crl.) 426, 2004 (1) SCC ?

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

1. By means of this application under Section 482 Cr.P.C. the applicant prays for quashing the Criminal Complaint No. 4434 of 1987 instituted by Bareilly Development Authority, Bareilly and the proceedings initiated in consequence thereof, pending in the Court of Chief Judicial Magistrate, Bareilly.

2. The back up facts giving rise to these proceedings are:-

A Criminal compliant was instituted by the Bareilly Development Authority against the applicant with the allegations that on 2.8.1984 at about 11 A.M. Sri Y.P. Singh, Junior Engineer visited her premises No. 35-11/B, Rampur Bagh, Police Station Kotwali Bareilly situated within development area. The said area was meant for residential land use in the Master plan. On inspection the Junior Engineer found that the applicant, owner of the residential house had let out the first floor about six months before to Regional office of United India Insurance Company for commercial purpose. The use of residential premises for commercial purpose contravened the land use mentioned in the Master plan and constituted an offence punishable under Section 26 (2) of Uttar Pradesh Urban Planning and Development Act., 1973 (hereinafter referred to as the 'Act').

3. Heard Sri Rajiv Gupta holding brief of Sri Dilip Kumar, learned counsel for the applicant, the learned A.G.A. and have perused the record. Sri Naveen Sinha, learned counsel for the opposite party No. 2 did not appear to make submissions.

4. The- learned counsel for the applicant submitted that the contract of tenancy was entered into between the applicant and the Regional Manager of United India Insurance Company on 24.10.1973. In pursuance of Sections 3 and 4 of the Act the Bareilly Development Authority was constituted vide Gazette notification dated 20.4.1977 and vide Government Order dated 29.8.1978 the Master plan was approved by the State Government. The Act came into force on 15.8.1974. The contention was that a portion of the house was being used for commercial purpose since before the coming into force of Master plan. It was argued that the proviso appended to Section 16 embodies that in cases where the building is being used for some purpose prior to coming into force of the Act it shall be lawful to use it for the same purpose. Lastly it was canvassed that the offence under Section 26 (2) of the Act are compoundable under Section 32 but efforts made by the applicant to have the matter compounded failed due to non-cooperation of the officials of opposite party.

5. The learned A.G.A. submitted that the provisions of Section 27 have

come into force and an order passed under section 27 of the Act is appealable.

6. Section 3 of the Act provides for declaration of development area. If in the opinion of the State Government any area within the State requires to be developed according to plan it may, by notification in the Gazette, declare the area to be a development area. Section 4 of the Act embodies that the State Government may by notification in the Gazette, constitute for the purposes of this Act, an Authority to be called the Development Authority for any development area. The Authority shall be a body corporate, by the name given to it in the said notification, having perpetual succession and a common seal with power to acquire, hold and dispose of property, both moveable and immovable and to contract and shall by the said name sue and be sued.

7. Section 14 deals with development of land in developed area and reads as below:-

"(1) After the declaration of any area as development area under Section 3, no development of land shall be undertaken or carried out or continued in that area by any person or body (including a department of Government) unless permission for such development has been obtained in writing from the Vice-Chairman in accordance with the provisions ·of this Act.

(2) After the coming into operation of any of the plans in any development are no development shall be undertaken or carried out or continued in that area unless such development is also in accordance with such plans.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the following provisions shall apply in relation to development of land by any department of any State Government or the Central Government or any local authority-

(a) when any such department or local authority intends to carry out any development of land it shall inform the Vice-Chairman in writing of its intention to do so, giving full particulars thereof, including any plans and documents, at least 30 days before undertaking such development;

(b) in the case of a department of any State Government or the Central Government, if the Vice Chairman has no objection it should inform such department of the same within three weeks from the date of receipt by it under clause (a) of the department's intention, and if the Vice-Chairman does not make any objection within the said period the department shall be free to carry out the proposed development.

(c) where the Vice-Chairman raises any objection to the proposed development on the ground that the development is not in conformity with any Master Plan or zonal development plan prepared or intended to be prepared by it, or on any other ground, such department or the local authority, as the case may be, sha11-

(i) either make necessary modifications in the proposal for development to meet the objections raised by the Vice-Chairman; or

(ii) submit the proposals for development together with the objections raised by the Vice-Chairman to the State Government for decision under clause (d);

(d) the State Government, on receipt of proposals for development together with

the objections of the Vice-Chairman, may either approve the proposals with or without modifications or direct the department or the local authority, as the case may be, to make such modifications as proposed by the Government and the decision of the State Government shall be final;
(e) the development of any land begun by any such department or subject to the provisions of Section 59 by any such local authority before the declaration referred to in sub-section (1) may be completed by that department or local authority with compliance with the requirements of subsections (1) and (2)."

8. Section 16 of the Act provides that after the coming into operation of any of the plans in a zone no person shall use or permit to be used any land or building in that zone otherwise than in conformity with such plan. The proviso appended to this Section embodies that it shall be lawful to continue to use, upon such terms and conditions as may be prescribed by bye-laws made in that behalf, any land or building for the purpose and to the extent for and to which it is being used upon the date on which such plan comes into force.

9. In the present case the contract of tenancy between the applicant and United India Insurance Company came into force on 24.10.1973. The Bareilly Development Authority was constituted vide Government notification dated 20.4.1977. The Master plan was approved by the State Government vide Government order dated 29.8.1978. The premises in question were being used for office purpose by the United India Insurance Company before coming into operation of the Master plan and constitution of Bariely Development Authority. The proviso appended to Section 16 of the Act authorises the use of any land or building for the purpose and to the extent for and to which it is being used upon the date on which such plan comes into force subject to such terms and conditions as may be prescribed by bye-laws made in that behalf.

10. Section 26 (2) of the Act contains the penalties for the use of any land or building in contravention of provisions of Section 16 of the Act and provides that any person who uses any land or building in contravention of any terms and conditions prescribed by regulations under the proviso to that Section shall be punishable with fine which may extend twenty-five thousand rupees and in case of continuing offence, with further fine which may extend to one thousand two hundred and fifty rupees for every day during which such offence continues after conviction for the first commission of the offence.

11. A portion of residential building of applicant was in use for commercial purpose prior to the constitution of Bareilly Development Authority and coming into force of Master plan, therefore, the use of the building cannot be said to be in contravention of Master plan and no offence under Section 26 (2) of the Act is made out.

12. The inherent powers under section 482 Cr.P.C. can be exercised to quash the proceedings: (i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction; (ii) where the allegations in the First Information Report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged; (iii) where the

allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge. The scope of exercise of power under section 482 of the Code and the categories of cases where this court may exercise its power under it relating to cognizable offences to prevent abuse of process of court or otherwise to secure the ends of justice have been set out by the Apex Court in the case of ***State of Haryana Vs. Bhajan Lal 1992 Supp (1) SCC 335 (Cri) 426*** as herein under:

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first infom1ation report and other materials, if any, accompanying the First Information Report do not disclose a cognizable offence, justifying an investigation by police officers under section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the First Information Report or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the First Information Report do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the First Information Report or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafides and/ or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

In *State of M.P. Vs. Awadh Kishore Gupta (2004) 1 SCC*, the Apex Court has held as follows:

"The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arises Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties

imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All Courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice on the principle quando lex aliquid alicui concedit, concedere videtur id sine quo res ipse esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the Court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in section itself. It is to be exercised ex debito justitiae to do read and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of process of the court to allow any action which would result injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

13. The facts set out in the Criminal complaint are that a portion of residential premises of applicant was found in use for commercial purpose at the time of visit of the Junior Engineer of Bareilly Development Authority on 2.8.1984. The demised premises having been let out to United India Insurance Company prior to the notification of constitution Bareilly Development Authority and enforcement of Master plan the use of building was not in contravention of provisions of Section 16 of the Act. The allegations made in the complaint taken as a whole do not constitute the offence under Section 26 (2) of the Act. In view of the foregoing discussion, the application is allowed. The above mentioned Criminal complaint and further proceedings in consequence thereof are quashed. Application Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2008

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

Criminal Misc. Writ Petition No.712 of 2008

Bhagwati Prasad ...Petitioner
Versus
State of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri Ravi Chandra Srivastava

Counsel for the Respondents:
Sri A.K. Yadav
A.G.A.

Code of Criminal Procedure-146 (3)-Attachment of Property-civil suit as well

as Revenue litigation still going on-Magistrate dropped the proceeding-the matter decided by Civil Court, appeal is pending-the magistrate can not sit over the civil court-question of possession can be better decided by the civil court-held-magistrate committed no illegality in dropping proceeding under Section 145 Cr.P.C..

Held: Para 9

Thus, there is a complete machinery available both before the civil Court as also before the revenue court for the redressal of the grievances of the petitioner, if any, on the facts as alleged. Sofaras the breach of peace or the existence of an emergent situation is concerned, it is evident that the order under 146 (1) was passed almost after 13 months of the drawing of the proceedings. There is nothing on record to indicate any apprehension of breach of peace and even if it were existing, then the remedy of the petitioner is to approach the concerned court as noticed herein above for appropriate orders.

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

1. The petitioner contends that the Magistrate as well as the revisional court have erred by dropping the proceedings in view of the fact that the petitioner is in possession and that in view of the History of the litigation, the proceedings for attachment ought to have been continued as there was a continuous existence of an apprehension of breach of peace and there was a serious dispute with regard to possession.

2. In order to appreciate the aforesaid contention of the petitioner, it is to be noticed that the property in dispute which is an agricultural land appears to have been recorded in the name of the father of the petitioner Gaya Prasad and

confirmed by revisional court also-once

the same continued during consolidation operations. After the consolidation was over, the petitioner alleges that his father Gaya Prasad and his brother Bhawani had departed from the village and were living elsewhere for the past 15 or 16 years and that he was the exclusive owner of the said property. To assert his aforesaid rights, he filed a Suit for declaration before the revenue court being original Suit No.285 of 1989 under Section 229-B of the U.P. Zamindari Abolition and Land Reforms Act, 1952; a copy of the plaint is on record as Annexure-l which was verified on 7.6.1989. This Suit was filed by the petitioner against his own father. Gaya Prasad and his real brother Bhawani Prasad. Under the provisions of the U.P. Zamindari Abolition and Land Reforms Act, the Court also has the power to grant a temporary injunction under Section 229-D which appears to have been invoked on 2.6.1990 in favour of the petitioner. The petitioner alleges that since the property in question was ancestral property, and since his father was simply the Karta of the family, therefore, his name had been recorded only in a representative capacity and that the petitioner as well as the other members had separate shares in the property to the extent of 1/3 each. The declaration, therefore, was, thus, sought on the strength of the said allegation. The said temporary injunction was, however, vacated on contest by the father of the petitioner on 19.1.1991. Against the said order, a revision is alleged to have been filed in which a stay was granted on 22.1.1991 and ultimately the revisional authority made a reference to the Board of Revenue for setting aside the order dated 19.1.1991. This reference was answered by the Board of Revenue on 26.5.1997

whereby the order vacating the injunction was quashed and the matter was remanded for a decision afresh. This order was passed on 26.5.1997.

3. Pending these proceedings, the petitioner's father Gaya Prasad is said to have executed a sale-deed of the said property by a registered document in favour of the contesting respondent - Rajdev Yadav and the other members of the family on 31.7.1991. The petitioner asserts that he came to know about the execution of the sale-deed later on and, therefore, he instituted an original Suit No. 962 of 1995 before the civil Court praying for a permanent injunction in respect of the same property. The plaint of the said Suit is also on record which indicates that the petitioner had also expressed an intention to the effect that the said sale-deed deserves to be cancelled to the extent it was void. It also appears from the pleadings that some amendment was sought for adding the relief for cancellation of the sale-deed which application was initially rejected against which the petitioner approached this Court in which some interim order had been passed at that point of time. In the said Suit, an injunction was also prayed for as a temporary measure and the said application was pending consideration before the Civil Court.

4. Pending both these proceedings before the revenue court and the civil Court, a police report was submitted apprehending breach of peace on 27.12.1995 and for drawing proceedings under Section 145 Cr.P.C. A preliminary order was drawn .on 9.1.1996 and pursuant thereto notices were issued. After a lapse of almost 13 months, on the basis of some police reports dated 16.2.1996, 29.3.1996, 4.2.1997 and a report of the Naib Tahsildar dated 7.1.1997, an order of attachment was passed under Section 146 (1) Cr.P.C. Since then the property continued under attachment. A revision, filed by the respondent no.2 against the same, was dismissed on 10.12.1997 and a writ petition arising out of the proceedings under Section 145 was dismissed on 30.10.1998, wherein an observation was made that this shall continue till orders are passed by the civil court for which the parties are at liberty to obtain appropriate orders in respect of the possession of the property from the civil Court. These judgments dated 10.12.1997 and 30.10.1998 are Annexures-6 and 7 to the writ petition.

5. It is, thus, clear from the aforesaid facts that the property was brought under attachment through proceedings under Section 145 Cr.P.C. in spite of the orders being passed both by the revenue court as well as by the civil court. In between in some misc. proceedings, it appears that there was a stay of further proceedings in the Suit by this Court as well which is evident from the order dated 21.11.2002 in Writ Petition No. 49354 of 2002. However, the said interim order does not in any way take away the impact of the orders passed by this Court on 10.12.1997 and 30.10.1998 nor do the same find reference in the said order.

6. The sum and substance of this entire litigation, therefore, reflects that the proceedings under Section 145 Cr.P.C. had been initiated after the institution of the civil Suit as also the revenue Suit. Upon the directions contained in the judgments of this Court dated 10.12.1997 and 30.10.1998 calling upon the parties to approach the civil Court, the matter

appears to have been contested before the civil court and ultimately vide order dated 12.1.1999 the civil Court rejected the application for interim injunction filed by the petitioner against his father Gaya Prasad and also the contesting respondent no.2. It need not be repeated that the Respondent No.2 is a party to the said civil Suit. The civil Court recorded findings on prima facie case, balance of convenience and irreparable injury and while doing so also came to the conclusion that the petitioner cannot be presumed to be in exclusive possession of the property and hence the application filed by the petitioner seeking an interim injunction was rejected. It is admitted to the petitioner that an appeal against the said order dated 12.1.1999 is still pending before the appellate court being Misc. Appeal No. 10 of 1999. The petitioner, therefore, does not appear to have any injunction order in his favour from the civil Court.

7. The aforesaid facts appear to have been brought to the notice of the Magistrate, who proceeded with the matter and during the pendency of these proceedings before him, an application was moved by one Sri Ram Sahai that he should also be impleaded as he has entered the fray on the strength of some sale-deed in his favour. The learned Sub-Divisional Magistrate, Bhadohi, after taking notice of the aforesaid fact, came to the conclusion that Mr. Ram Sahai could not be impleaded and in view of the order passed by the civil Court dated 12.1.1999, there was no reason to continue with the proceedings under Sections 145/146 Cr.P.C. in the matter. Accordingly, the proceedings were dropped against which the petitioner preferred a revision before the learned Addl. Sessions Judge, who also affirmed the orders passed by the learned Magistrate on the said ground.

8. I have heard Sri R.C. Srivastava, learned counsel for the petitioner at length, Sri A.K. Yadav for the respondent no.2 and the learned A.G.A. for the State.

9. From a perusal of the facts as brought forth herein above, it is evident that the Civil Court has passed the order dated 12.1.1999 in a Suit which had been instituted prior to the initiation of the proceedings under Section 145 Cr.P.C. The order has been passed after taking notice of all the facts pertaining to the dispute between the parties. The petitioner has already preferred an Appeal against the said order which is stated to be pending. If that is so, then the remedy of the petitioner lay by approaching the civil Court for the redressal of his grievances, if any, in respect of the finding of possession which has been returned against him in the order dated 12.1.1999. The Magistrate in the proceedings under Section 145 cannot sit in Appeal over the said inference drawn by the civil Court. In case the petitioner wants to establish his possession then the same can now be done only by way of the reversal of the finding recorded in the order dated 12.1.1999 and not by a finding by the Magistrate, who will have no authority to proceed with the matter keeping in view the law laid down by the Apex Court in the case of Ram Sumer Puri Vs. State, AIR 1985 SC 472, followed in the case of Amresh Tiwari Vs. Lalta, reported in AIR 2000 SC 1504. The Magistrate, therefore, cannot be said to have erred in dropping the proceedings as all such remedies including redressal on account of violation of an order or the restitution of

the possession of a property can always be had from the concerned court. The civil Court has all powers under Order 39 Rule 2 and Rule 2-A for either granting appropriate orders or ensuring the compliance thereof. The civil Court in view of the provisions of Section 144 C.P.C. also have the power of restitution and in view of the provisions of order 40 CPC, the civil Courts also has the power to appoint a receiver in case the occasion so arises. Similarly, the revenue court entertaining a Suit under Section 229-B has the power to pass orders of interim injunction as is evident from the provisions of Section 229-D of the U.P. Zamindari Abolition and Land Reforms Act, 1950. Not only this, in view of the provisions of Section 341 of the said Act, the provisions of the Code of Civil Procedure in so far as they are not expressly excluded shall apply to the proceedings in a revenue Suit as well. Thus, there is a complete machinery available both before the civil Court as also before the revenue court for the redressal of the grievances of the petitioner, if any, on the facts as alleged. Sofaras the breach of peace or the existence of an emergent situation is concerned, it is evident that the order under 146 (1) was passed almost after 13 months of the drawing of the proceedings. There is nothing on record to indicate any apprehension of breach of peace and even if it were existing, then the remedy of the petitioner is to approach the concerned court as noticed herein above for appropriate orders.

10. In the light of what has been stated above, it cannot be said that the Magistrate has proceeded erroneously or has failed to exercise the jurisdiction vested in him in accordance with law. For the same reason, the order passed in revision also does not call for any interference by this Court in the exercise of extra ordinary jurisdiction under Article 226 of the Constitution of India. The parties are at liberty to approach the concerned court for the redressal of their grievances and the observations made herein above shall in no way impede the proceedings before either the civil Court or the revenue Court who shall be free to pass orders untrammelled by any of the observations made herein above.

11. The writ petition is, accordingly, dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2008

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

F.A.F.O. No.333 of 1986

Employees State Insurance Corporation, Kanpur ...Appellant (Respondent)
Versus
Sri B.S. Saini and another ...Respondents (Appellant)

Counsel for the Appellant:
Sri B.N. Asthana

Counsel for the Respondents:

Employees State Insurance Act-Section 85-B-Liability to pay interest-as well as penality-without considering several mitigating circumstances like reduction in business prolonged strike etc.-employer already paid the due amount-held-non consideration vitiate entire finding-direction issued for fresh consideration.

Held: Para 8

of his liability to pay damages under Section 85-B, however, it may be taken into consideration for reduction of damages and interest may be adjusted in damages to be imposed under Section 85-B.

Case law discussed:

2004 (4) AWC 3106, 1994 (69) FLR 842, AIR 1994 SC 521, AIR 1997 SC 1771

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

1. At the time of hearing, no one appeared on behalf of the respondents, hence only the arguments of learned counsel for the appellant were heard.

2. Joint Regional Director, E.S.I., Kanpur passed two orders against respondents. One order was passed on 15.09.1982, which was slightly modified on 07.01.1983. The other order was passed on 21.04.1983. Against both the orders, respondents filed appeals before Employees Insurance Court, Saharanpur under Section 75 of Employees State Insurance Act (hereinafter referred to as "E.S.I. Act'). The appeals were registered as Appeal No.22 of 1983 & Appeal No.95 of 1983 and were disposed of by common judgment dated 06.01.1986 by State Employees Insurance Court/ S.D.M., Nakur, District Saharanpur. The said judgments have been challenged through these appeals.

3. The Joint Regional Director had imposed penalty under Section 85-B, E.S.I. Act as well as directed payment of interest under Regulation 31-A of the Regulations framed under the Act. In the opinion of the court below, penalty could not be imposed along with direction for

Direction for payment of interest may be a mitigating circumstance and even though it does not absolve the employer

payment of interest as it would amount to double jeopardy.

4. Court below has further held that penalty could be imposed only if the employer had failed to pay the amount due, however, in the instant case before any proceedings could be initiated, the amount had been paid by the employer even though the payment was late, hence penalty was not warranted.

5. Learned counsel for the appellant has cited the following authorities:-

1. **2004 (4) AWC 3106 "Swastik Pharmaceuticals Varanasi Vs. J.R.D., U.P.** holding that both damages and interest may be imposed and charged.

2. **1994 (69) FLR 842 (Bombay High Court), Joint Regional Director, Employers' State Insurance Corporation Vs. Ganesh Foundry Pvt. Ltd.** holding that damages are penal in nature.

6. The view taken by the court below is not legally sustainable. Delayed payment is also failure to pay within time vide **AIR 1994 SC 521 "Prestolite of India Ltd., M/s. v. Regional Director" and AIR 1997 SC 1771 "Sovrin Knit Works v. Employees' State Insurance Corpn."** In view of these authorities damages may be imposed under Section 85-B and interest may also be directed to be paid under Regulation 31-A, simultaneously.

7. However, in the aforesaid authority of Prestolite, it has been held

that adjudicating authority shall take mitigating circumstances into consideration, it should not act mechanically in applying uppermost limit of damages. The employers had pleaded several mitigating circumstances like reduction in business and prolonged strike etc. The said points require consideration by the Employees State Insurance Court/ S.D.M.

8. Direction for payment of interest may be a mitigating circumstance and even though it does not absolve the employer of his liability to pay damages under Section 85-B, however, it may be taken into consideration for reduction of damages and interest may be adjusted in damages to be imposed under Section 85-B.

9. Through the impugned orders, the court below directed payment of interest.

10. Accordingly, appeals are allowed. Impugned orders are set aside. Matter is remanded to Employees State Insurance Court/ S.D.M., Nakur, Saharanpur for deciding the appeals in the light of observations made above.

11. As no one has appeared on behalf of the employers-respondents, hence before proceeding further, the court below shall issue notice to them.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2007

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 40844 of 2007

Smt. Pratibha Devi ...Petitioner

Versus

Additional Commissione, Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri Sankatha Rai
Sri Dr. Vinod Kumar Rai
Sri Vijay Kumar Rai

Counsel for the Respondents:
Sri B.B. Paul
Sri A.P. Paul
Sri Braj Raj
Sri Anuj Kumar
S.C.

Constitution of India 226–writ petition–arises out from-summary (mutation) proceeding–No right title are decided–finding recorded in summary proceeding neither conclusive nor binding–held–petition not maintainable.

Held: Para 17

The present case is not covered by any of the exceptions, in which this Court exercises its jurisdiction under Article 226 of the Constitution of India against an order arising out of mutation proceedings. The mutation courts have decided in summary proceedings as to whose name be recorded in the revenue record on the basis of Will. The decisions of the mutation court impugned in the writ petition are subject to adjudication of right of the parties by a competent Court. It is well settled that findings recorded in the mutation proceedings are neither conclusive nor binding when the rights are adjudicated in a competent Court. In view of the foregoing discussions, no around has been made to entertain this writ petition arising out of mutation proceedings in writ jurisdiction of this Court.

Case law discussed:
2002(46) ALR564, 1972 RD 361, W.P. 43450 OF 2003 DECIDED ON 11.5. 04 1993 RD–337, 1968 RD–123 2001, RJ 522, 1956 ALJ–807, 2001 RD-166, 2003 RD-217

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

1. Heard Sri Sankatha Rai, learned Counsel for the petitioner and Sri B.B. Paul, learned Counsel appearing for the contesting respondents.

2. By this petition, the petitioner has prayed for quashing the order dated 25.5.2007, passed by the Additional commissioner, Administration Varanasi Division, Varanasi dismissing the revision No. 84 of 2005 filed by, the petitioner under Section 219 of the Land Revenue Act. The petitioner has also prayed for quashing the order dated 28.3.2005 passed by the Deputy Collector Revenue, Varanasi deciding the appeal filed by the contesting respondent against the order dated 22.7.2002, passed by the Naib Tahsildar allowing the restoration application of the petitioner, setting aside the mutation order dated 4.11.2000, passed by the Naib Tahsildar in proceedings under Section 34 of the Land Revenue Act, 1901 (hereinafter referred to as 'Act')

3. Brief facts necessary to be noticed for deciding the writ petition are that Smt. Shanti Devi was recorded tenure holder. An unregistered Will deed dated 1.1.2000 is claimed to have been executed by Smt. Shanti Devi in favour of the petitioner. Another unregistered Will dated 8.3.2000 is said to have been executed by Smt. Shanti Devi in favour of contesting respondents. Smt. Shanti Devi died on 9.3.2000 at Bombay. A mutation application under Section 34 of the Act was filed by the contesting respondents on the basis of Will dated 8.3.2000. The Naib Tahsildar vide order dated 30.5.2000 allowed the mutation application of the respondents mutating their names. An application dated 4.11.2000 was filed by the petitioner, seeking recall of the order dated 30.5.2000 of Naib Tahsildar, mutating the name of the contesting respondents. The Naib Tahsildar vide his order dated 22.7.2000 set aside the order dated 30.5.2000 and restored the mutation application. An appeal was filed by the contesting respondents against the order dated 22.7.2000 before the Sub Divisional Officer. The Sub Divisional Officer passed an order on 2.8.2000, treating the appeal to be maintainable and directed that the case be, decided by the appellate authority and both the parties may led their evidence. Both the parties led their evidence and after hearing the parties and considering the evidence, the Deputy Collector vide his order dated 28.3.2005 allowed the claim of the contesting respondents and directed mutation of their names in place of Smt. Shanti Devi on the basis of the Will dated 8.3.2000. The revision was filed by the petitioner under Section 219 of the Act against the order dated 28.3.2005, which having been dismissed by the revisional Court, this writ petition has been filed challenging the aforesaid orders.

4. Sri B.B. Paul, learned Counsel for the contesting respondents raised a preliminary objection regarding maintainability of the writ petition on the ground that the orders impugned in the writ petition have been passed in the proceedings under Section 34 of the Act, which are summary in nature hence, the writ petition under Article 226 of the Constitution of India is not maintainable. Learned Counsel for the contesting respondents relied on various decisions of this Court which would be referred, while

considering the respective submissions of learned Counsel for the parties.

5. Sri Sankatha Rai, learned counsel for the petitioner refuting the preliminary objection of the learned Counsel for the contesting respondents, contended that the writ petition is fully maintainable under Article 226 of the Constitution of India. He submits that the order passed by the Deputy Collector dated 28.3.2000 in appeal filed by the contesting respondents, was an order passed without jurisdiction since no appeal lay under the U.P. Land Revenue Act against the order dated 22.7.2002, passed by the Naib Tahsildar allowing the restoration application. Sri Sankatha Rai referred to sections 201,210 and 211 of the U.P. Land Revenue Act and contended that appeal against the order dated 22.7.2002, passed by the Naib Tahsildar was not maintainable hence, error has been committed by the Sub Divisional Officer in allowing the appeal. He furtherer contended that the Sub Divisional Officer did not consider the evidence of the parties properly and has arrived at erroneous conclusion that unregistered Will dated 8.3.2000 is proved. Learned Counsel for the petitioner has also placed reliance on various judgments of this Court which would be referred to hereinafter, while considering the submissions in details.

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

7. This writ petition arises out of the proceedings under Section 34 of the Land Revenue Act. This Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India, normally does not entertain a writ petition against the orders passed in summary proceedings under Section 34 of the Land Revenue Act. The question regarding maintainability of the writ petition against the orders passed in mutation proceedings and the cases in which the Court can entertain the writ petition, came up for consideration before this Court in several cases. I had an occasion to consider the issue in **Lal Bachan Vs. Board of Revenue, U.P. Lucknow and others**, reported in 2002 (46) ALR 564. After considering the judgments of this Court and Apex Court following was laid down in paragraphs 11,12,13 and 16.

"11. This Court has consistently taken the view as is apparent from the decisions of this Court referred above that writ petition challenging the orders passed in mutation proceedings are not to be entertained. To my mind apart from there being remedy of getting the title adjudicated in regular suit there is one more reason for not entertaining such writ petition. The orders passed under section 34 of the Act are only based on possession which do not determine the title of the parties. Even if this Court entertains the writ petition and decide the writ petition on merits, the orders passed in mutation proceedings will remain orders in summary proceedings and the orders passed in the proceedings will not finally determine the title of the parties.

12. In view of the above discussions, it is clear that although the writ petition arising out of the mutation proceedings cannot be held to be non-maintainable but this Court do not entertain the writ petition under Article 226 of the Constitution due to reason that parties have right to get the title adjudicated by regular suit and the orders

passed in mutation proceedings are summary in nature.

13. The second question which needs to be considered is as to in what circumstances the writ petition can be entertained arising out of the mutation proceedings. The Division Bench of this Court in Jaipal's case (supra) has referred to "exception" to the general rule in the following words:

"The only exception to this general rule is in those cases in which the entry itself confers a title on the petitioner by virtue of the provisions of the U.P. Zamindari Abolition and Land Reforms Act. This petition does not fall in that class and we think therefore this Court should not entertain it. It is accordingly dismissed with costs."

8. The writ petition against the order passed in mutation proceedings can be entertained in case the order passed is held to be an order passed without jurisdiction. The submission of Sri Sankatha Rai, learned counsel for the petitioner to bring the present case in one of the exceptions as recognized for entertaining the writ petition against the mutation proceedings is; that the appeal before the Sub Divisional Officer against the order dated 22.7.2002, was without jurisdiction which can very well be interfered with in the present writ petition. Thus the appeal filed by the contesting respondents against the order dated 22.7.2002 of the Naib Tahsildar before the Sub Divisional Officer was maintainable or not?

9. As noticed above, the Naib Tahsildar passed the order dated 30.5.2000, allowing the mutation application filed by the contesting respondents. A restoration application was filed by the petitioner for recall of the said order on 4.11.2000, which application was allowed on 22.7.2002 by setting aside the order dated 30.5.2000. The appeal before the Sub Divisional Officer was filed against the order dated 22.7.2002. Section 200 and 201 of the U.P. Land Revenue Act in this context is relevant to note.

"200. Hearing in absence of party.- *Whenever any party to such proceeding neglects to attend on the day specified in the summons or on any day to which the case may have been postponed, the court may dismiss the case for default or may hear and determine it ex parte.*

201. No appeal from orders passed ex parte or by default.- *No appeal shall lie from an order passed under Section 200 exparte or by default.*

Re-hearing on proof of good cause for nonappearance.- *But in all such cases, if the party against whom judgment has been given appears either in person or by agent (if a plaintiff within fifteen days from the date of such order, and if a defendant, within fifteen days after such order has been communicated to him, or after any process for enforcing the judgment has been executed or at any earlier period), and shows good cause for his nonappearance, and satisfies the officer making the order that there has been a failure of justice, such officer may, upon such terms as to costs or otherwise as he thinks proper, revive the case and alter or rescind the order according to the justice of the case:*

Order not to be altered without summons to adverse party.- *Provided that no such order shall reversed or altered without*

previously summoning the party in whose favour judgment has been given to appear and be heard in support of it."

10. Section 201 of U.P. Land Revenue Act provides that no appeal shall lie from an order passed under Section 200 ex-parte or by default. The order dated 30.5.2000 of the Naib Tahsildar allowing the mutation of the respondents, was an order allowing the mutation exparte. Against the order dated 30.5.2000, thus, appeal was not maintainable by virtue of section 201. In the present case, appeal was not filed against the order dated 30.5.2000, rather the appeal was filed against an order by which the application of the petitioner for setting aside the ex-parte order was allowed. Section 201 itself provides that if, party against whom judgment has been given ex-parte satisfy that there was good cause for his non-appearance, the order can be set aside. Present is a case where the application under Section 201 was made by the petitioner for recall of the order and the order dated 22.7.2002 was an order passed under Section 201 allowing the restoration application.

Sections 210 and 211 provides for appeal. Section 210 and 211 is quoted herein below.

"210. Courts to which appeals lie.- *(1) Appeal shall lie under this Act as follows:*

(a) to the Record Officer from orders passed by any Assistant Record Officer;

(b) (i) to the Commissioner from orders passed by a - Collector or an Assistant Collector first class or Assistant Collector in charge of sub-division,

(ii) to the Collector from orders passed by an Assistant Collector second class or Tahsildar.

(6) No appeal shall lie against an order passed under Section 28,33, 39 or 40."

211. First Appeal.- *Unless an order is expressly made final by this Act, an appeal shall lie to the court authorised under Section 210 to hear the same from every original order under Section 210 to hear the same from every original order passed in any proceedings held under the provisions of this Act."*

11. According to section 210 (1) (b) (ii) an appeal shall lie to the Collector from an order passed by the Tahsildar. Section 211 provides that unless an order is specifically made final by the Act, the appeal shall lie to the Court authorized under Section 210 to hear from every original order passed in any proceedings held under the provisions of this Act. The proceeding for recall of an ex-parte order under Section 201 is a proceeding contemplated under Section 211. The order passed under Section 201 allowing an application setting aside ex-parte order has not been made final by any provisions of the Act hence, the said order is appealable under Section 211 of the Act.

12. Learned Counsel for the petitioner in support of his submission has placed reliance on judgment of this Court in the case of **Kundan Vs. Board of Revenue** reported in *1972 R.D. 361*, **Laxman Vs. State of U.P.& others,** Civil Misc. writ petition No. 43450 of 2003, decided on 11.5.2004, **Nawab Singh and others Vs. Deputy Director of Consolidation and others**, reported in *1993 R.D. 337*, Mst. Isharaji Vs. Commissioner *1968 R.D. 123,* **Jokhu Vs.**

Deputy Director of Consolidation and others, reported in *2001 RJ 522*.

13. In the case of **Kundan** (*supra*), the Court was considering the provisions of section 144 (2) C. P.C. The court held that where an ex-parte decree is set aside, it cannot be said that the decree has been varied or reversed. The question in that case was as to whether section 144(2) C.P.C. will be applicable or not. The issue which has arisen in the present case was neither considered nor any such proposition has been laid down that against an order setting aside an ex-parte order, passed under Section 200 U.P. Land Revenue Act, an appeal shall not lie. The next judgment relied upon by learned Counsel for the petitioner is the judgment of this Court in the case of **Laxman** (*supra*). In the case of **Laxman**, the Naib Tahsildar has rejected the application for recall of the mutation order. The writ petition was entertained only on the ground; as to whether Naib Tahsildar committed error in rejecting the application when sufficient grounds were made out for recall of the order. Following was observed by this Court:

"There is no dispute that writ petition arises out of summary proceeding. The consistent view of this Court has been that writ petition arising out of mutation proceedings cannot be entertained because the findings and orders passed by mutation courts are always subject to decision by a competent Court. In the present case. This is not examining the merits of the order passed by Naib Tahsildar dated 23rd August, 1985. The petitioners' counsel has confined his submission only on the aspect that the said order was ex-parte and Naib Tahsildar erroneously rejected the application to recall the order on the ground that summons were served. In view of the aforesaid, the writ petition has been entertained only for a limited purpose to examine as to whether the order passed by Naib Tahsildar dated 23rd August, 1985 deserved to be recalled or not. For other issues which were sought to be raised in the writ petition, it is not necessary to express any opinion or to enter into the said issues."

14. In the above case the issue was not involved as to whether against an order allowing the restoration application under Section 201 of the Act appeal was barred or not. The said case does not help the petitioner in any manner. Another case relied upon by learned Counsel for the petitioner is **Nawab Singh** (*supra*). In the said case the Court was examining as to whether by virtue of section 41 of the U.P. Consolidation of Holdings Act, the provisions of section 210 of the U.P. Land Revenue Act were applicable in consolidation proceedings. Learned Single Judge held that remedy for setting aside ex-parte order is available to an aggrieved party under Section 201 of the U.P. Land Revenue Act which has been made applicable to the proceedings under the U.P. Consolidation of Holdings Act by virtue of section 41. The issue which has arisen in the present case, was not considered in that case hence, the said case will not help the petitioner. The next case relied upon by learned Counsel for the petitioner is Mst. Isharaji (*supra*). The question in the said case was as to whether a decision on objection passed ex-parte or in default, is appealable under Section 11 of the U P Consolidation of Holdings Act. This Court considered the provisions of U.P. Consolidation of Holdings Act including section 41 as sell

as section 201 of U. P. Land Revenue Act and came to the conclusion that all kinds of the orders passed by the Consolidation Officer are appealable under Section 11 of the U.P. Consolidation of Holdings Act and section 201 excluding an appeal against an order passed ex-parte is not attracted. Following was laid down in paragraph 5 of the said judgment:

"5. Section 41 of the Consolidation of Holdings Act opens with the phrase "Unless otherwise expressly provided by or under this Act." So far as the applicability of section 210 is concerned if any other provision of the Consolidation of Holdings Act provides for an appeal against an order passed exparte or by default then section 202 will not apply. Its applicability would be excluded by the opening part of Section 41. Section 11 of the Consolidation of Holdings Act is general. It provides an appeal against all kinds of orders of the Consolidation Officer passed under Section 10 of the Act. ... .."

15. The last case relied on by learned Counsel for the petitioner is **Jokhu** (*supra*). The issue raised in that case was as to whether the Deputy Director of Consolidation had power to hear the case against exparte order and had also power to recall the ex-parte order. This Court came to the conclusion that power to set aside ex-parte order is provided under Section 201 of the U.P. Land Revenue Act, is available to the Deputy Director of Consolidation by virtue of section 41 of the U.P. Consolidation of Holdings Act. Following was laid down in paragraph 9

9. *The power to set aside ex parte order has been conferred in Section 201 of the UP. Land Revenue Act on all the authorities and, therefore, in my opinion the Deputy Director of Consolidation under the UP. Consolidation of Holdings Act, Section 41 read with Section 201 of the UP. Land Revenue Act, 1901 has the power to proceed ex parte and for recalling of the ex parte orders on good cause being shown for non-appearance....."*

16. In view of the foregoing discussions, it is clear that none of the cases relied on by learned counsel for the petitioner in support of his submission that against an order passed by the Naib Tahsildar under Section 201 of the U.P. Land Revenue Act, recalling a mutation order appeal to the Deputy Collector is barred. Thus, submission of the learned Counsel for the petitioner that the order of the appellate authority dated 28.3.2005 was without jurisdiction, cannot be accepted.

17. Learned Counsel for the respondents have placed reliance on judgments of this Court in the case of **Jaipal Minor Vs. Board of Revenue**, reported in *1956 ALJ 807,* **Kunj Bihari Vs. Board of Revenue**, reported in *2001 R.D. 166*, **Ishu Vs. State of U.P**, reported in *2003 R.D. 217* for the proposition that against mutation proceedings which are summary in nature, the writ petition under Article 226 of the Constitution of India is not maintainable. As noted above in **Lal Bachan Singh** (***supra***), this Court had laid down that normally the writ petition challenging the mutation proceedings is not entertained since they are summary proceedings which do not decide any question of title and they are always subject to adjudication by competent Court. The present case is not covered by

any of the exceptions, in which this Court exercises its jurisdiction under Article 226 of the Constitution of India against an be recorded in the revenue record on the basis of Will. The decisions of the mutation court impugned in the writ petition are subject to adjudication of right of the parties by a competent Court. It is well settled that findings recorded in the mutation proceedings are neither conclusive nor binding when the rights are adjudicated in a competent Court. In view of the foregoing discussions, no around has been made to entertain this writ petition arising out of mutation proceedings in writ jurisdiction of this Court.

18. Subject to observation as made above, the writ petition is dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.11.2007

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

Criminal Revision No. 1954 of 2003

Raj Dei ...Plaintiff/Revisionist
Versus
Ram Lakhan ...Opposite Party/Defendant

Counsel for the Revisionist:
Sri Dr. Pradeep Kumar Misra

Counsel for the Opposite Party:
Sri R.P. Singh
A.G.A.

Code of Criminal Procedure- Section–125(4)–Maintenance–wife living adultery at the time of filing application–not proved–finding recorded by the Family Court–regarding birth of child out of adulterous relationship–baseless–can order arising out of mutation proceedings. The mutation courts have decided in summary proceedings as to whose name not sustain–revisionist/wife entitled for maintenance.

Held: Para 7
The statement of the opposite party was silent on the point that his wife was living in adultery on the date the application was made. In view of these facts the conclusion drawn by the Principle Judge Family Court that the revisionist is living in adultery and child was the outcome of adulterous relationship cannot be sustained.

Case law discussed:
1985 Crl.L.J. 1923 (All), 1990 DMC 533, 1990 (1) DMC 38 (All), 1991 (2) DMC 422 (M.P.), 1993 Crl. L.J. 238, 1996 (2) Mah.L.J. 341

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

1. This criminal revision is directed against the judgment and order dated 24.4.2003 passed by the Principal Judge Family Court Azamgarh in case crime no. 23 of 1995 Smt. Raj Dei and another Vs. Ram Lakhan whereby declining to grant maintenance under the provisions of section 125 of the Code of Criminal Procedure (hereinafter referred to as the 'Code').

The facts giving rise to this revision are these:

2. The revisionist was married to the opposite party about 25-26 years before the presentation of maintenance petition. The Gona ceremony took place 5-6 years after the marriage. It was alleged that a son was born to her few years after the Gona ceremony out of the wedlock of opposite party. According to the revisionist there was change in the behaviour of opposite party and he started

subjecting her to assault and abuses. The opposite party was serving in the Army and used to come home on leave. The revisionist some how managed her stay in the marital home bearing all sorts of cruelties. Two years before the presentation of maintenance petition the opposite party brutally assaulted her and turned her out of the marital home. He threatened to kill her if she came back to his house. She came to her parental home. Her brother and respectable members of the locality tried to reason with the opposite party but he refused to keep her with him. The opposite party did not provide maintenance to her though he was a man of means. The opposite party was drawing more than Rs.2000/- per month as pension and had income from agricultural land and tractor.

3. The opposite party contested the petition by filing written statement. He admitted having married the revisionist in the year 1954. According to him Gona ceremony took place in the year 1966. It was alleged that due to Indo-Pakistan war in the year 1971 he did not get leave to visit his native place. In January 1972 he came home on leave and joined his duty in February 1972. The revisionist went to her parental home thereafter and gave birth to a male child in January 1973. According to him he was not the father of the child. The opposite party alleged the revisionist having given birth to an illegitimate child he deserted her. According to him the revisionist did not stay at his house thereafter. It was alleged that the revisionist being employed in the Health Department was capable of maintaining herself.

4. The court below after taking into account the evidence adduced by the parties recorded the finding that the opposite party was not the father of the child of revisionist. The court below declined the grant of maintenance on the ground of her adulterous relationship with another man.

5. The impugned judgment and order has been assailed on the grounds that it is the responsibility of the husband to maintain his wife and the wife is entitled to claim maintenance so long she stays away from the matrimonial home under the compelling circumstances. The learned court below erred in recording the finding that the revisionist failed to establish sufficient cause for staying away from the marital home. The court below while assessing the testimony of revisionist ignored the aspect that she is an illiterate and rustic woman. The court was much impressed by the fact that opposite party was living the life of a widower or bachelor having not entered into a second marriage. According to the revisionist there is no material on the record to establish that the child born to her was an illegitimate child. The court below committed illegality in construing the provisions of section 125 of the code.

6. Heard Shri P.K. Mishra, learned counsel for the revisionist, Shri R.P. Singh learned counsel for the opposite party, learned A.G.A and have perused the record.

7. The learned counsel for the revisionist submitted that the provisions of section 125 (4) of the Code disentitle a wife to receive allowance for maintenance if she is living in adultery or if without any sufficient reason she refuses to live with her husband. It was urged that the burden of proving the child's parentage

was upon the opposite party which he miserably failed to discharge. The opposite party did not resort to D.N.A. test to establish the identity of the parent of child born to the revisionist. The learned counsel further argued that there is sufficient material on the record for coming to the conclusion that the opposite party was the father of the child. The next submission was that the opposite party having sufficient means to provide maintenance to the wife neglected and refused to maintain her.

8. The learned counsel for the opposite party strenuously canvassed that the revisionial court should not interfere with the finding of fact recorded by the court below. There is sufficient evidence to come to the conclusion that opposite party was not the father of the child born to the revisionist. The revisionist was living in adultery therefore she was not entitled to claim maintenance from her husband.

9. It is well settled that section 125 of the Code has been enacted for providing speedy relief to deserted wife, children and parents. The precondition, for the grant of maintenance under section 125 of the Code are that the applicant must be a wife and unable to maintain herself and her husband having sufficient means neglects or refuses to maintain her. It is not disputed that the revisionist is legally wedded wife of the opposite party and she is residing at her parental home.

Admittedly the opposite party is a retired Army personnel and is getting pension. The maintenance has been refused to the revisionist on the ground that she has incurred the disability contained in sub-section (4) of Section 125 of the Code Section 125 (4) of the Code reads as below:

"No wife shall be entitled to receive an allowance for maintenance or interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

10. In the first part of sub-section (4) of Section 125 of the Code the expression 'if she is living in adultery' has been used which means continuous course of adulterous conduct. An occasional lapse is not enough for refusing maintenance. The adulterous conduct on the part of the wife is to be seen at the time of presentation of application. Moreover there has to be clear proof of adultery. It is true that direct evidence of adultery is not available but there has to be some evidence to prove the allegations.

11. In Udaivir Singh V. Smt. Vinod Kumari, (1985) Cri. LJ 1923(All.), wife was living separately from husband and chastity of wife was doubted by husband. The High Court held that the wife was justified in living separately from husband and claiming maintenance.

12. In Chhagan Lal Devman V. State of Maharashtra (1990) 1 DMC 533, this Court has held that the expressing "living in adultery" as used in Section 125 Cr.P.C. is to mean a continuous course of adulterous life as distinguished from one or two lapses from virtule and the burden to prove allegations of adultery against the wife lives on the-husband.

13. In Khem Chand V. State (1990)1 DMC 38 (All) it has been held that the cardinal principle is that in matrimonial or maintenance cases solitary evidence of spouse attributing unchastity or adultery to the other party, should not be relied on because such spouse is extremely interested in the case.

14. In Ravindra Singh V. Kapsi Bai, (1991) 2 DMC 422(Madh Pra) it has been down that if for the husband to prove that the wife is continuously committing violation of the marriage bed indulging in adulterous life, i.e. living in, quasi permanent union with another. It has been further observed that to establish this, more than one instance of adultery has to be brought home to the knowledge of the wife, thereby constituting the term "living in adultery" within the meaning of sub-section (4) of Section 125 Criminal Procedure Code. In this case, it was found that considering the evidence in totality, barring the two instances of which husband had condoned one and except the second one which then took place or isolated act of adultery, there was no other evidence to infer that wife was living in adultery.

15. In Baishnab Charan Jena V. Ritarant Jena 1993 Cri. Ll 238 (Orissa) it has been laid down that merely proving one or more instances of lapses in character of wife is not sufficient to absolve her husband from liability to pay maintenance to her and even assuming that the instances alleged by the husband are held to have been established, still he will not be entitled to succeed to deny his liability for payment of maintenance. It was further pointed out that the very allegation by the husband to castigate the wife as a person living in adultery entitles her to live separately from her husband and claim maintenance from him.

16. In Chandrakant Gangaram Gawade V. Sulochana Chandrakant Gawade(1996) 2 Mah. Ll 341 it was held that it is for the husband to prove that wife is living in adultery and a mere stray or single lapse on the part of the wife is not sufficient to bring her conduct within the meaning of the expression "living in adultery" as used in Section 125(4) Cr.P.C. and that it should be a continuous course of adulterous conduct. It was further held out that the husband cannot get over his liability to pay maintenance merely by proving one or more instances or lapses on the part of the wife and he will have to produce additional evidence to establish continuous course of adulterous behaviour of wife.

In Narnath Thazhakuniyil Sandha V. Kottayat Thazhakuniyil Narayan 1999 Cri. LJ 1663 the wife was actually found indulging in sexual intercourse with another person on one occasion and it was held that the words "living in adultery" under Section 125(4) Cr.P.C. contemplate continuous course of conduct on the of wife with paramour and it would be improper to refuse maintenance to wife on the evidence adduced by husband showing only a single act of unchastely or few lapses from virtue on the part of wife.

17. The provisions of sub-section (4) of section 125 of the Code being an exception to the general rule that the maintenance is to be provided by the husband to the wife unable to maintain herself, the burden of proof that the wife is living in adultery is on the husband who claims protection of the exception, contained in section 125(4) of the Code.

In the instant case the opposite party examined himself as O.P.W. -1 and deposed that he came home on leave in he had no physical relationship with her after February 1972. In the Parivar Register maintained by Gram Panchyat the date of birth of the child has been mentioned as 9.9.1972. The opposite party did not apply for D.N.A. test of blood samples of the child with his blood samples to establish the identity of the father of the child. The D.N .A. test is recognized under the Indian Evidence Act as proof of paternity of the child. There is no documentary proof that the child was born in January 1973. On the contrary, the entries of Parivar Register indicate the birth of the child on 9.9.72. The opposite party did not examine any witness to establish the adulterous relationship of revisionist with a particular person. The deposition of opposite party was not sufficient for coming to the conclusion that the revisionist had adulterous relationship and child born to her was the result of said relationship. Moreover the child was born in the year 1972 or 1973. The petition for maintenance was filed in the year 1995. The statement of the opposite party was silent on the point that his wife was living in adultery on the date the application was made. In view of these facts the conclusion drawn by the Principle Judge Family Court that the revisionist is living in adultery and child was the outcome of adulterous relationship cannot be sustained.

18. Coming to the question whether the revisionist has established that her husband neglected and refused to maintain her. The opposite party deposed that, he will not allow his wife and her son to live in his house. He admitted that his wife is an illiterate woman and she is January 1972 and went away to join his duty in February 1972 and child was born to the revisionist in January 1973 though residing at her parental home since the birth of the child. According to him he is drawing pension of Rs.2400/- per month. The opposite party did not provide maintenance to his wife and refused to maintain her. The revisionist asserted that she was assaulted, turned out of marital home by the opposite party and threatened not to come again. She gave out that she has no means to maintain herself whereas the opposite party is drawing pension and had income from agricultural land. There is no reason to discard the sworn testimony of the revisionist that opposite party neglected and refused to maintain her. The opposite party is a man of means having sufficient income to provide maintenance to the revisionist. In view of these facts and circumstances the revisionist is entitled to get maintenance allowance @ Rs.500/- per month from the opposite party from the date of the revision i.e. 25.7.2003.

19. A propose to what has been discussed above the revision is allowed. The impugned order dated 24.4.2003 is set aside. Allowing the application moved under section 125 of the Code maintenance allowance @ Rs.500/- per month is awarded to the revisionist from the opposite party from the date of this revision.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2008

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ petition No. 63027 of 2007

Surya Prakash Dwivedi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Sharma
Counsel for the Respondents:
Sri Girish Kumar Singh
S.C.

U.P. Punchayat Raj (16th Amendment) Rules 2005-Rule 33-B-No confidence motion notice-given with signature of 1189 members-District Punchayat Raj officer nominated District Horticulture Officer-who fixed the date by beat of drum to assemble all those person to verify their signature-presence of all those members on specified date not possible-procedure adopted by the enquiry officer contrary to rule-set a side.

Held: Para 9

In the present case the calling of the meeting by beat of drums in the village and thereafter asking the persons to assemble to verify their signatures virtually pre-empted the 'no confidence motion'. It was not necessary to call for the members who had signed or put their thumb impressions. They may not be present on that date or at any particular time to be chosen by the enquiry officer. It is not possible to assume that more than half of the members of village will be present in the village on any given time before the enquiry officer.

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

1. Heard learned counsel for the petitioner. Sri Girish Kumar Singh appears for contesting respondent. Learned Standing Counsel appears for state-respondents.

2. The petitioner along with four other members of the Gram Sabha, Ram Nagar, presented a motion to the District Panchayat Raj Officer, Pilibhit to convene a meeting to consider a 'no confidence motion' vide notice dated 2.11.2007 signed by 1189 members of Gaon Sabha. The District Panchayat Raj Officer nominated the District Horticulture Officer, Pilibhit to verify these signatures. He made a proclamation by beat of drums in the village on 12.11.2007 calling the villagers to assemble on 14.11.2007 for verifying the signatures. The District Horticulture Officer found that 913 persons/villagers did not appear to verify their signatures and thumb impressions, and that 16 persons present expressed their doubts over the signatures/thumb impressions. On the next day, on 15.11.2007, on receiving the report, the District Panchayat Raj Officer found that the notice was not verified and cancelled the same.

3. Learned counsel for the petitioner contends that five members presenting the notice, affirmed in their affidavits and verified the signatures/thumb impression on the notice. The law does not prescribed for any specific procedure under the Rules for verification. The subjective satisfaction of the Prescribed Authority, and his discretion, however, must be used in a reasonable manner to verify the signature/thumb impression on the notice. The procedure adopted by the District Panchayat Raj Officer was neither reasonable nor fair and over reaches the requirement prescribed in law.

4. Learned counsel for the respondent, on the other hand, submit that the District Panchayat Raj Officer directed the District Horticulture Officer, and that the notice by bit of drum to verify the signatures/thumb impression on the notice of 'no confidence motion' was a proper procedure. According to him there was nothing wrong in the procedure adopted by the Prescribed Authority.

5. In the Full Bench case of **Mathura Prasad Tewari Vs. Assistant District Panchayat Raj Officer, 1966 ALJ 672 (FB)** Hon. M.C. Desai, C.J., observed as follows:

"The most that can be said is that the matter is in the discretion of the Prescribed Authority, if a complain is made to it that material number of signatures is invalid, it may, in its discretion, make enquiry or refuse to make it."

Similar 2 as the view taken by Hon'ble Satish Chandra, J. as he then was, in **Daya Shankar Vs. District Panchayat Raj Officer**, 1968 ALJ 753:-

"The Prescribed Authority was not obliged by law to make an enquiry into the genuineness or otherwise of the signatures appended to the notice. The enquiry directed to be conducted in the instant case was informal for the personal satisfaction of the Prescribed Authority for which the Pradhan or other members of the Gaon Sabha have no concern or interest."

6. A Division Bench of this Court in **Banshoo Vs. District Panchayat Raj Officer, Jaunpur, 1986 UPLBEC 429** approved the decision and held that it was the discretion of the Prescribed Authority to hold or not to hold the enquiry would be justified depending upon the facts of the case, and even the enquiry is to be made, it should not be a long drawn enquiry so as to take it beyond the statutory period of thirty days as required by Rule 33-B of the Rules made under U.P. Panchayat Raj Act, 1947.

7. Since after the aforesaid decisions, Rules have been amended and that now Rule 33-B as amended by U.P. Panchayat Raj (Sixteenth Amendment) Rules, 2005 with effect from 4.3.2005 provides as follows:

"33-B. Procedure for removal of Pradhan.- (1) A written notice of the intention to move a motion for removal of the Pradhan under Section 14 of the Act shall be necessary. It shall be signed by not less than one-half of the total number of members of the Gram Sabha and shall state the reasons for moving the motion and it shall be delivered in person by at least five members signing the notice to the District Panchayat Raj Officer. It shall also be necessary to certify the signatures of the other members signing the notice by all five members presenting the notice by furnishing their affidavit to this effect. Before proceeding further on notice the District Panchayat Raj Officer shall satisfy himself regarding genuineness of the signatures of the members signing the notice.

(2) The District Panchayat Raj Officer shall convene a meeting of the Gram Sabha, under Provisions of Section 14 of the Act, on a date and time of commencement of meeting to be fixed by him which shall not be later than thirty days from the date of receipt of the notice. The meeting shall be presided over by the District Panchayat Raj Officer or by the person authorised by him in writing in this behalf. If any other person is authorised to preside the meeting, he shall be supplied a copy of the electoral rolls of the Gram Sabha and all other papers relating to the motion by the District Panchayat Raj Officer. The Presiding Officer may take such clerical assistance for conducting the proceedings of the meeting for the consideration of the motion as he may deem necessary.

(3) The Presiding Officer shall read in the meeting, the notice received by him. He shall then allow the motion to be moved and discussed. The Presiding Officer shall not

speak on the merit of the motion. Such discussion shall terminate on the expiry of two hours appointed for the commencement of the meeting unless it is concluded earlier. Then the motion shall be put to vote according to provisions of Rule 33-D."

8. After the amendment of the Rules with effect from 4.3.2005, the delivery of the notice by five members signing the notice, certifying the signatures of other members signing the notice is prima facie sufficient to satisfy the District Panchayat Raj Officer regarding genuineness of the signatures of the members signing the notice. He may hold an enquiry, the manner of which is not prescribed, to satisfy himself, with regard to the genuineness and number of signatures on the notice. He may also refuse to make an enquiry in this regard. The enquiry, however, should not be so elaborate so as to defeat the very object of the notice. The law does not require the enquiry officer to summon each and every signatory or to knock on their door, or even to ask them to assemble and to verify the signatures/thumb impressions. The enquiry should not be delayed or deferred giving an opportunity to the elected Pradhan to either withhold the members from attending the proceedings or to manipulate to defeat the motion. The enquiry also should not be extended so that the members are not provided with 15 clear days to consider the motion.

9. In the present case the calling of the meeting by beat of drums in the village and thereafter asking the persons to assemble to verify their signatures virtually pre-empted the 'no confidence motion'. It was not necessary to call for the members who had signed or put their thumb impressions. They may not be present on that date or at any particular time to be chosen by the enquiry officer. It is not possible to assume that more than half of the members of village will be present in the village on any given time before the enquiry officer.

10. The writ petition is allowed. The order dated 15.11.2007 passed by the District Panchayat Raj Officer is set aside. Now since the period of thirty days has expired, no effective relief can be given to the petitioner except by observing that the petitioner may give a fresh notice, call the meeting to consider the 'no confidence motion'. If and when such a meeting is called, the District Panchayat Raj Officer would hold the enquiry regarding the genuineness of the signatures/thumb impressions in accordance with law as explained in the judgment.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2007

BEFORE
THE HON'BLE S.K. SINGH, J.

Second Appeal No. (88) of 2006

Ram Pal ...Plaintiff Appellant
Versus
Smt. Birmo ...Defendant/Respondent

Counsel for the Appellant:
Sri A.K. Singh

Counsel for the Respondent:
Sri Amit

Indian Limitation Act-Section 14-Condonation of delay in filling Second Appeal-5 years delay-No proper explanation wrong advice of counsel-even name of such counsel not disclosed-No complaint filed before Bar counsel who advised to file revision against the rejection of First Appeal by District Judge-even on merit-no loss or injury caused the appellant-delay not liable to condone.

Held: Para 6 & 8

On careful examination of the averments as made in the affidavit it is found that even wrong then what action was taken by the appellant against that learned Advocate i.e. by filing complaint in the Bar Council or otherwise suing him in the competent court. It is unbelievable for a law graduate that against the judgment and decree of the civil court passed by the Additional District Judge the advise was given to file a revision against the order of the Naib Tahsildar passed in the year 1991. It was the mutation proceeding. The order of the Naib Tahsildar is said to have been passed in the year 1991 and thus giving of the advise of filing revision after about ten years after judgment of the Additional District Judge appears to be something funny and that makes no sense so as to give a belief to this court about bonafide on the part of the appellant.

In view of the aforesaid, this court is not satisfied that there is any bonafide on the part of appellant in filling appeal after about five years and thus this court refuses to condone the delay in filing the appeal.

Case law discussed:

AIR 1972 SC-749, AIR 1998 SC-2276

(Delivered by Hon'ble S. K. Singh. J.)

1. Heard Sri A.K. Singh, learned Advocate in support of delay condonation application and Sri Amit, learned Advocate who appeared for the respondent.

2. This appeal has been filed against the judgment and decree passed by the lower appellate court dated 7.4.2001. In view of report of the stamp reporter the appeal is barred by time by four years 273 days. Affidavit has been filed in support of the delay condonation application to which counter affidavit has been filed by the respondent and rejoinder affidavit is also there.

the name of the local counsel who has given wrong advise has not mentioned. There is further no averment that if the advise given by the local counsel was

3. The ground which has been taken for condonation of delay is that under wrong advise of the local counsel appellant pursued a wrong remedy and after exhausting that remedy when he came to the present learned counsel he was correctly advised to file appeal and thus this appeal has been filed. It is on these premises delay in filing the appeal is sought to be condoned. In support of the submission that pursuing a different remedy than appeal on wrong advise of a counsel constitute substantial cause reliance has been placed on the decision given by the Apex Court in case of State of West Bengal Vs. Howrah Municipality, reported in AIR1972, SC, page 749.

4. The aforesaid stand was contested by the respondent by filing counter affidavit. Learned counsel for the respondent submits that if the explanation is not satisfactory then delay is not to be condoned as that is to cause irreparable injury to the other side. In support of his submission learned counsel for the respondent placed reliance on the judgment given by the Apex Court in case of P.K. Ramachandran Vs. State of Kerala and another reported in AIR 1998 SC, 2276.

5. In view of the aforesaid, this court has examined the matter.

The suit was for cancellation of sale deed which is said to have been executed by plaintiff-appellant on 13.7.84. The suit was filed in the year 1991 which was numbered as Original Suit No. 279 of 1991. The suit was dismissed on 16.10.1999. The appeal was dismissed on 7.4.2001. Admittedly second appeal has been filed after delay of four years 273 days as noted above. The

ground is that appellant pursued a wrong remedy under wrong advise of local counsel.

6. On careful examination of the averments as made in the affidavit it is found that even the name of the local counsel who has given wrong advise has not mentioned. There is further no averment that if the advise given by the local counsel was wrong then what action was taken by the appellant against that learned Advocate i.e. by filing complaint in the Bar Council or otherwise suing him in the competent court. It is unbelievable for a law graduate that against the judgment and decree of the civil court passed by the Additional District Judge the advise was given to file a revision against the order of the Naib Tahsildar passed in the year 1991. It was the mutation proceeding. The order of the Naib Tahsildar is said to have been passed in the year 1991 and thus giving of the advise of filing revision after about ten years after judgment of the Additional District Judge appears to be something funny and that makes no sense so as to give a belief to this court about bonafide on the part of the appellant. After 2001 it is said that revision was filed against the order of the Naib Tahsildar of the year 1991 and when it was rejected then a recall application was also filed and when that too was rejected then appellant came to present learned Advocate who gave him correct advise to file this second appeal.

7. The suit for cancellation of sale deed was filed in the year 1991. First appeal came to be decided in the year 2001 and after about five years prayer is to entertain this appeal on the excuse of wrong advise by the local counsel. Neither his name has been given nor action taken has been stated. Against the wrong advise as given by the learned advocate whose name is still to be ascertained, it is better for the appellant to take appropriate action against him by filing complaint before the Bar Council by giving complete details. This is not a case of pursuing remedy in a forum where the appellant can be said to have bonafide belief of getting relief. After dismissal of the suit by the trial court and dismissal of the appeal by the First Appellate Court in the year 2001 there cannot be any occasion of getting any relief from the court of Naib Tahsildar in respect to the sale deed by challenging the order of the Naib Tahsildar passed in the year 1991 i.e. after about ten years. In this situation appellant will have to fight with learned Advocate if contention of wrong advise is accepted for the sake of argument to be correct. This cannot be a case of granting indulgence in the garb of Section 14 of the Limitation Act which permits condonation on account of bonafide litigation in a wrong court.

7. So far the judgment of the Apex Court given in case of State of West Bengal (Supra) that happened to be a case of land acquisition proceeding and litigation came to this court and remedy was found to be to challenge the judgment in the land acquisition reference case. The fact of the present case cannot be equated with the fact of the case, referred above. Thus on the facts, this court is not satisfied that appellant can get any help from the decision on which reliance has been placed.

8. In view of the aforesaid, this court is not satisfied that there is any bonafide on the part of appellant in filling appeal after about five years and thus this court refuses to condone the delay in filing the appeal.

9. Accordingly, this application is rejected and thus appeal also stands dismissed.
