ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2008

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

Civil Misc. Writ Petition No. 58470 of 2005

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

Counsel for the Petitioner:
Sri. Shakti Dhar Dubey
Sri. Neeraj Dubey

Counsel for the Respondents:
Sri. O.S. Tripathi
Sri. Ganga Prasad
S.C.

Constitution of India, Article 226- suspension of licence for running Fair Price shop-along with suspension order no show cause notice served-which is mandatory requirement in view of G.O. 29.07.2004-apart from allegations not made in suspension order cannot be allowed to be supplemented by counter affidavit-held-suspension order vague-cannot sustain.

Held: Para 13

The decision in Smt. Alka Rani's case applies to the facts of the case in hand, as in this case also the allegations are vague and specific instances and material sought to be read in support of the allegations against the petitioner have not been mentioned. If no material is mentioned in the suspension order then substituting the material in the counter affidavit would be of no help to the respondents. We further find that along with the suspension order no show cause notice had been issued to the petitioner directing him to show cause as to why his fair price shop licenses/agreement may not be cancelled. The impugned suspension order is vitiated on this ground alone being in violation of mandatory requirements of G.O. dated 29.7.2004.

Case law discussed:
2007(4) AWC 3937, (1991) 4 SCC 139, (1998) 8 SCC 1, Civil Misc. Writ Petition No. 60978 of 2005

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

1. The petitioner is a fair price shop licensee. His licence has been suspended by order dated 28.5.2005 passed by Sub Divisional Magistrate, Faridpur, District-Bareilly. The petitioner has challenged the suspension order on the ground that the suspension order does not disclose any material which is to be relied upon by the respondents during the enquiry. It has not been mentioned as to when and who had inspected the shop of the petitioner, when he found that the notice was not displayed on the shop. The allegation that the petitioner had not distributed sugar etc. to persons who were below poverty line is vague as no details of persons had been mentioned to whom sugar etc. were not distributed. It has also not been mentioned as to whom the kerosene oil was sold at the rate of Rs.12/- per litre, in excess of the scheduled price, and in violation of the agreement. The petitioner has challenged the suspension order dated 28.5.2005 by means of this writ petition.

2. We have heard Sri S.D.Dubey, learned counsel for the petitioner and Sri O.S. Tripathi, Additional Chief Standing Counsel appearing for the respondents. The learned counsel for the petitioner has urged that the impugned suspension order has been passed in violation of G.O. dated 29.7.2004 and

G.O. dated 20.12.2004. He has further urged that Government order dated 20.12.2004 is ultra vires. The learned counsel further urged that the impugned suspension order has been passed in violation of principles of natural justice. He has lastly urged that the petitioner has been deprived of his right to livelihood due to illegal and arbitrary action of the respondents. He placed reliance on a division bench decision of this court in Civil Misc. Writ Petition No.60978 of 2005 Smt.A1ka Rani Vs. State of U.P. and others decided on 14.9.2005. On the other hand, the learned Additional Chief Standing Counsel has urged that there were complaints against the petitioner of irregularities and the complaints have been filed along with the counter affidavit. He has placed reliance on a division bench decision of this court in **Gopi Vs. State of U.P. and others,2007(4) AWC 3937**.

3. The first question that arises for consideration is whether the impugned suspension order has been passed in. violation of G.O. dated 29.7.2004 and 20.12.2004? The State Government with an objective to ensure fair distribution of essential commodities, to the residents of the State including persons living below the poverty line, had been issuing various government orders from time to time for equitable distribution of sugar, kerosene oil etc., by appointing agents/licensees in each district for running fair price shops under licenses/agreements. It came to the notice of the State Government that large number of its officers were suspending/ cancelling the licenses/agreements arbitrarily and whimsically without giving any opportunity of hearing to the licensees. It is well known that fair price shops licenses/agreements are sometimes suspended/cancelled rightly as the licensees are found indulging in mal-practices and the officers are justified in suspending/cancelling the license/ agreement. But it is equally well known that, largely, fair price shops licenses/ agreements are suspended/cancelled arbitrarily by the officers for political reasons or under political, pressure, Iicenses/agreements are sometimes suspended cancelled due to rivalry with the Pradhan of the Gaon Sabha because he is unhappy with the licensee, and sometimes licenses/ agreements are suspended/cancelled due to "partibandi" in the village. The State Government took serious note of the fact that the authorised officers of the State as well as District Supply Officers were suspending and cancelling fair price shop licences of the fair price shop licensees and attaching their shops to another fair price shop licensees without any preliminary enquiry in an ex-parte manner and prior to suspending the fair price shop licence no preliminary enquiry was being got conducted and before cancellation of fair price shop licence no opportunity of hearing was being provided which resulted in passing illegal orders, contrary to the principles of natural justice, by the concerned authorities and sometimes even innocent fair price shop licensees were subjected to arbitrary action of the authorities. Therefore, for the first time, the State Government granted a fair deal to fair price shops licensees/agents and tried save them from arbitrary action of the officers and issued G.O. dated 29.7.2004 laying down the procedure for suspending/cancelling the fair price

shop license/agreement so that its officers may act in a legal manner and by following correct procedure take action against fair price shops licensees so that un-necessary litigation may be avoided. In paragraph 2 the State Government laid down the procedure to be followed by the concerned authorities which is extracted below:-

"2(I) उचित दर की दुकान का निलम्बन मात्र किसी व्यक्ति की शिकायत के आधार पर नहीं किया जाय। यदि किसी दुकानदार के विरूद्ध किसी स्रोत से शिकायत प्राप्त होती है तो पहले उसकी प्रारम्भिक जांच करायी जाय। यदि प्रारम्भिक जॉच में दुकानदार के विरूद्ध ऐसी गम्भीर अनियमितताएं प्रथम दृष्टया सिद्ध हो रही हों जिनके आधार पर दुकानदार की दुकान निरस्त होने की सम्भावना हो तभी दुकान को निलम्बित किया जाय और साथ ही साथ दुकानदार को कारण बताओ नोटिस जारी किया जाय कि उसकी दुकान क्यों न निरस्त कर दी जाय। यदि प्रारम्भिक जांच में पाया जाय कि अनियमितता इतनी गम्भीर नहीं है कि दुकान के निरस्तीकरण की सम्भावना हो तो केवल कारण बताओ नोटिस जारी किया जाय। निलम्बन-आदेश/कारण बताओ नोटिस एक "स्पीकिंग आर्डर" होना चाहिए तथा उसमें प्रारम्भिक जॉच में पायी गयी उन सभी अनियमितताओं का विवरण होना चाहिए जिनका उत्तर दुकानदार से अपेक्षित हो।"

4. From the aforesaid government order it is apparent that if a complaint is received against a fair price shop licensee, a preliminary enquiry has to be conducted and the concerned officer has to be satisfied that on the basis of the enquiry report the licensee was prima facie guilty of serious irregularities which may warrant cancellation of his fair price shop "-license/agreement, only then the licence could be suspended and along with the suspension order, show cause notice was required to be issued to the licensee to show cause as to why his licence may not be cancelled. It was further provided that if in the preliminary enquiry report it is found that the irregularities are not serious enough on the basis of which the licence of the licensee could be cancelled then only a show cause notice be issued, but in either case a speaking order was required to be passed in which all the irregularities found in the enquiry on which a reply was expected from the licensee must be mentioned. In view of clause 2(i) of the G.O dated 29.7.2004 the concerned authority is required to arrive at a decision on objective consideration as to whether the irregularities found against licensee in the enquiry are serious or not, and only then he can proceed either to suspend the fair price shop licence and issue show cause notice for cancellation or he may merely issue a show cause notice only to the licensee. The decision cannot be taken by the officer on subjective satisfaction. We are of the considered opinion that in view of the provisions of G.O. dated 29.7.2004 the concerned authority or officer should take a decision on the enquiry report on objective consideration by recording his reasons by a speaking order which should exist on the record. In absence any order on objective consideration on the record would render the order of suspension/cancellation arbitrary and in violation of the mandatory provisions of G.O. dated 29.7.2004.

5. Paragraph 2(ii) of the G.O. dated 29.7.2004 empowers the authorities to make surprise inspection and if he finds any serious irregularity then in his discretion the officer may suspend the licence. Even if the authority finds any irregular work or irregularity in distribution or black marketing by the licensee even then he is empowered to suspend the licence, but in the suspension order it is mandatory for him to mention every irregularity found by him and he is also required to issue a show cause notice

to the licensee to show cause as to why the licence may not be cancelled.

6. It is also relevant to extract paragraphs 4 and 5 of the Government Order dated 29.7.2004:

"4. निलम्बित की गयी दुकानों के विरूद्ध जाँच की कार्यवाही अधिकतम एक माह में अनिवार्य रूप से पूरी की जायेगी तथा जाँच में संबंधित दुकानदार को सुनवाई का पूरा मौका दिया जायेगा। सम्बन्धित दुकानदार का यह दायित्व होगा कि वह जाँच में अपना पूरा सहयोग दे ताकि जाँच का कार्य जल्दी से जल्दी पूरा किया जा सके तथा नियुक्ति प्राधिकारी द्वारा प्रकरण में गुण दोष के आधार पर अन्तिम निर्णय लिया जा सके। यदि दुकानदार द्वारा जाँच में सहयोग नहीं किया जा रहा हो और जाँच में विलम्ब करने का प्रयास किया जा रहा हो तो दुकानदार को इस आशय का भी नोटिस जारी किया जायेगा और अपना पक्ष रखने का अन्तिम अवसर प्रदान किया जायेगा।

5. जाँच की कार्यवाही अधिकतम एक माह में पूर्ण करके नियुक्ति प्राधिकारी द्वारा प्रकरण में अन्तिम निर्णय लिया जायेगा और गुण दोष के आधार पर एक स्पीकिंग आर्डर जारी किया जायेगा। इस आदेश में यह स्पष्ट उल्लेख होना चाहिए कि सम्बन्धित दुकानदार को सुनवाई का अवसर दिया गया और उसे सुना गया। यदि दुकानदार ने जाँच में सहयोग नहीं किया हो तो अन्तिम आदेश में इस बात का भी पूरा उल्लेख होना चाहिए कि दुकानदार को अवसर प्रदान किया गया तथा अन्तिम नोटिस दिया गया परन्तु उसने जानबूझ कर अवसर का उपयोग नहीं किया और जाँच में सहयोग नहीं किया।"

7. Paragraphs 4 and 5 of the government order provides that the shops where the licence of fair price shop dealer has been suspended enquiry must be completed within a period of one month and in the enquiry the licensee should be given opportunity of hearing and if the licensee tries to delay the enquiry then a notice be given to him fixing a last date of enquiry and thereafter final speaking order on merits would be passed. The provisions of paragraphs 2, 4 and 5 are mandatory in nature and its non compliance would vitiate the order passed by the concerned authority. Paragraph 7 had fixed a period of one month for enquiry and another month for passing cancellation order and for appointment of new dealer. It further provides that where a fair price shop licence has been suspended/cancelled the fair price shop will be attached for a maximum period of two months.

8. The Additional Chief Standing Counsel has urged that The Uttar Pradesh Scheduled Commodities Distribution Order, 2004 (in brief the 2004 Order) which was notified and published on 20.12.2004 had superseded the government order dated 29.7.2004. The argument is devoid of any merits. It is necessary to extract clauses 30 and 31 of 2004 Order as under:-

"30. **Savings-** Any act performed under the provisions of the Uttar Pradesh Scheduled Commodities Order, 1990, which is hereby repealed prior to commencement of this order shall be deemed to have been validly performed under the provisions of this order.

31. **Provisions of the order to prevail over previous orders of State Government-** The provisions of this order shall have effect notwithstanding anything to the contrary contained in any order made by the State Government before the commencement of this order except as respects anything done, or omitted to be done thereunder before such commencement."

9. From a reading of clause 30 it is clear that the Uttar Pradesh Scheduled Commodities Order, 1990 was superseded and repealed. Clause 31 of 2004 Order states that it will have effect irrespective on any thing contrary to it contained in any earlier order issued by the State Government. The 2004 Order was issued

by the State Government for maintaining the supplies of food grains and other essential commodities and for securing their equitable distribution and availability at fair prices. Its clause 2l is concerned with monitoring of fair price shops by the food officer and he was to make regular inspections. Clause 22 of the Order gave power to the Food Officer and other officers the power of entry, search and seizure and clause 23 gave power to the State Government to authorise any person to inspect the stocks of scheduled commodities other than the officers mentioned in clause 22. So far as the maintenance of supply of food grains and other essential commodities and their distribution and availability at fair price shop was concerned the 2004 Order provided stringent methods to deal with the erring licensees of fair price shops. But the 2004 Order did not provide any procedure for suspension/cancellation of the licences or agreement of fair price shop licensees. The 2004 Order did not lay down any procedure as to how and in what manner the licence/agreement of a fair price shop licensee/agent could be suspended or cancelled nor any time frame had been provided. On the other hand, the . government order dated 29.7.2004 prescribes the procedure for taking recourse to suspension/cancellation by the officers and fixes a time frame for taking action against the licensees. The government order dated 29.7.2004 does not contain any provision which is contrary to 2004 Order. The 2004 Order has not superseded the government order dated 29.7.2004. The G.O dated 29.7.2004 and 2004 Order dated 20.12.2004 operate in different fields with the same object to ensure equitable and fair distribution of essential commodities to the people. We are of the considered opinion that the G.O. dated 29.7.2004 and the 2004 Order dated 20.12.2004 are valid and are still in force and are applicable in the State of Uttar Pradesh.

10. The next question is whether the impugned suspension order has been passed in violation of principles of natural justice? From the perusal of the suspension order it is clear that no opportunity of hearing was afforded to the petitioner either at the time of enquiry or before passing of the order suspending the fair price shop license/agreement of the petitioner. In the counter affidavit it had not been stated that opportunity of hearing was given at any stage. The enquiry was conducted behind the back of the petitioner. The entire proceedings were in violation of the principles of natural justice. The argument of learned Additional Chief Standing Counsel that the principles of natural justice do not apply to the cases where fair price shop licence had been granted in view of the decision in Gopi's case, cannot be accepted. The G.O. dated 29.7.2004 clearly mandates and directs the authorities to comply with the principles of natural justice before suspending/cancelling fair price shop licenses/agreements. It appears that this G.O. dated 29.7.2004 was not placed before the division bench which decided Gopi's case and in ignorance of this government order the decision has been rendered and the decision has been passed in sub-silentio in view of the law declared by the Apex Court in **State of U.P. and another vs. Synthetic and Chemicals and another (1991) 4 SCC 139**. Since the G.O. dated 29.7.2004 was not considered by this court the decision in Gopi's case cannot be said to be a good law or a precedent.

11. The next question is whether the petitioner has to be relegated to alternative remedy of filing an appeal to challenge the suspension order which has been passed in violation of principles of natural justice? The learned Additional Chief Standing Counsel has vehemently urged that even if there was violation of principles of natural justice the petitioner had an alternative remedy to file an appeal before the Commissioner challenging the supension order. It is true that the suspension or cancellation of a fair price shop licence could be challenged under clause 28(3) of the Uttar Pradesh Scheduled Commodities Distribution Order, 2004 before the concerned Divisional Commissioner, but the appeal under clause 28(3) lies only against the suspension or cancellation of agreement of the fair price shop. But where an order is passed suspending/cancelling the fair price shop license/agreement in violation of principles of natural justice the alternative remedy would not be a bar and a writ petition would be maintainable under Article 226 of the Constitution of India. It has been held by the apex court In **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others(1998) 8 SCC 1** that even if an alternative statutory remedy is available it would not be a bar in maintenance of a writ petition under Article 226 of the Constitution In at least three contingencies,
(i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is violation of principles of natural justice; or (iii) where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged. We have already held that it was mandatory for the authorities/officers to comply with the principles of natural justice before suspending/cancelling the fair price shop licenses/agreements. Therefore, we are of the considered opinion that the impugned suspension order has been passed in violation of principles of natural justice, the writ petition filed by the petitioner without availing the alternative remedy of appeal, is maintainable under Article 226 of the Constitution.

12. The last question is whether on merits the suspension order is liable to be set aside? In view of the findings recorded by us that the suspension order was passed in violation of principles of natural justice, it is not necessary to examine whether the order suspending the license of the petitioner was in accordance with government orders, but since the Additional Chief Standing Counsel has vehemently attempted to defend the order on merits, we consider it necessary to examine the correctness of the suspension order in brief. The petitioner's fair price shop licence/agreement has been suspended. The suspension order does not disclose that any opportunity of hearing was given to the petitioner. It appears that Sub Divisional Magistrate, Faridpur, Bareilly on the basis of oral complaints of the village got an enquiry conducted against the petitioner on 27.5.2005 and in the enquiry it was found that the shop was closed and rate board was not put outside the shop. The fair price shop licensee was charging Rs.12/- per litre in excess of the scheduled price of kerosene oil which was violation of condition no.24 (Ga) of the license/agreement. In the enquiry ration cards were also inspected and it was found that every month kerosene oil was not properly distributed. Sugar was also

not properly distributed to persons who were below the poverty line which was violation of condition no.3 of the licence/agreement. The shop of the petitioner was suspended and attached to another fair price licensee Devendra Kumar Pathak. It is not mentioned in the suspension order that who conducted the enquiry and when? It is also not clear that if the shop was closed at the time of enquiry then from where this fact was revealed that the petitioner was charging Rs.12/- per litre in excess of scheduled price of kerosene oil and from where the ration cards were inspected by the enquiry officer. The impugned suspension order does not disclose that any show cause notice was issued to the petitioner to submit his reply as to why the petitioner's licence may not be cancelled. According to learned counsel for the petitioner on the basis of such vague allegations licence/agreement of the petitioner could not be suspended. He has placed reliance on the decision of this court in Civil Misc. Writ Petition No. 60978 of 2005 **Smt. Alka Rani Vs. State of U.P. and others** decided on 14.9.2005. The order of the division bench is extracted below:-

"We have heard the learned counsel for the petitioner and the learned Standing Counsel. Petitioner's fair price shop licence was suspended and by the impugned order dated 22.8.2005 it has been cancelled. The cancellation order says that despite opportunity the petitioner did not submit any reply.

Normally, we would have directed the petitioner to avail alternative remedy of appeal, but we find from the show cause notice (annexure 4 to this writ petition) that almost all the charges are absolutely vague without giving any specific instance and without mentioning any material on the basis of which each of the charges is proposed to be proved against the petitioner. For example when charge no.2 says that distribution according to entitlement of ration cardholders has not been made every month, the notice should also have indicated when and to which cardholders has not been made every month, the notice. should also have indicated when and to which card holder distribution was not· made. Similarly, when charge no.4 says that kerosene oil is being sold at the rate of Rs.11/- per litre, it should have been disclosed when and from which person such extra value was charged.

Without specific instances of this kind and without informing the material which is sought to be read against the petitioner in support of these charges, no proper effective defence or reply was possible. The only thing, which the petitioner could have done, was to make an equally vague denial that he was not guilty of these charges, which ultimately would lead nowhere. Levelling of charge is easy, proving of charge is another matter. A person can be punished for proved charges and not for levelled charges. The standard of proof may vary but nevertheless proof must be there. If evidence is there to prove charges, this Court will not go into the sufficiency of the evidence. But a finding based on no evidence is not sustainable.

In the circumstances, we find that the impugned order is based on no material. The writ petition is allowed. The impugned order dated 22.8.2005 is quashed."

13. The decision in Smt. Alka Rani's case applies to the facts of the case in hand, as in this case also the allegations are vague and specific instances and material sought to be read in support of the allegations against the petitioner have not been mentioned. If no material is mentioned in the suspension order then substituting the material in the counter affidavit would be of no help to the respondents. We further find that along with the suspension order no show cause notice had been issued to the petitioner directing him to show cause as to why his fair price shop licenses/agreement may not be cancelled. The impugned suspension order is vitiated on this ground alone being in violation of mandatory requirements of G.O. dated 29.7.2004.

14. For the aforesaid reasons, we are in agreement with learned counsel for the petitioner that the impugned suspension order is vague and on the basis of which petitioner's fair price shop licence/agreement could not be cancelled and the impugned order deserves to be quashed.

15. In the result, this writ petition succeeds and is allowed. The impugned suspension order dated 25.5.2005 passed by respondent No.2, Annexure-l to the writ petition, is quashed.

16. The parties shall bear their own costs. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 58671 of 2007
With
Civil Misc. Writ Petition No. 8439 of 2008

Paras Nath ...Petitioner
Versus
Deputy Director of Consolidation, Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri. V.K. Singh
Sri. M.N. Singh

Counsel for the Respondents:
Sri. Shailendra kumar Singh
S.C.

U.P. Consolidation of Holdings Act 1953-Section 48-Revision order condoning the delay in filing objection under section 9 A(2)-not interlocutory order-such order passed by Consolidation Officer is subject to revisional jurisdiction of D.D.C.

Held: Para 15

In view of the foregoing discussions it is clear that an order passed by Consolidation Officer condoning the delay in an objection under Section 9A(2) of U.P. Consolidation of Holdings Act, 1953 terminates the proceeding under Section 5 of the Limitation Act, hence the same cannot be treated to be an interlocutory order and is subject to revisional jurisdiction of Deputy Director of Consolidation under Section 48 of U.P. Consolidation of Holdings-Act,1953.

Case law discussed:
1972 R.D. 80, 2002(93) R.D. 764, 2003(94) R.D. 353, 2004(97) R.D. 295, 1984 R.D. 382,

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

1. Heard Sri V.K. Singh, learned counsel for the petitioners and Sri Shailendra Kumar Singh appearing for respondent No.3, who is contesting respondent in both the writ petitions.

2. Learned counsel for the petitioners submits that respondent NO.3 is only contesting party and other respondents being proforma respondents, the writ petition be decided without service to notice to other respondents.

3. Both the writ petitions raise similar question of law and facts and are being decided finally by this common judgment by consent of the parties.

4. These two writ petitions pray for quashing the order dated 20th September, 2007 passed by the Deputy Director of Consolidation, dismissing the revision filed by the petitioners under Section 48 of U.P. Consolidation of Holdings Act, 1953 as well as the order dated 16th November, 2004 passed by Consolidation Officer condoning the delay in objection filed by respondent No.3. Writ Petition No.58671 of 2007 is being treated as leading case.

5. Brief facts necessary for deciding the writ petitions are; respondent No.3, Murlidhar, filed a belated objection under Section 9A(2) of U.P. Consolidation of Holdings Act. 1953 dated 23rd February, 2001 praying that by giving benefit of Section 5 of Limitation Act the names of petitioners be expunged and names of contesting respondents be entered. Writ Petition No.58671 of 2007 relates to Khata No.293 and Writ Petition No.8439 of 2008 relates to Khata No.61. The objection of respondent No.3 was contested by the petitioners by filing objection objecting condonation of delay. The Consolidation Officer by order dated 16th November, 2004 condoned the delay in filing the objection. Against the order dated 16th November, 2004 condoning the delay, revisions were filed before the Deputy Director of Consolidation under Section 48 of U.P. Consolidation of Holdings Act, 1953. The Deputy Director of Consolidation by the impugned order took the view that order of Consolidation Officer condoning the delay is interlocutory in nature, hence revision is not maintainable. The Deputy Director of Consolidation refused to interfere with the order of Consolidation Officer on the ground that order of Consolidation Officer is interlocutory in nature. These writ petitions have been filed challenging the order of Deputy Director of Consolidation.

6. Learned counsel for the petitioners, challenging the order of Deputy Director of Consolidation, contended that order of Consolidation Officer was not interlocutory in nature since it disposed of the application under Section 5 of the Limitation Act, which prayed for condonation of delay in filing objection. He has placed reliance on the Division Bench judgment of this Court reported in 1972 R.D. 80; ***Mst. Kailashi vs. Deputy Director of Consolidation and others***.

7. Sri Shailendra Kumar Singh, learned counsel for respondent No.3, submits that order of Consolidation Officer was interlocutory in nature and the revision was not maintainable. He has placed reliance on judgments of this Court in 2002(93) R.D. 764; ***Paras Nath vs.***

Deputy Director of Consolidation, Basti and others, 2003(94) R.D. 353; ***Sukhjinder Jeet Kaur and others vs. Deputy Director of Consolidation, Rampur and others*** and 2004(97) R.D. 295; ***Dhanush Raj and others vs. Deputy Director of Consolidation, Mau and others***.

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

9. The objection, which was filed under Section 9A(2) of U.P. Consolidation of Holdings Act. 1953, was admittedly barred by time. The prayer for condonation of delay was separately taken up by the Consolidation Officer and was allowed after hearing both the parties. The effect of allowing application under Section 5 of the Limitation Act was that objection was treated within time and was to be decided on merits. The revision was filed under Section 48 of U.P. Consolidation of Holdings Act, 1953. Section 48 of U.P. Consolidation of Holdings Act, 1953 is in very wide term, which is to the following effect:-

"[48. Revision and reference.-*(1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order [other than interlocutory order] passed by such authority in the case of proceedings and may, after allowing the parties concerned an opportunity of being heard, make such order in the case of proceedings as he thinks fit.*

(2) Powers under sub-section (1) may exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under subsection (1).]

[Explanation [(1)] - For the purposes of this section, Settlement Officer, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.]

[Explanation (2). For the purpose of this section the expression 'interlocutory order' in relation to a case or proceedings, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect of finally disposing of such case or proceeding.]"

10. There cannot be any dispute that entertainment of revision is barred against an interlocutory order as per amendments made in Section 48 of the U.P. Consolidation of Holdings Act, 1953. The Explanation No.2 has also been added explaining the term interlocutory order. The objection under Section 9A(2) was barred by time. The prayer for condoning the delay under Section 5 of the Limitation Act was although in the objection under Section 9A(2) of U.P. Consolidation of Holdings Act, 1953 but has been separately dealt with and decided. The prayer for condonation of

delay in filing the objection has to be treated as separate proceeding and after condonation of delay the question of Section 5 Limitation Act was terminated. The word 'proceedings', which has been used in Section 48 is a term of wide import. The proceedings under Section 5 of the Limitation Act stands terminated when an order is passed by Consolidation Officer either condoning or refusing to condone the delay. This can be better explained by taking an example. In a case where condonation of delay is refused by Consolidation Officer, the application shall stand rejected, which will have effect of rejection of the objection also; but in a case where condonation of delay has been allowed although Section 5 proceedings shall come to an end but objection will continue. Can the question of entertainability of revision against such order will vary in a case where the condonation is allowed with a case where condonation is refused. There cannot be any doubt that when condonation is refused, the proceeding is terminated, hence the said order cannot be said to be an interlocutory order within the plain meaning of 'interlocutory order' as defined in Explanation (2) because that terminates the proceedings but drawing a distinction between the cases where condonation is allowed and condonation is refused for purposes of Section 48 of U.P. Consolidation of Holdings Act, 1953 cannot be said to be legislative intent. The revisional power under Section 48 of Deputy Director of Consolidation shall have to be available in both the cases and it cannot be held to be available only in cases where condonation is refused.

11. A Division Bench of this Court in ***Mst Kailashi's*** case (supra) had examined the scope of Section 48 of U.P. Consolidation of Holdings Act, 1953 in case delay condonation application was allowed. The Division Bench held that order condoning the delay was subject to revisional power under Section 48 of U.P. Consolidation of Holdings Act, 1953. Following was held by the Division Bench in paragraph 1 of the said judgment:-

"1. The Consolidation Officer condoned the delay in filing an objection under Section 9, U.P. Consolidation of Holdings Act. The other side feeling aggrieved filed a revision. The Dy. Director went into the merits and held that there was no sufficient explanation for the delay. On this ground he allowed the revision and set-aside the order condoning the delay. Learned counsel for the applicant has urged that the Dy. Director had no jurisdiction to go into the merits of the application for the condonation of delay. Section 48 of the UP. Consolidation of Holdings Act confers powers upon the Dy. Director to reach on facts and law every kind of order passed by a subordinate consolidation authority. The order condoning the delay was subject to the revisional powers under Section 48 of the Act. Learned counsel, however, relied upon the decision of the Board of Revenue in Mangali v. Putti Lal (1) to the effect that where the Court of original jurisdiction condones the delay, an appellate Court has no power to go into the merits of such condonation. It can go into the merits of the case because an appeal would lie only against an order passed by the trial Court on the merits of the case. The decision does not discuss the statutory provisions in regard to the appellate or revisional powers under the Zamindari Abolition Act. We are not satisfied that this decision

lays down the law correctly; but it is unnecessary to discuss the matter further because it does not apply to the proceedings under the Consolidation of Holdings Act under which, as mentioned above, the revisional powers are very wide and they can reach every order passed by a subordinate consolidation authority. "

12. The Supreme Court in ***Shanti Prasad Gupta vs. Deputy Director of Consolidation, Camp at Meerut and others*** reported in 1984 R.D. 382 considered the scope and power of Deputy Director of Consolidation under Section 48 of U.P. Consolidation of Holdings Act. 1953. In the case before the Supreme Court objection under Section 9A was filed with delay. The Consolidation Officer vide order dated 22nd July, 1975 condoned the delay in filing the objection. A revision was filed before the Deputy Director of Consolidation challenging the order of Consolidation Officer. The Deputy Director of Consolidation interfered with the order of Consolidation Officer. The writ petition was filed in the High Court and thereafter matter was taken to the Apex Court. The Apex Court laid down that Deputy Director of Consolidation cannot lightly interfere with the discretion of the Consolidation Officer unless the order sought to be revised is clearly erroneous or is likely to cause gross miscarriage of justice. Following was laid down in paragraph 3 of the said judgment:-

"3. ..... Whether or not there is sufficient cause for condonation of delay, is a question of fact dependent upon the facts and circumstances of a particular case, and the proposition is well settled that when order has been made under Section 5, Limitation Act by the lower court in the exercise of its discretion allowing or refusing an application to extend time, it cannot be interfered with in revision, unless the lower court has acted with material irregularity or contrary to law or has come to that conclusion on no evidence. We are aware that the powers of the Director under Section 48 of the Act are wider than those mentioned in Section 115 of the Code of Civil Procedure. Even so, the Director cannot lightly interfere with the discretion of Consolidation Officer, unless the order sought to be revised is clearly erroneous or is likely to cause gross miscarriage of justice. Such was not the case here. The Consolidation Officer had in condoning the delay exercised his discretion judicially on the basis of evidence produced before him by the parties. The Deputy Director of Consolidation (exercising the powers of Director) had without assigning any reason allowed the revision-petitioner to produce additional evidence (letter) before him, which the revision-petitioner could with due diligence, produce before the Consolidation Officer, but failed to do so. Then it is not apparent from the impugned order whether the appellant before us, was also given by the Deputy Director an opportunity to produce evidence in rebuttal of the additional evidence, although a bold mention is there that "the opposite party has not any documentary evidence in rebuttal of this. "

13. The above quoted observations of the Apex Court indicate that Apex Court did not lay down that revision was not maintainable against an order passed by Consolidation Officer condoning the delay but the Court took the view that the

said order cannot be lightly interfered with unless the order is clearly erroneous or likely to cause gross miscarriage of justice. The revisional power against such order of Consolidation Officer condoning the delay was not excluded but was cautioned to be exercised in appropriate case. This Court in ***Sukhjinder Jeet Kaur's*** case (supra) has relied the above Supreme Court judgment in ***Shanti Prasad Gupta's*** case for the proposition that revision is not maintainable against interlocutory order. The Apex Court did not lay down any such proposition that order passed by Consolidation Officer is an interlocutory order and against the said order writ petition does not lie under Section 48 of U.P. Consolidation of Holdings Act, 1953.

14. The judgments, which have been relied by counsel for respondent No.3 in ***Paras Nath's*** case (supra), ***Sukhjinder Jeet Kaur's*** case (supra) and ***Dhanush Raj's*** case (supra) were the judgments in which earlier Division Bench judgment was not noticed. The Judgment in ***Paras Nath's*** case (supra) was relied in ***Sukhjinder Jeet Kaur's*** case (supra). The order condoning the delay in filing an objection, which was barred by time cannot be treated to be an interlocutory order not amenable to the revisional jurisdiction of the Deputy Director of Consolidation under Section 48 of U.P. Consolidation of Holdings Act, 1953. Coming to the facts of the present case, the Deputy Director of Consolidation has refused to enter into the merits of condonation and has rejected the revision only on the ground that the order of Consolidation Officer is interlocutory and the revision is not entertain able.

15. In view of the foregoing discussions it is clear that an order passed by Consolidation Officer condoning the delay in an objection under Section 9A(2) of U.P. Consolidation of Holdings Act, 1953 terminates the proceeding under Section 5 of the Limitation Act, hence the same cannot be treated to be an interlocutory order and is subject to revisional jurisdiction of Deputy Director of Consolidation under Section 48 of U.P. Consolidation of Holdings -Act, 1953.

16. In result, both the writ petitions are allowed. The order dated 20th September, 2007 of Deputy Director of Consolidation is set-aside. The matter is remitted to the Deputy Director of Consolidation to decide the revision filed by the petitioners afresh in accordance with law. The revision being only confined to the question of delay, it is in the ends of justice that the said revision shall be decided expeditiously preferably within a period of six months from the date of production of a certified copy of this order.

17. With the aforesaid directions, the writ petitions are disposed of.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.02.2008

BEFORE
THE HON'BLE S.S KULSHRESTHA, J.
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Appeal No. 585 of 2008

Tinna and another ...Appellants (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Atul Kumar Tiwari

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

Criminal Appeal-conviction of life imprisonment without imposition of fine-offence u/s 302/34 IPC-held-No discretion left to court regarding levy of fine or not-whereas it is mandatory in addition to the substantive punishment of life imprisonment.

Held: Para 5

It is worthwhile to mention that the learned Trial Court has not imposed fine, whereas it is mandatory to impose fine in addition to the substantive sentence of imprisonment for the offence punishable under Section 302 I.P.C., as the language used in Section302 I.P.C. is, "*and shall also be liable to fine".* No discretion is left to the Court to levy or not to levy fine and imposition of both imprisonment and fine is imperative in such case, as held by Hon'ble Apex Court in the case of *Zunjarrao Bhikaji Nagarkar Vs. Union of India and others (AIR 1999 SC 2881),* in which reference has been made to the case of *Rajasthan Pharmaceuticals Laboratory, Bangalore V. State of Karnataka (1981) 1 SCC 645.*
Case law discussed:
AIR 1999 SC 2881, (1981) 1 SCC 645

(Delivered by Hon'ble S.S. Kulshrestha, J.)

1. Heard Sri Atul Kumar Tiwari, learned counsel for the appellants, learned A.G.A. for the State and also perused the material on record.

2. The bail application on behalf of the accused appellants Tinna and Harvansh convicted for the offences under Section 302/34 I.P.C. in S.T. No. 444 of 1998 vide judgement dated 24.03.2007 passed by Additional Sessions Judge, Court No.3, Farrukhabad has been pressed on the ground that the case is totally based on circumstantial evidence. Report of the incident was lodged after twenty four days from the date of disappearance of the deceased and after thirteen days from the date of recovery of dead body. It is also said that the witnesses are not reliable. When the witnesses being in the near relation of the deceased had seen the deceased being dragged and Criminally assaulted by appellants accused, then why no F.I.R. was lodged immediately thereafter.

3. Having regard to all the facts and circumstances of the case, without expressing any opinion on merit of the case, the accused-appellants may be released on bail.

4. Let the appellants Tinna and Harvansh be released on bail for the offences indicated above during the pendency of the appeal on their executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the Trial Court concerned.

5. It is worthwhile to mention that the learned Trial Court has not imposed fine, whereas it is mandatory to impose fine in addition to the substantive sentence of imprisonment for the offence punishable under Section 302 I.P.C., as the language used in Section302 I.P.C. is,***"and shall also be liable to fine"***. We have come across some other cases also, in which, fine was not imposed by the Trial Courts even for those offences where the expression used by the legislature in the Sections for which conviction was recorded was ***"and shall also be liable to fine"***. Where such expression is used in any Section, the

Court is under obligation to impose fine also in addition to the substantive sentence of imprisonment. No discretion is left to the Court to levy or not to levy fine and imposition of both imprisonment and fine is imperative in such case, as held by Hon'ble Apex Court in the case of ***Zunjarrao Bhikaji Nagarkar Vs. Union of India and others (AIR 1999 SC 2881),*** in which reference has been made to the case of ***Rajasthan Pharmaceuticals Laboratory, Bangalore V. State of Karnataka (1981) 1 SCC 645.***

6. Let a copy of this order be sent by Registrar General within a week to Sri Rajiv Kumar Tripathi, the then Additional Sessions Judge, Court No.3, Farrukhabad for his future guidance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 8846 of 2008

Talib Khan ...Petitioner
Versus
Additional Commissioner and others ...Respondents

Counsel for the Petitioner:
Sri Haider Husain

Counsel for the Respondents:
Sri D.V. Jaiswal
S.C.

U.P. Zamindari Abolition & Land Reforms Act, 1950-Section333-Revisional power of Board-very wide-empowers to call for record of any Suit or proceeding-order passed under Section 229-D not specifically excluded by amended Act No. 11 of 2002-held-revision against the order passed under Section 229-D not to be dismissed in the garb of interlocutory order.

Held: Para 9

Section 333 of the Act is very widely worded which empowers the Board or Additional Commissioner to call for the record of any suit or proceeding. Application under section 229-D has been separately provided under the Act and when an application under section 229-D is disposed of finally either granting or refusing to grant interim order, it can be said that the said proceedings are finally terminated. Under section 333 of the Act, the Court is empowered to call for record of any suit or-proceeding. The order under section 229-D is not specially excluded from the purview of section 333 of the Act. It is relevant to note that by U.P. Act No. 11 of 2002, an amendment has been inserted excluding one proceeding from the revisional jurisdiction that is proceedings under sub-section (4-A) of section 198. Had the legislature intended to have excluded the proceeding under section 229-D, there was no reason of not indicating or mentioning the same in section 333. The amendment made in 2002 as noted above, clearly shows the intendment of the Legislature that no other proceeding has been excluded except the proceeding under sub-section (4-A) of section 198 from the purview of section 333 of the Act.

Case law discussed:
2002 (93) R.D. 883, 2001 RJ 661, 2001 RJ 913, 2001 RJ 529, 2001 RJ 918.

(Delivered by Hon'ble Ashok Shushan. J.)

1. Heard Sri Haider Husain, learned counsel for the petitioner and Sri D.V. Jaiswal, learned Counsel for the contesting respondents.

2. With the consent of learned Counsel for the parties, the writ petition is

being disposed of at the admission stage itself without inviting counter affidavit.

3. By this writ petition the petitioner has prayed for quashing the order dated 28.9.2007, passed by the Sub Divisional Officer refusing to grant an interim injunction and the order dated 5.11.2007, passed by the revisional court dismissing the revision as not maintainable.

4. The brief facts of the case necessary for the disposal of the writ petition are; that a suit under section 229-B of the U.P. Zamindari Abolition and Land Reforms Act, 1950 was filed by the petitioner. Alongwith the suit an application under section 229-D of the U.P. Zamindari Abolition and Land Reforms Act. 1950 read with section 151, Order XXXIX Rule 1 Coda of Civil Procedure was also filed by the petitioner. An interim injunction was granted on 13.9.2007 by the Assistant Collector directing the parties to maintain status-quo till disposal of the suit. The respondents put in appearance in the suit and prayed for vacation of the ex-parte interim injunction. The trial Court by order dated 28.9.2007 set aside the interim injunction order. Against the order dated 28.9.2007, a revision was filed by the petitioner before the Additional Commissioner under section 333 U.P; Zamindari Abolition and Land Reforms Act, 1950. Before the revisional Court an objection was raised by the defendant respondents that revision was not maintainable since it had been filed against an interlocutory order. The revisional Court proceeded to examine the objection and relying on certain decisions of the Board of Revenue and one judgment of this court, vide the impugned order dated 5.11.2007 dismissed the revision holding that the revision is not maintainable. Against the aforesaid order, the present writ petition has been filed.

5. Learned Counsel for the petitioner contends that the view taken by the revisional Court that revision is not maintainable since the order passed under section 229-D was interlocutory in nature, is erroneous. He further submits that order passed under section 229-D is subject to revisional jurisdiction and the revisional Court committed error in rejecting the said revision on the ground of its non-maintainability. Learned Counsel for the petitioner further contends that the judgments of the Board of Revenue relied on by the revisional court do not lay down the correct law. The order passed under section 229-D is revisable under section 333 of the U.P. Zamindari Abolition and Land Reforms Act, 1950. He further submits that the judgment in the case of **Ram Vyas and others Vs. Board of Revenue, U.P. Allahabad** reported in *2002 (93) R.D. 883* is not applicable in the facts of the present case since the question involved in the present writ petition, has not been considered in the said judgment. Sri D.V. Jaiswal, learned Counsel for the contesting respondents on the other hand contends that no error was committed by the Assistant Collector in vacating the ex-parte interim order as the petitioner was not entitled for any interim injunction.

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

7. The issue raised in the present writ petition is, as to whether the order passed under section 229-D is revisable under Section 333 of the U.P. Zamindari

Abolition and Land Reforms Act, 1950 or not. The revisional Court relied on the judgment in the cases of **Shikhari Vs. State of U.P.** reported in *2001 RJ 661*, **Sageer Ahmad vs. Mohammad Quddus and others**, reported in *2001 RJ 913*, **Mahfooz Vs. State of U.P.**, reported in *2001 RJ 529*, **Sangam Sahkari Avas Samiti Vs. Rani Brijmani Devi** reported in *2001 RJ 918*. All the aforesaid judgments are the judgments of the Board of Revenue. In the said judgments, the Board of Revenue held that the order passed under section 229-D of U.P. Zamindari Abolition and Land Reforms Act, 1950 is interlocutory in nature and is not liable to be interfered with in revision. The above noted judgments do not specifically lay down that order passed under section 229-D is not revisable. In the case of **Ram Vyas (supra)**, the question as to whether the order passed under section 229-D is revisable or not, was not considered.

Section 229-D of the U.P. Zamindari Abolition and Land Reforms Act, 1950 is to the following effect:

***"229-D. Provision for injunction**. (1) If in the course of a suit under the provisions of Sections 229-B and 229-C, it is proved by an affidavit or otherwise-*

(a) that any property, tree or crops standing on the land in dispute is in danger of being wasted, damaged or alienated by any patty to the suit; or

(b) that any party to the suit threatens or intends to remove or dispose of the said property, trees or crops in order to defeat the ends of justice, the Court may grant a temporary injunction and where necessary, also appoint a receiver."

8. The revisional jurisdiction of the Court is provided under section, 333 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, which is to the following effect:

***"333. Power to call for cases. -** (1) The Board of. the Commission or the Additional Commissioner may call for the record of any suit or proceeding other than proceeding under Sub-section (4-A) of Section 198 decided by any court subordinate to him in which no appeal lies or where an appeal lies but has not been preferred, for the purpose of satisfying himself as to the legality .or propriety of any order passed in such suit or proceeding and if such subordinate court appears to have:*

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of jurisdiction illegally or with material irregularity the Board or the Commissioner or the Additional Commissioner, as the case may be, may pass such order in the case as he thinks fit.

(2) If an application under his section has been moved by any person either to the Board or to the Commissioner or to the Additional Commissioner, no further application by the same person shall be entertained by any other of them."

9. Section 333 of the Act is very widely worded which empowers the Board or Additional Commissioner to call for the record of any suit or proceeding. Application under section 229-D has been separately provided under the Act and when an application under section 229-D

is disposed of finally either granting or refusing to grant interim order, it can be said that the said proceedings are finally terminated. Under section 333 of the Act, the Court is empowered to call for record of any suit or-proceeding. The order under section 229-D is not specially excluded from the purview of section 333 of the Act. It is relevant to note that by U.P. Act No. 11 of 2002, an amendment has been inserted excluding one proceeding from the revisional jurisdiction that is proceedings under sub-section (4-A) of section 198. Had the legislature intended to have excluded the proceeding under section 229-D, there was no reason of not indicating or mentioning the same in section 333. The amendment made in 2002 as noted above, clearly shows the intendment of the Legislature that no other proceeding has been excluded except the proceeding under sub-section (4-A) of section 198 from the purview of section 333 of the Act.

10. In view of the provisions of section 333, it is to be held, that an order passed under section 229-D is not excluded from the revisional jurisdiction provided under section 333 of the U.P. Zamindari Abolition and Land Reforms Act, 1950. The view taken by the revisional Court that revision is not maintainable cannot be sustained and is hereby set aside. The writ petition is partly allowed. The order 5.11.2007 is set aside and the matter is remanded to the revisional Court to decide the the same afresh in accordance with law.

Petition partly allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2008

BEFORE
THE HON'BLE S. RAFAT ALAM, J.
THE HON'BLE VINEET SARAN, J.

Special Appeal No. 1614 of 2007

Pushpendra Singh & another...Petitioners
Versus
State of U.P. and another...Respondents

Counsel for the Petitioners:
Sri Gulab Chandra

Counsel for the Respondents:
Sri Y.K. Srivastava
Sri G.C. Upadhyaya
S.C.

Constitution of India, Art. 226-readwith U.P. Police Officers of the Subordinate Rank (Punishment & Appeal) Rules 1991-Rule 8 (2)(b)-dismissal alternative remedy-dismissal order-without recording reasons of satisfaction for not holding regular enquiry-without affording opportunity of hearing-order passed contrary to the mandatory provision of the regulation-held-alternative remedy no absolute bar.

Held: Para 9 and 11

It is also an admitted position that the appellants have been dismissed from service without holding any enquiry. They have not been informed of the charges against them nor been afforded opportunity of being heard in respect of charges before inflicting punishment of dismissal from service. Thus, in the absence of reasons for dispensing with the regular enquiry the impugned order of dismissal is patently illegal and it is difficult to uphold the same.

Since, in the case in hand, admittedly, the order has been passed without

following the mandatory provision of the Act and also in violation of principles of natural justice thus, the writ petition cannot be thrown only on the ground of availability of alternative remedy when there is blatant error in the order.

Case law discussed:

AIR 1985 SC 1416, AIR 1991 SC 385, AIR 1978 SC 851, AIR 1999 SC 22

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

1. This appeal under the Rules of the Court arises from the judgment of the Hon'ble Single Judge of this Court dated 1.10.2007 in Civil Misc. Writ Petition No. 47241 of 2007.

2. We have heard Sri Gulab Chandra, learned counsel for the appellants and the learned Standing Counsel appearing for the State-respondents.

3. It appears that the petitioner-appellants, being aggrieved by the order of the Senior Superintendent of Police, Agra dated 12th September, 2007, dismissing them from service, preferred the aforesaid writ petition on the ground, inter alia, that the impugned order is bad, illegal and arbitrary because it has been passed under Rule 8 (2) (b) of the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991, (in short the Rules), without recording any reason to dispense with regular departmental proceeding and, therefore, it cannot sustain. The Hon'ble Single Judge, however, having heard the learned counsel for the parties, dismissed the writ petition on the ground that the appellants have efficacious statutory alternative remedy under the Rules itself and thus they can avail the same. Appellants are constables in U.P. Police and at the relevant time were posted in Police outpost Balkeshwar, Police Station New Agra, District Agra. However, on 10.9.2007 at 11.30 pm Shri Anil Kumar, Incharge Police Out Post while patrolling along with the appellants arrested a suspect Raju @ Rakesh from cremation ground and some objectionable incriminating articles were recovered from his possession and was produced before the Magistrate. Thereafter, his mother-in-law made a complaint on 12.9.2007 alleging therein that the petitioner along with other police personnel took Rs.5000/-- as illegal gratification yet he was arrested and challaned in a false case and was subsequently released by the Magistrate. Consequently, an FIR was lodged and on the same day i.e. 12.9.2007, they were dismissed from service by the impugned order.

4. Learned counsel for the appellants vehemently contended that since the impugned order of dismissal did not contain any reason to dispense with the regular departmental proceeding and thus, the same being in violation of the statutory provisions, the writ petition could not have been thrown only on the ground of availability of alternative remedy. He further submits that under Rule 8 (2) (b) of the Rules, the punishment of dismissal from service without holding regular proceeding, can only be inflicted where the authority empowered, records reasons indicating the difficulty on account of which it is not practicable to hold such enquiry. It is contended that in the instant case, the Senior Superintendent of Police, without recording any reason for not holding regular departmental proceeding, inflicted the punishment of dismissal from service.

It is submitted that the Hon'ble Single Judge fell in error in dismissing the writ petition only on the ground of availability of alternative remedy when the order apparently is in violation of the statutory provisions whereunder recording reasons is mandatory. On the other hand, learned Standing Counsel appearing on behalf of the state respondents opposed the writ petition. However, he could not show us any reason in the impugned order to dispense with the regular departmental proceeding before giving punishment of dismissal to the appellants under Clause-(b) of Rule 8(2) of the Rules.

We have considered the submissions made on both sides and also perused the record.

5. The core question for consideration in this appeal is as to whether the impugned order of the Senior Superintendent of Police (respondent no.2) dated 12.9.2007 is in accordance with law or is in disregard of the prescription of law. To appreciate the contention made before us, it is necessary first to have a look of the provisions contained in Rule 8, which provides as under:

*"**8**. Dismissal and removal- (1) No police office shall be dismissed or removed from service by an authority subordinate to the appointing authority.*
(2) No police officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these rules.
Provided that this rule shall not apply-
a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge:
b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing it is not reasonably practicable to hold such enquiry or
c) Where the Government is satisfied that in, the interest of the security of the state it is not expedient to hold such enquiry,"

6. The above provision is pari materia with Article 311 (1) and (2) of the Constitution, which gives constitutional protection to a Member of civil service of the Union or of the State. The normal rule is that no major punishment, such as, dismissal, removal or reduction in rank should be inflicted without taking recourse of regular disciplinary enquiry against such delinquent. However, second proviso to Article 311 (2) has carved out certain exception where even without holding regular proceeding punishment of dismissal, removal or reduction in rank can be inflicted. Similarly, Rule 8 (2) (b) like Article 311 (2) (b) provides that where the authorities empowered to dismiss or remove a person or to reduce him in rank is satisfied that it is not reasonably practicable to hold such enquiry then in that event he has to record reasons as to why it is not reasonably practicable to hold the enquiry. Thus, in order to dispense with the regular departmental proceeding for inflicting punishment of dismissal, removal or reduction in rank, recording reasons is condition precedent. The idea or object of recording reasons is obviously to prevent arbitrary, capricious and mala fide exercise of power. Therefore, recording of

reason is mandatory and in its absence the order becomes laconic and cannot sustain. Onus is on the State or its authorities to show that the order of dismissal has been passed strictly as per prescription of the statutes. The Hon'ble Apex Court in the case of ***Union of India v. Tulsi Ram Patel, AIR 1985 SC 1416*** while considering Articles 310 and 311 of the Constitution of India held that two conditions must be satisfied to uphold action taken under Article 311 (2) of the Constitution of India, viz., (i) there must exist a situation which renders holding of any enquiry not reasonably practicable, (ii) the disciplinary authority must record in writing its reasons in support of its satisfaction. The Hon'ble Apex Court further observed that though Clause 3 of Article 311 makes the decision of the disciplinary authority in this behalf final, yet such finality can certainly be tested in the court of law and interfered with if the action is found to be arbitrary or mala fide or motivated by extraneous considerations or merely a rule to dispense with the enquiry. The Hon'ble Apex Court at page 1479 in ***Tulsi Ram Patel*** (supra) held as follows: -

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

7. The words some "reason to be recorded in writing that it is not reasonably practicable to hold enquiry" means that there must be some material for satisfaction of the disciplinary authority that it is not reasonably practicable. The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. The Apex Court in the case of ***Jaswant Singh Vs. State of Punjab and others, AIR 1991 SC 385*** in para 5 at page 390 has observed as under:-

"It was incumbent on the respondents to disclose to the Court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent no.3 in the impugned order. Clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry,"

"...When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer."

8. Therefore, in view of the exposition of law such satisfaction has to be recorded either in the impugned order or in any case it must be available on record. In the case in hand, the impugned order is enclosed as Annexure 5 to the writ petition. From a perusal thereof it is evident that the Senior Superintendent of Police merely reproduced the provisions contained in Rule 8 (2) (b) against the above police personnel, stating that it is not reasonably practicable to hold such enquiry. It does not contain any reason showing as to why it is not reasonably practicable to hold regular enquiry. The

satisfaction that it is not reasonably practicable to hold such enquiry has to be spelled out either in the order itself or at least it has to be available on record. Learned Standing Counsel also during his submission could not show us any such reason recorded by the competent authority in the record to show any ground or reason for invoking the provisions contained in Rule 8 (2) (b) of the Rules. It is well settled legal position that when a statutory functionary makes an order based on some reasons or grounds, its validity is to be tested on the ground or reasons mentioned therein and cannot be supplemented by giving reasons through affidavit filed in the case (See ***Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, AIR 1978 SC 851, para 8).***

9. It is also an admitted position that the appellants have been dismissed from service without holding any enquiry. They have not been informed of the charges against them nor been afforded opportunity of being heard in respect of charges before inflicting punishment of dismissal from service. Thus, in the absence of reasons for dispensing with the regular enquiry the impugned order of dismissal is patently illegal and it is difficult to uphold the same.

10. The Hon'ble Single Judge, however, did not address on this core question and dismissed the petition only on the ground of availability of alternative remedy. It is true that normally this Court declines to entertain the writ petition where the aggrieved person has efficacious alternative statutory remedy. The doctrine of exhaustion of other remedy is a self-imposed restriction by the Court so that a person, who has statutory remedy for redressal of his grievance before another forum, may not be allowed to bye-pass such remedy. However, the existence of statutory remedy is not an absolute bar in entertaining the petition under Article 226 of the Constitution where there is apparent and gross violation of mandatory statutory provision of an Act or the Constitution. The Hon'ble Apex Court in the case of ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others, AIR 1999 SC 22*** held that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose". However, their Lordships have carved out three contingencies, where alternative remedy will not stand in the way in entertaining the writ petition under Article 226 of the Constitution of India, viz. (1) where the writ petition has been filed for the enforcement of any of the Fundamental Rights; (2) where there has been a violation of the principle of natural justice; and (3) where the order or proceedings are wholly without jurisdiction or where the vires of an Act is challenged.

11. Since, in the case in hand, admittedly, the order has been passed without following the mandatory provision of the Act and also in violation of principles of natural justice thus, the writ petition cannot be thrown only on the

ground of availability of alternative remedy when there is blatant error in the order.

12. For the foregoing reasons, this appeal succeeds on this point alone. In the result, this appeal is allowed. The impugned order dated 12.9.2007 passed by the Senior Superintendent of Police, Agra dismissing the appellant from service and the judgment of the Hon'ble Single Judge dated 1.10.2007 are hereby set aside. However, it would be open to the respondents to proceed against the appellant in accordance with law, either by initiating proceedings after regular enquiry or dispensing with the regular proceedings by recording reasons under Section 8 (2) (b) of the Rules. There shall be no order as to costs. Appeal allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2008

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 7825 of 2008

Mohd. Zeeshan ...Petitioner
Versus
State of U. P. and others ...Respondents

Counsel for the Petitioner:
Sri Umesh Narain Sharma
Sri Sunnet Kumar

Counsel for the Respondents:
Sri S.F.A. Naqvi
S.C.

Constitution of India, Art. 226-Service Law-Transfer Order-passed by Chief Secretary of the Department-on the complaint of Ex. M.P. of affiliation ruling party-having no concern with the affairs-non representing the people-held-arbitrary, malafiedy-total non application of mind-unsustainable.

Held: Para 13

A former M.P., on whose request the transfer is made is not a person who represents the public in general. He is only a political person and therefore his letter if being acted upon would result in giving political mileage to such a person and would not be an action in public interest or administrative exigency. I am therefore of the view that the power of transferring an officer can not be wielded arbitrarily, malafidly or at the instance of politicians who no longer represent the public. If it is for the better administration that the employee concerned must have freedom from fear of being harassed by repeated transfer or transfer orders at the instance of someone who has nothing to do with the administration of the department concerned. Thus, in the above facts and circumstances the impugned order is unsustainable and suffers from total non application of mind which has been passed only to please a leader affiliated to the Ruling party. The impugned order dated 31.1.2008 (Annexure-1 to the writ petition) is therefore quashed.

Case law discussed:
2007 (8) SCC 150, 2003 (11) SCC 740, 2005 (3) SCC 153, 1998 (1) AWC 27, 2000(2) AWC 1515, 2004 (1) AWC 940

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

1. The petitioner is an Assistant Tax Superintendent (Tax and Revenue Inspector) which is a class III post governed by the U.P. Palika Centralized Services, Rules, 1966. Rule 25 of the aforesaid Rules empowers the State Government to transfer any officer of the Centralized Service from one Palika to another.

2. In exercise of the said power, the petitioner has been transferred from Nagar Palilka, Parishad Chandpur, Bijnor and has been attached to the Directorate without assigning any duties. This order of transfer/attachment dated 31st January 2008 passed by the Chief Secretary has been impugned in the writ petition on the ground of *malafidies* and on the ground that it has been passed without application of mind by the authority concerned simply on the dictates of a political personality.

3. The writ petition was entertained by an order dated 18.2.2008 and in view of the fact that the transfer order was not a routine order of transfer but was an order made under the head VIP, the Court had directed the standing counsel to produce the record. The record has been produced and has been seen by me.

4. Heard learned counsel for the parties. All of them are agreeable for the disposal of this petition at this stage itself on the basis of the record without any further opportunity to file any counter or rejoinder affidavits.

5. Sri U.N. Sharma, learned Senior Advocate assisted by Sri Suneet Kumar, learned counsel for the petitioner has submitted that the petitioner has been transferred only on the basis of a letter written by one former member of the Lok Sabha and the Zila Parabhari, Bijnor U.P., of the BSP to the effect that the workers of the BSP have made complaints to him that the petitioner is working in the interest of the Samajwadi Party and his actions are contrary to the policies of the BSP. Therefore, he should be transferred from Chandpur.

6. The record produced do reveals the existence of the above letter of the former Member of Parliament (in short M.P.) of the Bijnor and that the impugned transfer order has been passed without verifying the substance in the complaints made against the petitioner simply to please the said political person.

7. Learned standing counsel has defended the order on the ground that the Chief Secretary was within its power to transfer the petitioner, even if it has been passed on the dictates of a political person and in support thereof he has placed reliance upon a Division Bench decision of the Supreme Court ***2007 (8) SCC 150 Mohd. Masood Ahmad Vs. State of U.P., and others.*** Sri Farman Naqvi who has appeared for the Nagar Palika Parishad Chandpur respondents No.3 and 4 by filing counter affidavit has defended the order on an additional ground that the petitioner is a resident of Bijnor and therefore he can not be posted in the home district and in support has brought documents such as voters list of the year 2006 and the certificates of the school to establish that the petitioner is basically resident of district Bijnor.

8. There is no dispute to the settled legal preposition that where an employee holds a transferable post the transfer being part of the service condition of the employee should not ordinarily be interfered with by the Court unless, it is established that the order is malafide and has been passed in contravention of the service Rules or by an authority who is not competent to pass the same. In ***Mohd. Masood Ahmad (supra)*** the Supreme Court has held that even if an employee has been transferred on the recommendation of a MLA that by itself

would not vitiate the transfer order as it is the duty of the representative of the people to express the grievances of the people and the State government is certainly empowered to transfer such employee on his behalf.

9. In ***2003 (11) SCC 740 Sarvesh Kumar Awasthi Vs. Jal Nigam and others*** Apex Court while dealing with the transfer of an employee effected at the recommendations either of Minister or MLAs, MPs and MLCs observed that the transfer of an officer is required to be made on the basis of set norms and guidelines without any political interference. Some what similar view was expressed by the three Judges Bench of the Supreme Court in ***2005 (3) SCC 153 Suresh Chandra Sharmd Vs. Chairman, U.P.S.E.C., and others*** and it was held that interference in transfer and posting with political patronage has totally disturbed the autonomous nature of the Electricity Board. Accordingly, the practice of transferring the officers and employees at the behest of politicians was discouraged by the Supreme Court.

10. A Division Bench of this Court in the case of ***Lokesh Kumar Vs. State of U.P., and others 1998 (1) AWC 27*** held that the transfer without any administrative exigency or pubic interest merely for political reasons is not sustainable.

11. This has been followed by the Division Bench decision in the case of ***Goverdhan Lal vs. State of U.P., and others 2000(2) AWC 1515*** wherein also the practice of transferring employees on political pressure was deprecated.

12. Another Division Bench of this Court ***Ajai Jauhari Vs. State of U.P., and others 2004 (1) AWC 940*** has held that the transfer of a government servant on political pressure can not be sustained when the government has not applied mind to the relevant consideration as to whether the transfer is justifiable on the touch stone of administrative exigency or public interest.

13. In view of the above legal position the principal that emerges is that ordinarily transfer should be made only on set norms either looking to the administrative exigency or the public interest and transfers on the request/complaints or dictates of MLAs and MPs would not normally stand vitiated provided they are made on the administrative grounds after verifying the substance of the complaints or public interest. In other words, transfers at the behest of politicians are permitted only to the limited extent where the authority concerned applies its mind and founds some substance in the request or complaints of the politicians of the officers/employees concerned. In nutshell, without there being anything to substantiate the complaints or to support the request the order of transfer passed merely because a politician has requested, can not be justified. Even, in the case of ***Mohd. Masood Ahmad (Supra)*** it is said that every transfer at the behest of a politicians would not stand vitiated but it all depends upon the facts and circumstances of the individual case. In the instant case the transfer has been made merely in view of the letter of the former M. P., on the allegation that he has received complaints that the petitioner is patronizing the policies of the previous government and as such his actions are

against government in power. This complaint has not been verified and there is nothing on record to show that the Chief Secretary had found any substance in the same. The transfer in the instant case as such has not been made on any administrative exigency or in public interest. Moreover, this was not a request or complaint made by a sitting MLA or MP who may be said to be a representative of the public. It is a letter by the former MP which does not represent anybody as on date. He is nobody to inter meddle with the affairs of the department concerned on behalf of the public. In view of the aforesaid facts and circumstances the decision of the Supreme Court in the case of ***Mohd Masood Ahmad (Supra)*** would not be applicable in the present case. A former M.P., on whose request the transfer is made is not a person who represents the public in general. He is only a political person and therefore his letter if being acted upon would result in giving political mileage to such a person and would not be an action in public interest or administrative exigency. I am therefore of the view that the power of transferring an officer can not be wielded *arbitrarily, malafidly* or at the instance of politicians who no longer represent the public. If it is for the better administration that the employee concerned must have freedom from fear of being harassed by repeated transfer or transfer orders at the instance of someone who has nothing to do with the administration of the department concerned. Thus, in the above facts and circumstances the impugned order is unsustainable and suffers from total non application of mind which has been passed only to please a leader affiliated to the Ruling party. The impugned order dated 31.1.2008 (Annexure-1 to the writ petition) is therefore quashed.

14. However, before parting it would be suffice to add that the contention raised by Sri Naqvi that the petitioner is a resident of district Bijnor and therefore he should not be posted in the home district is a matter which is required to be considered after verification of the facts. Therefore, it is not necessary to deal with the said aspect of the matter in exercise of the writ jurisdiction. The respondents are left free to take necessary action in this regard in accordance with law.

Petition allowed. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2009

BEFORE
THE HON'BLE R.K. RASTOGI, J.
THE HON'BLE A.K. ROOPANWAL, J.

Habeas Corpus Petition No. 45113 of 2008

Anil Pal ...Petitioner(In Jail)
Versus
Superintendent, District Jail, Basti and others ...Respondents

Counsel for the Petitioner:
Sri Daya Shanker Mishra
Sri Chandra Kesh Mishra

Counsel for the Respondents:
Sri R.D. Tiwari
A.G.A.
Addl. Solicitor General of India

Constitution of India-Art. 226-National Security Act-Section 3 (2)-Detention

order-challanged on various ground-including non application of mind-criminal case relied by District Magistrate-fair acquittal non consideration-vitiate entire finding only on this ground-detention order-quashed.

Held: Para 9

Learned counsel for the petitioner submitted that this reply is vague .He further submitted that the District Magistrate could not deny this fact that the petitioner had been acquitted in the above case, and he has simply taken a plea that it was not taken as a basis for passing the detention order he pointed out that it t is clear from the report of the Inspector as well as from the order passed by the District Magistrate that the above case in which the petitioner has been acquitted has also been taken into consideration for passing the detention order mentioning this fact that the charge sheet had been submitted against the petitioner and other co accused persons but the acquittal order passed in favour of the petitioner has not been considered by the authorities and so the detention order is vitiated. In support of this contention, the learned counsel for the petitioner cited before us a ruling of the Hon'ble Supreme Court dated 22.11.1985 in *Criminal Appeal No. 72 of 1985 arising out of Special leave petition (Crl) no. 3068 of 1985, Ashok Kumar Dixit Vs. State of U.P. and others*. In this case it was held that where the rival version, which was certainly a vital circumstance to be considered by the detaining authority before passing any order of detention was not taken into account and was ignored, it is a circumstance that vitiates the order of detention. The acquittal order passed in favour of the petitioner in the above case has not been taken into account and so the detention order stands vitiated on this ground also.

Case law discussed:

2000 (1) A.Cr.R. 611, (1985) 1 SCC 561, (2006)1 SCC (Cri) 61, Criminal Appeal No. 72 of 1985 arising out of Special leave petition (Crl) no. 3068 of 1985, Ashok Kumar Dixit Vs. State of U.P. and others

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

1. This Habeas Corpus Petition has been filed by the petitioner for quashing the order dated 1.5.2008 passed by the District Magistrate, Basti against him under section 3(2) of the National Security Act and for his release from detention.

2. It has been alleged in the petition that the petitioner is a peace loving and law abiding citizen and he has not been convicted in any case so far. On 16.2.08 at about 9.30 A.M. a F.I.R. was lodged by Sri Yashwant Chaudhary against him and other co-accused persons under sections 147, 148,149,302 I.P.C. at police station Lalganj District Basti and on the basis of that report case crime No. 63/08 was registered against him. On the basis of this report the District Magistrate, Basti, the respondent no.2, passed an order against him for his detention under section 3(2) of the National Security Act on 1.5.08. The petitioner has challenged the validity of this order on several grounds in the present Habeas Corpus petition.

3. Separate counter affidavits have been filed on behalf of the respondents no. 1, 2,3 and 4 and the petitioner has filed rejoinder affidavits also in reply to those counter affidavits.

We have heard the learned counsel for both the parties and have gone through the record.

4. Learned counsel for the petitioner first of all submitted before us that the

District Magistrate, Basti, respondent no. 2 did not apply his mind before passing the impugned order and he simply signed the detention order in a mechanical manner. He further submitted that a perusal of the grounds of detention contained in the order dated 1.5.08 (Annexure -2) shows that these are verbatim reproduction of the report of the Inspector of Police Station Lalganj dated 30.4.2008 (Annexure-4).

5. In support of this contention he cited before us a Division Bench Ruling of this Court in ***Tunnu Vs. Superintendent, District Jail, Ballia and others: 2000 (1) A.Cr.R. 611***. In this case also in the grounds of detention, there was almost verbatim reproduction of the report submitted by sponsoring authority with this charge only that the name of the petitioner in the report was substituted by word *'Aap'* in the grounds of the detention order. The Court, relying upon a ruling of the Hon'ble Apex Court in ***Jai Singh vs. State of J & K : (1985) 1 SCC 561***, held that apparently the detention order had been passed in mechanical manner, casually and without application of mind and so it stood vitiated. He also cited before us another ruling of Hon'ble Supreme Court in ***Rajesh Vashdev Adnani Vs. State of Maharashtra and others: (2006)1 SCC (Cri) 61***. This was a case in which the detention order was passed under section 3(1)(i) & (iii), COFFPOSA and the detention order was· verbatim reproduction of the proposal at the sponsoring authority except use of the word *'Aap'* in the order for the word 'he' in the proposal. It was held that such a detention order suffers from non application at mind on the part of the detaining authority at the time of actual preparation of the detention order and grounds thereof and so it was not sustainable.

6. We have gone through the proposal for detention of the petitioner submitted by the Inspector of P.S. Lalganj (Annexure-4) and the grounds for detention furnished to the petitioner on 1.5.08 along with the detention order which is annexure-2. A comparative reading of both these documents reveals that the contents of paras 1 and 2 of Annexure -4 have been almost virtually reproduced in paras 1 and 2 of Annexure-2 with this change only that the word '*Aap*' has been used in the grounds (Annexure 2) in place of reference to the petitioner either by name or by pronoun in the report .It was submitted by the learned counsel for the petitioner that the aforesaid facts go to show that there was no application of mind on the part of the District Magistrate at the time of passing the order of detention so he simply signed the order casually in a mechanical manner and J therefore, the order stands vitiated. We agree with this contention in view of the discussion attempted above.

7. Learned counsel for the petitioner further submitted that in para 2 of the report of the Inspector (Annexure 4) as well as in the grounds of detention furnished by the District Magistrate (Annexure 2) there is reference of case Crime No. 69/88, P.S. Lalganj under sections 302,307,394 I.P.C. and it has been stated in it that the charge sheet was submitted against the petitioner and his colleagues in that case and this fact has also been taken into consideration for passing the detention order against the petitioner.

8. Learned counsel for the petitioner submitted that the above case was tried in the court of Sessions at Basti as S.T. No. 193/88 and the petitioner was acquitted in this case vide judgement and order dated 18.9.90. He has asserted this fact in para 28 of the petition. He pointed out that no reply to this assertion made in para 28 of the petition has been given by respondents no. 1,3 and 4 in their counter affidavits, and in the counter affidavit filed on behalf of the District Magistrate, respondent no. 2 the following reply has been given in its para 14:

"That the contents of paragraphs no. 27 and28 of the writ petition, as stated, are not admitted. In reply thereto, it is submitted that the detention order has been passed on the basis of the incident relating to the Case Crime No. 63 of 2008 under sections 147,148,149,302,506,34 I.P.C., P.S. Lalganj, District Basti."

9. Learned counsel for the petitioner submitted that this reply is vague .He further submitted that the District Magistrate could not deny this fact that the petitioner had been acquitted in the above case, and he has simply taken a plea that it was not taken as a basis for passing the detention order he pointed out that it t is clear from the report of the Inspector as well as from the order passed by the District Magistrate that the above case in which the petitioner has been acquitted has also been taken into consideration for passing the detention order mentioning this fact that the charge sheet had been submitted against the petitioner and other co accused persons but the acquittal order passed in favour of the petitioner has not been considered by the authorities and so the detention order is vitiated. In support of this contention, the learned counsel for the petitioner cited before us a ruling of the Hon'ble Supreme Court dated 22.11.1985 in ***Criminal Appeal No. 72 of 1985 arising out of Special leave petition (Crl) no. 3068 of 1985, Ashok Kumar Dixit Vs. State of U.P. and others***. In this case it was held that where the rival version, which was certainly a vital circumstance to be considered by the detaining authority before passing any order of detention was not taken into account and was ignored, it is a circumstance that vitiates the order of detention. The acquittal order passed in favour of the petitioner in the above case has not been taken into account and so the detention order stands vitiated on this ground also.

10. Learned counsel for the petitioner challenged the order of detention on several other grounds also, but since the detention order has been found by us to be invalid on the above grounds of verbatim reproduction of the report of the Inspector in the grounds of detention and for non consideration of the acquittal order of the petitioner in the above case Crime No. 69/88 as well as for non application of mind by the detaining authority, in view of the law laid down in the rulings referred to above, we need not consider those other points and we are allowing this petition on these grounds only.

11. Hence, for the reasons aforementioned, this Habeas Corpus Petition is allowed. The impugned detention order dated 1.5.2008 passed by the District Magistrate, Agra under section 3(2) of National Security Act is hereby quashed. Let the petitioner be set at liberty forthwith if he is not required to

be detained in connection with any other case. Petition allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2008

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

First Appeal No.18 of 2008

Hirdaya Narain Rai and others
...Appellants/Defendants
Versus
Ratanjay Pradhan ...Opposite Party

Counsel for the Appellants:
Sri Awadh Narain Rai

Counsel for Opposite Party:
Sri Rakesh Pande
Sri C.K. Rai
Sri Faujdar Rai
Sri A.K. Rai

Hindu Marriage Act 1956-Section 13 (i)(iii)-Divorce-Since the first day of marriage-No response of natural behaviour given by wife-due to schizophrenia-fully proved by documentary evidence-finding recorded by the Trail Court-fully justified-need no interference-considering her welfare-husband to deposit Rs.50,000/- in F.D. for 10 years-conditional direction for release of interest issued.

Held: Para 13

The court below has recorded finding that the lady since the first day of marriage did not respond to normal situations in a normal way. From the evidence on record, it was fully proved that schizophrenia suffered by the lady was of such magnitude which warranted divorce as held by the Supreme Court in AIR 1988 SC 2260 "Ram Narain Gupta Vs. Rameshwari Gupta" referred in AIR 2006 SC 1662 "Vineeta Saxena Vs. Pankaj Pandey" (Para-12).

Case law discussed:
AIR 1988 SC 2260, AIR 2006 SC 1662

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

1. Heard learned counsel for the appellants as well as learned counsel for the respondent, who has appeared through caveat.

2. This appeal is directed against judgment and decree dated 27.11.2007 passed by A.D.J. Court No.2, Ghazipur in matrimonial case No.84 of 2003, Ratanjay Pradhan Vs. Smt. Suman and others. Through the impugned judgment, marriage in between plaintiff respondent and appellant No.2/ defendant No.1 has been annulled and declared void mainly under Section 13 (1)(iii) of Hindu Marriage Act, which is quoted below:

*"13. **Divorce.** (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-*

(i) & (ii) not relevant.

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation. -In this clause,-

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other

disorder or disability of mind and includes schizophrenia;

. (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it require or is susceptible to medical treatment; or]"

3. The court below held that the wife Smt Suman is suffering from some mental dis-order in the form of schizophrenia.

4. The first dispute, which cropped up at the initial stage of the hearing, was regarding present residence/ custody of the wife. On the very first date, it was stated by learned counsel for the husband respondent that Smt. Suman- the wife was in the custody of her uncle appellant No.1, which was disputed by learned counsel for appellants. Accordingly, on 16.01.2008, I directed S.S.P., Ghazipur to make enquiry and inform the Court regarding present residence/ custody of the lady. However, afterwards learned counsel for the husband respondent stated that under some confusion he had given statement on 16.01.2008 and the fact is that the lady is still with husband and as the mental condition of the lady is not good, hence unless appellant No.1 comes to take her, she can't be turned out from the house. Learned counsel for the appellant since day one was asserting that the lady was still with the husband respondent.

5. The second question is regarding maintainability of appeal. In the divorce petition, the wife Smt. Suman was sued through her uncle Sri Uma Shanker Rai (deceased), who has been impleaded as appellant No.3. A deceased ought not to have been impleaded as appellant. Appellant No.2 is described as Smt. Suman, however Vakalatnama does not bear her signatures and learned counsel for the appellant has stated that the husband, in whose custody Smt. Suman is, did not allow appellant No.1 to obtain her signatures on the Vakalatnama. However, I do not propose to decide the question as to whether the appeal is maintainable or not. I propose to decide the appeal on merit.

6. The marriage was solemnized on 08.06.2003 and marriage petition was filed within two or three weeks. The court below through order dated 13.08.2004 appointed appellant No.1 as guardian of the wife.

7. The husband pleaded that since the day one, the behaviour of the wife was not normal and she appeared to be abnormal and he got her examined and treated by various doctors, who were expert in treating the patients of mental dis-order. The Presiding Officer of the court below summoned the lady and examined her. She only gave her name and father's name. Thereafter, when the names of her mother, husband and father-in-law were asked, she kept quite. She also kept quite when her educational qualification were asked. When she was asked her school's name in which she studied, she kept quite. When she was asked that how many days before she was married, she kept quite. When asked that with whom she had to come to Court, she said that she was brought forcibly. When it was asked that who forced her, she did not reply. When she asked that what sort

of case was filed against her, she kept quite. When asked whether anyone assaulted her, she kept quite.

8. The Presiding Officer of the court below on 31.05.2004 passed an order that wife Smt. Suman should be got examined medically by Chief Medical Officer, Ghazipur. The C.M.O. intimated that Smt. Suman was referred to S.S.P.G. Hospital, Varanasi, which in turn referred her to Mental Hospital, Varanasi, where she was examined. The report of Mental Hospital, Varanasi was referred to Chief Medical Superintendent through Rishi Prasad and the said report was also sent to the Court. According to the report, she was examined in mental hospital from 02.06.2004 to 12.06.2004 Dr. Amrendra Kumar, who had examined her, gave the report, which was Paper No.71 ga. Dr. Amrendra Kumar appeared as witness and proved the report.

9. Thereafter she was brought to the Mental Hospital, Varanasi on 22.06.2004 for treatment. Thereafter she was again brought in August, September, October, December, 2004, February, April, June, July, August, September, October and November, 2005.

10. Dr. Amrendra Kumar in his statement as P.W. 4 proved his report and stated that he found Smt. Suman suffering from mental dis-order, known by the name of schizophrenia, code F-20. He also stated that since about two years before his inspection, the lady was suffering from the said disease and it was a case of the chronic schizophrenia. He stated that his report was based on the inspection and test conducted by him. He further stated that there were very little chances of cure of the lady Smt. Suman. Doctor also stated that schizophrenia was different from mental dis-order.

11. In the impugned judgment, it has also been mentioned that even though on behalf of mother and uncle of the lady, it was stated that she passed the examination of Intermediate, however when ever she came to court, she put her thumb impression and not the signatures.

12. I fully agree with finding of the fact recorded by the court below regarding condition of the wife. Those finding are based on correct appraisal of the evidence. The evidence of the Doctor and the conduct of the lady observed by the court, when she appeared herself was the most independent evidence. The husband proved that within a week of the marriage he started consulting the Doctors about the mental condition of his wife. In view of this, the court below did not believe and in my opinion rightly the assertion of the appellant that Smt. Suman became a mental case due to torture of her husband. Even after obtaining decree for divorce, husband is keeping her with him further proves the said fact.

13. The court below has recorded finding that the lady since the first day of marriage did not respond to normal situations in a normal way. From the evidence on record, it was fully proved that schizophrenia suffered by the lady was of such magnitude which warranted divorce as held by the Supreme Court in **AIR 1988 SC 2260 "Ram Narain Gupta Vs. Rameshwari Gupta"** referred in **AIR 2006 SC 1662 "Vineeta Saxena Vs. Pankaj Pandey"** (Para-12).

14. Accordingly, the court has got absolutely no option but to accept the

findings of fact recorded by the court below. Learned counsel for the appellant has not been able to put slightest dent in the findings and reasoning of the court below.

15. Accordingly, appeal is dismissed.

16. However, the court persuaded the learned counsel for the parties to come out with some such suggestion or solution which could safeguard the future of the lady to some extent. Learned counsel for the appellant states that in case so much money is paid by the husband, which may yield about Rs.1000/- interest per month, if kept in Bank, then suffering of the lady would be mitigated to some extent and the said amount would be utilized in her maintenance. Learned counsel for the husband stated that husband was mainly depending upon his father and his father had other persons also to maintain, hence by maximum they could pay Rs.30,000/- as alimony.

17. Even through the court is of the opinion that due to her mental condition Smt. Suman deserves proper alimony, however only so much alimony may be awarded, which is within the possible means of the husband.

18. Accordingly, I direct husband to pay Rs.50,000/- as alimony to the wife Smt. Suman. He must deposit Rs.50,000/- in some Nationalized Bank in the name of Smt. Suman for ten years' fixed period with interest payable monthly to appellant No.1. The appellant No.1 must utilise the said amount of interest for the welfare of Smt. Suman. After ten years, appellant No.1 would be entitled to reinvest the said amount. However, if condition of the wife is improved during these ten years and she becomes capable to handle her affairs, then the interest must be given to her and she will be at complete liberty to receive the principal amount after ten years.

19. If Government has got some such fund, which may be made available to the ladies like appellant No.2 in this appeal that on an application being filed in that regard by appellant, Government should sanction proper amount with proper conditions for appellant No.2.

Appeal dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2008

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

Criminal Misc. Application No. 5348 of 2003

Anita Mishra and others ...Applicants
Versus
State of U.P. & another...Opposite Party

Counsel for the Applicants:
Sri Manish Tiwary
Sri Ashwini Kumar Awasthi

Counsel for the Opposite Party:
Sri K.K. Tripathi
Sri Dinesh Tiwari
A.G.A.

Code of Criminal Procedure-Section-482-Application for quashing Criminal proceeding-offence under Section 448, 406 IPC-applicant is daughter of opposite Party No. 2-after death of her mother the name of applicant as well as Opposite Party No. 2 jointly recorded-before her marriage she was residing in the house in question-No allegation in FIR for offence of intermediation, insult

or annoyance-No entrustment of ornament or valuable articles and house hold goods-nor mentioned in FIR-held Criminal prosecution sheer abuse of the process of Court-proceedings including summoning order quashed.

Held: Para 9

The applicant no. 1 is co-owner to the extent of half share in the dispute property. The name of applicant no. 1 finds place alongwith opposite party no. 2 in the assessment of Nagarpalika. The F.I.R. and other material do not show the commission of offence of house trespass. There are no allegations that the applicants entered into the property with the intention to commit the offence of intimidation, insult or annoyance. As a matter of fact the applicant no. 1 being the daughter of opposite party no. 2 lived in the disputed house prior to her marriage and she remained in its possession after marriage in the year 1996. There was no entrustment of the ornaments, valuable documents to the applicants. The details of ornaments, valuable documents and house hold-goods have not been mentioned in the F.I.R.. The F.I.R. was lodged more than two months after the institution of civil suit by the applicant no. 1. The ingredients of Sections 406 and 448 I.P.C. are not made out. In view of the foregoing discussion, the institution of criminal prosecution in the present case is sheer abuse of the process of court.

Case law discussed:

1992 Supp (1) SCC 335 (Cri) 426, (2004) 1 SCC, AIR 2004 Supreme Court 4674

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

1. By way of this application under Section 482 Cr.P.C., the applicants have prayed for quashing the proceedings of Criminal case No. 1310 of 2003-State Vs. Smt. Anita Mishra & others, under Sections 448 and 406 I.P.C., Police station Harbans Mohal, District Kanpur Dehat pending in the Court of A.C.M.M.-I, Kanpur Nagar.

2. The factual matrix of the case is as below:

3. The applicant no. 1 and opposite party no. 2 are daughter and father. The applicant no. 2 is maternal grand-mother and applicant no. 3 is husband of applicant no. 1. The F.I.R. was lodged by the opposite party no. 2 on 22.4.98 with the allegations that the disputed house was purchased by him with his own funds in the name of his wife who died in the year 1984. The opposite party no. 2 had two daughters out of which one died in February, 1992 and second daughter is applicant no. 1. It was alleged that on 30.4.1996, the applicant no. 1 married applicant no. 3 against the will of opposite party no. 2. After marriage the applicants started living in house of opposite party no. 2 and had taken possession of house-hold goods, ornaments and valuable documents. They refused to vacate the house and inducted tenants. It was alleged that opposite party no. 2 was ousted from the possession of the house. After investigation final report was submitted. The opposite party no. 2 filed protest petition. On going through the material available in the case-diary the Magistrate took cognizance for the offences under Sections 406 and 448 I.P.C. by the order dated 25.1.99.

4. The contention of the applicants is that the disputed house belonged to the mother of applicant no.1. The opposite party no. 2 became a Sadhu after the death of her mother and she as well as her sister were brought up by their maternal grand-mother. Opposite party no. 2 threatened to take forcible possession of

the house and she was compelled to file a suit for permanent injunction against opposite party no. 2. The interim injunction directing to maintain status-quo was issued on 27.3.98. The application moved under order 39 rules 1 and 2 C.P.C. was allowed by the order dated 10.3.99 and the opposite party no. 2 was restrained from selling the house in suit or causing any interference in the peaceful use and occupation of applicant no. 1. The temporary injunction order dated 10.3.99 was affirmed by the appellate court in Civil Misc. Appeal No: 151 of 1999 vide order dated 16.3.2001.

5. The civil suit was instituted on 18.2.98. The interim injunction order was granted on 27.3.98. The F.I.R. was lodged on 22.4.98 with an oblique object to pressurise the applicants to vacate the disputed house. The applicants have stated that the dispute is purely a civil nature and F.I.R. was lodged with malafide intention to harass the applicants. The allegations made in the F.I.R. do not constitute the offences under Section 406 and 448 I.P.C.. There was no entrustment of any property. The details of the ornaments, valuable documents and other house-hold goods alleged to have been misappropriated are not mentioned in the F.I.R.. The opposite party no. 2 has instituted suit against Mahesh Kumar Triwedi, one of the occupants. In the municipal record the name of applicant no. 1 is entered over the disputed house alongwith opposite party no. 2 her father.

6. The opposite party no. 2 has filed counter-affidavit stating that in proceedings under Section. 482 Cr.P.C. this Court cannot consider the factual aspect of the matter and against the summoning order statutory remedy of revision under Sections 397, 401 Cr.P.C. is available. The revision against the summoning order would have been barred by limitation, therefore, the entire criminal proceedings have been challenged by the applicants. The applicants having not prayed for quashing the summoning order, the application is not maintainable and is liable to be dismissed.

7. Heard Sri Manish Tiwary, learned counsel for the applicants, Sri K.K. Tripathi, learned counsel for opposite party no. 2, learned A.G.A. and have perused the record.

8. The learned counsel for the applicants submitted that on the death of mother the property was inherited by applicant no. 1 and her father, Opposite party no. 2 intended to cause interference in the possession of the applicants, civil suit for permanent injunction was instituted and temporary injunction granted in favour of applicant no. 1 was confirmed in Civil Misc. appeal preferred by opposite party no. 2. The applicant no. 1 being in possession of the disputed house in her own rights, no offence under Section 448 I.P.C. is made out. There was no entrustment of any property, ornaments or valuable documents to applicant no. 1 as such no offence under Section 406 I.P.C. is made out.

9. In order to constitute an offence entrustment of property or any dominion over the property, dishonest, misappropriation or conversion of that property by the person entrusted to his own use or dishonest use or disposal of that property or wilfully suffering any other person so to do in violation of any direction of law prescribing the mode in

which such trust is to be discharged or of any legal contract made touching the discharge of such trust are essential ingredients. In order to make out the offence of criminal breach of trust proof of entrustment is essential. Section 441 I.P.C. defines criminal trespass. Entering into or upon property in the possession of another to commit an offence or to intimidate, insult or annoy any person in possession of such property constitute the offence of criminal trespass. Section 442 I.P.C. defines house trespass. A person by entering into or remaining in any building, tent or vessel used as a human dwelling of any building used as a place for worship, or as a place for the custody of property is said to commit house-trespass. Section 448 I.P.C. prescribes the punishment for house trespass. The aim or dominant intention of the accused for committing an offence of intimidation, insult or annoyance has to be established to constitute the offence of criminal trespass. The opposite party no. 2 is the father of applicant no. 1. Admittedly the wife of opposite party no. 2 and mother of applicant no. 1 was the owner of the disputed house. On the death of the wife opposite party no. 2 and his daughter applicant no. 1 inherited the property. The allegation that house was purchased by opposite party no. 2 in favour of his wife with his own funds is not a question for decision in criminal proceedings. However, his contention did not find favour with the civil court in Appeal No. 151 of 1999-Ram Pratap Tiwari Vs. Anita Mishra & others. The applicant no. 1 is co-owner to the extent of half share in the dispute property. The name of applicant no. 1 finds place alongwith opposite party no. 2 in the assessment of Nagarpalika. The F.I.R. and other material do not show the commission of offence of house trespass. There are no allegations that the applicants entered into the property with the intention to commit the offence of intimidation, insult or annoyance. As a matter of fact the applicant no. 1 being the daughter of opposite party no. 2 lived in the disputed house prior to her marriage and she remained in its possession after marriage in the year 1996. There was no entrustment of the ornaments, valuable documents to the applicants. The details of ornaments, valuable documents and house hold-goods have not been mentioned in the F.I.R.. The F.I.R. was lodged more than two months after the institution of civil suit by the applicant no. 1. The ingredients of Sections 406 and 448 I.P.C. are not made out. In view of the foregoing discussion, the institution of criminal prosecution in the present case is sheer abuse of the process of court.

10. 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 hereinunder:

"(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 information 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 (I) 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. A wadh 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."

11. In view of the Apex Court decision in ***Adalat Prasad Vs. Rooplal Jindal-AIR 2004 Supreme Court 4674*** the only remedy for challenging the summoning orders is under Section 482 Cr.P.C.

12. In the wake of foregoing discussion, the allegations made in the F.I.R. and the evidence collected in support thereof taken as a whole do not constitute the offences under, Sections 406 and 448 I.P.C..

13. With the result the application is allowed. The entire proceedings of the above mentioned Criminal case No. 1310 of 2003 including the summoning order dated 25.1.1999 are quashed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2008

BEFORE
THE HON'BLE RAJES KUMAR, J.

Second Appeal No. 1282 of 1977

Ram Chandra Prasad Srivastava and others ...Appellants
Versus
Kalika and others ...Respondents

Counsel for the Appellant:
Sri N.K. Saxena
Sri V.P. Mishra
Sri Sankatha Rai
Sri V.K. Rai
Sri Dr. Vinod Kumar Rai

Counsel for the Respondents:
Sri Faujdar Rai
Sri C.K. Rai

Code of Civil Procedure-Section 100-Second Appeal-finding of facts, recorded by Court below-regarding the land on which house was constructed is not ancestral property-even no issue framed except the construction of house-can not

be interfered by the High Court in Second Appeal.

Held: Para 10

From the perusal of the order of the first Appellate authority, it reveals that no argument has been raised that the land was ancestral property over which the construction-was-made, The order of the trial court reveals that the evidences has been adduced and the statements have been recorded and on the basis of such evidences, it has been held that the plaintiffs have no share in the disputed premises and that the disputed, house .was not the ancestral property of the plaintiffs and was self acquired property of defendant no.4. It has been observed that the land over which the Baithaka has been constructed formerly belonged to Maharaja Dumraon from whom it was acquired by defendant no.4, who subsequently constructed the house over the same from his self acquired funds. Both the authorities below have held that the plaintiff was never in possession of the house in dispute. The findings of both the authorities are finding of fact which does not require any interference. The findings are based on the evidences on record are neither illegal or perverse.

Case law discussed:

2007 (102) RD 311, JT 2003 (10) SC 150, AIR 1964 Supreme Court 538

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

1. Present second appeal is against the order- of the IInd Additional District Judge, Ballia dated 30th March, 1977 arising from the suit no.331 of 1969.

2. Plaintiffs-appellants filed the suit for permanent injunction restraining the defendants-respondents from causing any interference in the plaintiffs possession over the disputed house. It was claimed that the house was ancestral property and was in possession of the plaintiffs and without the partition, defendants-respondents were raising the construction. The Trial Court vide order dated 13th March, 1976 dismissed the suit with costs. It has been held that the plaintiffs have no share in the disputed premises and the disputed house was not the ancestral property of the plaintiffs and it was the self acquired property of defendant no.4 only. It was also observed that the land over which the baithaka which is in dispute has been constructed formerly belonged to Maharaja Dumraon from whom it was acquired by defendant no.4, who subsequently constructed the house over the same from his self acquired funds. It has been observed that the plea of the defendant was supported by the statements of the witnesses and also by the evidences. The plaintiffs-appellants filed Civil Appeal no.130 of 1976, which has been dismissed with costs. The appellant authority recorded the following findings.

"**The documentary evidence available on the record also speaks of the exclusive possession of deceased defendant no. 4 and is descendants over the house in suit. The extract of Kutumb register (Ex. A-1) shows that the defendant no.4 was residing in house no.49 exclusively belonging to him. He had been paying the Panchayat taxes. The electoral rolls prepared in the year 1960 and 1973 respectively (Exts. A-4 & A-5) also go to show that the defendant no.4 was residing in house no.49 whereas the plaintiffs Raghunath in house no.45 and Bindhyachal Prasad in house no.46 separately. No doubt, the name of the father of the defendant no. 4 has been wrongly written in the electoral rolls which is nothing but a clerical error,**

Sri Dharmnath (P.W.2) stated that defendant no.4 was in exclusive possession of an area of 1 1/2 or 2 bighas of land. Thus, the documents on record also suggest the inference that the house was exclusively owned and resided by the house was exclusively owned and resided by the deceased defendant no.4.

Sri Param Hans Rai (P.W.3) hails from a different village. He states that he was pasted as a Primary School teacher in the village during the period 1963-1968. Admittedly, the house in question was constructed decades before the year 1963. His testimony is of no avail. Sri Bindhyachal Prasad (P.W.l) and Dharm Nath (P.W.2) are the claimants of the share in the house in question and are the interested persons. Their so object seems to be to snatch whatever they can afford from the vendees in a bargain for their own gain. The learned trial court has considered in detail that the land was acquired by the defendant no.4 and constructed the house in question. His findings are well considered and well appreciated. There does not appear to be any scope for disagreeing with the findings recorded by him. As a result of what has been observed above, the appeal does not admit of any scope for interference with the judgment and decree in question, and it should be dismissed."

3. The present appeal has been admitted on substantial question of law arises from ground nos. 2, 3 and 5 which reads as follows.

"Because the Courts below did not even enter the question of the ownership of the land on which the disputed house was constructed.

Because the Courts below failed to decide whether the house in dispute was constructed prior to private partition of the family or after it.

Because there having been no partition in the residential house mere exclusive possession of defendant no.4 could not apprise of his share of the house as the possession by one co-sharer as the possession by all co-sharers."

4. From the aforesaid grounds, the substantial question of law which arises is that whether the Court below without entering into the question of ownership of the land on which the disputed house was constructed, prior to private partition of the family has rejected the claim and dismissed the suit.

5. Heard Sri Sankatha Rai, learned Senior Advocate appearing on behalf of the appellants and Sri C.K. Rai, learned counsel appearing on behalf of the respondents.

6. Learned counsel for the appellants submitted that without entering into the question of ownership of the land on which the disputed house was constructed both the court bellows have held that the house in question was not the ancestral property and was self acquired property of defendant no.4. He submitted that burden lies upon the person to prove his claim who alleges that he earned property from his own sources. In support of the contention he relied upon the decision of Lucknow Bench of this Court in the case of **Shyam Lal and others Versus Assistant Director of Consolidation, Gonda, reported in [2007 (102) RD**

311]. He further submitted that under Section 100 of the C.P.C. this Court has jurisdiction to interfere with the concurrent findings of courts below if there is wrong appreciation of evidence and wrong placement of onus of proof. In support of his contention he relied upon the decision of the Apex Court in the case of **Krishna Mohan @ Nani Charan Kul and Anr. V. Pratima Maity and Ors., reported in JT 2003 (10) SC 150**. He further submitted that the vague denial of the facts in the written statement may amount to have acceptance of the fact. In support of his submission relied upon the decision of the Apex Court in the case of **Badat and Co., Bombay V. East India Trading Co., reported in AIR 1964 Supreme Court 538**.

7. Learned counsel for the respondents submitted that the dispute before the courts below was about the disputed house. No issue was framed relating to the land. He submitted that both the courts below have considered the evidences adduced and the statements of the various persons and have recorded the findings of fact that the house in dispute was not ancestral property of the plaintiff and was the self acquired property of the defendant no. 4. He further submitted that on the basis of the evidences adduced the courts below observed that the land over which the Baithaka was constructed formerly belonged to Maharaja Dumraon from whom it was acquired by defendant no. 4. He subsequently constructed the house over the same from his self acquired fund. Therefore, the plea of the plaintiff that the land over which the construction was made was an ancestral property is absolutely incorrect and has no leg to stand.

8. I do not see any substance in the argument of the learned counsel for the appellants. The issues which have been framed were as follows.

"1. Whether the plaintiffs have any share in the disputed premises?

2. Whether tile disputed house is ancestral property of plaintiffs and defendant no.4, or the defendant no.4 is in exclusive acquisition and is self acquired property?"

9. The issue was, therefore, relating to the disputed house and no issue was framed raising the claim that the land was the ancestral property over which the construction was made.

10. From the perusal of the order of the first Appellate authority, it reveals that no argument has been raised that the land was ancestral property over which the construction-was-made, The order of the trial court reveals that the evidences has been adduced and the statements have been recorded and on the basis of such evidences, it has been held that the plaintiffs have no share in the disputed premises and that the disputed, house .was not the ancestral property of the plaintiffs and was self acquired property of defendant no.4. It has been observed that the land over which the Baithaka has been constructed formerly belonged to Maharaja Dumraon from whom it was acquired by defendant no.4, who subsequently constructed the house over the same from his self acquired funds. Both the authorities below have held that the plaintiff was never in possession of the house in dispute. The findings of both the authorities are finding of fact which does not require any interference. The

findings are based on the evidences on record are neither illegal or perverse.

11. In my view the decisions cited by the learned counsel for the appellants referred herein above are not applicable to the present case on the facts and circumstances stated above and are clearly distinguishable on facts.

12. In view of the above, the appeal has no merit and is, accordingly, dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2008

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 1421 of 2008

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

Counsel for the Applicant:
Sri Arun Kumar Singh

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

Code of Criminal Procedure-439-Bail-offence under Section 148, 149, 452, 307-applicant murdered the deceased who was an eye witness-refused to compromise-active role-causing injury assigned to the applicant-not entitled for bail-Rejected.

Held: Para 7

Considering the facts and circumstances of the case and submissions made by the learned counsel for the applicant and the learned A.G.A. and considering the gravity of the offence which is too much, because in this case the witness in the earlier murder case has been murdered by the applicant and other co-accused person, active role of causing injury is assigned to the applicant. The case of the applicant is distinguishable with the case of Har Pal, Dharam Pal and Hema, who have been released on bail, by another bench of this court and without expressing any merits of the case, the applicant is not entitled for bail, the prayer for bail is refused.

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

1. This application has been filed by the applicant Om Pal with a prayer that he may be released on bail in case crime no. 2107 of 2006 under sections 147,148,149,452,307 and 302 I.P.C. P.S. Kotwali City district Bijnor.

2. The fact of the case in brief are that the F.I.R. of this case has been lodged by Ved Pal Singh on 8.9.2006 at 4.00 a.m. in respect of the incident which had occurred in the night of 7/8.9.2006 at about 3.30 a.m., distance of the police station was about 8 km from the alleged place of occurrence, the applicant and seven other co-accused persons are named in the F.I.R.. It is alleged that prior the alleged incident one Tej Pal Singh alias Roshan was murdered by the co-accused Rupesh, co-accused Sonu, co-accused Dinesh and co-accused Som Pal, they were pressurizing the deceased to settle the dispute by way of a compromise but the same was refused by the deceased, in the night of 7/8.9.2006 at about 3.30 a.m., the applicant and other co-accused persons armed with sword and country made pistol came at the roof of the deceased Tejpal where Updesh and Ganeshi were also sleeping and caused injury by using country made pistol, gun and sword and other weapons

consequently, the deceased Tejpal died instantaneously and Updesh and Ganeshi sustained injuries. According to the post mortem examination report, the deceased has sustained several ante mortem injuries in which injury nos. 1 and·4 were lacerated wounds, injury no. 3 and 6 were gun shot wounds and injury no.5 and 7 were abrasion. According to the medical examination report of Ganeshi, he had sustained 11 injuries, in which injury no. 1,3,4,5,6,7,9,10 and 11 were incised wounds, and. injury no. 2 and 8 were lacerated wounds and the injured Updesh had sustained 2 injuries, in which injury no. 1 lacerated wound and injury no. 2 was gun shot wound.

3. Heard Sri Arum Kumar Singh 1st, learned counsel for the applicant, learned A.G.A. for the State of U.P.

4. It is contended by ·the learned counsel for the applicant that no specific weapon has been shown in the hand of the applicant, and he was not an accused in the earlier murder case, he was not having any motive or intention to commit the alleged offence, no specific weapon has been shown in the hand of the applicant but during investigation it has been alleged that the applicant was armed with pharsa whereas this weapon has not been shown in the F.I.R. and the co-accused Har Pal, Dharam Pal and Hema have been released on bail by another bench of this court on 8.8.2007 in criminal misc. Bail application no. 27263 of 2006, therefore, the applicant is also entitled to get the benefit of parity.

5. It is further contended by the learned counsel for the applicant that the applicant is innocent, he has not committed the alleged offence, but he has been falsely implicated due to village party bandi.

6. In reply to the above contention, it is submitted by the learned A.G.A. that in the present case the deceased has been murdered by the applicant and other co-accused persons because he was not agreed for compromise in the earlier murder case because he was a star witness in that case, the applicant and other co-accused persons have committed the murder of the deceased and caused injury on the person of the injured, F.I.R. has been promptly lodged, the applicant is closely associate with the co-accused who are also accused in the earlier murder case, the co-accused Har Pal, Dharam Pal and Hema have been released on bail after considering the statements of the witnesses under section 161 Cr.P.C. in which the role of causing injury to the injured and the deceased by lathi was shown and the injury caused by lathi was simple in nature. The case of the applicant is not on the same footing with the above mentioned co-accused, therefore, he is not entitled for bail and the gravity of the offence is too much.

7. Considering the facts and circumstances of the case and submissions made by the learned counsel for the applicant and the learned A.G.A. and considering the gravity of the offence which is too much, because in this case the witness in the earlier murder case has been murdered by the applicant and other co-accused person, active role of causing injury is assigned to the applicant.. The case of the applicant is distinguishable with the case of Har Pal, Dharam Pal and Hema, who have been released on bail, by another bench of this court and without expressing any merits of the case, the

applicant is not entitled for bail, the prayer for bail is refused.

8. Accordingly this application is refused. Application rejected.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.02.2008

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Misc. Application No. 840 of 2008

Sushil Kumar Budhiya ...Applicant/Petitioner
Versus
Sushil Kumar Singh & others ...Respondents

Counsel for the Applicant/Petitioner:
Sri R.S. Chauhan
Sri Shree Kannan Kapoor

Counsel for the Respondents:
Sri Vinod Kumar Mishra
A.G.A.

Code of Criminal Procedure-Section-482-Summoning order on application under Section 156 (3)-offence under Section 406 I.P.C.-challenged on the ground for same act of transaction proceeding under negotiable instrument already going on-held-No bar.

Held: Para 12

But in a case like the present, where the offence could be both under the Negotiable Instrument Act as well as for certain provisions of the penal Code, I see no bar for the prosecution of the applicant for both the offences.

Case law discussed:
AIR 2000 SC 754, (1999) 8 SCC 686, AIR 1992 SC 604, (1999) 3 SCC 259, 1999 Cri LJ 1833, AIR 1992 SC 604, AIR 2006 SUPREME COURT 2780, (2000) SCC 539, AIR 2005 SC 2436, AIR 2004 SUPREME COURT 4674, (200 1) 7 SCC 659

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

1. Heard learned counsel for the applicant and Shri Vinod Kumar Mishra, learned Additional Government Advocate representing the State.

2. An application under Section 156(3) of the Code of Criminal Procedure (hereinafter referred to as the Code) dated 24.8.2002, which was treated as a complaint after the statements of the witnesses under Sections 200 and 202 of the Code were recorded, the summoning order dated 23.9.2002 and the order dated 13.0.2006 passed by the Additional Chief Judicial Magistrate, Court No.1, Varanasi in case No. 9051 of 2004 (Sushil Kumar Vs. Budhia Roadways and others) rejecting the objections and refusing to discharge the applicant under Section 406 IPC have been challenged by means of this application.

3. The allegations in the application under Section 156(3) Cr.P.C. filed by the complainant Sushil Kumar Singh, Manager of Harish Chandra Krishna Vitran Kendra were that the complainant was running a petrol pump, which used to supply fuel to the firm of the applicant namely Budhia Roadways Private Limited and in a fraudulent manner the applicant and the other directors of the said firm had obtained fuel, whose outstanding bills for payment rose to the tune of Rs.3,25,000/- (rupees three lac twenty five thousand) for which a cheque was given, which was dishonoured on account of the fact that there was no money in the applicant's firm account. When the complainant received information from the bank on 27.5.2007, then on enquiry he learnt that Om Prakash Budhia, Sushil Budhia and the other directors had

fraudulently taken fuel from the complainant's firm, not made payment for the same and had even closed their business and vanished and that they had fraudulently misappropriated the diesel supplied by the complainant's firm.

4. Firstly, it was argued by learned counsel for the applicant that essentially the proceedings between the parties are civil in nature and no criminal proceedings would lie on the said allegations. In support of this contention reliance has been placed on the decision of the Apex Court in the case of *G. Sagar Suri and another Vs. State of U.P. and others, AIR 2000 SC 754*. Specifically reliance has been placed on paragraphs 8 and 14 of the aforesaid judgement for the proposition that the entire family members of the firm ought not to have been roped in and that there is misuse of law by resorting to criminal process for prosecuting the applicant especially when another complaint under Section 138 of the Negotiable Instrument Act had been filed.

5. It may be noted that in the case of *G. Sagar Suri (Supra)*, where the complainant was a finance company and the applicants were automobile dealers it had been found in the investigation that the applicants were not the directors of the accused's company, but they were only the parents of the directors. This fact had been admitted in the counter affidavit filed by the complainant.

6. Furthermore, the Apex Court expressed its disapproval of the fact that although proceedings under Section 138 of the Negotiable Instrument Act were pending, yet for some inexplicable reason a separate case under Section 406/420 IPC had also been filed. Also there did not appear to be any direct misrepresentation on the part of the appellants in the case before the Apex Court and there was no explanation why the other directors were not proceeded against and were left out or the investigation was still pending against them, and only the applicants had been prosecuted. It was in the totality of those circumstances, that the Apex Court observed that criminal proceedings should not be used as a lever for putting pressure in a civil dispute between the parties and quashed the same.

7. In *Trishuns Chemical Industry Vs. Rajesh Agarwal and others, (1999) 8 SCC 686*, it has been held that merely because an act involves civil liability, is not sufficient to denude it of its criminal outfit if the circumstances also suggest the commission of a criminal offence. The following lines from paragraphs 6 and 7 of the aforesaid case are relevant:

"6. Time and again this Court has been pointing out that quashment of FIR or a complaint in exercise of inherent powers of the High Court should be limited to very extreme exceptions (vide State of Haryana v. Bhajan Lal, AIR 1992 SC 604 : 1992 Cri LJ 527) and Rajesh Bajaj v. State NCT of Delhi (1999) 3 SCC 259: (1999 AIR SCW 881 : AIR 1999 SC 1216: 1999 Cri LJ 1833)). In the last referred case this Court also pointed out that merely because an act has a civil profile is not sufficient to denude it of its criminal outfit. We quote the following observations (para 10 of AIR, Cri LJ) :

"It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a

reason for holding that the offence of cheating would elude from such a transaction. In fact, many a cheatings were committed in the course of commercial and also money transactions."

7. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in State of Haryana v. Bhajaj Lal (AIR 1992 SC 604) (supra)."

8. Furthermore, in *M/s Indian Oil Corporation Vs. M/s NEPC India Ltd. and others, AIR 2006 SUPREME COURT 2780* the case of *G. Sagar Suri* was considered and the tendency to utilize criminal prosecution for settling civil disputes was deprecated. However, the proceedings were allowed to continue and it was observed in the said case that an offence under Section 420 IPC as defined under section 415 IPC appeared to have been made out as the NEPC company had removed the engines and other parts of the hypothecated aircrafts, although no case of criminal breach of trust was made out.

9. It was also clarified in the case of *Indian Oil Corporation (Supra)* that in the event, the prosecution is found to be malicious, the remedy is available to the accused to initiate proceedings for compensation under Section 250 of the Code.

10. It should be noted that it has not been clarified anywhere in the original application or in the supplementary affidavit filed by the applicant whether the prosecution against the applicant under the Negotiable Instruments Act is still pending and whether the applicant and other co-accused are co-operating with the same.

11. It is also the intent of Section 220 of the Code, wherein if one series of act connected together as to form the same transaction, constitutes more offences than one, an accused can be charged and tried even in one trial for several such offences. This section has of course been made subject to the limitation contained under Section 71 of the IPC, that where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment for more than one of such offences, unless it be so expressly provided. The illustration to the section is self-expanatory. It reads thus:

"*llustration:* A gives Z fifty strokes with a stick. Here accused may have committed the offence of voluntarily causing hurt to victim by the whole beating and also by each of the blows which make up the whole beating, but he would be liable for only one punishment for the whole beating."

12. But in a case like the present, where the offence could be both under the Negotiable Instrument Act as well as for certain provisions of the penal Code, I see no bar for the prosecution of the applicant for both the offences.

13. In *Prudential Capital Market Vs. State of Bihar (2000) SCC 539*, it has been clarified that simply because the prosecution was pending under Section 45 Q-A and 58-E of the Reserve Bank of India Act, the prosecution under Section 138 of the Negotiable Instrument Act and Section 420 IPC could not be barred on that score.

14. Another contention which was stressed by the learned counsel for the applicant was that the applicant was a chartered accountant, who was working in Mumbai and he had no concern with the instant firm as he was only a son of one of the accused. The applicant has even filed a copy of the Memorandum of Association and Articles of Association of Budhia Roadways Private Limited and in paragraph 15 I) a. of the Grounds in his application he has stated that a certificate had been granted by Mr. V. Sundaram, the Company Secretary to the effect that "applicant is not holding any share or structure in the accused company".

15. I think these are matters, which can properly be appreciated at the appropriate stage during the trial and cannot be allowed to be raised in an application under Section 482 of the Code by means of such averments in an application or affidavit.

16. In *S. V. Muzumdar Vs. Gujarat State Fertilizer Company, AIR 2005 SC 2436*, it has been observed by the Apex Court that whether a particular accused (who was lawyer in that case) was incharge of the business and liable to be proceeded with in view of Section 141 of the Negotiable Instrument Act was a matter which could only be adjudicated during trial and an opinion on the matter could not be formed at the initial stage.

17. There also appears to be undue unexplained delay in the applicant's approaching this Court disentitling him from any relief also on account of laches as admittedly the initial application under Section 156(3) was moved on 24.8.2002, the summoning order was passed on 23.9.2002 by the Additional Chief Judicial Magistrate, Varanasi. Even the application for setting aside the summoning order was rejected by the ACJM as far as back on 13.9.2006 and the applicant appears to have been sleeping over the matter thereafter.

18. Significantly, in the said order dated 13.9.2006, it has been observed that the other principal accused Om Prakash Budhia, -the father of the applicant has still not appeared and the other accused Pradeep Budhia has died in the meantime. It was also noted in the said order that the application has been moved for challenging the summoning order dated 23.9.2002. I think that in view of the decision of the Apex Court in *Adalat Prasad Vs Roop Lal Jindal*, *AIR 2004 SUPREME COURT 4674* such a summoning order could not have been challenged before the learned Magistrate.

19. However, so far as the observations in the order dated 13.9.2006 are concerned that on perusal of the record it appears that when the learned Magistrate passed the order dated

23.9.2002 summoning the applicant and other accused under Section 406 IPC, only the statement of Sushil Kumar Singh, the complainant appeared to have been recorded and that the statements of the other witnesses Rajesh Kumar and Sunil Kumar Singh were not recorded under Section 202 of the Code, but the same appear to have been recorded in Complaint case No. 1564 of 2002 (Sushil Kumar Singh Vs. Budhia Roadways), under Section 138 of the Negotiable Instrument Act. In my view, there is no legal bar in summoning the accused even after recording the statement of the complainant under Section 200 of the Code and it is only incumbent in a case, which is exclusively triable by a court of sessions that evidence of the complainant and the witnesses (present if any) be also examined on oath before passing the summoning order, but the present is not such a case.

20. One further submission has been raised by the learned counsel for the applicant that no offence under Section 406 I PC appears to be disclosed as the property (fuel) had been sold to the applicant and other accused and it had not been entrusted to them for a particular purpose. There may be some merit in this contention, but criminal proceedings can only be quashed if no offence whatsoever is disclosed. In *S.M. Datta v. State of Gujarat, (200 1) 7 SCC 659*, at page 666 it has been observed that the practice of the High Court in scuttling criminal proceedings at the initial stage was improper, and that the High Court must not interfere except in the rarest cases where the same amounted to abuse of the process of law. Only broad allegations were to be seen as to whether any offence was disclosed and the FIR was not to be looked at with mathematical exactitude at this stage as to whether the offence alleged is made out. Even if some other offence is made out, different from what has been alleged the charge sheet can not be quashed. The relevant passage in page 666 in *S.M. Datta* reads as follows:

"Criminal proceedings, in the normal course of events ought not to be scuttled at the initial stage, unless the same amounts to an abuse of the process of law. In the normal course of events thus, quashing of a complaint should rather be an exception and a rarity than an ordinary rule. The genuineness of the averments in the FIR cannot possibly be gone into and the document shall have to be read as a whole so as to decipher the intent of the maker thereof. It is not a document which requires decision with exactitude, neither is it a document which requires mathematical accuracy and nicety, but the same should be able to communicate or indicative of disclosure of an offence broadly and in the event the said test stands satisfied, the question relating to the quashing of a complaint would not arise."(Emphasis added)

However it will be open for the trial court to consider when framing the charges or at any other appropriate stage under Section 215 of the Code as to whether a charge ought to be framed against the accused persons under section 406 or 420 IPC because the allegations were that the accused persons continued to take fuel from the petrol pump of the complainant and the bills ran up to 3,25,000/-, thereafter the firm of the accused persons and the accused persons themselves vanished without making the due payments and even the cheques issued by them were dishonoured. Prima facie on

these allegations it could at least be said that there was an intention to cheat from the very inception as defined under section 415 IPC although perhaps strictly a case under section 406 IPC may not be disclosed. If the Magistrate is so satisfied upon exercise of his independent discretion after considering the materials and documents of this case, he may refrain from framing a charge under Section 406 IPC or by substituting it with a charge under section 420 IPC if he deems appropriate at the proper stage.

21. In view of what has been indicated herein above, I find no ground for quashing the criminal proceedings against the applicant and the application is accordingly rejected.

22. However, in the circumstances of the case, it is provided that if the applicant appears before the court concerned and applies for bail, his prayer for bail within a month, the application shall be considered expeditiously in accordance with law.

23. The observations, made herein above, were only for the purpose of disposal of this application and should not be taken into account by the Magistrate concerned while deciding the bail application or the trial. Application disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Review Application No. 294786 of 2007
In
Civil Misc. Writ Petition No. 55022 of 2007

Chet Ram Gangwar ...Petitioner
Versus

State of U.P. and others ...Respondents

Counsel for the petitioner:
Sri.Dr. H.N. Tripathi

Counsel for the Respondents:
S.C.

U.P. Intermediate Education Act 1921- Chapter II Regulation -I Appendix-A- Lecturer in Hindi-B.A. with Sanskrit-a person having Sahitya Ratna Degree from Hindi Sahitya Sammelan can be treated equivalent degree/eligible for promotion?-Question referred to larger Bench.

Held: Para 12

Let record of this writ petition be placed before Hon'ble Chief Justice for considering the constitution of the larger Bench for consideration of the following questions.

(i) Whether the judgment of learned Single Judge in the case of Purushottam Das Agarwal Vs. District Inspector of Schools, Allahabad and another, *reported in (1999) 2 UPLBEC 1609* holding that a candidate not possessing B.A. with Sanskrit but possessing two years course of Sahitya Ratna from Hindi Sahitya Sammelan is eligible for promotion as

Lecturer, Hindi, lays down the correct law?

(ii) Whether the qualification of two years course of Sahitya Ratna from Hindi Sahitya Sammelan can be treated a qualification for the candidates who do not possess the qualification of B.A. with sanskrit?

Case law discussed:

1999(2) UPLBEC 1609-referred to Larger Bench, 2006(2) SCC 670, 1985(2) SLR 576

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

1. Heard Dr. H.N. Tripathi, learned Counsel for the applicant and learned Standing Counsel representing the respondents.

2. This is an application seeking review/ recall of the judgement and order dated 13.11.2007 by which the writ petition filed by the petitioner was dismissed.

3. By the writ petition, the petitioner had prayed for quashing the order dated 18.10.2007, passed by the Joint Director/Of Education returning the proposal of the petitioner's promotion as Lecturer Hindi on the ground that the petitioner having not passed B.A. with· Sanskrit was not eligible for promotion on the post of Lecturer Hindi. The petitioner is postgraduate in Hindi and has passed two years course of Sahitya Ratna from Hindi Sahitya Sammelan. After hearing the learned Counsel for the petitioner, the writ petition was dismissed taking the view that two years course of Sahitya Ratna from Hindi Sahitya Sammelan cannot be said to be equivalent to B.A. with Sanskrit.

4. The grounds taken in the review application is that the learned counsel for the petitioner could not cite an earlier judgment of learned Single Judge of this Court in the case of **Purushottam Das Agarwal Vs. District Inspector of Schools, Allahabad and another,** *reported in (1999) 2 UPLBEC 1609* by which it was held that person possessing Sahitya Ratna degree from Hindi Sahitya Sammelan and not having B.A. with Sanskrit is eligible for promotion as Lecturer in Hindi. It has been stated in paragraph 15 of the affidavit that due to inadvertent mistake the said judgment could not be cited by the learned counsel for the petitioner, a copy of which has been filed as Annexure-1 to the affidavit filed in support of the review application. Learned Single Judge of this Court in the said judgment has taken the view that the person having Sahitya Ratna two years course from Hindi Sahitya Sammelan and not possessing B.A. with Sanskrit is eligible for promotion on the post of Lecturer in Hindi. The said judgment supports the claim of the petitioner. The petitioner has prima-facie made out a case for review/recall of the order dated 13.11.2007. The order dated 13.11.2007 deserves to be and is hereby recalled.

5. Learned counsel for the petitioner applicant as well as learned Standing Counsel have been heard on the issue which has arisen for consideration in the writ petition.

6. Chapter II Regulation 1 Appendix A of Regulations framed under the U.P. Intermediate Education Act, 1921 provides qualifications for appointment on the post of Lecturer Hindi to teach classes XI and XII and for the post of

Assistant Teacher to teach classes IX and X.

Following are the qualifications prescribed in Appendix A:

2. हिन्दी अध्यापक इण्टरमीडिएट (कक्षा 11- 12) के लिए	1- हिन्दी में एम०ए० तथा संस्कृत के साथ बी०ए० अथवा शास्त्री परीक्षा राजकीय संस्कृत कालेज, वाराणसी अब सम्पूर्णानन्द विश्वविद्यालय, वाराणसी २- प्रशिक्षण योग्यता वरीयान (राजाज्ञा संख्या मा/4428/15-72 (13)--76, दिनांक 16 मार्च, १९७९ के अनुसार दिनांक 5 अप्रैल, १९७५ के पूर्व हाई स्कूल कक्षाओं के अध्यापन हेतु तत्समय प्रचलित विनियमों के अनुसार नियुक्त अध्यापकों के लिए, यदि वे निर्धारित अन्य शैक्षिक योग्यतायें रखते हों, इंटरमीडिएट कक्षाओं के हिन्दी प्रवक्ता पद पर प्रोन्नति हेतु संस्कृत विषय से बी०ए० उत्तीर्ण होना आवश्यक नहीं होगा।
हाई स्कूल (कक्षा 9 10) के लिये	(1) बी०ए० हिन्दी एवं संस्कृत विषय के साथ एवं एल०टी० या बी०टी० या बी० एड० या अन्य समकक्ष शिक्षा अथवा शिक्षण में डिग्री या डिप्लोमा अथवा (2) साहित्य रत्न 2 वर्षीय कोर्स हिन्दी साहित्य सम्मेलन, प्रयाग जिसमें संस्कृत विषय प्राचीन भाषा के रूप में लिया गया हो तथा रिफ्रेशर कोर्स ट्रेनिंग

7. A perusal of the above qualifications indicate that for appointment of Lecturer Hindi (to teach class XI &XII), the qualifications prescribed is M.A. in Hindi and B.A. with Sanskrit or Shastri examination of Rajkiya Sanskrit College Varanasi (now Sampurnanand Vishwavidyalaya Varanasi). The qualification thus is post graduation in Hindi together with Sanskrit in B.A. or qualification of Shastri. The said item in Appendix A also provides qualifications for teaching High school classes of Hindi. There are two alternate qualifications prescribed for Hindi teacher in High school classes i.e. B.A. with Hindi and Sanskrit and L.T., B.T. or B.Ed. or an equivalent qualification of degree or diploma in teaching. The alternate qualification provides Sahitya Ratna two years course from Hindi Sahitya Sammelan, Prayag with Sanskrit as an ancient language with refresher course training. The judgment which has been relied upon by learned counsel for the petitioner has taken the view that Sahitya Ratna has been treated as equivalent to B.A. With Hindi and Sanskrit therefore, the qualification of B.A. with Sanskrit as provided for intermediate classes can be very well be fulfilled by reason of the qualification of High school teacher. Following has been laid down in paragraph 6 of the judgment:

"6. *A plain reading of the said Appendix shows that in order to be a Lecturer in Hindi in an Intermediate College, a teacher should be M.A. in Hindi and B.A. with Sanskrit or Shastri from the Government Sanskrit College, Varanasi, now Sampoornand University, Varanasi. Admittedly, the petitioner did not have Sanskrit in B.A. nor is a Shastri from Sampoornand University. For a High School teacher the qualification is B.A. in Hindi with Sanskrit or Sahitya Ratna" in Hindi with Sanskrit. Therefore, the petitioner was qualified even as "Sahitya Ratna" for being appointed as a High School teacher even without being B.A. and M.A. in Hindi. The petitioner is M.A. in Hindi and had passed B.A.with Hindi but without Sanskrit. The qualification " Sahitya Ratna" which is stated to be equivalent to B.A. in Hindi*

and Sanskrit as provided in clause 2 of the· qualification for High School teacher suffice the qualification. "Sahitya Ratna" has been treated in the Appendix itself as equivalent to B.A. in Hindi with Sanskrit. Therefore, the qualification B.A. with Sanskrit as provided for a teacher in Intermediate Classes can very well be fulfilled by reason of the qualification of a High School Teacher. If he had been appointed before 5th April, 1974 by reason of his being appointed as a High School teacher, he would have been eligible for promotion to the post of Lecturer by reason of Notification dated 16th March, 1978, then there cannot be any earthly reason to deny him such promotion on the ground of his being appointed after 5th April, 1974 when he fulfils the qualification of a High School teacher as observed earlier. When the degree of " Sahitya Ratna" from Hindi Sahitya Sammelan has been equated with B.A. with Hindi and Sanskrit, the qualification B.A. with Sanskrit or Hindi teacher in intermediate College has to be reconciled. If such a stand is not taken, in that event the question of promotion would become discriminatory. Inasmuch as a person though qualified to be a teacher in the High School in Hindi with" Sahitya Ratna" Degree, he could not be eligible for promotion though M.A. in Hindi and B.A. in Hindi only because he did not have Sanskrit in B.A. The purpose was to satisfy the qualification that a teacher should been Sanskrit upto the standard of Graduation level. When the degree of" Sahitya Ratna" has been equated to with graduation level by virtue of the inclusion of the qualification in the Appendix itself, there cannot be any other interpretation of B.A. with Sanskrit for being appointed as a Hindi Lecturer as provided in serial NO.2 of the Appendix imputing a different meaning. "

8. The basis of the judgment in Purushottam Das Agarwal case (supra) is that Sahitya Ratna two years course has been treated equivalent to B.A. with Hindi and Sanskrit. The above observation is not supportable from the plain reading of the item No.2 of Appendix A as quoted above. The qualification to teach intermediate classes i.e. Lecturer Hindi provides B.A. with Sanskrit or Shastri Pariksha of Rajkiya Sanskrit College, Varanasi (now Sampurnanand Vishwavidyalaya, Varanasi). Thus, while prescribing an equivalent qualification of B.A. with Sanskrit, the rule making authority has mentioned only Shastri Pariksha of Rajkiya Sanskrit College, Varanasi. Had the Rule making authority intended to include the Sahitya Ratna two years course from Hindi Sahitya Sammelan Prayag, the said qualification ought to have also been mentioned in qualifications prescribed for the intermediate classes, wherein the same column No. 2 Appendix A while equating B.A. with Sanskrit for intermediate classes they have mentioned only one i.e. Shastri Pariksha of Rajkiya Sanskrit College, Varanasi and they have used another course ie. Sahitya Ratna two years course from Hindi Sahitya Sammelan for High School classes. Non-mentioning of Sahitya Ratna two years course as equivalent to B.A. with Sanskrit for intermediate classes has relevance and cannot be treated to be an omission or without any purpose. It is settled rule of interpretation that words in a statute are to be given plain and grammatical meaning and no words can be added or subtracted. The Apex Court in the case of **Vemareddy Kumaraswamy Reddy and**

Another·Vs. State of A.P. reported in *(2006) 2 Supreme Court Cases 670* has laid down that where the language of the Statute is clear and unambiguous, court cannot make any addition or substitution of words, unless otherwise the provision stands meaningless or of doubtful meaning. Following was laid down in paragraphs 15 and 16 by the Apex Court:

*" **15**. Where, however, the words were clear, there is no obscurity, there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to innovate or take upon itself the task of amending or altering the statutory provisions. In that situation the judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by "an alert recognition of the necessity not to cross it and instinctive, as well as trained reluctance to do so". (See Frankfurter" Some Reflections on the Reading of Statutes in 'Essays on Jurisprudence"'. Columbia Law Review, p.51.)*

***16**. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. (See Institute of Chartered Accountants of India V. Price Waterhouse.) The intention of the legislature is primarily to be gathered from the language used, which means the attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford V. Spooner, Courts cannot aid the legislatures defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See State of Gujrat Vs. Dilipbhai NathjibhaJ Patel.) 1t is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. (See Stock Vs. Frank Joines (Tipton) Ltd.) Rules of interpretation do not permit courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn, L.C. in Vickers Sons and Maxim Ltd. Vs. Evans quoted in Jumma Masjid V. Kodimaniandra Deviah.)"*

9. The mere fact that Sahitya Ratna two years course from Hindi Sahitya Sammelan has been treated to be an alternate qualification with B.A. with Hindi and Sanskrit for High School classes, cannot be said that same qualification can also be read in the qualification for Lecturer Hindi. Non-mentioning of Sahitya Ratna two years course, while prescribing qualifications for Lecturer Hindi, cannot be said to be without any purpose or intendment when the Legislature is well aware of both the qualifications i.e. Shastri Pariksha of Rajkiya Sanskrit College, Varanasi as well as Sahitya Ratna and treats the former as an.alternate qualification for B.A. with Sanskrit for the purpose of qualification of Lecturer Hindi and did not include Sahitya Ratna two years course from Hindi Sahitya Sammelan as

equivalent to B.A. with Sanskrit. To hold that Sahitya Ratna two years course from Hindi Sahitya Sammelan is equivalent to B.A. with Sanskrit is to add words to Statute or to read a word in qualifications which is not present. The Apex Court in **Union of India and others Vs. Tulasi Ram Patel** reported in 1985 (2) SLR 576 has laid down that where there is an express mention of certain things in the Act or Rules, then anything not mentioned is excluded. Learned Single Judge in *Purushottam Das Agrawal's case (supra)* proceeded on the premise that Appendix A has treated Sahitya Ratna as equivalent to B.A. with Hindi and Sanskrit, which is not born out from the Appendix A. Learned Single Judge in the aforesaid case has also observed that if, B.A. with Sanskrit or Hindi cannot be treated equivalent to Sahitya Ratna two years course from Hindi Sahitya Sammelan, a person though may be qualified to teach High School classes but he may not be qualified for promotion as Lecturer Hindi. It is not necessary that every teacher who is eligible to teach High School classes is entitled to be promoted as Lecturer Hindi. The possessing of qualification for promotion is a necessary condition. This can very well be illustrated by a simple example. A person who is not a post graduate can be appointed to teach High School classes in Hindi. Can it be said that he not being eligible for promotion causes discrimination? The answer obviously is no. Learned Single Judge has also observed that not treating Sahitya Ratna two years course from Hindi Sahitya Sammelan equivalent to B.A. with Hindi or Sanskrit has discriminatory effect with regard to right of promotion who is teaching High School Classes. The above reason is also unfounded. It is not necessary that every teacher who is teaching High School classes should be promoted as Lecturer irrespective of the fact whether he possess the specific qualification mentioned for Lecturer Hindi. In view of the above, specially the principles of interpretation as laid down by the Apex Court, the judgment of the learned Single Judge in *Purushottam Das Agarwal's* case (supra) requires reconsideration by a Division Bench.

Issue notice to the respondent no. 5 in the writ petition.

10. Learned Standing Counsel has accepted notices on behalf of respondents no. 1 to 4.

11. The selection on the post of Lecturer Hindi may take place which shall however be subject to the result of the writ petition.

12. Let record of this writ petition be placed before Hon'ble Chief Justice for considering the constitution of the larger Bench for consideration of the following questions.

(i) Whether the judgment of learned Single Judge in the case of **Purushottam Das Agarwal Vs. District Inspector of Schools, Allahabad and another**, *reported in (1999) 2 UPLBEC 1609* holding that a candidate not possessing B.A. with Sanskrit but possessing two years course of Sahitya Ratna from Hindi Sahitya Sammelan is eligible for promotion as Lecturer, Hindi, lays down the correct law?

(ii) Whether the qualification of two years course of Sahitya Ratna from

Hindi Sahitya Sammelan can be treated a qualification for the candidates who do not possess the qualification of B.A. with sanskrit?

Reference made to larger bench.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2008

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SHISHIR KUMAR, J.

First Appeal From Order No. 275 of 2008

Union of India ...Defendant/Appellant
Versus
Smt. Vidyawati & others ...Respondents

Counsel for the Appellant:
Sri Govind Saran

Counsel for the Respondents:

Railways Act 1989- Section 124-A- untoward incident-Compensation– deceased traveling having valid ticket– unreserved compartment–due to heavy rush fell down–expired due to serious injury–held-railway cannot shirk its responsibility–claimant entitled for compensation.

Held: Para 4

According to us, the appellant has proceeded with a misconception of law. The deceased was a bonafide passenger. In spite of having valid ticket when a passenger fall down from the railway due to an untoward incident, he is entitled for compensation. There is gulf difference between untoward incident and self inflicted untoward incident. Without any specific proof an untoward incident cannot be said as self inflicted.

(Delivered by Hon'ble Amitava Lala, J.)

1. This appeal is arising out of an order of the Railway Claims Tribunal, Gorakhpur Bench, dated 12th October, 2007. By the order impugned the Tribunal allowed compensation of Rs.4,00,000/- to the claimants on account of death of the deceased. The deceased was a police personnel, who was traveling by train having valid ticket. The Tribunal gave the following finding in coming to the conclusion:-

6.1 *Original ticket for journey has been filed. It is for the correct stations and date as per application. Ticket was found from the person of the deceased. Although, respondent stated that its genuineness was to be proved by applicant, tribunal cannot accept this plea. Original ticket was filed on 15.5.2004 and respondent could very well have checked it up to 12.6.07 most diligently. In absence of any specific defence by respondent, the deceased is held to be a bonafide passenger at the time of untoward incident.*

6.2 *Deceased fell down from train due to pushing by other passengers who were in large number. Possibly, he could not get a seat to sit and had to stand. Although uncomfortable, such journey is undertaken by quite a significant number of passengers overlooking their comfort and convenience. Even fall from footboard at the entrance of coach is an accidental fall because footboard is part of coach. Second issue is allowed i.e. accident in this application was an untoward incident as per Railway Rules for compensation."*

2. The appellant contended before this Court that this is a first appeal lies, to the High Court under Section 123 of the Railway Claims Tribunal Act, 1987. However, we are not concerned about the maintainability when such law available but with the feasibility of admission on merit. Section 124-A of the Railways Act, 1989 speaks as follows:-

124-A. Compensation on account of untoward incidents -

When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependent relative of a passenger who has been killed to maintain an action and recover damages in respect thereof, the railway administration such as would entitle a passenger who has been injured or the dependant of a passenger who has been killed to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such ***untoward incident:***

Provided that no compensation shall be payable under this section by the railway administration if the passenger dies or suffers injury due to
(a) suicide or attempted suicide by him;
(b) self-inflicted injury;
(c)his own criminal act;
(d) any act committed by him in a state of intoxication or insanity;
(e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident."

The learned counsel contended before this Court that **'untoward incident'** means as follows:-

*Section 123 (c)**"untoward incident"** means-*
(1) (i) the commission of a terrorist act within the meaning of subsection (1) of section 3 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(ii) the making of a violent attack or the commission of robbery or dacoity; or

(iii) the indulging in rioting, shoot-out or arson, by any person in or on any train carrying passengers, or in a waiting hall, cloak room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or

(2) the accidental falling of any passenger from a train carrying passengers."

3. According to the learned counsel appearing for the appellant since untoward incident includes "the accidental falling of any passenger from a train carrying passengers," it can be construed as self-inflicted injury as per proviso to Section 124-A of the Act for which the claimants are not entitled to claim any compensation. He also said standing on the foot board is a punishable offence by virtue of Section 154 of the Act.

4. According to us, the appellant has proceeded with a misconception of law. The deceased was a bonafide passenger. In spite of having valid ticket when a passenger fall down from the railway due to an untoward incident, he is entitled for compensation. There is gulf difference between untoward incident and self inflicted untoward incident. Without any specific proof an untoward incident cannot be said as self inflicted.

5. The learned counsel stated that there is a difference between reserved compartments and unreserved compartments. Facilities of reserved compartment cannot be given to the passengers of unreserved compartments. We are of view that a reserved compartments means the seats of the valid ticket holders are reserved, but unreserved compartment means seat are unreserved, who will come first he will occupy. In case of unreserved compartments Railways are issuing tickets irrespective of accommodations in case of unreserved seats. Even at the time of return of tickets without journey, certain amounts are being deducted by the Railways. Therefore, Railways are duty bound to discharge the responsibilities. In such situation it does not lie on the mouth of the Railways that as because the unreserved compartment was overloaded and the passenger, who was standing on the foot board, sustained death, it can be construed as self inflicted incident. This submission cannot lie on the mouth of a public authority of a developed country. This is also a disgraceful submission that the deceased could have board on the next train. Therefore, the balance of convenience does not support the contentions of the cause. Hence, we cannot admit the appeal. The appeal is, accordingly, dismissed without imposing any costs. Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2008

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 17404 of 1998

Bal Krishna Varshney ...Petitioner
Versus
The Dy. Director of Education (Madhyamik), Agra and others ...Respondents

Counsel for the Petitioner:
Sri R.R. Singh
Sri V.K. Srivastava

Counsel for the Respondents:
Sri M.K. Gupta
S.C.

U.P. Intermediate Education Act 1921– Section 16-G Regulation 36 and37– termination of Head Clerk of Intermediate collage–without prior approval without giving charge-sheet– without affording opportunity to submit reply–Held-mandatory provision of regulation 36,37 not complied with– termination order quashed.

Held: Para 19

In the present case, from the record it is clear that no enquiry was held, no evidence was recorded and no report of enquiry officer was considered by the Committee of Management after notice to the petitioner. Even if petitioner has failed to submit his explanation in time it was incumbent on the Committee of Management to act in accordance with Regulation 37 by giving him notice and opportunity to appear before the Committee on the day the matter was finally considered. The Committee of

Management, however, did not issue any notice to the petitioner or there is nothing on record to show that notice was ever served upon the petitioner, therefore, a clear inference can be drawn that the Committee of Management has taken a decision without affording an opportunity to the petitioner. The procedure adopted by the Committee of Management was in contravention of the statutory provision of Regulations 36 and 37, which rendered the decisions of the Committee of Management as illegal.

Case law discussed:

1980 UPLBEC 110, 1983 UPLBEC 597, AIR 1960 Supreme Court, 992, A.I.R. 1964, Supreme Court, 1854, A.I.R. 1971 Supreme Court, 823, A.I.R. 1971 Supreme Court, 2148

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

1. The present writ petition has been filed for quashing the resolution termination order dated 11.12.1995 (Annexure 1 to the writ petition) and order of approval dated 10.11.1996 (Annexure 5 to the writ petition) and appellate order dated 10.2.1998 (Annexure 7 to the writ petition) passed by the respondent Nos. 3, 2 and 1 respectively. Further a writ in the nature of mandamus commanding the respondents to treat the petitioner as holding the post of accountant and to provide him all consequential benefits in accordance with law.

2. The brief facts of the case are that the petitioner was appointed as an accountant in the Agrasen Inter College, Harduaganj District Aligarh. In the year 1990, one Sri Rajpal Sharma, head clerk retired and the petitioner being senior most was entitled to be promoted on the post, which came into existence due to retirement of Sri Rajpal Sharma. When the Committee of Management do not promote the petitioner on the post of head clerk, the petitioner was compelled to file a writ petition before this Court and by order dated 2.4.1993 this Court had passed the following orders:-

"The petitioner is claiming that he is entitled to be promoted on the post of Head Clerk. He has made a representation to the District Inspector of Schools to the same effect. The District Inspector of Schools may decide the petitioner's representation in accordance with the rules expeditiously. The writ petition is accordingly disposed of."

3. The respondents after coming to know of the aforesaid order of the Hon'ble Court, illegally promoted one Sri Nand Kishore, who was junior to the petitioner from back date. Then the petitioner filed another Writ Petition No.28794 of 1993 challenging the appointment of Sri Nand Kishore on the post of head clerk. The writ petition is still pending and no counter affidavit has been filed. As promotion of Nand Kishore was wholly illegal and there was a hope that the petitioner will succeed in the writ petition, as such, the respondents started pressing the petitioner to withdraw the writ petition. It was on 14.6.1995, the petitioner fell ill and he made an application for grant of leave. On 19.6.1995, petitioner sent an application for granting leave from 15.6.1995 to 14.7.1995 by registered post. The same was returned back as the principal of the college refused to accept the registry sent by the petitioner. Again a letter was sent to the Manager of the College alongwith the original application and the medical certificate dated 19.6.1995 and a copy of the same was handed over to the District Inspector of Schools. Respondent annoyed to the aforesaid act, so without

any resolution the respondent No.1 placed the petitioner under suspension on 18.6.1995. As the petitioner could not recover from his ill health on 16.11.1995, he made another application for extension of leave from 16.11.1995 to 30.12.1995 with a request that the medical certificate will be submitted when the petitioner will join. On 8.12.1995, the petitioner came to know through his son that a notice has been published in the 'Dainik Jagran' dated 6.12.1995 to the effect that the petitioner should obtain a copy of the charge-sheet up to 9.12.1995. As stated above, petitioner was ill and was not in a position to obtain the copy of charge-sheet, as such, he sent his son on 9.12.1995 with an application to handover the said charge-sheet but the Principal of the said institution refused to accept the same.

4. Suddenly on 10.1.1996, the petitioner received an order dated 11.12.1995 sent under the postal certificate by which services of the petitioner have been terminated. The order dated 11.12.1995 has been passed without any opportunity of hearing to the petitioner and without conducting any enquiry, therefore, the resolution and order dated 11.12.1995 is bad in law as no charge-sheet was ever served upon the petitioner and no enquiry was conducted whatsoever. The order is in contravention of Regulations 36 and 37 framed under the U.P. Intermediate Education Act, 1921. The mandatory provision to this effect regarding seeking prior approval from the District Inspector of Schools was not obtained.

5. It has been submitted by the learned counsel for the petitioner that the Committee of Management did not issue any show cause notice to the petitioner and was not afforded any opportunity of being heard before passing the order impugned. The petitioner challenge the said order of termination by filing a Writ Petition No.15171 of 1996 and this Court had passed the following orders:-

"Sri Manoj Gupta and Sri V.K. Gupta appear for the respondents. They pray for allowed two weeks time to file counter affidavit. Petitioner may file rejoinder affidavit within two weeks thereafter.

Writ petition shall be listed thereafter for admission/final disposal in the first week of August, 1996.

In the meantime operation of resolution passed by the Managing Committee dated 10.12.1995 (Annexure-9 to the writ petition) shall remain stayed. District Inspector of Schools is also restrained from taking any action thereon."

6. Aggrieved by the aforesaid order dated 30.4.1996, the Committee of Management preferred a Special Appeal mainly on the ground that order dated 10.12.1995 has not yet been given effect to as it is only a resolution and will take effect only after the approval of the District Inspector of Schools. On the basis of the aforesaid statement made by the Committee of Management, the Special Appeal was disposed of finally and directed the District Inspector of Schools to pass an order upon the proposal submitted by the Committee of Management. In spite of the direction issued by this Court, the District Inspector of Schools instead of approving or disapproving the order has passed a detailed order without giving any reasons and without considering the

representation of the petitioner, which was received in the office of the District Inspector of Schools on 5.11.1996. Against the order dated 10.11.1996, the petitioner filed a writ petition before this Court and while disposing of the writ petition the petitioner was directed to approach the appropriate authority.

7. In pursuance of the order the petitioner filed an appeal before the respondent No.1 on the ground that the petitioner did not submit his reply to the charges levelled against him before the Committee of Management or before the District Inspector of Schools and no notice and opportunity to that effect was given but in spite of the aforesaid fact, the appeal filed by the petitioner was rejected vide its order dated 10.2.1998.

8. The petitioner submits that it is apparent from the record that no notice and opportunity to that effect has been given to the petitioner by the alleged enquiry officer as submitted by the Committee of Management. From the publication, which is alleged to be published in the newspaper dated 5.12.1995 clearly states that charge sheet may be taken by the petitioner on or before 9.12.1995, therefore, prior to this date no order can be passed. But from the perusal of the report of the enquiry officer dated 9.12.1995, it was recommended to terminate the services of the petitioner only on 9.12.1995. The Committee of Management on 2.12.1995 alleged to have issued a letter to this effect that there will be a meeting of Committee of Management and Item No.3 will be taken into consideration regarding the services of the petitioner and by order dated 11.12.1995, the services of the petitioner were terminated. It clearly goes to show that the respondents were pre-determined to pass the order of termination against the petitioner. If the time was given up to 9.12.1995 the enquiry officer would have waited either for the next date for recommendation to terminate the services of the petitioner to the Committee of Management. The Committee of Management was also pre-determined and has alleged to have issued a letter dated 2.12.1996 to determine the question of services of the petitioner. There is nothing on record to show that this letter was ever received by the petitioner at any point of time and from the order impugned dated 11.12.1995 it clearly appears that a decision was taken on 10.12.1995 to terminate the service of the petitioner, therefore, it clearly appears that the Committee of Management was in haste in terminating the services of the petitioner.

9. Further it has been argued by Sri Rajiv Ratan Singh, learned counsel for the petitioner that the respondent No.1 has recorded a finding to this effect that in spite of the notice to the Committee of Management regarding submission of the relevant documents for initiating the disciplinary proceedings after suspension to this effect was commenced or not, no documents to that effect were filed by the Committee of Management. In spite of the aforesaid finding the appeal filed by the petitioner has been rejected holding therein that no proper procedure as provided under the Regulations 36 and 37 has been complied with. Regulations 36 and 37 are being reproduced below:-

*"**36.** (1) The grounds on which it is proposed to take action shall be reduced in the form of a definite charge of charges which shall be communicated to the*

employee charged and which shall be so clear and precise as to give sufficient indication to the charged employee of the facts and circumstances against him. He shall be required within three weeks of the receipt of the charge-sheet to put in a written statement of his defence and to state whether he desired to be heard in person. If he or the inquiring authority so desires, an oral enquiry shall be held in respect of such of the allegations as are not admitted. At that enquiry such oral evidence will be heard as that inquiring authority considers necessary. The person charged shall be entitled to cross-examine the witnesses, to give evidence in person, and to have such witnesses called as he may wish; provided that the enquiring authority conducting the enquiry may, for sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the grounds thereof, The inquiring authority conducting the enquiry may also, separately from these proceedings, make his own recommendation regarding the punishment to be imposed on the employee.

(2) Clause (1) shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him.

(1) All or any of the provisions of clause (1) may for sufficient reasons to be recorded in writing be waived where there is difficulty in observing exactly the requirements thereof and those requirements can in the opinion of the inquiring authority be waived without injustice to the person charged.

***37**. Soon after the report of the proceedings and recommendation from the inquiring authority are received, the Committee of Management shall after notice to employee meet to consider the report of the proceedings and recommendation made and take decision on the case. The employee shall be allowed, if he so desires, to appear before the committee in person to state his case and answer any question that may be put to him by any member present at the meeting. The Committee shall then send a complete report together with all connected papers to the Inspector or Regional Inspectress, as the case may be, for approval of action proposed by it."*

10. The reliance has been placed upon a Division Bench Judgement of this Court reported in ***Ram Kumar Dixit Vs. Deputy Director of Education, Bareilly and others*** reported in 1980 UPLBEC 110. Reliance has been placed upon paras 5 and 6 of the said judgement. The same are being reproduced below:

***"5**. Section 16-G of the U.P. Intermediate Education Act lays down that teachers employed in a recognised institution shall be governed by such conditions of service as maybe prescribed by Regulation. Regulations 31 to 17 prescribed procedure for punishment, enquiry and suspension of a teacher. Regulation 35 lays down that no receipt of a complaint the Committee may in the case of teachers appoint the Headmaster or Principal or Manager as Enquiry Officer to hold enquiry into the charges. Regulation 36 lays down that a teacher shall be required to submit reply to the charges within three weeks of the receipt of the charge sheet. An oral enquiry shall be held in respect of the allegations which are not admitted. The person charged shall be entitled to cross-examine*

witnesses to give evidence in person and to have such witnesses called as he may desire. On completion of the enquiry the enquiry officer shall submit his own recommendations which is required to be considered by the Committee of management. Regulation 37 lays down that after the report of the enquiry officer, is received the Committee of Management shall consider the same after notice to the teacher. The teacher shall be allowed if he so desires to appear before the Committee of Management in person to state his case. Regulation 37 is mandatory in nature and the Committee of management is required to comply with that provision before awarding any punishment to the teacher.

***6**. In the instant case the petitioner was served with the order of the Managing Committee dated 9.5.1972 placing him under suspension pending enquiry. A perusal of the resolution of the Committee of management shows that the Committee unanimously resolved that the petitioner was guilty of the charges. The resolution shows that the Committee of Management prejudged the charges against the petitioner even before obtaining petition's explanation. Since the Committee of Management prejudged the issues against the petitioner even before obtaining petitioner's explanation the subsequent proceedings are vitiated. Assuming that the committee of management did not prejudge the charges the entire proceedings are vitiated as the petitioner was denied opportunity of defence. The committee of management allowed three weeks' time to the petitioner to submit his explanation. The petitioner sought 10 days' extension of time by his letter dated 31.5.1972 on the ground of his illness and thereafter the petitioner submitted his explanation by post on 8.6.1972, which reach the office of the institution on 12.6.1972. Meanwhile the committee of management at its meeting held on 11.6.1972 passed the resolution dismissing the petitioner from service. No enquiry office was appointed, no enquiry was held, no evidence was recorded and no report of the enquiry office was considered by the committee of management after notice to the petitioner. Even if the petitioner had failed to submit his explanation in time it was incumbent on the committee of management to act in accordance with Regulation 37 by giving him notice and opportunity to appear the committee on the date the matter was finally considered by it. The Committee of Management however did not issue any notice to the petitioner regarding its meeting dated 11.6.1972 and it did not afford him any opportunity to appear before it an that date to state his case before the member. The procedure adopted by the Committee of Management was in contravention of the statutory provision of Regulations 36 and 37 which rendered the decision of the Committee illegal."*

11. In support of the aforesaid contention the learned counsel for the petitioner submits that the Division Bench of this Court has held that Regulations 36 and 37 are mandatory and if the same has not been followed, the total proceeding is vitiated. The further reliance has been placed upon a judgement of this Court in ***Bhopal Singh Verma Vs. Deputy Director of Education and others*** reported in 1983 UPLBEC 597. In support of the aforesaid decision the learned counsel for the petitioner submits that prior approval is necessary before imposition of punishment upon any

employee even a clerk of the institution. If the same has not been taken the order is bad in law.

12. In view of the aforesaid facts and circumstances, the learned counsel for the petitioner submits that order impugned is liable to be quashed. It has also been brought to the notice of the Court that the petitioner has already expired on 28.10.2003 and their heirs have already been substituted.

13. On the other hand, the learned counsel on behalf of the Committee of management has submitted that the charges levelled against the petitioner are very serious and if the copy of the charge-sheet was not given to the petitioner as alleged, he should have requested the same when the matter was pending before the District Inspector of Schools. Petitioner was aware regarding the proceeding and according to Rules if the same has been published in the newspaper it will be presumed to be deemed service. Admittedly, the charge-sheet was not taken by the petitioner on the date mentioned in the publication, as such, the enquiry officer has no occasion except on the basis of the charge-sheet to recommend on the basis of preliminary enquiry dated 2.4.1995 to terminate the services of the petitioner. On the basis of recommendation a meeting of the Committee of Management was held on 10.12.1995 and on 11.12.1995 an order of termination was passed. The District Inspector of Schools has also considered the fact that in spite of service of the charge-sheet he has not submitted any cogent reply regarding the charges levelled against the petitioner and therefore by order dated 10.11.1996, he has approved the order of termination exercising the power under Section 15-ka of the D.P. Intermediate Education Act. Therefore, it cannot be said as submitted by the petitioner that petitioner has not been afforded an opportunity and there is any violation of any Regulation of the D.P. Intermediate Education Act.

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

15. From the record it appears that the petitioner was suspended and subsequently for the purposes of providing the charge-sheet, it was published in the newspaper dated 5.12.1995 directing the petitioner to obtain the charge-sheet by 9.12.1995. From the record, it is also clear that before the order of termination the charge sheet was never served upon the petitioner. One thing is also very relevant that when there was a cut of date mentioned in the publication the enquiry officer should have waited at least up to the next date i.e.10.12.1995 but it was only on 9.12.1995 he has recommended for termination of the services of the petitioner. It is also apparent from the record filed by the respondents that the Committee of Management by letter dated 2.12.1995 has decided to hold a meeting on 10.12.1995 regarding taking action against the petitioner and a decision was taken on the next date i.e. 11.12.1995 an order of termination was passed. Admittedly, order of termination has to be approved. Now in view of provision of the act, the prior approval is necessary. If approval has not been taken the order cannot be given effect too and the person concerned will be treated to be in service.

16. The respondent No.1 has also recorded a finding that the Committee of Management has not submitted any document to this effect. If the Committee of Management has not submitted any document before, the respondent No.1, then under what circumstances a finding can be recorded against the petitioner. A finding to this effect that the District Inspector of Schools, Aligarh has given a copy of the charge-sheet to the petitioner on 17.9.1996 when the matter was being heard by the District Inspector of School, no documentary evidence has been submitted by the petitioner before the District Inspector of Schools.

17. As no proper disciplinary proceeding, as provided under the Regulation has taken place, therefore, there was no occasion for the petitioner to submit any documentary evidence before the Appellate Authority. The Appellate Authority was bound to see in the appeal filed by the petitioner that whether the services of the petitioner were terminated after following the proper procedure as provided under the Rules or not. Whether proper opportunity has been provided to the petitioner during the course of enquiry. The Appellate Authority as well as the District Inspector of Schools have failed to take into consideration that the date fixed in the publication to obtain the charge-sheet was 9.12.1995 and on the same day the enquiry officer without waiting even for one day has recommended to terminate the services of the petitioner. It is also not the case of the respondents that before the Committee of Management, the petitioner was afforded any opportunity or notice, therefore, in my view, the orders passed by the respondents is not sustainable in law.

18. Further the Division Bench of this Court has held that Regulation 37 is mandatory in nature and the Committee of Management is required to comply with that provision before awarding any punishment to a teacher and to its employees. Regulation 36 laid down that a teacher or employee shall be required to submit reply to the charges within three weeks of the receipt of the charge sheet and an oral enquiry shall be held in respect of allegation, which are not admitted. The person charged shall be entitled to cross examine the witness to give evidence in person and to have called such witnesses as he may desire. On completion of enquiry, the enquiry officer shall submit his own recommendation, which is required to be considered by the Committee of Management. Regulation 37 laid down that after the report of the enquiry officer is received the Committee of Management shall consider the same after notice to the teacher /employee. In Ram Kumar Dixit (Supra), the Division Bench has held that Regulation 37 is mandatory in nature and it has to be complied with in its true spirit.

19. In the present case, from the record it is clear that no enquiry was held, no evidence was recorded and no report of enquiry officer was considered by the Committee of Management after notice to the petitioner. Even if petitioner has failed to submit his explanation in time it was incumbent on the Committee of Management to act in accordance with Regulation 37 by giving him notice and opportunity to appear before the Committee on the day the matter was finally considered. The Committee of Management, however, did not issue any notice to the petitioner or there is nothing on record to show that notice was ever

served upon the petitioner, therefore, a clear inference can be drawn that the Committee of Management has taken a decision without affording an opportunity to the petitioner. The procedure adopted by the Committee of Management was in contravention of the statutory provision of Regulations 36 and 37, which rendered the decisions of the Committee of Management as illegal.

20. Further it has also to be noted from the record and as submitted by the counsel for the respondent that the punishment to the petitioner has been recommended by the enquiry officer only on the basis of the preliminary enquiry report dated 2.4.1995 and that was the basis of punishment awarded by the Committee of Management. The Apex Court in AIR 1960 Supreme Court, 992, ***Amlendu Ghosh Vs. District Traffic Superintendent, N.E. Railway,*** A.I.R. 1964, Supreme Court, 1854 ***Champak Lal Shah Vs. Union of India***, A.I.R. 1971 Supreme Court, 823, **Government of India Vs. Tarak Nath,** A.I.R. 1971 Supreme Court, 2148 ***Narayan Dattatraya Ramteerathakar Vs. State of Maharastra,*** has held that preliminary enquiry cannot be a basis of punishment against a charged employee. From the record it is clear that the enquiry officer has recommended punishment of termination against the petitioner only on the basis of preliminary enquiry. In view of the aforesaid fact also the decision rendered by the Committee of Management only on the basis of the report of the preliminary enquiry can safely be held to be illegal.

21. Further it is also to be noted that in such type of cases where the mandatory provision has not been complied with, the matter can safely be remanded back to the competent authority to take a fresh decision according to law but as the petitioner has already died on 28.10.2003, therefore, in facts and circumstances of the present case it will not be appropriate in the interest of justice to re-open the matter again. But as the mandatory provision of Regulations 36 and 37 has not been complied with, therefore, in my view, the decision rendered by the Committee of Management can safely be held to be invalid.

22. In view of the aforesaid fact, the writ petition is allowed and the orders dated 11.12.1995 (Annexure I to the writ petition) and order of approval dated 10.11.1996 (Annexure 5 to the writ petition) and appellate order dated 10.2.1998 (Annexure 7 to the writ petition) passed by the respondent Nos. 3, 2 and 1 respectively, are hereby quashed and the petitioner will be treated to be in service till the date when he attend the age of superannuation and will be entitled for the benefits for which he is entitled according to law. No order as to costs.

Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 13141 of 2007

Lallu Ram and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri Sunil Kumar Srivastava

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

Group D Service Rules 1985-Rule 16 readwith U.P. Direct Recruitment to Group D post (inclusion of members nomination by the D.M. in the Selection Committee) Rules 2006-selection of group-D employee-on direction of High Court director of Higher Education found-nominee of District Magistrate not participated in selection committee which is must w.e.f. 3.3.06-while interview held on 27/28/29.8.06-held-Rules relating to constitution of committee mandatory-non compliance-selection illegal.

Held: Para 14 & 15

In the present case, the selection committee was constituted in accordance with rule 16 of the Rules of 1985, which did not include a nominee of the District Magistrate. In my opinion, the rules relating to the constitution of the selection committee is mandatory, and non-compliance of this mandatory provision invalidates the entire selection process vis-a-vis the recommendations made by the selection committee and, consequently, the appointment orders.

Consequently, this Court is of the opinion that the selection committee was illegally constituted in violation of the mandatory provision of the rules of 3rd March, 2006. Non-compliance of the amended rules vitiated the selection process. Consequently, the petitioners' appointment as Class IV posts became invalid and illegal.

Case law discussed:
(1990) 1 SCC-411, 1990 SCC (L&S)-446, (1999) 1 SCC-544

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

1. Heard Sri Ashok Khare, the learned Senior Counsel appearing for the petitioner and the learned Standing Counsel for the respondents.

2. The petitioners are aggrieved by the orders dated 08.09.2006 and 29th January, 2007, passed by the Director of Education (Higher Education) Uttar Pradesh, Allahabad, by which their representation has been rejected and their appointment as Class IV employees has been held to be illegal and void.

3. The brief facts leading to the filing of the writ petition is, that there exists a government degree college known as Smt. Indira Gandhi Government Degree College in Lalganj in the district of Mirzapur (hereinafter referred to as the college), in which the service conditions of the teachers along with non-teaching staff are governed by the provisions of the Uttar Pradesh Higher Education Services Commission Rules and the Act. It transpires that the Government of Uttar Pradesh issued an order dated 18th March, 2005 taking a policy decision to recruit class III and class IV employees in all the departments of the State Government, except the Medical, Health and Family Welfare Department as per the situation prevailing prior to the issuance of the Government Order dated 12th March, 2005.

4. Pursuant to the aforesaid Government Order, the Director Higher Education, Allahabad communicated to all the Principals of the institution by a letter dated 21st November, 2005, to undertake the recruitment process to fill up the class III and class IV posts, after taking into consideration the reservation policy. The Regional Higher Education Officer, Varanasi, in turn, also communicated the same to all the

Principals of his region, and further, directed the Principals to advertise the posts between the 20th June, 2006 to 30th June, 2006, and that the last date for inviting the applications was fixed as 31st July, 2006. The Regional Higher Education Officer further directed that the process of interview should be completed by August, 2006.

5. Based on the aforesaid directions, the Principal of the college duly advertised the vacancies on 25th of June and 27th June, 2006 inviting applications for four posts of Class IV employees in two daily newspapers, namely, Amar Ujala and the Dainik Jagaran, both, published from Varansi. In terms of Rule 16 of Group-D Service Rules, 1985, the Principal constituted a three-member selection committee. The interviews were held on 27, 28 and 29th of August, 2006, and the petitioners were selected for the Class IV posts, and appointment letters were issued to them by the Principal on 29th August, 2006 itself.

6. Based on certain complaints, the Director Higher Education issued an order dated 8th September, 2006 directing for stoppage of the salary of the petitioners on the ground that some complaints were received with regard to their illegal appointments. The petitioners, being aggrieved, filed Writ Petition No. 62629 of 2006, which was disposed of by a judgment dated 16.11.2006 directing the Director of Education to examine the legality of the appointment of the petitioners. Based on the aforesaid directions, the impugned order was passed, after hearing the petitioners, holding that the appointment of the petitioners was invalid and consequently cancelled the appointment of the petitioners. The petitioners, being aggrieved by the aforesaid decision, have filed the present writ petition.

7. In the impugned order, the petitioners' appointment has been cancelled on a variety of grounds. The main ground which has engaged the attention of the Court is, that the selection committee was constituted in violation of the Government Order dated 3rd March, 2006, and therefore, the entire selection process held by the selection committee was wholly illegal, invalid, and consequently, the appointment of the petitioners was void ab initio.

8. Under Rule 16 of the Group-D Service Rules, 1985, a three-member selection committee is required to be constituted by the Principal, in which one member is required to be appointed from the backward class, the second member from a scheduled caste category, and the third member is the appointing authority himself. A Government Order dated 3rd March, 2006 was issued known as the Uttar Pradesh Direct Recruitment to Group-D Posts (inclusion of Members nominated by the District Magistrate in the Selection Committee) Rules, 2006, amending the constitution of the Selection Committee directing that w.e.f. 3rd March, 2006 a nominee of the District Magistrate will also be a member of the selection committee. Consequently, for appointments of Group-D posts, the selection committee was required to include a nominee of the District Magistrate. The Director of Education found that the selection committee taking the interviews held on 27, 28 and 29th August, 2006, did not include a nominee of the District Magistrate, and therefore,

an invalid selection committee took the interview and selected the candidates.

9. Shri Ashok Khare, the learned Senior Counsel submitted that the amended Rules as per the Government Order dated 3rd March, 2006 could not be made applicable inasmuch as the vacancies were required to be filled up as per the existing orders as on the date of the issuance of the letter dated 21st November, 2006, by which, the Director, Higher Education had directed the authorities to undertake the recruitment process of Class III and Class IV posts. The learned counsel submitted that since the selection process had started on 21st November, 2005, the amended Rules of 3rd March, 2006 had not come into existence. Consequently, the vacancies were required to be filled up as per the Rules and Regulations and Government Circulars existing as on 21st of November, 2005. The learned counsel submitted that the amended Rules of 3rd March, 2006 was clearly prospective in nature and could not apply retrospectively to the vacancy which was notified on 21st November, 2005, and in which, the selection process had been initiated.

10. In support of his submission the learned counsel for the petitioners placed reliance upon the decisions of the Supreme Court, namely, **P. Mahendran & Ors. Vs. State of Karnataka & Ors.,** (1990) 1 SCC 411; **N.T. Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors.,** 1990 SCC (L&S) 446; and **Gopal Krushna Rath Vs. M.A.A. Baig (Dead)** By L.Rs. & Ors., (1999) 1 SCC 544, in which it has been held that the Rules or Orders prevailing on the date when the selection process was initiated by the issuance of the advertisement would apply to such vacancies, and that subsequent amendments made in the existing Rules or Orders would not affect the selection process, unless a contrary intention was expressed or impliedly indicated in the amended Rules.

11. The learned counsel for the petitioner further submitted that in any case the amended Rules of 3rd March, 2006 were not known to the department, namely, the Educational Department, nor was it known to the Principal (the appointing authority) and since there was no allegation of mala fides in the selection process, consequently, the selection process, having been conducted in a fair manner, the appointments should be validated even if the Court found that the selection committee was not properly constituted.

12. On the other hand, the learned Standing Counsel, Shri Mohan Yadav, submitted that the selection committee was not properly constituted and was against the Rules of 3rd March, 2006., which was mandatory in nature and non-compliance of the mandatory rules was fatal to the entire selection process. The petitioners were selected by an invalid selection committee and their appointments cannot be validated under any circumstances.

13. Having considered the submissions of the learned counsel for the parties, this Court is of the opinion that the petitioners cannot be granted any relief. The order of the Director of Education dated 21st November, 2005 only issued a direction to the authorities to initiate the recruitment process. The selection process had not started by that

order. In my opinion, the selection process starts from the date of the issuance of the advertisement. In the present case the advertisement was issued on 25 and 27th of June, 2006 and prior to the issuance of the advertisement the amended rules were gazetted on 3rd March, 2006 which became applicable. The selection committee was required to be constituted in accordance with the amended rules of 3rd March, 2006.

14. In the present case, the selection committee was constituted in accordance with rule 16 of the Rules of 1985, which did not include a nominee of the District Magistrate. In my opinion, the rules relating to the constitution of the selection committee is mandatory, and non-compliance of this mandatory provision invalidates the entire selection process vis-a-vis the recommendations made by the selection committee and, consequently, the appointment orders.

15. Consequently, this Court is of the opinion that the selection committee was illegally constituted in violation of the mandatory provision of the rules of 3rd March, 2006. Non-compliance of the amended rules vitiated the selection process. Consequently, the petitioners' appointment as Class IV posts became invalid and illegal.

16. The submissions of the learned counsel for the petitioner that the amended rules of 3rd March, 2006 were not known either to the department or to the appointing authority is patently erroneous. The moment the rules are gazetted, it is deemed to be in the knowledge to all the authorities. Since I have already held that the constitution of the selection committee is mandatory and that there cannot be any variation in the constitution of its members, the deviation made by the appointing authority was fatal to the selection process.

17. In view of the aforesaid, there is no infirmity in the impugned order. The writ petition fails and is dismissed. Since I have held that the selection committee was wrongly constituted, consequently, I direct the appointing authority to reconstitute the selection committee in the light of the amended rules of 3rd March, 2006 and hold a fresh interview from all the candidates who had appeared pursuant to the advertisement dated 25 and 26th of June, 2006. The petitioners would also be called for the interview along with other candidates and selection would be made in accordance with law. The entire process shall be completed by the appointing authority within three months from the date of the production of a certified copy of this order.

18. Shri Mohan Yadav, the learned Standing Counsel will ensure that a certified copy of this order is sent to the appointing authority within three weeks from today. Petition dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2008

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

Special Appeal No. 129 of 2008

Neetu Devi Singh ...Appellant/Petitioner
Versus
High Court of Judicature at Allahabad and another ...Respondents

Counsel for the Appellant:
Sri Anup Kumar

Counsel for the Respondents:
Sri Amit Sthalekar

Constitution of India Art. 335-petitioner participated in written examination for the post of A.R.O. under Physically handicapped Quota-obtained only 36% marks-while qualifying marks fixed is 55% -denial of further consideration-held-proper.

Held: Para 13

In view thereof, as the reservation is provided for physically handicapped persons, though horizontal in nature, he/she must secure minimum qualifying marks as fixed by the authority concerned. The appellant-petitioner who has failed to achieve the said benchmark as she secured 36 percent marks while qualifying marks had been fixed as 55 percent, would be denied further consideration in view of the provisions of Article 335 of the Constitution of India. It is not the case of the appellant-petitioner that any other physically handicapped person securing lesser marks than her, is being permitted consideration any further.

Case law discussed:
AIR 1988 SC 162, AIR 1988 SC 1452, AIR 2002 SC 224, (2007) 8 SCC 621, AIR 1981 SC 298, AIR 1993 SC 477, AIR 1999 SC 2894, AIR 2000 SC 498, (2006) 8 SCC 212

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

1. This Special Appeal has been filed against the judgment and order of the learned Single Judge dated 24/1/2008 by which the writ petition filed by the appellant claiming appointment in reserve category being physically handicapped has been dismissed on the ground of suitability as the appellant-petitioner secured only 44 marks out of maximum 120 marks in the Preliminary Examination.

2. The facts giving rise to this appeal are that this Court vide advertisement dated 31/5/2006 invited applications for 150 posts for direct recruitment on the post of Assistant Review Officer in its establishment. The reservation provided by the State Government for physically handicapped persons was given effect and the advertisement itself provided that five posts were reserved for physically handicapped candidates. Petitioner-appellant appeared in the examination, but secured only 44 marks out of 120 marks and could not qualify as the Selection Committee had prescribed 55 percent as qualifying marks. Being aggrieved, the petitioner-appellant filed the writ petition which was dismissed vide judgment and order dated 24/1/2008. Hence this appeal.

3. Shri Arun Kumar, learned counsel for the appellant-petitioner has submitted that in view of the provisions contained in the "The U.P. Public Servants (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-servicemen) Act 1993 and the Disabilities (Equal opportunities Protection of Rights and Full Participation) Act, 1995 (hereinafter called the Acts, 1993 and 1995 respectively), the respondents were bound to consider the candidature of the appellant-petitioner in spite of his lower merit. It is submitted that the Selection Committee was not competent to prescribe any minimum percentage as qualifying marks, hence the appeal deserves to be allowed.

4. On the contrary it is submitted by Shri Amit Sthalekar, learned counsel for the respondents that the judgment and

order of the learned Single Judge does not require any interference whatsoever in view of the fact that the Selection Committee was competent to prescribe minimum qualifying marks and as the appellant miserably failed to secure the said qualifying marks, her claim for reservation has become meaningless. Had she qualified by securing minimum qualifying marks then her right for reservation would have been considered. Therefore, the appeal is liable to be dismissed.

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

6. So far as the issue of competence of the Selection Committee to prescribe minimum qualifying marks is concerned, it is no more res-integra. In State of U.P. & Ors. Vs. Rafiquddin & Ors, AIR 1988 SC 162, the Hon'ble Supreme Court considered the issue at length and held that, the competitive examination is quite different from .the examination conducted by the Universities and educational institutions. The purpose and object of competitive examination is to select more suitable candidates for appointment to public office. A person may obtain sufficient high marks and yet he may not be selected on account of the limited number of posts and availability of persons of higher quality. The authority concerned is competent to prescribe the minimum marks/benchmarks and for that purpose there is no legal requirement to give notice to the candidates. The said judgement was approved and followed by the Apex Court in Mehmood Alam Tariq Vs.. State of Rajasthan & Others AIR., 1988 SC 1452. However, once the Selection Board/Committee/Commission prescribes the minimum qualifying marks and initiates the selection process, it cannot alter the same at any subsequent stage of the selection. (Vide Maharastra SRTC Vs. Rajendrra Bhimrao Mandve AIR 2002 SC 224).

7. So far as the second question is concerned, admittedly, the appellant-petitioner secured only 36 percent marks though the minimum qualifying marks as prescribed by the authority was 55 percent. Appellant-petitioner claims that he was entitled to be considered further in view of the reservation prescribed for physically handicapped persons under the aforesaid Acts.

8. In Mahesh Gupta & Ors. Vs. Yashwant Kumar Ahirwar & Ors, (2007) 8 SCC 621, the Hon'ble Supreme Court considered the scope of application of the aforesaid Acts and held that State Authorities are under a legal obligation to provide reservation for the handicapped persons. It is necessary to give effect to the provisions of the said Acts as the Acts have been framed to fulfil the commitments assured by Union of India being signatory to various International Treaties in this regard. In that case reservation had not been provided for the physically handicapped candidates and the decision taken by the State Government for implementing the reservation policy in respect of physically handicapped persons had not been given effect to. The Hon'ble Apex Court therefore directed for implementation of the said policy by creating supernumerary posts.

9. Undisputedly, the Act of 1983 and 1995 provide for reservation in favour of the category to which the appellant

belongs. However, the benefit of the statutory provisions of those Acts had to be given effect keeping in mind the provisions of Article 335 of the Constitution of India which specifically provides for maintenance of efficiency of Administration. The benefit of vertical reservation cannot be denied to Scheduled Castes, Scheduled Tribes and Other Backward Classes if it adversely affects the maintenance of efficiency of Administration. Reservation in educational institution and in employment can be provided under Article 15 (1) or 16 (1), or 16 (4) of the Constitution of India. Both the said provisions enable the Competent Authority to provide for reservation, they are merely enabling provisions, while Article 335 is in mandatory language. (Vide Akhil Bharatiya Soshit Karamchari Sangh (Railway) Vs. Union of India & Ors, AIR 1981 SC 298; Indra Sawhney Vs. Union of India & Ors., AIR 1993 SC 477; Dr. Preeti Srivastava & Anr. Vs. State of Madhya Pradesh & Ors., AIR 1999 SC 2894 and Indra Sawhney Vs. Union of India, AIR 2000 SC 498).

A Constitution Bench of the Hon'ble Supreme Court in E.U Chinnaiah Vs. State of Andhra Pradesh & Ors., AIR 2005 SC 162, held as under:-

"Furthermore, the emphasis on efficient administration placed by Article 335 of the Constitution must also be considered when claims of Scheduled Castes and Scheduled Tribes to employment in the services of the Union are to be considered."

10. A Constitution Bench of the Apex Court in M. Nagraj & Ors. Vs. Union of India & Ors., (2006) 8 SCC 212, examined the validity of the Constitution (Seventy Seventh Amendment) Act, 1995; the Constitution (Eighty First Amendment) Act 2000; the Constitution (Eighty Second Amendment) Act 2000; and the Constitution (Eighty Fifth Amendment) Act 2001, providing for reservation to Scheduled Castes in promotions, which also provided for relaxation of qualifying marks etc. and held that constitutional limitation of efficiency under Article 335 can be relaxed but not obliterated. The Court observed as under:-

"If the appropriate government enacting a law providing for reservation without keeping in mind the parameters in Article 16 (4) and Article 335 then this Court will certainly set aside and strike down such legislation..... It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables could be accommodated."

11. Thus, only in exceptional cases, for compelling interest of the reserved category candidates, the State may relax the qualifying marks after identification by weighing the comparable data, without affecting general efficiency of service as mandated under Article 335 of the Constitution.

12. The judgment in Mahesh Gupta (supra) is not an authority on the issue as to whether an employer can compromise

with the efficiency of administration to provide employment to the candidates of any reserved category in contravention of the mandate of Article 335 of the Constitution.

13. In view thereof, as the reservation is provided for physically handicapped persons, though horizontal in nature, he/she must secure minimum qualifying marks as fixed by the authority concerned. The appellant-petitioner who has failed to achieve the said benchmark as she secured 36 percent marks while qualifying marks had been fixed as 55 percent, would be denied further consideration in view of the provisions of Article 335 of the Constitution of India. It is not the case of the appellant-petitioner that any other physically handicapped person securing lesser marks than her, is being permitted consideration any further.

14. The Special Appeal lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2008

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

Civil Misc. Writ Petition No. 1820 (Tax) of 2007

M/s Vehalana Steels & Alloys Pvt. Ltd. ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Aloke Kumar

Counsel for the Respondents:
S.C.

Constitution of India-Art. 226-Principle of Natural Justice-Provisional assessment-notice issued based on survey report-copy of enquiry report not given as being confidential document-held-once inference given in show cause notice-can not be said to be confidential.

Held: Para 5 & 6

The present case also where assessment is proposed by the authority based on a survey and the report submitted on the basis of the said survey, the authority before acting upon such report is bound to disclose the said report to the person concerned otherwise it would amount to take a decision without disclosing adverse material to the person concerned.

In our view the aforesaid decision of the assessing authority cannot be sustained. There does not appear any logical reason to hold the report of the DC SIB to be confidential and accordingly-for not supplying the same, if it is proposed by the department to rely upon that report in the provisional assessment.

Case law discussed:
AIR 1979 SC-1237, AIR 1978 SC-851, AIR 1991 SC-471, AIR 1994 SC-1074

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

1. It is alleged by the petitioner that after the survey on 12.7.2007 by the team of the Respondent-Department, the petitioner was called upon by the Deputy Commissioner (SIB) Trade Tax, Muzaffar Nagar (hereinafter referred for short as DC SIB) for producing the accounts, which the petitioner claims to have produced. The petitioner also claims to have participated in the proceedings before the said DC SIB. Further, according to the petitioner, the DC SIB submitted a report as a result of the said inquiry, whereafter notice for provisional assessment has been issued to the

petitioner. The petitioner further submits that despite request of the petitioner copy of the report submitted by the DC SIB has not been supplied to the petitioner. The prayer in this writ petition is to restrain the provisional assessment proceedings till the supply of the said report of the DC SIB.

2. We have heard the learned counsel for the petitioner and the learned Standing Counsel.

3. There are only two possibilities namely either that some part of the said report of the DC SIB will be relied upon in the provisional assessment proceedings; or that the report will be ignored in the sense that no part of it will be considered in those proceedings.

4. In the event of the first of the aforesaid two possibilities, the report or its part will constitute material adverse to the petitioner which is proposed to be relied upon, either by itself or coupled with other facts and/or circumstances, for recording findings against the petitioner. In any case it may influence the mind of the Authority making the provisional assessment. Therefore the principles of natural justice would require that such material must be disclosed to the petitioner before it is used against the petitioner. In **Mazharaul Islam Hashmi Vs State of U.P. and another** reported in **AIR 1979 SC 1237**, the Apex Court has held that other person must know what he has to met in that case. In **Mohinder Singh Gill Vs Chief Election Commissioner, New Delhi** reported in **AIR 1978 SC 851**, it was held that a person likely to suffer civil consequences is entitled to the report, which is being relied upon to take a decision against him. Again in respect of the departmental inquiry, a three Judges Bench of the Apex Court in **Union of India and others Vs Mohd. Ramzan Khan AIR 1991 SC 471** held that copy of the inquiry report which is taken into consideration by the disciplinary authority must be communicated to the delinquent employee before final decision is taken by the disciplinary authority otherwise his decision would be in violation of the principles of natural justice. The correctness of the Apex Court decision in the case of **Mohd. Ramzan (supra)** came to be considered by a Constitution Bench in **Managing Director E.C.I.L. Vs B. Karunakar reported in AIR 1994 SC 1074** and affirming the same it was held that *"before the disciplinary authority comes to its own conclusion, the delinquent employee should have an opportunity to reply to the inquiry officer's finding"*.

5. Though the aforesaid law was in respect of the proceedings arising out of a disciplinary matter, in our view the dictum would apply to all such cases where an order passed is likely to cause civil consequences whether judicial, quasi judicial or administrative. However, the said requirement may be checked by legislature by making appropriate provision but in the absence thereof, we have no manner of doubt that no document or material can be relied by an authority for passing an order without disclosing the same to the affected party otherwise the ultimate order would be in violation of natural justice. The present case also where assessment is proposed by the authority based on a survey and the report submitted on the basis of the said survey, the authority before acting upon such report is bound to disclose the said

report to the person concerned otherwise it would amount to take a decision without disclosing adverse material to the person concerned.

6. The assessing authority has declined to supply copy of the report by his letter dated 15.12.2007 on the ground that the same is confidential and, therefore, need not be furnished to the petitioner particularly when inference drawn from the said report has already been noticed in the show cause notice. In our view the aforesaid decision of the assessing authority cannot be sustained. There does not appear any logical reason to hold the report of the DC SIB to be confidential and accordingly-for not supplying the same, if it is proposed by the department to rely upon that report in the provisional assessment.

7. It is mentioned in Anncxurc-5 to the writ petition that the 'substance of the adverse inferences' has been communicated to the petitioner. But the communication of the substance of the adverse findings in that report may not always be sufficient. The reason is that the material adverse to the petitioner in the report may not have been properly or completely understood or appreciated in its proper perspective by the Officer when it read the report, and what has been understood by the Officer may not have been communicated accurately to the petitioner by that Officer. Language as a medium for communication of ideas is far from perfect, and that imperfection increases indirect communication. The inadmissibility of hearsay evidence is based on that concept. Moreover the context in which the adverse conclusion finds place in the report may, in some cases, have great importance. Again the basis of the adverse conclusion, as mentioned in the report, would also be important. Therefore, principles of natural justice would require a copy of the original report to be supplied, instead of supplying indirect information to the person against whom that report is proposed to be relied upon.

8. In the circumstances, we dispose of this writ petition finally directing the respondents not to proceed with the provisional assessment unless copy of the report of DC SIB is supplied to the petitioner if the department proposes to rely on any part of that report in the provisional assessment proceedings. It is clarified that the supply of the copy of the report will not be necessary, and the provisional assessment proceedings may be continued if the department does not propose to rely upon that report at all in the provisional assessment proceedings. However, in the latter situation the petitioner will be informed in advance in writing by the department that the department will not rely on any part of that report. Petition disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2008

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

Civil Misc. Writ Petition No. 17571 of 2006

Union of India and others ...Petitioners
Versus
Hari Nath Yadav & another ...Respondents

Counsel for the Petitioners:
Sri V.K. Goel

Counsel for the Respondents:
Sri D.B. Yadav
S.C.

Constitution of India Art. 226-Service law- Regularisation-petitioner/ Respondents worked as an unauthorized substitute-approached after 13 years-claiming re-engagement and regularization-once the status accepted as unauthorized substitute-can not be re-engaged or regularized-Tribunal ought to have rejected the application on ground of laches-even on merit when the respondents are not in service for a considerable period-No question of regularization-wrong concession given by counsel not binding upon client.

Held: Para 20

A person not in service and further who has not been appointed under any procedure prescribed by law, cannot seek remedy of regularization. In the instant case, admittedly respondent no.1 had been appointed unauthorizedly and without following procedure prescribed by law. Once the learned Tribunal had reached the said conclusion that respondent no.1 was an unauthorized substitute, no relief could have been granted to respondent no.1 on merit.

Case law discussed:
1997 (1) SCC 269, (1996) 6 SCC 267, AIR 1997 SC 2366, AIR 1989 SC 674, 2006 (10) JT 500, AIR 1962 SC-554, AIR 1964 SC 377, AIR 1989 SC 662, (1998) 2 SCC 502, AIR 1998 SC 1681 (para 23), (1998) 2 SCC 523, (1999) 6 SCC 464, (2000) 5 SCC 44, (2001), 5 SCC 59 (para 13), AIR 2004 SC 1704, 2006 AIR SCW 2068, AIR 1978 SC 22, AIR 1981 SC 537, AIR 1970 SC 794

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

1. Heard Sri V.K. Goel, learned counsel for the petitioners and Sri D.B. Yadav, learned counsel for respondent no.1.

2. This writ petition has been filed challenging the judgment and order of the Central Administrative Tribunal dated 16th January, 2006 rejecting the review application as well as the judgement and order dated 21st March, 2005 passed in Original Application No. 1300 of 2000 filed by respondent no.1, Hari Nath Yadav, which had been allowed by issuing a direction for re-engagement and regularization of his services in Group-D.

3. Facts giving rise to the present writ petition are that respondent no.1 had worked as an unauthorised substitute for certain periods between 1984 to 1987. In 1984, he worked for 40 days, in 1985 and 1986, 75 days and in 1987, 44 days. He filed Original Application No. 1300 of 2000, claiming the relief for re-engagement as casual labour from the date persons junior to him have been re-engaged and then to regularize him against Group-D vacancy. Learned Central Administrative Tribunal, under the impugned judgment and order dated 21st March, 2005, has allowed the original application without considering the issue of limitation, as the original application had admittedly been filed after expiry of 13 years of his disengagement and without considering as to whether he had been an authorised substitute or had been appointed after following the procedure prescribed by law or not. The original application has been allowed by merely placing the reliance upon its earlier judgment and order dated 21st August, 2000 passed in Original Application No. 1193 of 1996; ***Jamuna vs. Union of India through General Manager, North Eastern Railway, Gorakhpur & ors.***, wherein same relief had been granted.

4. Petitioners have earlier filed writ petition no. 57242 of 2006 challenging the order dated 21st March, 2005. This Court vide judgment and order dated 6th September, 2005 disposed of the writ petition giving liberty to the petitioners to file a review application. As it was contended before this Court that in the case of **Jamuna (Supra)** relief had been granted by the Tribunal on a concession made by the department illegally, though, in law such concession could have been given and that no person had subsequently been given the same relief, which issue had not been noticed by the Tribunal. Present petitioners accordingly filed review application. However, the learned Tribunal dismissed the same vide judgement and order dated 16th January, 2006. Hence this writ petition.

5. Three things remain undisputed, (a) that the respondent no.1 had not worked subsequent to 1987, (b) he approached the learned Tribunal after expiry of 13 years, and (c) the learned Tribunal has allowed the original application filed by respondent no.1 only giving reference to its earlier judgement and order passed in the case of **Jamuna (Supra)** and not on merits. In case, the respondent no.1 had not been in service subsequent to 1987, the question of grant of the relief of regularization would not be arise or could not be considered by the learned Tribunal, as it is settled legal proposition that relief of regularisation can be claimed by a person, who is working continuously for a very long period and is not being made permanent. In such eventualities, the action of the employer becomes arbitrary and is hit by Article 14 of the Constitution of India. A person not in service can never claim his re-engagement or regularization, unless he has first challenged the order of dis-engagement/termination, as held by the Apex Court in the case of ***H.P. Housing Board vs. Om Pal & ors.;1997 (1) SCC 269*** and ***Ram Chander & ors. vs. Additional District Magistrate & ors.; 1998 (1) SCC 183***.

6. Secondly the issue of limitation was very relevant to determine the controversy as no person can claim the benefit of the judgement rendered by any Court or Tribunal in favour of a person, who has prosecuted his case diligently and approached the appropriate forum within time.

7. If some person has taken a relief from the Tribunal by filing a writ petition immediately after the cause of action had arisen, others cannot take the benefit thereof by filing a belated original application. Such negligent persons cannot claim similar relief at such a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.

8. In State of Karnataka & Ors. Vs. S.M. Kotrayya & Ors., (1996) 6 SCC 267, the Hon'ble Supreme Court rejected the contention that a petition should be considered ignoring the delay and laches on the ground that he filed the petition just after coming to know of the relief granted by the Court in a similar case as the same cannot furnish a proper explanation for delay and laches. The Court observed that such a plea is wholly unjustified and cannot furnish any ground for ignoring delay and laches.

9. Same view has been reiterated by the Hon'ble Supreme Court in Jagdish Lal

& Ors. Vs. State of Haryana & Ors., AIR 1997 SC 2366, observing as under:-

"Suffice it to state that appellants may be sleeping over their rights for long and elected to wake-up when they had impetus from Veerpal Chauhan and Ajit Singh's ratio.... desperate attempts of the appellants to re-do the seniority, held by them in various cadre.... are not amenable to the judicial review at this belated stage. The High Court, therefore, has rightly dismissed the writ petition on the ground of delay as well."

10. In M/s. Roop Diamonds & Ors. Vs. Union of India & Ors., AIR 1989 SC 674, the Hon'ble Supreme Court considered a case where petitioner wanted to get the relief on the basis of the judgment of the Supreme Court wherein a particular law had been declared ultra vires. The Court rejected the petition on the ground of delay and latches observing as under:-

"There is one more ground which basically sets the present case apart. Petitioners are re-agitating claims which they have not persued for several years. Petitioners were not vigilant but were content to be dormant and close to sit on the fence till somebody else's case came to be decided."

11. Recently the Hon'ble Supreme Court of India in the case of ***Chairman U.P. Jal Nigam & Anr. vs. Jaswant Singh & anr.; 2006 (10) JT 500***, had refused to grant the similar relief to the incumbent of Jal Nigam on the ground that they were not vigilant and had slept over his rights for considerable period. In paragraph-13, it was held as follows:

"..... Therefore, whenever it appears that the claimants lost time or while away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted.... "

12. In such a fact situation, it was the, duty of the Tribunal to address the application on the issue of limitation and it could not have granted the benefit which had been granted to Jamuna, who might have challenged the order within time. Thus, we are of the considered opinion that the learned Tribunal has failed to appreciate that the original application ought to have been dismissed only on the ground of limitation.

13. So far as the affidavit/ undertaking given by the present petitioners in case of Jamuna (Supra) is concerned, the Court must examine as to whether the undertaking was inconsonance in law, as it is settled law that any judgment or decree, which is not inconsonance of law is a nullity.

14. It has also consistently been held that a wrong concession by a counsel on question of law does not bind the client or any person as there can be no estopple against the Statute. (Vide Dr. H.S. Rikhy & Ors. Vs. The New Delhi Municipal Committee, AIR 1962 SC-554; Bank of Bihar Vs. Mahabir Lal & Ors., AIR 1964 SC 377; Union of India & Anr. Vs. K.S. Subramaninan, AIR 1989 SC 662; Dr. Ashok Kumar Maheshwari Vs. State of

U.P. & Anr., (1998) 2 SCC 502; Uptron India Ltd. Vs. Shammi Bhan & Anr., AIR 1998 SC 1681 (para 23); B.S. Bajwa & Anr. Vs. State of Punjab & Ors., (1998) 2 SCC 523; M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu & Ors., (1999) 6 SCC 464; Jagdish Lal Vs. Parmanand, (2000) 5 SCC 44; Laxmibai (Smt.) Vs. Karnataka State Road Transport Corpn. Bangalore, (2001), 5 SCC 59 (para 13); Union of India & Ors. Vs. Mohanlal Likumal Punjabi & Ors., AIR 2004 SC 1704; and Union of India & Anr. Vs. S.C. Parashar, 2006 AIR SCW 2068.

15. Any judgment or decree, which is not inconsonance with the statutory requirements is void and cannot be executed. Any compromise contrary to the statutory rules is void.

16. In Smt. Nai Bahu vs. Lala Ramnarayan & ors.; AIR 1978 SC 22 specifically para-14, the Hon'ble Supreme Court has held as follows:

"14. It is true that a decree for eviction of a tenant cannot be passed solely on the basis of a compromise between the parties (see KK Chari v. A.M. Seshadri (1973) 3 SCR 691 : (AIR 1973 SC 1311)). The Court is to be satisfied whether a statutory ground for eviction has been pleaded which the tenant has admitted by the compromise. Thus dispensing with further proof, on account of the compromise, the court is to be satisfied about compliance with the statutory requirement on the totality of facts of a particular case bearing in mind the entire circumstances from the stage of pleadings upto the stage when the compromise is effected."

17. In Netaji Studios (P) Ltd. vs. Navrang Studios & anr; AIR 1981 SC 537, specifically Paragraph-17, the Hon'ble Supreme Court has held as follows:

"17. The Bombay Rent Act is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways. It is a matter of public policy. The scheme of the Act shows that the conferment of exclusive jurisdiction on certain Courts is pursuant to the social objective at which the legislation aims. Public policy requires that contracts to the contrary which nullify the rights conferred on tenants by the Act cannot be permitted. Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by special Courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rent Act cannot be recognized by a Court of law."

18. In Ferozi Lal Jain vs. Man Mal & anr.; AIR 1970 SC 794 specifically paras-6 and 7, the Hon'ble Supreme Court of India has held as follows:

"6. From the facts mentioned earlier it is seen that at no stage, the Court was called upon to apply its mind to the question whether the alleged subletting is true or not. Order made by it does not show that it was satisfied that the subletting complained of has taken place, nor is there any other material on record to show that it was so satisfied. It is clear from the record that the court had proceeded solely on the basis of the compromise arrived at between the

parties. That being so there can be hardly any doubt that the court was not competent to pass the impugned decree. Hence the decree under execution must be held to be a nullity."

19. In view of the above, we are of the considered opinion that if the present petitioners had not given an undertaking in-consonance with the statutory requirement it will not be binding on the Courts or Tribunal.

20. In view of the Constitution Bench Judgement in the case of Secretary, State of Karnataka & ors. vs. Umadevi (3) & ors.; 2006 (4) SCC 1, relief of regularization cannot be granted to a person who has not been appointed in consonance in accordance with law or rules. It has been held that any appointment made in contravention of Articles 14 and 16 of the Constitution of India-is void and cannot be given effect to. A person not in service and further who has not been appointed under any procedure prescribed by law, cannot seek remedy of regularization. In the instant case, admittedly respondent no.1 had been appointed unauthorizedly and without following procedure prescribed by law. Once the learned Tribunal had reached the said conclusion that respondent no.1 was an unauthorized substitute, no relief could have been granted to respondent no.1 on merit.

21. Thus in view of the above, the writ petition succeeds and is allowed and the impugned order dated 21st March, 2006 and dated 16th January, 2006 passed by the Central Administrative Tribunal are hereby quashed. There shall be no order as to costs. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2008

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

Civil Misc. Writ Petition No. 59709 of 2007
Connected with
Civil Misc. Writ Petition No. 57894 of 2007

Paras Nath Chaubey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri V.D. Shukla
Sri Ashok Khare

Counsel for the Respondents:
Sri P.S. Baghel
Sri G.K. Singh
S.C.

U.P. State Universities Act, 1973-Section 49 (e) officiating Principal-Post Graduate College-senior most teacher-without possessing minimum requisite qualification can not be appointed even for short terms of 3 month on initial stage-exemption from requisite qualification can be granted only by the selection Committee-approval of such appointment by V.C.-immaterial consequential direction issued.

Held: Para 23

From the impugned order of the Vice-Chancellor of the University, it is apparently clear that there are no reasons recorded qua the issue of prescribed minimum qualification or relaxation thereto in favour of Paras Nath Chaubey. The Vice-Chancellor of the University has misdirect himself in recording that for a period of three months Paras Nath Chaubey can be permitted to continue as Officiating

Principa1 of the college, even if he is not possessed of the degree of B.Ed. The reason so recorded is based on complete misreading of Statute 14.14 (2) of the First Statutes of the Universities framed under-the provisions of U.P. State of Universities Act, 1973.

Case law discussed:

1997 (2) A.W.C. 2214 (NOC), (2001) 3 UPLBEC 218, 1998 (1) ESC 767

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

1. These two writ petitions have been filed by two lecturers of Sri Gandhi Post Graduate College, Maltali, Azamgah claiming a right to function as Officiating Principal of the institution till regular selected candidate recommended by the U.P. Higher Education Services Commission joins the post. The claim set up in both the writ petitions is for the same post i.e. officiating principal. Both petitioners have challenged the same order of the Vice-Chancellor of Veer Bahadur Singh Purvanchal University, Jaunpur dated 8th September, 2007. These two writ petitions have, therefore, been tagged and are being decided by this common judgment.

2. Heard Sri Ashok Khare, Senior Advocate, assisted by Sri V.D. Shukla, learned counsel for Paras Nath Chaubey, Sri G.K. Singh, Advocate, learned counsel for Dr. Ghanshyam Singh, Sri P.S. Baghel, learned counsel for Veer Bahadur Singh Purvanchal University, Jaunpur and learned Standing Counsel for State-respondents.

3. Sri Gandhi Post Graduate College, Maltali, Azamgarh (hereinafter referred to as the 'college') is a degree college affiliated to Veer Bahadur Singh Purvanchal University, Jaunpur (hereinafter referred to as the 'University'). The permanent Principle of the college, Dr. Dwij Ram Yadav retired on 30th June, 2001. One Chandra Shekhar Ojha was handed over charge of the post of Principal on officiating basis between 1st July, 2001 to 30th January, 2004. Thereafter Dr. Jagdish Prasad Pandey, senior most teacher, was appointed as officiating principal. Dr. Jagdish Prasad Pandey attained the age of superannuation on 1st January, 2007. He was, however, continued as Principal of the institution, even after he attained the age of superannuation. Feeling aggrieved by the said continuation, Paras Nath Chaubey, present petitioner filed Civil Misc. Writ Petition No. 20190 of 2007 (Paras Nath Chaubey vs. State of U.P. & Ors.), which was disposed of vide judgment and order dated 24th April, 2007, with a direction upon the Vice-Chancellor to consider the matter pertaining to the officiating appointment on the post of principal of the college in a time bound manner. Before the Vice Chancellor of the University could take a decision in the matter, Dr. Jagdish Prasad Pandey at the end of the academic session i.e. 20th June, 2007, handed over the charge of the post of officiating principal to Dr. Ghanshyam Singh on 1st July, 2007.

4. According to Paras Nath Chaubey, Dr. Ghanshyam Singh is junior to him and therefore, not entitled to work as officiating principal of the college in preference to Paras Nath Chaubey.

5. The Vice-Chancellor of the University, by means of order dated 8th September, 2007, has held that Parash Nath Chaubey is entitled to function as officiating principal of the college for a period of three months only.

6. Despite the order of Vice-Chancellor, Dr. Ghanshyam Singh did not hand over the charge of the post of officiating principal. This lead Paras Nath Chaubey to file Civil Misc. Writ Petition No. 59709 of 2007 for quashing the order of Vice-Chancellor dated 8th September, 2007, insofar as it restricts his appointment (i.e. Paras Nath Chaubey), as officiating principal of the college for a period of three months only and with a further relief that respondents may be directed to permit Paras Nath Chaubey to continue as Officiating Principal of the college till regularly selected candidate recommended by the U.P. Higher Education Services Commission joins the post.

7. Dr. Ghanshyam Singh has independently filed Civil Misc. Writ Petition No.57894 of 2007 challenging the order of Vice-Chancellor of the University dated 8th September, 2007 whereby he has approved the appointment of Paras Nath Chaubey as officiating principal of the college for a period of three months only and with a further prayer that he (Dr. Ghanshyam Singh) should be permitted to continue as officiating principal of the college and be paid salary as and when it falls due.

8. Dr. Ghanshyam Singh contends that although he is junior to Paras Nath Chaubey, he is entitled to the appointment on the post of officiating principal in preference to Paras Nath Chaubey, who is not possessed of the prescribed minimum qualification as per the First Statutes of the University applicable for the post of principal of a Post Graduate Degree College. In absence of prescribed minimum qualification being possessed by Paras Nath Chaubey, he cannot be permitted to function as officiating principal even for a single day. Dr. Ghanshyam Singh therefore, contends that he being the next senior most Lecturer in the institution possessed of minimum prescribed qualifications is entitled to the officiating appointment on the post of Principal in terms of the First Statutes of the University.

9. In reply, learned counsel for Paras Nath Chaubey, submits that as per Statute 10.20, senior-most teacher of the college is entitled to be appointed as officiating principal till a regularly selected candidate joins and it is immaterial that such senior-most teacher is not possessed of the essential qualification prescribed for the post of regular Principal.

10. From the records of these two writ petitions, it is an admitted position between the parties that permanent vacancy on the post of Principal of the college has been caused because of retirement of the earlier principal. The dispute pertains to the officiating appointment on the post of Principal pending regular selection by the U.P. Higher Education Services Commission in accordance with U.P. Act No. 16 of 1980.

11. It is also admitted to the parties that Paras Nath Chaubey is senior to Dr. Ghanshyam Singh in the college. Officiating appointment on the post of Principal of the college pending regular selection is to be made in accordance with Statute 10.20 of the First Statutes of Veer Bahadur Singh Purvanchal University, Jaunpur, which reads as follows:

"10.20 जब किसी सम्बद्ध महाविद्यालय के प्राचार्य का पद रिक्त हो जाय, तब प्रबन्धतंत्र किसी अध्यापक को तीन

मास की अवधि के लिये या जब तक किसी नियमित प्राचार्य की नियुक्ति न हो जाय, इनमें से जो भी पहले हो, प्राचार्य के रूप में सीनापन्न रूप में कार्य करने के लिये नियुक्त कर सकता है। यदि तीन मास की अवधि की समाप्ति पर या उसके पूर्व कोई नियमित प्राचार्य नियुक्त न किया या ऐसा प्राचार्य अपना पद ग्रहण न करें तो महाविद्यालय का ज्येष्ठतम अध्यापक ऐसे महाविद्यालय के प्राचार्य के रूप में कार्य करेगा जबतक कि कोई नियमित प्राचार्य नियुक्त न कर दिया जाय।"

12. From the aforesaid provisions, it is apparently clear that initially for a period of three months, the Management of the institution has been conferred a right to appoint any teacher as officiating principal. In case regular principal is not appointed even during this period of three months, the Management is obliged to hand over the charge of the office of Principal on officiating basis to the senior-most lecturer of the degree college.

13. The issue up for consideration before this Court is as to whether for such officiating appointment be it for a limited period of three months or for a period subsequent to three months, till the regular selected candidate recommended by the U.P. Higher Education Services Commission joins the post, is it necessary that the teacher/lecturer concerned should be possessed of the prescribed minimum qualification as provided under the Statutes applicable to the post of Principal or not.

14. Although the said Statute 10.20 does not refer to any such condition, however, we must record that appointment on various posts under the University have to be made strictly in accordance with the provisions of U.P. State Universities Act, 1973 and Statutes applicable as a whole and no provision is to be read in isolation.

15. Section 49 (e) of the U.P. State Universities Act, 1973 provides for Statutes being framed for laying down the minimum qualification for various posts and reads as follows:

"49. Statutes.....

(e) the recruitment (including minimum qualifications and experience) and their emoluments and other conditions of service (including provisions relating to compulsory retirement) of persons appointed to other posts under the University;"

16. Section 49 (e) provides that essential qualifications for recruitment of persons to be appointed on a post under the University may be laid down by the Statutes. In exercise of power under Section 49{e), the First Statutes of the University contained in Part-II, lays down the prescribed minimum qualifications for appointment on the post of Principal in various degree colleges affiliated to the University, so far as the Post Graduate Degree Colleges are concerned. The minimum essential qualifications have been provided for under Statute 14.14 sub-statute (2), which reads as follows:

"**14. 14** किसी महाविद्यालय की दशा, जो विश्वविद्यालय से सम्बद्ध हो, प्राचार्य के पद के लिये न्यूनतम अर्हतायें निम्नलिखित होंगी-

स्नातकोत्तर महाविद्यालय के लिए-

(क) महाविद्यालयों में प्राध्यापित किसी विषय में प्रथम श्रेणी या उच्च द्वितीय श्रेणी में (अर्थात अंकों के पूर्णयोग के 54 प्रतिशत से अधिक अंकों सहित) स्नातकोत्तर उपाधि या उस विषय में किसी विदेशी विश्वविद्यालय की समकक्ष उपाधि सहित अविच्छिन्न उत्तम शैक्षिणक अभिलेख अर्थात अभ्यर्थी के शिक्षा काल में आद्योपान्त सभी मूल्यांकों का सम्पूर्ण अभिलेख और

(ख) महाविद्यालय में प्राध्यापित किसी एक विषय में डाक्टरेट की उपाधि और स्नातकोत्तर कक्षाओं के अध्यापन का 7 वर्ष का अनुभव या किसी उपाधि महाविद्यालय में प्राचार्य के पद का 5 वर्ष का अनुभव-

परन्तु यदि किसी अभ्यर्थी को स्नातकोत्तर कक्षाओं के अध्यापन का 10 वर्ष का अनुभव या किसी उपाधि कक्षाओ के अध्यापन का 20 वर्ष का या उससे अधिक का अनुभव या किसी महाविद्यालय के प्राचार्य के पद का 7 वर्ष का अनुभव है या किसी स्नातकोत्तर महाविद्यालय का 5 वर्ष या उससे अधिक समय से स्थाई प्राचार्य है या रहा है, तो चयन समिति डाक्टरेट की उपाधि की उपेक्षा को शिथिल कर सकती है-

परन्तु यह और कि यदि चयन समिति का यह विचार हो कि किसी अभ्यर्थी का अनुसंधान कार्य जैसा कि जो उसके शोध निबन्ध या उसकी प्रकाशित रचना से सुस्पष्ट हो, अत्यधिक उच्चस्तर का है, तो वह उपखण्ड (क) में विहित किसी अर्हता को शिथिल कर सकती है।"

17. In view of the aforesaid statutory provisions, we have no hesitation to record that no person can be appointed on the post of Principal in an affiliated degree college, unless he is possessed .of the prescribed minimum qualifications on the post in question. The appointment may be officiating/ adhoc or regular. Possession of the minimum essential qualifications for the post prescribed by Statutes is a condition precedent for any valid appointment. It is immaterial that appointment is regular or officiating as contemplated by Statute 10.20. A person not possessed of the prescribed minimum essential qualification cannot be appointed on the post of Principal in any capacity whatsoever. The conclusion so drawn by us is supported by the following judgements:

(a) Division Bench of this Court in the case of ***Dr. Raghvendra Pratap Singh Vs. Director of Higher Education, Allahabad & ors., reported in 1997 (2) A.W.C. 2214 (NOC)*** i.e. Civil Misc. Writ Petition No. 25259 of 1992 decided on 16th December, 1996, wherein with regard to the issue of appointment on ad-hoc lecturers in degree colleges affiliated to Purvanchal University, has held that even for ad-hoc appointment, essential minimum qualifications prescribed have necessary to be possessed by the candidate concerned, otherwise the appointment would be void in view of the provisions of the Commission Act, 1980. We may clarify that although Section-15 has been deleted but the legal principal stated therein qua officiating/ad-hoc appointment apply with full force.

(b) Division Bench Judgment of this Court in the case of ***Shamshul Zama vs. District Inspector of Schools, Chandauli & ors.*** reported in (2001) 3 UPLBEC 218, wherein with regard to the appointment on the post of Officiating Principal in an intermediate college governed by the provisions of U.P. Intermediate Education Act, 1921 and U.P. Secondary Education Services Selection Board Act, 1982, same principal has been stated.

18. Even otherwise it does appeal to this Court that a person not possessed of the prescribed qualification can be permitted to discharge the duties on the post of Principal of the institution, even if for a period of three months. We therefore record that a lecturer of degree college not possessed of the prescribed minimum qualification as provided for under the Statutory Provisions of the First Statutes of the University cannot be appointed as officiating principal under Statute 10.20 of the First Statutes of the University.

19. In this legal background it is to be examined as to whether Paras Nath Chaubey is possessed of the prescribed minimum qualification or not with reference to Statute 14.14 (2) of the First Statutes of the University. It is admitted on record that Paras Nath Chaubey does not satisfy the requirement of Clause-Ka and Clause-Kha of the aforesaid First

Statutes, inasmuch as he does not have minimum 54% marks at graduate level nor he has good academic record. He also does not satisfy the requirement of Clause-Kha as he is not possessed of a degree of Doctorate. Proviso to the aforesaid Statutes, however, provides that the essential minimum qualification can be relaxed in a given set of facts.

20. Sri Ashok Khare, Senior Advocate on behalf of Paras Nath Chaubey submits that since the Vice-Chancellor of the University has approved the appointment of Paras Nath Chaubey for a. period of three months, it is to be presumed that he has relaxed the requirement of essential qualifications as - per the proviso to the aforesaid Statute 10.20. He therefore, submits that the appointment of Paras Nath Chaubey cannot be said to be illegal and it cannot be said that Paras Nath Chaubey is not possessed of the prescribed minimum qualification, senior-most teacher, he is entitled to continue on the post of Officiating Principal till the regular selected candidate recommended by the U.P. Higher Education Services Selection Commission joins the post.

21. The contention so raised by Sri Ashok Khare is opposed by Sri G.K. Singh, learned counsel for Dr. Ghanshyam Singh on following two grounds:

(a) Proviso to Statute 10.20 will have no application, so far as the ad·hoc/officiating appointments are concerned, inasmuch as power to grant relaxation is with the Selection Committee to be constituted for regular appointment. So far as the officiating appointment is concerned, no Selection Committee is required to be constituted and therefore, in terms of the provisions, no other person has any right to grant relaxation from the essential qualifications,

(b) there is no order in writing of the Vice-Chancellor of the University granting relaxation in favour of Paras Nath Chaubey from the essential qualifications.

22. After haring the parties on the aforesaid issue, we are of the considered opinion that the issue as to whether relaxation from the essential qualifications can be granted in respect of officiating appointment on the post of Principal in terms of proviso to Statute 10.20 has not at all been examined by the Vice-Chancellor of the University. We may further record that the Hon'ble Supreme Court of India in the case of ***Nagendra Singh Chauhan vs. Hemwati Nandan Behguna University, Sri Nagar and ors.,*** reported in 1998 (1) ESC 767, has held that relaxation from the essential qualifications prescribed under the Statutes can be granted by the Selection Committee only under a specific order in writing supported by reasons.

23. From the impugned order of the Vice-Chancellor of the University, it is apparently clear that there are no reasons recorded qua the issue of prescribed minimum qualification or relaxation thereto in favour of Paras Nath Chaubey. The Vice-Chancellor of the University has misdirect himself in recording that for a period of three months Paras Nath Chaubey can be permitted to continue as Officiating Principa1 of the college, even if he is not possessed of the degree of B.Ed. The reason so recorded is based on complete misreading of Statute 14.14 (2)

of the First Statutes of the Universities framed under-the provisions of U.P. State of Universities Act, 1973.

24. In the totality of the circumstances, as noticed herein above, we have no hesitation to record that the order of Vice-Chancellor of the University dated 8th September, 2007 is illegal and deserves to be quashed. It is ordered accordingly.

25. Let the Vice-Chancellor of the University re-examine the dispute between the parties qua officiating appointment on the post of Principal of the college in terms of the observations made by us herein above afresh after affording opportunity of hearing to the parties concerned, by means of a reasoned speaking order, preferably within four weeks from the date a certified copy of this order is filed before him.

26. With the aforesaid observations/directions, both the writ petition no. 59709 of 2007 and writ petition no. 57894 of 2007 are disposed of finally.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2008

BEFORE
THE HON'BLE B.A. ZAIDI, J.

Criminal Misc. Application No. 1399 of 2008

Manish ...Applicant
Versus
State of U.P. and another ...Respondents

Counsel for the Applicant:
Sri Raj Kumar

Counsel for the Opposite Parties:
Sri Mohammad Israil Siddiqui
A.G.A.

Code of Criminal Procedure-Section 482-demand of local sureties-accused belong to District Bulandshahr-Bail granted by Session Judge Gautam Budh Nagar-held-order manifestly callous and cruel against in Moti Ram's case-order set a side so for it concern to demand of local sureties.

Held: Para 6

Even if, the aforesaid pronouncement of the Supreme Court was not within the knowledge of the learned Judge and was not brought to his notice, the order is manifestly callous and cruel. How will an accused, who knows no one in a district, where he is being prosecuted and belongs to another district, would bring local sureties. The amount of bail bond also seems to be on higher side. This order for demanding local sureties for an amount of Rs.35,000/- each is set aside. The learned Judge will rectify the order accordingly.

Case law discussed:
AIR 1978 SC-1594 relied on.

(Delivered by Hon'ble B.A. Zaidi, J.)

1. In Case Crime No. 388/2007 under Sections 379, 411 I.P.C. Police Station Sector-39 Noida district Gautam Budh Nagar, bail was granted by Sessions Judge (on 3.11.2007) and the accused (applicant) was asked to furnish two local sureties for a sum of 35,000/-.

2. The accused applied that he belongs to Auraiya and it is difficult for him to procure two local sureties and he produced two sureties residents of district Bulandshahr, which the Sessions Judge declined to accept by order dated 15.11.2007 without giving any reason.

3. That is what brings the applicant here under section 482 Cr.P.C.

4. Heard Sri Raj Kumar, Advocate for the applicant and Sri Sri Mohammad Israil Siddiqui, Addl Government Advocate for the State.

5. The order of Judge is violative of Article 14 of the Constitution of India, as held in the case of Moti Ram and others versus State of Madhya Pradesh (AIR 1978 S.C. 1594), where the Hon'ble Supreme Court held that demand of local sureties is violative of Article 14 of the Constitution of India.

6. Even if, the aforesaid pronouncement of the Supreme Court was not within the knowledge of the learned Judge and was not brought to his notice, the order is manifestly callous and cruel. How will an accused, who knows no one in a district, where he is being prosecuted and belongs to another district, would bring local sureties. The amount of bail bond also seems to be on higher side. This order for demanding local sureties for an amount of Rs.35,000/- each is set aside. The learned Judge will rectify the order accordingly.

7. With these observations, the application is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2008

BEFORE
THE HON'BLE BHARATI SAPRU, J.

Civil Misc. Writ Petition No. 1051 of 2008

Smt. Poonam Yadav ...Petitioner
Versus
Director Health Service Department and others ...Respondents

Counsel for the Petitioner:
Sri Jawahar Yadav
Sri B.R. Sharma

Counsel for the Respondents:
S.C., Addl. Solicitor General of India

Constitution of India, Art. 226- Advertisment-application be send through Regd. Post-petitioner with intention to ensure receiving within 24 hours-send through speed post-both services rendered by the India post and Telegraph Department-authorities can not refuse such application-send through speed post.

Held: Para 6

In view of the above, I am of the opinion that both Speed post or registered post are services rendered by Indian Post and Telegraph Department which ensures strict delivery of post and mere making clause in the advertisement that application will be sent through registered post, the respondent cannot refuse the application of the petitioner on the pretext that it had not been sent by the registered post but had been sent by the Speed Post which is equally efficacious post.

(Delivered by Hon'ble Bharati Sapru, J.)

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

2. The petitioner has applied for the post of *upcharika* in the department of respondent no. 2. The last date for submission of the application was 10.12.2007. According to the terms of the advertisement, the petitioner was to send the application by registered post.

3. As the petitioner under some apprehension that the application will not reach by registered post within the time, he sent it by speed post vide receipt dated 6.12.2007. In fact the petitioner did not comply with the terms of the advertisement.

4. It is well aware that Speed Post (EMS) service is value added post services enunciated by the Indian Post and Telegraph Department, for which sender has to pay charges equivalent to the registered letter/parcel together with speed charges depending upon the distance of the place, where the post is being dispatched.

5. In the instant case, the petitioner has sent the application by speed post on 6.12.2007 through an agency authorized by the Indian Post and Telegraph Department which assured that the letter would be delivered within 24 hours.

6. In view of the above, I am of the opinion that both Speed post or registered post are services rendered by Indian Post and Telegraph Department which ensures strict delivery of post and mere making clause in the advertisement that application will be sent through registered post, the respondent cannot refuse the application of the petitioner on the pretext that it had not been sent by the registered post but had been sent by the Speed Post which is equally efficacious post.

7. Learned counsel for the petitioner has stated that since the interview for the job is going on, she may also be considered.

8. In view of the facts and circumstances stated in the case and if the interview is going on, the petitioner's application too may be considered by the respondents.

9. The writ petition is disposed of as above.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2008

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SHISHIR KUMAR, J.

First Appeal From Order No. 3127 of 2007

Oriental Insurance Company Ltd.
...Appellant
Versus
Puspa Devi and others ...Respondents

Counsel for the Appellant:
Sri Anand Kumar Sinha

Counsel for the Respondents:
Sri Dinesh Kumar

<u>Motor Vehicle Act 1988-Section 170</u>-Rejection of application-Insurance company allegation of conspiracy between vehicle owner and claimant-Insurance company allowed the tribunal to pass final award-can not be allowed to

challenge in Appeal-Insurance company had remedy to challenge the said order under Art. 227 of Constitution-However on quantum of compensation matter remitted back before the Tribunal.

Held: Para 8

Hence, in totality when we find that the appeal as made by the insurance company only for the purpose of quantum of compensation and negligence in spite of rejection of application under Section 170 of the Act is squarely hit both by the verdict of the Supreme Court as well as the High Court, we are of the view that the appeal can not be admitted and as such the same is dismissed without imposing any cost.

Case law discussed:

2003 (7) S.C.C. 212, F.A.F.O. No. 2087 of 2007, AIR 2002 SC 3350, 2007 (4) ADJ 101 (DB)=2007(4) ALJ 541 (DB), 2007 (4) T.A.C. 17 (S.C.), 2004 (5) SCC 222, 2007 AIR SCW 2362, (2006) 1 SCC 212, AIR 2007 SC 1563.

(Delivered by Hon'ble Amitava Lala, J.)

1. This appeal is made by the insurance company against an award of the Motor Accident Claims Tribunal dated 14th August,2007 under Section 166 read with Section 140 of the Motor Vehicles Act, 1988 (hereinafter called as the 'Act') on account of wrong fixation of quantum of compensation and negligence of the deceased. An application was made by the insurance company under Section 170 of the Act to contest the claim on the ground of collusion between owner of the vehicle and the claimant of the compensation which was rejected by the tribunal on or about 2nd July, 2007. A limited observation has been made by the tribunal which implies that since owner has already filed his objection against the claim of the claimant, the application of the insurance company can not be entertained. Therefore, on the ratio of the judgment reported in **2003 (7) S.C.C. 212 (United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel)** followed by this Division Bench in F.A.F.O. No. 2087 of 2007 (United India Insurance Co. Ltd. Vs. Krishna Kumar & others), delivered on 1st August, 2007 and circulated to all District Judges of the State of Uttar Pradesh, we can construe that minimum reason as above will suffice the cause of disposal with reasons to meet the technicality.

2. The appellant/insurance company slept with the order of the tribunal without taking any step and preferred this appeal when the tribunal finally passed the award on 14th August, 2007 taking both the plea of rejection of his application as well as the award ignoring laid down principle by the three Judges' Bench of the Supreme Court reported in **AIR 2002 SC 3350 (National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and others)** followed by Division Bench judgment of this Court reported in **2007 (4) ADJ 101 (DB)=2007(4) ALJ 541 (DB) (Oriental Insurance Company Limited Vs. Smt. Manju and others).** In the case of **Nicolletta Rohtagi and others (Supra)** the Supreme Court has categorically held as follows:

"31. We have already held that unless the conditions precedent specified in Section 170 of 1988 Act is satisfied, an insurance company has no right of appeal to challenge the award on merits. However, in a situation where there is a collusion between the claimants and the insured or the insured does not contest the claim and, further, the tribunal does not implead the insurance company to contest the claim in such cases it is open to an insurer to seek permission of the

tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merits in that case it is open to the insurer to file an appeal against an award on merits, if aggrieved. In any case where an application for permission is erroneously rejected the insurer can challenge only that part of the order while filing appeal on grounds specified in sub-section (2) of Section 149 of 1988 Act. But such application for permission has to be bonafide and filed at the stage when the insured is required to lead his evidence. So far as obtaining compensation by fraud by the claimant is concerned, it is no longer res integra that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award.

32. For the aforesaid reasons, our answer to the question is that even if no appeal is preferred under Section 173 of 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well as findings as regards negligence or contributory negligence of the offending vehicle."

3. This Division Bench of the High Court specifically considered the issue that if the application under Section 170 of the Act is rejected whether the insurance company will be remediless or not and ultimately held either the appellant/insurance company will go for rectification of the award if it is victim of circumstances before the tribunal by establishing such fact or it can take out an application under Article 227 of the Constitution before the High Court challenging the order passed in the application under Section 170 of the Act. The present appeal is in the teeth of such judgments. Learned Counsel appearing for the appellant contended that inspite of rejection of the application under Section 170 of the Act, it can prefer appeal from the judgment and award of the tribunal as a matter of course being an aggrieved under Section 173 of the Act. He placed reliance on **2007 (4) T.A.C. 17 (S.C.) (New India Assurance Company Ltd. Vs. Smt. Shanti Pathak and others)** by saying that the three Judges' Bench of the Supreme Court entertained the appeal on merit inspite of rejection by the High Court on the ground of not having permission to contest the claim.

4. According to us, the appellant overlooked the following observations of the Supreme Court: (a) The High Court held that no permission had been granted to the insurer to contest its claim, and (b) The High Court did not find any substance in this plea **also**. Therefore, the Supreme Court entertained the appeal only when found that the High Court had already entered into the merit irrespective of rejection. Such observation can not be said to be a conflicting or later opinion contrary to earlier opinion of the Supreme Court in the case of **Nicolletta Rohtagi and others (Supra).**

5. Moreover, in **2004 (5) SCC 222 (Common Cause Vs. Union of India and others)** it was held by the Supreme Court itself that without laying down the law cannot be read as a ratio of the judgment and certainly not as a precedent. Therefore, when in Smt. Shanti Pathak and others (Supra) no reference has been made about the well considered judgment

of the Bench of similar strength in Nicolletta Rohtagi and others(Supra), the same can not be said to be ratio decidendi. **In 2007 AIR SCW 2362 (Oriental Insurance Co. Ltd. Vs. Meena Variyal and others)** it was held by the Supreme Court that an obiter dictum of this Court (read as Supreme Court) may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court (read as Supreme Court). Here we are bound by the expressed pronouncement. Unless a pronouncement forms a ratio decidendi, it can not bind in rem. Judgment in rem is one which declares, defines or otherwise determines the status of a person or of a thing, that is to say, the jural relation of the person or thing to the word generally following ratio of three Judges' Bench judgmnent reported in **(2006) 1 SCC 212 (Satrucharla Vijaya Rama Raju Vs. Nimmaka Jaya Raju and others).** That apart a statute is an edict of the legislature and in construing a statute, it is necessary to see the intention of its maker. If a statutory provision is open to more than one interpretation, the Court has to choose that interpretation which represents the true intention of the legislature**. AIR 2007 SC 1563 (National Insurance Co. Ltd. Vs. Laxmi Narain Dhut)** supports the same.

6. Learned Counsel appearing in support of the appellant/insurance company contended before this Court that as per Section 168 of the Act, the Motor Accident Claims Tribunal on receipt of an application for compensation made under Section 166 of the Act after giving notice to the parties(including the insurer) and opportunity of being heard, hold an enquiry etc. Therefore, insurance company is a necessary party to the proceeding before the Motor Accident Claims Tribunal. According to us, Section 168 of the Act speaks for holding an enquiry but not for impleading the party as a matter of course. Section 170 of the Act puts an embargo to that extent by saying that where in the course of enquiry the Motor Accident Claims Tribunal found it satisfied that the insurer should be made party then and then alone it will be impleaded as party respondent. In other words, Section 168 of the Act will be applicable subject to satisfaction of Section 170 of the Act.

7. There is reason for such legislation. Relationship between the insured and insurer is like a relationship between principal and agent. They are sailing in the same boat. Therefore, when the principal is disclosed principal existence of the agent is insignificant unless it is hit by fraud or collusion or any statutory provision like Section 149 (2) for having separate identity which is to be tested by the tribunal at first before impleadment but not as a matter of course inspite of the existence of the principal. Therefore, the tribunal will only examine whether there is any conflict between the insurer and insured which likely to be hit by fraud or collusion and statutory requirement and then only the permission is to be granted by the tribunal otherwise there will be a routine permission for the insurance company to contest the proceeding without any cause. The Supreme Court in **Nicolletta Rohtagi and others (Supra)** discouraged such type of activities on the part of the insurance company and held that if ultimately the insurance company found that there is a fraud or collusion it can also apply for rectification of the award in the tribunal but not to wait and see whether the award

is going in its favour or against and then prefer a chance appeal. This discourageable state of affairs is to be understood carefully before making grievance. Moreover, from the composite reading of **Jyotsnaben Sudhirbhai Patel (Supra), Nicolletta Rohtagi and others (Supra)** and **Smt. Manju and others (Supra)** we are of the view that an insurance company is entitled to know the reason of allowing or rejection of application under Section 170 of the Act by the Motor Accident Claims Tribunal and can challenge the order of rejection, if any, under Article 227 of the Constitution of India. Therefore, the insurance company can not be said to be remediless.

8. Hence, in totality when we find that the appeal as made by the insurance company only for the purpose of quantum of compensation and negligence in spite of rejection of application under Section 170 of the Act is squarely hit both by the verdict of the Supreme Court as well as the High Court, we are of the view that the appeal can not be admitted and as such the same is dismissed without imposing any cost.

9. Incidentally, the appellant-insurance company prayed that the statutory deposit of Rs.25,000/- made before this Court for preferring this appeal be remitted back to the concerned Motor Accidents Claims Tribunal as expeditiously as possible in order to adjust with the amount of compensation to be paid to the claimants, however, such prayer is allowed. Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2008

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Misc. Writ Petition No. 33392 of 2006
Connected with
Civil Misc. Writ Petition No. 39638 of 2006

Satya Narian Tripathi and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Radha Kant Ojha
Sri Saroj Kumar Yadav

Counsel for the Respondents:
Sri Indra Raj Singh
Sri Mahendra Singh
Sri Vijendra Singh
S.C.

Constitution of India, Art. 19 & 226-Writ Petition-maintainability-validity of the list of members of society-challenge made by member-neither statutory nor fundamental right of such member affected-serous disputed question of facts involved-petitioner may file civil suit or approach before the Registrar under Section 25 of the Society Registration Act-petition-held-not maintainable.

Held: Para 9

In neither of these petitions has any fundamental right or statutory right of the petitioners been breached. The petitioners have effective alternative remedy to challenge the election by a civil suit or under Section 25 of the Societies Registration Act. The writ petitions are therefore not maintainable. Moreover disputed questions of fact are

involved in these petitions and a writ petition is not an appropriate remedy.

Case law discussed:

2007 (4) ESC 2500, 1993 (2) UPLBEC 1333, 2007 (4) ESC 2500, W.P, No. 31886 of 2004, Special Appeal No. 94 of 2007, W.P. No. 54508 of 2006 decided on 7.5.2007

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

1. The Kshettriya Shri Gandhi Ashram, Deoria is a society registered under the Societies Registration Act, 1860. Under the bye law no.10 of the bye laws of the society the members of the society are to elect members of the prabandh samiti. Under bye law no.14 ordinary members of the committee of management are to be elected for 3 years. Under bye law no.21 the Secretary is to be elected by the committee of management. The dispute in the present writ petition relates to the election to the post of Secretary. It appears that a list of members of the committee of management for the year 2001-2002 was filed under Section 4 (1) of the Societies Registration Act and in that list the names of Satya Narain Tripathi petitioner no. 1 in writ Petition No. 33392 of 2006 and the respondent no.4 Mahendra Nath Dubey were also included. In the year 2003 two rival claims to the post of Secretary were set up one by the petitioner No.1 Satya Narain Tripathi and the other by the respondent no. 4 Mahendra Nath Dubey. The Assistant Registrar, Firms, Societies and Chits, Gorakhpur passed an order dated 11.7.2003 and approved the proceedings dated 24.4.2003 submitted by Mahendra Nath Dubey and recognised him as the Secretary and directed him to file a list of members of the management committee. The order of the Assistant Registrar dated 11.7.2003 was challenged in Writ Petition No. 32799 of 2003. The writ petition was disposed of by an order dated 4.5.2006 with a direction to the Assistant Registrar to hold the elections for the post of Secretary of the society under his supervision and to follow the procedure in the bye-laws. It was directed that till the elections of the secretary take place the post of Secretary shall be vested in the District Magistrate, Deoria.

2. In pursuance of the order of this Court the Assistant Registrar undertook the exercise of holding the elections. He invited the petitioner No.1 Satya Narain Tripathi as well as the respondent no.4 Mahendra Nath Dubey to produce the original records and members list. An election programme was published in the newspaper 'Rashtriya Sahara' dated 16.6.2006 in which the date of publication of the provisional voter list was fixed as 20.6.2006, objections to which were also to be filed later, on the same day. 22.6.2006 was fixed as the date for disposal of the objections and final voter list was to be published on 23.6.2006. The Assistant Registrar found that the Secretary of the society is to be elected by the committee of management of the society, which thus constitutes the electoral body. He also found that the list of members of the committee of management 2001-2002 filed under Section 4 (1) of was the authenticate list in as much as that list was not challenged while the subsequent elections in the year 2003 were disputed. He, therefore, decided that the election would be held on the basis of the list of members pertaining to the year 2001-2002. It appears that several sets of objections against the voter list were filed before the Assistant Registrar. One of these objections was filed by the petitioner No.1 Satya Narain Tripathi. Another objection was filed by

the respondent no.4 Mahendra Nath Dubey. Another objection was filed by Gauri Shanker Mishra petitioner in Writ Petition No. 39368 of 2006. There were 11 members of the committee of management in the list of 2001-2002. While deciding the objections of petitioner No.1 Satya Narain Tripathi and other persons the Assistant Registrar found that two of the members in the list have died. He, therefore, allowed the objections in this respect and published the final electoral list of nine members. The objections of the petitioner No.1 Satya Narain Tripathi on other points were rejected by the Assistant Registrar. The objections of this petitioner were (i) Mahendra Nath Dubey was not qualified to be a member in view of the fact that under the bye-law no. 5 only a person who had put in 15 years of service in the Sanstha alone could be a member, a qualification, which according to the petitioner, Mahendra Nath Dubey did not possess; (ii) out of the nine members Mahendra Upadhyay and Vishambher Nath Pandey had already retired; (iii) Durga Prasad Rai had resigned from service on 1.2.2004 and his resignation was approved by the committee; (iv) the services of Som Nath Dubey were terminated on 26.9.2005 and he had left the Sanstha and these persons not being in the service of the Sanstha had ceased to be qualified to be members of the Sanstha and consequently their names were liable to be excluded from the electoral roll. The Assistant Registrar found that there was a dispute regarding the membership of these persons and that there was also a dispute about membership of the petitioner No.1 Satya Narain Tripathi himself and in respect of three other persons who according to Satya Narain Tripathi were also members. He, therefore, published the electoral roll of nine members excluding out of the list of 11 members pertaining to the year 2001-2002 only the two members who had died. The order of the Assistant Registrar dated 22.6.2006 finalising the electoral list has been challenged by the petitioner No.1 Satya Narain Tripathi in Writ Petition No. 33392 of 2006 and also by Gauri Shanker Mishra in Writ Petition No. 39638 of 2006. The name of Gauri Shanker Misra does not find place in the list of members 2001-2002 which has been found by the Assistant Registrar to be the valid list and therefore Gauri Shanker Misra is not included in the electoral college. The stand of Gauri Shanker Mishra is that the members list of the year 2001-2002 was not a valid list and that the subsequent list of members of the committee of management on the basis of which elections were held in the year 2003 in which list his name was also included was the valid list. The petitioner Gauri Shanker Mishra claims that he was elected as a trustee member along with 15 others including the Secretary Mahendra Nath Dubey in the election of 2003 and his membership was acknowledged by the respondent no.4 Mahendra Nath Dubey and that the list of members in which the name of Gauri Shanker Mishra is included was approved by the Assistant Registrar by order dated 11.7.2003 and the said order dated 11.7.2003 has also been relied upon by the Assistant Registrar in his order dated 22.6.2006 finalising the voter's list impugned in this writ petition and as such there was no ground for excluding him from the membership. Several questions of fact are thus involved in this writ petition.

3. The writ petition of Satya Narain Tripathi was presented on 26.6.2006. An

interim order was passed by this Court in this writ petition on 28.6.2006 whereunder this court permitted the elections to be held on 29.6.2006 as scheduled but directed that the results of the elections shall not be given effect to till 7.6.2006. This order was extended from time to time. It appears that the respondent Mahendra Nath Dubey alone had filed his nomination paper for the post of Secretary and he was unopposed.

4. The contention of Sri Radha Kant Ojha, learned counsel for the petitioners is that Mahendra Nath Dubey was not qualified to be a member as he does not fulfil the requirement of 15 years minimum service in the Sanstha while the other four persons, namely, Mahendra Upadhyay, Vishambher Nath Pandey, Durga Prasad Rai and Som Nath Dubey are also not qualified to be members as they have ceased to be in the service of the Sanstha and are disqualified in terms of bye-law no. 5. On the other hand, Sri Indra Raj Singh, learned counsel for the respondent no.4 Mahendra Nath Dubey raised a preliminary objection relating to the maintainability of the writ petitions that it is not open to a member to challenge the election in writ petition. In support of his contention reliance has been placed upon the decision of this Court in Committee of Management, Sri Kachcha Baba Inter College, Varanasi and others Vs. Regional Committee, Pancham Mandal, Varanasi and others, 2007 (4) ESC 2500. It is also submitted that the petitioners have challenged the order of the Assistant Registrar finalising the electoral list, which is a step in the process of election and a writ petition challenging the election process is not maintainable. In support of his contention reliance is placed upon a Division Bench judgement of this Court in Basant Prasad Srivastava and another Vs. State of U.P. and others 1993 (2) UPLBEC 1333.

5. In so far as the procedure adopted by the Assistant Registrar in deciding the objections against the electoral roll is concerned there is nothing to indicate that there was any irregularity. The Assistant Registrar had invited both the parties to furnish list of members. He also gave opportunity to the members to file objections to the provisional list and has then decided the objections.

6. The question is whether a member can challenge an election of the committee of management. In Committee of Management, Sri Kachcha Baba Inter College, Varanasi and others Vs. Regional Committee, Pancham Mandal, Varanasi and others, 2007 (4) ESC 2500 relied upon by Sri Indra Raj Singh it was held that a writ petition by a member of the general body and not by a rival committee of management is not maintainable. Reliance was placed by the learned judge upon a decision in Writ Petition No. 31886 of 2004 (Bhagwan Kaushik Vs. State of U.P. and others) decided on 30.1.2006 as well as upon the judgement of the Division Bench of the Court dated 19.2.2007 passed in Special Appeal No. 94 of 2007 (Anjani Kumar Vs. State of U.P. and others) wherein it has been held that member of the society has no right to challenge the result of the election. In that case an order of the regional Committee under Section 16-A (7) of the U.P. Intermediate Education Act was challenged. A dispute under Section 16-A (7) where rival committees of management claim the right of management is to be decided on the basis of effective control of the committee of

management. The present is not a dispute decided under Section 16-A (7). The case is therefore distinguishable.

7. In Yogendra Singh and another Vs. State of U.P. and others Writ Petition No. 54508 of 2006 decided on 7.5.2007 it was held that a member of the general body can also challenge the elections. The case of Bhagwan Kaushik Vs. State of U.P. and others was distinguished on the ground that that case related to recognition of a committee of management by the Regional Committee in exercise of power under Section 16-A (7) of the U.P. Intermediate Education Act, 1921, which provides that the dispute is to be decided on the basis of effective control. A mere member of the general body cannot claim effective control and, therefore, can not challenge the decision of the Regional Committee recognising a particular committee of management on the basis of effective control and it was only a rival committee of management which could challenge such an order. In Yogendra Singh's case the elections were held by a person who was an imposter and who in a previous decision dated 22.7.2004 in Writ Petition No. 27492 of 2004 had been found to have been wrongly authorised by the District Inspector of Schools to hold the election. It was held in that case that a member has a right to participate in the election and also to contest the election and if he is excluded from the membership and deprived of the right to contest election he could file a writ petition for in such a case it is the member ousted from the electoral body who would be interested to agitate his rights and not the committee of management. In holding this the court was it appears considering the question of maintainability of the writ petition by a member in the context of a person aggrieved.

8. Article 19 (1) (C) of the Constitution of India confers a fundamental right upon a citizen to form an association. The question is whether exclusion of a member from the electoral college or inclusion of a member in the electoral college on the basis of an erroneous determination of the voter list by the Assistant Registrar or other authority can be treated as an infringement of Article 19 (1) (C) giving right to the aggrieved member to maintain a writ petition. The question about the nature of the right of a member to question his exclusion from the electoral college was examined in the context of Article19 (1) (C) of the Constitution of India in Kamla Kant Agrawal Vs. State of U.P. and others Writ Petition No. 23477 of 2007 decided on 20.7.2007. It was held that a citizen of India has a fundamental right under Article 19 (1) (C) of the Constitution of India to form an association. Reliance was placed by the learned judge upon the decision of the apex court in The Hindi Sahitya Sammelan Vs. Jagdish Swarup and others A.I.R. 1971 SC 966 in support of the proposition that the right to form an association enjoins with it a right to continue to be associated with it as well as to ensure that only those persons are admitted to the association whom they voluntarily admitted. In this background it was held that it is the right of a citizen to challenge his exclusion from the membership by a petition under Article 226and alternative remedy would not be a bar. A member can challenge his wrongful exclusion from membership of the association or the wrongful inclusion into the association of another person as a

member if his fundamental rights are breached and in such cases alternative remedy would not bar the maintainability of a writ petition. A member can also file a writ petition on breach of a statutory right but an alternative remedy may bar the maintainability of a writ petition. But a right to form an association on the one hand and the right to be elected to an office of such association or to participate in the elections on the other hand have been held to be distinct rights and the latter can be claimed only in accordance with the provisions of the bye-laws of the association or under a statute while the former can be claimed also as a fundamental right. Under the bye-laws in the present case the right to elect the Secretary has been conferred upon the Prabandh Samiti and not upon the members of the general body. What the Assistant Registrar has decided is that the persons forming the electoral college are members of the committee of management. The question whether any person was validly inducted or elected or continues as a member of the committee of management or whether the person who contests election to the post of Secretary is a member of the committee of management is an election dispute or a dispute relating to his induction as a member of the committee of management. The right of a person claiming to be a member of the committee of management is not a fundamental right. The petitioners do not have any fundamental right to contest the election of Secretary or to challenge the same. The petitioner Satya Narain Tripathi has challenged the candidature of Mahendra Nath Dubey on the ground that he cannot be included in the voters list which consists of members of the committee as he is not qualified to be a member under the bye laws. The bye laws of the society do not have statutory force. The right of a person to contest an election or to challenge it is not a fundamental right nor even a common law right but originates from the statute or from the rules and bye laws of an association. A breach of such a statutory right or right under the rules or bye laws can be redressed by availing the remedy which the statute or the bye laws or rules provide or by a civil court except where in the case of a civil suit unless the remedy of a suit is barred. Even where elections are held under statutory provisions the remedy of challenging the elections if provided under the statute has to be availed of as an alternative remedy which would ordinarily bar the maintainability of a writ petition. In this case the induction of members of the committee of management and the election of Secretary is governed by the bye laws of the society. It is only where an election is set aside or an office bearer is held no longer entitled to continue in office or where the elections are not held within the time specified in the rules of the society that the Registrar can hold the elections under Section 25(2) of the Societies Registration Act. In this case the petitioner Satya Narian Tripathi has challenged the voters list which consists of member of the committee of management primarily on the ground of breach of bye law no. 5. What is being challenged in this case is the wrongful induction of certain persons as members of the committee of management, which constitutes the electoral college. The infringement of the bye laws in such a case would not be a ground to maintain a writ petition when the election or continuance in office of the office bearers can be questioned in the manner provided by the statute under Section 25 of the Societies Registration

Act or by a civil suit. The proviso (C) to Section 25 (1) provides;

"25. Provided that the election of an office-bearer shall be set aside where the prescribed authority is satisfied.

(c) that the result of the election in so far as it concerns such office-bearer has been materially affected by the improper acceptance of any nomination or by the improper reception, refusal or rejection of any vote or the reception of any vote, which is void or by any non-compliance with the provisions of any rules of the Society."

9. In neither of these petitions has any fundamental right or statutory right of the petitioners been breached. The petitioners have effective alternative remedy to challenge the election by a civil suit or under Section 25 of the Societies Registration Act. The writ petitions are therefore not maintainable. Moreover disputed questions of fact are involved in these petitions and a writ petition is not an appropriate remedy.

10. In the present case Satya Narain Tripathi was not excluded from participating in the elections. The elections were also not held by an imposter as was done in the case of Yogendra Singh. The elections in the present case have been held by the Assistant Registrar who has been authorised by the Court to hold the elections. In the peculiar facts of the case of Yogendra Singh (supra) the court was not called upon to decide in that case the question of alternative remedy. The decision in Yogendra Singh is, therefore, also distinguishable. In the present case there appears to be a dispute raised by Gauri Shanker Mishra the petitioner in Writ Petition No. 39638 of 2007 that the elections could not have been held on the basis of the electoral roll of 2001-2002 but by another list. The membership of Satya Narain Tripathi himself was challenged before the Assistant Registrar so also the membership of Mahendra Nath Dubey. The High Court had not directed the Assistant Registrar to hold the elections on the basis of any particular list of members. The entire exercise was required to be conducted by the Assistant Registrar. Several disputed questions of fact, therefore, arise in the present writ petition.

11. There is an additional reason why the elections which have been held in this case cannot be challenged in writ petition. It is not in dispute that Mahendra Nath Dubey the respondent was the only person who had filed his nomination paper for the post of Secretary. He was thus unopposed. In these circumstances the main question for testing the validity of his election in this case is about the validity of the membership of Mahendra Nath Dubey. As there was no other candidate for the post of Secretary the question of validity of membership of some of the members of the electoral list is not of any significance because Mahendra Nath Dubey's election as Secretary would be valid even if some of the members were wrongly inducted in or excluded from the voter list as the result of the election would not be materially affected. In fact Gauri Shanker Mishra the petitioner in one of the petition has not challenged the membership of Mahendra Nath Dubey. He has rather alleged that Mahendra Nath Dubey was elected Secretary in the meeting held on 24.4.2003. On the point of membership of

Mahendra Nath Dubey it is not in dispute that Mahendra Nath Dubey was included in the list of members of the committee of 2001-02 filed under Section 4 (1). In paragraph 3 of the counter affidavit of Mahendra Nath Dubey in the writ petition of Satya Narain Tripathi it is stated that Mahendra Nath Dubey was enrolled as a Member on 24.2.2000. A copy of the minutes of the meeting dated 24.2.2000 in which 11 members participated is Annexure 1. A list of members it is stated was prepared on 16.6.2001 in which the name of Mahendra Nath Dubey is at serial no.12. Mahendra Nath Dubey it is said participated in the meeting of 28.10.2001 and 24.4.2003. A copy of the minutes have been filed as Annexure C.A.3 and C.A. 5. In the meeting dated 28.10.2001 and 24.4.2003 it is alleged the petitioner Satya Narain Tripathi also participated. The Assistant Registrar was required to decide the question about the validity of the members in a summary manner. The Assistant Registrar has given good reasons for relying upon the list of members of the committee of the year 2001-2002, which had never been challenged before objections were filed in the present case whereas the subsequent elections of the year 2003 were disputed. The finding on the point given by the Assistant Registrar is not perverse and does not suffer from any illegality, which may call for interference under Article 226 of the Constitution of India. As regards, the membership of Vishambher Nath who is said to have retired on 1.6.2003 and Mahendra Nath Upadhyay who is said to have retired on 30.9.2005 the Assistant Registrar has recorded a finding that a person's membership does not cease on retirement unless he has resigned or he is disabled. In support of this stand, the Assistant Registrar in paragraph 10 of his counter affidavit has relied upon Rule 7 (b) and has annexed with the counter affidavit the resolution of the general body of the society dated 15.7.1997. The finding recorded by the Assistant Registrar upon the membership of Som Nath Dubey is that the petitioners themselves have taken a contradictory stand and that at one place it was alleged that the termination order of Som Nath Dubey was set aside. About the resignation of Durga Prasad Rai the finding recorded by the Assistant Registrar is that it has been disputed. Disputed questions of fact cannot be decided in a writ petition. Moreover, in the facts of this case that Mahendra Nath Dubey's election was unopposed the question of the validity of the membership of some of the persons is not of much importance. The petitioner Satya Narain Tripathi did not contest the election of Secretary. I have already held that the order finalising the list of members passed by the Assistant Registrar in the summary proceedings is neither perverse nor suffers from any illegality. The petitioners are at liberty to challenge the elections and membership of Mahendra Nath Dubey and others either by way of civil suit or under Section 25 of the Societies Registration Act. The finding regarding the validity of the electoral roll or about the claim of Mahendra Nath Dubey shall not be binding in the suit or in the other remedy that the petitioners may avail.

12. In view of the findings above recorded both the writ petitions are dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.02.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Revision No. 1340 of 2006

Rajeshwar Prasad and others
...Revisionists
Versus
The State of U.P. and another
...Opposite Parties

Counsel for the Revisionists:
Sri Anil Kumar Srivastava
Sri Vinod Srivastava

Counsel for the Opposite Parties:
Sri Rajesh Kumar Gupta
Sri Rajesh Kishore
A.G.A.

Code of Criminal Procedure Section 397 (2)-Criminal Revision-issue of Non bailable warrant-interlocutory order-No final order passed-revision-held not maintainable.

Held: Para 4

The order issuing warrant is interlocutory order within the meaning of Section 397 (2) Cr.P.C. and hence, revision against the impugned order dated 06.01.2006 is also not maintainable Reference in this regard may be made to the case of Mohd. Usman Vs. State of U.P. (2002 (40) ACC 901).

Case law discussed:
[2004 (50) ACC 9241, [2005 (51) ACC 6841, [2006 (55) ACC 942], (2002 (40) ACC 901)

(Delivered by Hon'ble Vijay Kumar Verma, J.)

Heard Sri Vinod Srivastava, learned counsel for the revisionists and learned A.G.A. for the state and perused the record.

2. Instant revision has been preferred against the summoning order dated 01.09.2005 passed by Additional Chief Judicial Magistrate, Court No. 2, Allahabad in Criminal complaint case no.2702 of 2004 (State Vs. Rajeshwar Prasad and others), whereby the accused-revisionists have been summoned to face the trial. Order dated 06.01.2006 issuing bailable warrant has also been challenged.

3. In view of the observations made by Hon'ble Apex Court in the case of ***Adalat Prasad Vs. Rooplal Jindal and others [2004 (50) ACC 9241*** and Subramanium Sethuraman ***[2005 (51) ACC 6841***, revision against summoning order is not maintainable, as the Hon'ble Apex Court has held that the only remedy available to the accused against summoning order is to invoke the jurisdiction of High Court under Section 482 Cr.P.C. This Court also in the case of ***Bhajan Lal and others Vs. State U.P. and another [2006 (55) ACC 942]*** has held that revision against summoning order is not legally maintainable.

4. The order issuing warrant is interlocutory order within the meaning of Section 397 (2) Cr.P.C. and hence, revision against the impugned order dated 06.01.2006 is also not maintainable Reference in this regard may be made to the case of ***Mohd. Usman Vs. State of U.P. (2002 (40) ACC 901).***

5. Hence, keeping in view the law laid down in aforesaid cases, instant revision has to be dismissed. However the accused may move this Court in the

proceeding under Section 482 Cr.P.C. if they so advised.

6. With these observations, the revision is hereby dismissed, being not legally maintainable. Interim order dated 09.03.2006 stands vacated.

7. The office is directed to send a copy of this order to the lower Court concerned for further necessary action.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.02.2008

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No.19883 of 2007

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

Counsel for the Applicant:
Sri Satish Chaturvedi
Sri Satya Prakash Srivastava

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

Code of Criminal Procedure-Section 183-territorial Jurisdiction-offence took place in district Fatehpur during course of railway journey in Ist class coach-Rejection of application under Section 156 (1) by Magistrate Fatehpur with observation to lodge the same at Patna-wholly misconceived-Magistrate wrongly interpreted the said provision-order set-aside-with direction to decide the application afresh in accordance with law.

Held: Para 7

The aforesaid provision clearly indicates that it is not essential for a person to lodge complaint in the Court of origin of journey or the court of its destination. In the present case the journey started from Delhi and ended at Patna and therefore, the applicant was well within his right to lodge a complaint at any intervening district before the competent Magistrate. Chief Judicial Magistrate, Fatehpur wrongly interpreted the said provision by holding that the FIR should have been got lodged at Patna. This opinion of CJM is contrary to Section 183 Cr.P.C. ex-facie and on this ground alone I set aside the impugned order dated 8.8.2007 passed by CJM Fatehpur on the application of the applicant under Section 156(3) Cr.P.C.

Case law discussed:
Moolbaksh 25 Criminal Law General page 439

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

1. Heard Sri Satish Chaturvedi, learned counsel for the applicant and the learned AGA in opposition.

2. The applicant has prayed for quashing of the order dated 8.8.2007 passed by Chief Judicial Magistrate, Fatehpur under Section 156(3) Cr.P.C. refusing to direct registration of FIR and investigation of the offence.

3. At the time of admission, learned AGA contended that notice be issued to respondents nos.2 and 3, namely, Smt. Sujata and Ms. Bandana Preyashi before finally disposing of this application. This is a stage where the FIR has not been registered as yet. Whether the FIR should be registered or not is a matter which is to be decided from the prayer made by the victim complainant. The proposed accused persons (respondents nos.2 and 3, namely, Smt. Sujata and Ms. Bandana Preyashi) have got no right to be heard at

this stage. Hearing of accused at a stage on the question as to whether the FIR should be registered against them or not is not sanctified by statute nor is required. Therefore, I do not proposed to issue notice to respondents nos. 2 and 3, who are proposed accused which deciding this application.

4. Learned counsel for the applicant invited the attention of the Court on Annexure No.2 to the affidavit appended along with this Criminal Miscellaneous Application which is the application under Section 156(3) Cr.P.C. moved by the applicant before the Chief Judicial Magistrate Fatehpur. A perusal of said application indicates that the applicant is a DIG Administration Working in Railway Protection Force, Railway Board, Rail Bhawan, New Delhi and is member of Scheduled Tribes. On 8.7.2007 at 5.00p.m. he started his journey from Sampoorna Kranti Express Train No.2394 from New Delhi in F-Cabin of AC-Ist class Coach. In the said cabin the two proposed accused persons were also travelling. During the journey respondent no.2 Smt. Sujata introduced respondent no.3 Ms. Bandana Preyashi to be her sister and herself as the wife of an I. P.S. officer of Bihar cadre. The conversation between them started and the applicant informed that he is going to Patna on some official visit and he belongs to Himachal Pradesh. It is further alleged that Smt. Sujata started insisting for change of birth, which was declined by the applicant as he had to do some official work while travelling and had some medical problem with his right ankle as well. It is further alleged that the two ladies got annoyed and the petitioner was addressed by his caste in the conversation between them and they also among themselves, exchanged something in exasperation. After sometime the baby of Smt. Sujata started disturbing the applicant and started playing with the applicant's mobile phone on which the applicant objected and requested Smt. Sujata to control her child. After sometimes it is alleged, that the child picked up the paper and torned the notes, inked by the applicant. Applicant on this took the child to task which act infuriated Smt. Sujata who being highly agitated started abusing filthily words and uttered derogatory remarks which according to the applicant are "*Your Bastard Tribals; Chooti Jaat Ka Scheduled Tribe; Ise Bihar Pahunchne per dekh lenge.*" Meanwhile the security aid of the applicant Sri Ramzan ASI/RPSF entered into the cabin to inquire about the dinner. Two more co-passengers standing in passage also witnessed the incident. Applicant felt humiliated because of the utterances and protested against it. At 12.20 a.m. applicant switched on the reading lamp to attain the natures call but was scolded by Smt. Sujata asking him to put off the lamp. The applicant tried to pacify her but was faced with following utterances *"Your bloody jungles, Bihar aane wala hai, I will teach you some manners by getting you sent behind the bars."* Applicant then called the coach attendant and on his arrival Smt. Sujata started crying that the applicant has misbehaved with her and in that venture she was joined by applicant no.2 as well. It is further alleged that out of the two ladies Smt. Sujata forcibly snatched the official mobile phone and identity card of the applicant and did not allow to applicant to go out of the Cabin. Sri S.N. Singh, Coach Attendant, however, got the mobile phone and identity card of the applicant returned to him. It is further

alleged that to defame the applicant both ladies got adverse news made in the media both print and visual against the applicant who felt helpless at Patna where those two ladies wielded their powers and influence against him. After completion of his work applicant returned to Delhi and then sent a complaint S.P. Railways, Allahabad, S.H.O. G.R.P. Fatehpur on 13th July under postal Certificate followed by another complaint dated 28th July 2007. He also dispatched the complaint to Director General of Police, Uttar Pradesh, Lucknow and DG/Special Branch Lucknow but no action was taken against the ladies. It is alleged that the accused persons not being a member of SC/ST intentionally insulted and intimidated the applicant with the intention to humiliate him on 8/9th July 2007 within the public view and they also gave false and frivolous information to the public servants who then use their lawful power to the annoyance the member of the SC/ST and resultantly the proposed accused have committed offence under Section 3 of SC/ST (Prevention of Atrocities) Act, 1989. It was, therefore, prayed that the accused persons have committed offences under Sections 341, 379, 506 I.P.C and Section 3 SC/ST (Prevention of Atrocities Act, 1989). Wielding the power of the Magistrate under Section 156(3) Cr.P.C. it was prayed that the FIR be got registered against the accused persons and the investigation be ordered.

5. Chief Judicial Magistrate, Fatehpur vide his impugned order dated 8.8.2007 rejected the said application by passing a detailed order wherein he has mentioned that against the applicant a case under Section 354 IPC is registered in which even the charge sheet has been submitted. He also recorded a finding that the incident is alleged to be at 1.00 a.m. and at that time the train Sampoorna Kranti Express 2394 had reached Sirathu in district Allahabad. He also recorded a finding that the incident occurred inside the AC Coach and not in a public view. Relying upon a judgement reported in ***Moolbaksh 25 Criminal Law General page 439*** C.J.M. Fatehpur came to the conclusion that the FIR should have been got registered at Patna. He was of the opinion that under Section 156(3) Cr.P.C. only that court should pass an order for registration of FIR and investigation which has got the jurisdiction to take cognizance under Section 190 Cr.P.C. and holding thus, C.J.M. Fatehpur rejected the application under Section 156(3) Cr.P .C. filed by the applicant, which order is under challenged in this Criminal Miscellaneous Application.

6. After hearing the arguments of learned counsel for the applicant and the learned AGA and after going through the averment made in the application it is perceptibly clear that the offence alleged was committed during the course of journey. If any offence is committed during the course of the journey then the FIR can be registered at any place, which falls during the course of the journey. C.J.M. Fatehpur is not right in holding that he had no jurisdiction and the train had reached Sirathu. The incident had occurred during the course of a journey and it started much before Sirathu. The opinion of C.J.M. Fatehpur, therefore, in my view, is not right that he had no jurisdiction to take cognizance of the offence. Criminal Procedure Code in Chapter XIII from Section 177 to 189 deals with jurisdiction of criminal courts

in inquiry and trial. Section 183 Cr.P.C. provides as follows:-

"183. Office committed on Journey or voyage- *when an offence is committed whilst the person by or against whom, or the thing in respect of which, the offence is committed is in the course of performing a journey or voyage, the offence may be inquired into or tried by a Court through or into whose local jurisdiction that person or thing passed in the course of that journey or voyage."*

7. The aforesaid provision clearly indicates that it is not essential for a person to lodge complaint in the Court of origin of journey or the court of its destination. In the present case the journey started from Delhi and ended at Patna and therefore, the applicant was well within his right to lodge a complaint at any intervening district before the competent Magistrate. Chief Judicial Magistrate, Fatehpur wrongly interpreted the said provision by holding that the FIR should have been got lodged at Patna. This opinion of CJM is contrary to Section 183 Cr.P.C. ex-facie and on this ground alone I set aside the impugned order dated 8.8.2007 passed by CJM Fatehpur on the application of the applicant under Section 156(3) Cr.P.C.

8. Resultantly, this application is allowed. The impugned order dated 8.8.2007 is hereby quashed and the matter is remanded back to CJM Fatehpur to decide the application of the applicant afresh in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 9213 of 2008

Smt. Vakila ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Pandey
Sri M.I. Faruqui

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

U.P. Zamindari Abolition & Land Reform Act, 1950-Section 198 (9) 132-allotment of land in the year 1991-reserved for public purpose-benefit of deemed abatement under Section 198 (9) not available-after 10.11.1980-held-cancellation proper.

Held: Para 9

The above provision indicates that allotments, made prior to 'said date' i.e., November 10, 1980, of land specified under Section 132 as *sirdar or bhumidhar* shall be treated to a *asami* year to year, thus, the above deeming clause comes in operation with regard to land allotted prior to November 10, 1980. The allotment to the petitioner in the present case is allotment which was made with the approval dated 14th August, 1991 subsequent to specified date. The Legislature itself confined deeming clause as *Asami* with regard to only those *sirdar or bhumidhar* who were allotted land prior to November 10, 1980. The said legal fiction or benefit cannot be extended to the allottees of land specified under Section 132 .of the Act who were allotted land after the said

date, i.e., November 10, 1980. Thus, the petitioner's submission that he became *Asami* of the land specified Section 132 of the Act, cannot be accepted. The allotment in favour of the petitioner, being allotment of land which was recorded as river, was illegal and has rightly been set aside. No grounds have been made out to interfere in the impugned order in exercise of writ jurisdiction by this Court.

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

1. Heard Sri Sanjeev Kumar Pandy, learned counsel for the petitioner.

2. By this writ petition petitioner has prayed for quashing the order dated 4.8.2006 passed by Additional Collector directing for cancellation of lease granted to the petitioner, as well as the order dated 26.12.2006 passed by Additional Commissioner dismissing the revision.

3. The petitioner was granted lease by the approval of the Assistant Collector dated 14th August, 1991 along with several other persons. A report was submitted by Sub Divisional Officer, Modinagar dated 4th April, 2006 to the effect that by order dated 16th March, 1995 the land was allotted for agricultural whereas the land which has been allotted is a land of river and is for public utility within the meaning of Section 132 of U.P. Zamindari Abolition and Land Reforms Act, 1950 which could not be recorded. The recommendation was made for cancelling the lease. A case was registered and *suo-moto* exercise of power notices were issued to the petitioner. An objection was filed by the petitioner to the effect that the land was allotted by the Land Management Committee for agricultural purposes and it has wrongly been recorded as river in C.H. form no. 45 and it should be corrected as *bhumidhari*. It has further been stated that the name of petitioner was reported as *Asankramaniya bhumidhar* and the petitioner is in possession. The Additional Collector took a view that the land is a land within the meaning of Section 132 of U.P. Zamindari Abolition and Land Reforms Act, 1950, hereinafter referred to as 'the Act', and the same could not have been allotted and the allotment is cancelled. The revisional court affirmed the order.

4. Learned counsel for the petitioner, challenging the order, contends that the petitioner is *Asami* of the land within the meaning of Section 132 of the Act and he has right to retain possession of the land as provided under Section 133 and 146 of the, Act. He submits that even though the entry of *Asankramaniya bhumidhar* is there in the record in the name of petitioner but the petitioner is entitled to continue in possession. He further contends that the lease was not liable to be cancelled even if the land is recorded as river.

5. I have considered the submissions made by the learned counsel for the petitioner and perused the record.

6. The petitioner himself has filed the extract of revenue entry of *Kisan Bahi* which is annexure-1 to the writ petition, which clearly indicates that petitioner is recorded as lease holder as *Asankramaniya bhumidhar* of the land in dispute. The petitioner in the objection has also claimed that he having allotted the land by the Land Management Committee, her name as *Asankramaniya bhumidhar* has rightly been recorded. It has been stated that in the consolidation record the land is still shown as river

whereas said word 'river' ought to have been corrected when the lease was granted to the petitioner.

7. The factual matrix, as emerge from the material on record, clearly indicates that the petitioner's allotment of the land was not an *Asami* but the allotment was made as *Asankramaniya bhumidhar* which is recorded in record and which is specific case of the petitioner in the written objection filed to the reply of notice under Section 198(4) of the Act. Learned counsel for the petitioner in his submissions, has tried to improve the case by relying on Section 132, 133 and 146 of the Act. On the land which is covered under Section 132 of the Act no *bhumidhari* right can accrue as laid down by Section 132 of the Act itself. It is true that certain lands which are covered under, Section 132 of the Act can also be allotted as *Asami* by the Land Management Committee but by virtue of Section 197 sub-section (2) of the Act the right to admit any person as *Asmai* of any tank, pond or other land, covered by water shall be regulated by the rules made under this Act. The allotment of tank, pond or other land are governed by the Government Orders issued under Section 126 of the Act. The present case is not a case where allotment has been made within the meaning of Section 197(2) of the Act. Government Orders with regard to allotment of tank, pond or other land covered by water. In the present case the Land Management Committee has exercised power under Section 195 of the Act in allotting the land to the petitioner. The Additional Collector has rightly come to the conclusion that the lease cannot be granted of land which is covered under Section 132 of the Act. The reference of Section 133 and 147 of the Act does not help the petitioner in the present case since petitioner is not granted *Asami* lease as contemplated under Section, 197(2) of the Act. Leaned counsel for the petitioner has tried to make submissions defending the title and right as *Asami* but there is no foundation for the above submissions.

8. There is one more reason for not accepting the above submissions of learned counsel for the petitioner. Section 198 sub-clause (9) of the Act contains the deeming clause with regard to any land specified in Section 132 as a *sirdar or bhumidhar* with non-transferable rights prior to a specified date. Section 198(9) of the Act quoted below:

"198(9) *Where any person has been admitted to any land specified in Section 132 as* a sirdar or bhumidhar with nontransferable rights at any time before the said date and such admission war made with the previous approval of the Assistant Collector in charge of the sub-division in respect of the permissible area mentioned in Sub-section (3), then notwithstanding anything contained in other provisions of this Act or in the terms and conditions of the allotment or lease under which sub person was admitted to that land, the following consequences, shall, with effect form the said date ensure, namely:

(a) the allottee or lessee shall be deemed to be an asami of such land and shall be deemed to be holding the same from year to year, and the allotment or lease of the land to the extent mentioned above shall not be deemed to be irregular for the purposes of sub-section (4);
(b) the proceedings, if any, pending on the said date before the Collector or any other court or authority for all

cancellation of the allotment of lease of such land, shall abate.

9. The above provision indicates that allotments, made prior to 'said date' i.e., November 10, 1980, of land specified under Section 132 as *sirdar or bhumidhar* shall be treated to a *asami* year to year, thus, the above deeming clause comes in operation with regard to land allotted prior to November 10, 1980. The allotment to the petitioner in the present case is allotment which was made with the approval dated 14th August, 1991 subsequent to specified date. The Legislature itself confined deeming clause as *Asami* with regard to only those *sirdar or bhumidhar* who were allotted land prior to November 10, 1980. The said legal fiction or benefit cannot be extended to the allottees of land specified under Section 132 .of the Act who were allotted land after the said date, i.e., November 10, 1980. Thus, the petitioner's submission that he became *Asami* of the land specified Section 132 of the Act, cannot be accepted. The allotment in favour of the petitioner, being allotment of land which was recorded as river, was illegal and has rightly been set aside. No grounds have been made out to interfere in the impugned order in exercise of writ jurisdiction by this Court.

10. The petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 50842 of 2007

Nitin Katara and another ...Petitioners
Versus
U.P. Technical University, Institute of Engineering and technology, Lucknow and others ...Respondents

Counsel for the Petitioners:
Sri R.C. Katara

Counsel for the Respondents:
Sri Neeraj Tiwari

Constitution of India-Art. 226-Education-Petitioner a B. Tech student-claimed benefit of decision of academic council dated 20.9.06-to allow him to appear in 4th year examination without clearance of Ist year-held-no relaxation be granted in contravention of ordinance-before relaxation has to clear Ist year examination-court declined to interfere.

Held: Para 16

This being the position, this Court is not inclined to interfere in the matter. The counsel for the University states that as soon as the petitioner clears all papers of the first year, his result of third year will be declared which has been withheld in accordance with the Ordinance and if the petitioner is declared passed, he will be given admission. The petitioner may clear all papers of the 1st year examination if he so desires. No student can be permitted to be promoted in the next semester in contravention of the Ordinance. Once relaxation has been granted, he should clear all papers of the 1st year examinations.

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

1. Heard counsel for the petitioner and Sri Neeraj Tiwari for the respondents.

2. The counsel for petitioner submits that under U.P. Technical University Ordinance for Bachelor of Technology Programmes which has been approved by academic council in its meeting dated 20th Sep. 2006 and has been made effective from the session 2006-07, the petitioner is eligible for declaration of his result and appear in 4th year without passing the carry over papers or clearing 1st year examinations.

3. He has also relied upon the judgment in **Pravesh Kumar Dubey Vs. University of Kanpur and another** (1990 All. L.J.-832), wherein it has been held that the student who have been declared passed by inadvertence of University authorities and appeared for next year examination, the University is estopped from refusing to declare his result on the ground that he had failed in previous examination and his result is to be declared.

4. He has also relied **Miss Sangeeta Srivastava Vs. Prof. U.N. Singh and others** (A.I.R. 1980 Delhi 27). In this Case the Court was considering the question of equitable estoppel. In that case, inaction by the University resulted in admission to non eligible candidate. It was held that the principle of equitable estoppel operated and the University could not refuse her from appearing in the examination when the candidate had placed all facts before the University and had no committed any fraud or misrepresentation. It was further held that the ordinance of the University permitted grant of exemption in certain cases and therefore non eligibility of the student would amount to mere irregularity and would not be ultra vires of the ordinance. In that case, ordinance of Delhi University was under consideration by the Court.

5. Counsel for the petitioner then relied **Ravinder Pal Jindal Vs. Punjabi University. Patiala** (1990 (2) Services Law Reporter 332). In that case the petitioner was LI.B. student, who could not appear in the first paper of company law of third semester on account of illness. He sought permission from the University to appear in the next examination and permission was granted to him to appear in the said paper in the examination to be held on 30.3.1988. The petitioner appeared but could not succeed, hence the petitioner was not allowed to appear in that paper in the next examination. Thereafter, the petitioner was also allowed to join the future course of law i.e. 5th and 6th semester. It was held that the petitioner was entitled for appearing in the said paper within a period of five years from the date of joining the 1st semester and the order disallowing him to appear in the said paper was set aside.

6. Another case which has been relied by the counsel for petitioner is **Amiya Krishna and another Vs. Dr. Bhem Rao Ambedkar University. Agra and another** (2007(2) ESC 1105 (Alld.). In that case, the petitioner was not allowed to appear in the regular second year examination of B.D.S. course because of delay in declaration of the result of supplementary examination. The Court held that delay was caused by respondent university and the student was

not at fault. Hence the petitioner was permitted to appear in the examination.

7. Lastly, the counsel for petitioner has relied on **Sanatan Gauda Vs. Berhampur University and others** (AIR 1990 S.C. 1075). In that case question of estoppel was considered by the Court. The candidate was admitted to law course by law college. The University also permitted him to appear in pre-law and intermediate Law examinations. He was also admitted to final year course. In that context, the Court held that refusal to declare result by the University on ground of ineligibility to be admitted to law course, was barred by estoppel.

8. In **Kum. Bhanu Priya Vs. Union of India and others** (2007(3) ESC 1802(All), the petitioner had secured 174 marks in entrance examination conducted for admission. Candidates securing lesser marks than the petitioner were granted admission by the authority. In that circumstance, action of the University was held to be illegal. Since the course has been already commenced, no direction was issued for admission or permit her to appear in B. Com. examination 2006-07. However, college was directed to pay cost of Rs.25000/- to the petitioner for spoiling one academic year of her career.

9. The cases cited by the counsel for the petitioner are not applicable to the facts of the present case.

In **Pravesh Kumar Dubey** (supra), student was erroneously declared passed by inadvertence of the University authorities, hence University estopped from refusing to declare his subsequent result.

Miss Sangeeta Srivastava (supra) was also a case of inaction by the University which is not the position in the present case.

10. Similarly the case of **Ravinder Pal Jindal** (supra) is also distinguishable from the facts of the present case. In that case, the University had given admission to the petitioner in 5th and 6th semester without his having passed earlier one paper in 3rd semester. In those circumstances, the University was directed to allow the petitioner to appear in the examination in the paper he had failed.

11. The case of **Amiya Krishna** (supra) was a case of delay in declaration of the result, which is also not applicable in the instant case.

12. As regards the case of **Kum. Bhanu Priya** (supra), in that case students securing lesser marks than the petitioner in the Entrance Examination were granted admission, which is not the controversy in the instant case.

13. In the case of **Sanatan Gauda** (supra), the appellant had passed M.A. examination in July 1981 securing more than 40% of the total marks. In 1983 he secured admission in Ganjam Law College for three years Law course. At the time of admission, he had submitted his mark sheet alongwith his M.A. degree certificate. The appellant completed his first year course known as Pre Law Course and in 1984 he was promoted to the second year "Intermediate Law Course". In 1985 the appellant appeared for Pre Law and Inter Law examination held by Berampur University to which the Ganjam Law College is affiliated and was

admitted to the Final Law course in the same college but his results for the Pre Law and Inter Law examinations were not declared. The appellant had also made representations to the Bar Council of India and the Administrator of Berhampur University, who replied that since the appellant had secured less than 39.5% marks in his M.A. degree examination, he was not eligible for admission to the law Course. In was in that context that the Apex Court had decided that once a candidate had been admitted in Law course and had passed Pre Law and Intermediate law examinations, he was entitled to declaration of result of the final year.

14. In the instant case, it is not in dispute that the petitioner had been admitted in B. Tech. course of session 2004 of U.P. Technical University. It is also not in dispute that the petitioner did not clear all papers of 1st year examination i.e. 1st and 2nd semester. Though the petitioner has given names of some students in paragraph 12 & 13 of the writ petition who are said to have been promoted but the same has been denied by the University that these students have been promoted alongwith the petitioner and they all have cleared their first year examinations i.e. 1st and 2nd semester whereas the petitioner is the only student who has not cleared all papers of the first year. According to the counsel for the University, this relaxation has been given to the petitioners under powers of Ordinance 23 applicable at that time.

15. Therefore, no case of discrimination has been made out by the petitioner. Those students who have been granted promotion by relaxation for appearing in 2nd to 4th year, they all have cleared first year examinations.

16. This being the position, this Court is not inclined to interfere in the matter. The counsel for the University states that as soon as the petitioner clears all papers of the first year, his result of third year will be declared which has been withheld in accordance with the Ordinance and if the petitioner is declared passed, he will be given admission. The petitioner may clear all papers of the 1st year examination if he so desires. No student can be permitted to be promoted in the next semester in contravention of the Ordinance. Once relaxation has been granted, he should clear all papers of the 1st year examinations.

17. The writ petition is dismissed. No order as to costs. Petition dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2008

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

Special Appeal No. 1070 of 1998

Rajendra Prasad Yadav ...Appellant
Versus
Chairman, Sanyukt Kshetriya Gramin Bank, Azamgarh & others ...Respondents

Counsel for the Appellant:
Sri G.K. Singh
Sri V.K. Singh

Counsel for the Respondents:
Sri A.B. Saran
Sri Parmatma Rai

Constitution of India-Art. 226-Practice & Procedure-facts stated in Rejoinder affidavit-can not be ignored-provided proper opportunity to contravening the same given.

Held: Para 22

We may also record that if certain facts are stated in the rejoinder affidavit for the first time, the same cannot be ignored by a Court of Law, inasmuch as the statements so made are supported by affirmance on oath. These new facts, however, may not be taken into consideration unless and until an opportunity is afforded to the respondents in the writ petition to controvert these new facts stated in the rejoinder affidavit. Therefore, the Hon'ble Single Judge was not justified in ignoring the facts, which were stated in the rejoinder affidavit.

Case law discussed:

AIR 1976 SC 490, 1974 (1) SLR 217, 1999 SCC (L&S) 788, AIR 1996 SC 2733, AIR 1974 SC 87, AIR 1998 SC 2565, AIR 2000 SC 2513, (2001) 5 SCC 60; (2002) 4 SCC 16, JT 1990 (3) SC 468, 2004 (1) ESC 19, (2006) 6 SCC 145

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

1. Heard counsel for the parties.

2. Nobody has put in appearance on behalf of respondent Nos. 4 to 46 despite service by publication.

3. This special appeal is directed against the judgment and order of the Hon'ble Single Judge dated 07th November, 1998 passed in Civil Misc. Writ Petition No. 12315 of 1990; Rajendra Prasad Yadav Vs. Chairman, Sanyukt Kshetriya Gramin Bank, Balrampur Branch, Azamgarh. The facts giving rise to the present special appeal are as follows:

4. Sanyukt Kshetriya Gramin Bank, Balrampur Branch, Azamgarh is a rural bank. Petitioner-appellant was appointed on the post of Junior Clerk-cum-Cashier on 17.02.1982. He was promoted on the post of Senior Clerk-cum-Cashier in the year 1984. The next promotional post in the cadre is of Field Supervisor. The petitioner-appellant filed writ petition before this Court challenging therein that the criteria for promotion on the post of Field Supervisor is seniority-cum-merit, persons junior to petitioner and having inferior service record have been granted such promotion on the post of Field Supervisor under the select list published on 12.04.1990. He, therefore, prayed that he may also be granted similar promotion from the date persons junior to him have been promoted from the date persons junior to him have been promoted.

5. On behalf of the respondents counter affidavit was filed in the writ petition and it was contended that the criteria for promotion had been laid down under the circular of the Board dated 10th April, 1989, wherein after interview assessment of performance for promotion to the post of Field Supervisor had been made. Petitioner could not succeed therefore superseded. Reliance has been placed upon the judgment of Hon'ble Supreme Court in the case of *Sri Jagathigowda C.N. & Ors. V. Chairman Cauvery Gramin Bank & Ors.;* AIR 1996 SC 2733.

6. The Hon'ble Single Judge, after hearing counsel for the parties, under the impugned judgment and order held that petitioner had appeared in the interview and since he had not been selected it cannot be said that his any legitimate claim has been ignored. It has further

been held that the petitioner could not demonstrate that the persons mentioned in paragraphs 12 and 16 of the writ petition had performed poorly in interview and assessment report was equal to that of the petitioner or lesser than that of the petitioner. Lastly it has been recorded that since there is no allegation of bias or mala fide against the selection committee neither it has been alleged that the petitioner had outstanding or very good performance, he is not entitled to any relief.

7. The Hon'ble Single Judge in last but one paragraph of the said judgment has further noticed that certain facts stated for the first time in the rejoinder affidavit do make out a case in favour of the petitioner but since no opportunity has been given to the respondents to counter the said facts, the facts so pleaded in the rejoinder affidavit can not be taken note of.

8. The judgment of the Hon'ble Single Judge is being questioned basically on the ground that the Hon'ble Single Judge has failed to appreciate that the criteria, as admittedly applicable for promotion on the post of Field Supervisor, in the facts of the case was seniority-cum-merit. The criteria has been explained by the Hon'ble Supreme Court in the series of judgments and it has been held that it is open to employer to fix a minimum standard which every candidate must clear for being promoted under the said criteria and all those candidates who clear the said standard become entitled for promotion in order of seniority. It is, therefore, submitted that the Hon'ble Single Judge has failed to appreciate the aforesaid legal proposition qua criteria to be applied for promotion under the rules applicable. It is also contended that if certain new facts had been stated in the rejoinder affidavit, the same could not have been ignored, at best time could have been granted to respondents to file reply to the additional facts stated in the rejoinder affidavit, which was neither prayed for nor granted.

9. The first contention raised on behalf of the petitioner may be examined with reference to the law laid down by the Hon'ble Supreme Court determining the criteria to be applied in case of promotion where rules provide for seniority-cum-merit as the test.

10. A Seven Judge Bench of the Hon'ble Supreme Court, in State of Kerala & Anr. Vs. N.M. Thomas & Ors., AIR 1976 SC 490, observed as under:-

"Seniority cum merit' means that given the minimum necessary merit requisite for efficiency of administration, the senior, though less meritorious, shall have priority. This will not violate Articles 14, 16 (1) and 16 (2) of the Constitution of India."

11. In Sadi Lal Vs. Deputy Commissioner, Gurgaon & Ors., 1974 (1) SLR 217; and Govind Ram Purohit & Anr. Vs. Jagjiwan Chandra & Ors., 1999 SCC (L&S) 788, a similar view has been reiterated. Thus, it is apparent that the Apex Court provided for giving seniority a weightage without compromising with the merit as the candidate had to possess the minimum requisite merit.

12. In Sr. Jagathigowda C.N. & Ors. Vs. Chaiman, Kaweri Gramin Bank & Ors., AIR 1996 SC 2733, the Apex Court has observed as under:-

"It is settled proposition of law even while making promotion on the basis of seniority cum merit, the totality of the service record of the officer concerned has to be taken into consideration. The performance Appraisal Forms are maintained primarily for the purpose that the same are taken into consideration when the person concerned is considered for promotion to the higher rank."

13. In Union of India Vs. Mohan Lal Capoor, AIR 1974 SC 87, it was held as under:

"For inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale."

14. In B.V. Sivaiah Vs. Addanki Babu, AIR 1998 SC 2565, the Hon'ble Supreme Court held that the principle of "merit-cum-seniority" lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal.

15. In Union of India Vs. Lt. Gen Rajendra Singh Kadyan, AIR 2000 SC 2513, it was observed as under:-

"Wherever fitness is stipulated as the basis selection it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of Seniority-cum-merit. Merit-cum-suitability with due regard to seniority as prescribed in the case of promotion to All-India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them."

16. The said principle was approved, reiterated and followed by the Hon'ble Apex Court in The Central Council for Research in Ayurveda and Siddha Vs. Dr. K. Santhakumari, (2001) 5 SCC 60; and Bibhudatta Mohanty Vs. Union of India & Ors., (2002) 4 SCC 16.

17. In K. Samantaray Vs. National Insurance Company Ltd., AIR 2003 SC 4422, the Hon'ble Apex Court explained the distinction and difference between principles of merit-cum-seniority and seniority-cum-merit, placing reliance upon earlier judgments in Sant Ram (Supra); Syndicate Bank Scheduled Castes and Scheduled Tribes Employees Association & Ors. Vs. Union of India & Ors. JT 1990 (3) SC 468; and held that for the purpose of promotion, even on seniority-cum-merit, weightage in terms of numerical marks for various categories, the authority is permitted to work out the marks for individual head otherwise the word 'merit' would loose its sanctity.

18. A Division Bench of this Court in Rajendra Kumar Srivastava & Ors. Vs. Samyut Kshetriya Gramin Bank & Ors., 2001 Lab.I.C. 4086, considered the similar provision applicable in a similar

Bank providing for promotion on similar circular observing as under:-

"No doubt in Sivaiah's case (supra) more than 50% marks set apart for interview and performance but in that case only those who secured highest marks were ultimately promoted and that was declared illegal by the Supreme Court. The present case is distinguishable. This is not a case were those who got highest marks in the interview and appraisal were promoted rather those persons who got minimum of 78% marks were considered eligible and from them promotion was made on the basis of seniority. It is settled law even where the selection is done on the basis seniority-cum-merit, a minimum eligibility requirement can be fixed by the authorities."

19. Another Division Bench while deciding Writ Petition No. 7385 of 1989, Kamal Prakash Singhal Vs. The Chairman Aligarh Gramin Bank, Aligarh along with other petitions, vide judgment and order dated 07.04.2004, upheld the circular fixing standing marks for promotion and dismissed the petition. While deciding the said case, reliance had been placed upon the earlier judgment of this Court in Rajendra Kumar Srivastava (supra); and Vinod Kumar Verma Vs. Union of India & Ors., 2004 (1) ESC 19.

20. The Hon'ble Supreme Court in the latest judgment in the case of *Hari Goving Yadav Vs. Rewa Sidhi Gramin Bank & Ors.*; reported in **(2006) 6 SCC 145 (Para 21 and 22)** has clearly laid down that it is open to the employers to lay down a minimum standard for the purpose of judging the merit of the candidate within the eligibility zone and all those persons who clear the minimum standard are entitled for promotion in order of seniority.

21. In view of the aforesaid settled legal proposition, which has not been taken note of by the Hon'ble Single Judge it was open to the employer in the facts of the case to fix a minimum standard which a candidate should achieve before he could be granted promotion having regard to his seniority. But it was not open to the employer to make appointments on the basis of relative merit secured by the candidates on the basis of the marks fixed for various disciplines ignoring the seniority. We are of the opinion that the judgment and order of the Hon'ble Single Judge has run contrary to the law laid down by the Hon'ble Supreme Court, as noticed herein above.

22. We may also record that if certain facts are stated in the rejoinder affidavit for the first time, the same cannot be ignored by a Court of Law, inasmuch as the statements so made are supported by affirmance on oath. These new facts, however, may not be taken into consideration unless and until an opportunity is afforded to the respondents in the writ petition to controvert these new facts stated in the rejoinder affidavit. Therefore, the Hon'ble Single Judge was not justified in ignoring the facts, which were stated in the rejoinder affidavit.

23. Normally we would have remanded the matter for examination afresh to the Hon'ble Single Judge, however, such a course is not being followed in the present case, inasmuch as the persons, who had already been promoted and who had been impleaded as respondent nos. 4 to 46 are not before us,

directing their impleadment in the writ petition and notices being issued to them afresh on restoration of the writ petition to its original number, which is of the year 1998, would only prolong the dispute for many more years.

24. In such circumstances, we feel it appropriate to dispose of the present writ petition as well as the appeal with liberty to petitioner to approach the Board of Directors of the Bank itself at the first instance in respect of the grievance raised qua his super session with specific reference to the reasons recorded herein above by us qua the criteria to be applied in the case of seniority-cum-merit.

25. Accordingly, the petitioner is granted liberty to file his representation ventilating all his grievances before the Chairman of the Bank within two weeks from today alongwith certified copy of this order as well as Photostat copies of the judgment in support of his claim. On such representation being filed, the Chairman of the Bank shall place the same before the Board of Directors, which may, after affording opportunity of hearing to the parties concerned, take fresh decision in the matter strictly in accordance with law by means of a reasoned speaking order, preferably within eight weeks thereafter.

26. With the aforesaid observations/directions the present special appeal is disposed of finally.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.02.2008

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

Special Appeal No.690 of 2007

Gobari Yadav & another ...Appellants
Versus
District Inspector of Schools, Deoria and others ...Respondents

Counsel for the Appellants:
Sri R.C. Singh

Counsel for the Respondents:
S.C.

Constitution of India Art. 226-Payment of Salary- petitioner/ Appellants appointed on the post of peon in recognized Inter Mediate College-without advertisement without following the procedure for appointment in consonance of provisions Article 14 and 16 of Constitution-Single Judge declined to interfere-even in appeal inspite of time granted to produce the documents relating to their appointment-No reply given in counter affidavit allegation of forged appointment letter-not controverted-No relief can be granted.

Held: Para 18 & 19

Therefore, it is evident that any appointment made without advertising the vacancy cannot be held to be in conformity with the mandate of Articles 14 and 16 of the Constitution of India and is a nullity.

Appellants claim their appointments in the year 1991 when the 1985 rules were already in force. Even otherwise, if no statutory Rules providing for the procedure of selection exist, selections have to be based on a fair procedure and

in consonance with Articles 14 and 16 of the Constitution of India. It is for this reason that this Court had called upon the appellants to file an affidavit to support the selections on the strength of any advertisement or any other process which could justify the adoption of a fair selection process. In spite of lapse of almost 9 months, no affidavit has been filed nor any material has been brought on record to substantiate the presumption of a fair procedure of selection. On account of this lapse on the part of the appellants, it is difficult for us to assume that the appointment of the appellants was made in accordance with law.

Case law discussed:

1987 UPLBEC 553, 1993 ESC 265, AIR 1992 SC 789, AIR 1992 SC 2130, (1996) 6 SCC 216, AIR 1987 SC 1227, AIR 1998 SC 331, (2000) 9 SCC 405, (2000) 10 SCC 82, (2004) 8 SCC 353, AIR 2005 SC 2103, AIR 2006 SC 2319, 2008 AIR SCW 704, (2006) 4 SCC 1, AIR 2006 SC 1165

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

1. The appellants preferred the writ petition, which has given rise to this Special Appeal, claiming payment of salary as Peon in an Intermediate College, which is duly recognised and governed by the provisions of the U.P. Intermediate Education Act, 1921 and the Regulations framed thereunder read with U.P. Act No. 14 of 1974 (Payment of Salary Act). The claim was founded on the strength of letters of appointment which are annexures 1 and 2 respectively to the writ petition. The said letters of appointment are stated to have been issued by the Principal of the institution, who is the Appointment Authority. The matter was taken up by the District Inspector of Schools at the time of grant of financial sanction on which a query was raised by the District Inspector of Schools calling upon the Principal to furnish the documents including the relevant certificates which were necessary for the purposes of verifying the correctness or otherwise of the qualifications of the candidates as claimed by them and further to verify as to whether their candidatures were valid or not.

2. Later on, it transpires that the Committee of Management of the institution raised some objections with regard to the appointments of the appellants, upon which the Principal of the institution sent a letter dated 10th December, 1991 withdrawing the recommendations of the appointments of the appellants and made a request to the District Inspector of Schools not to grant approval. The District Inspector of Schools, thereupon, passed the order dated 30.01.1992 (Annex.4). The writ petition has been filed thereafter in May, 1992 claiming payment of salary with effect from the dates of their joining.

3. A counter affidavit was filed on behalf of the District Inspector of Schools wherein it was stated that the certificate which was relied upon by one of the appellants was forged and this fact has been stated in paragaph 8 of the counter affidavit of Jagdish Prasad Gupta, the Camp Assistant who has sworn the affidavit on behalf of the District Inspector of Schools. The same was, however, denied in paragraph 7 of the rejoinder affidavit and certain explanations were given.

4. The learned Single Judge by the judgment under appeal, refused to go into these questions and opined that the appellants, who are claiming salary as Class IV employees, have alternative and efficacious remedy by approaching the

Labour Court under the provisions of the U.P. Industrial Disputes Act, 1947, and ultimately, dismissed the writ petition on the ground of alternative remedy.

5. Mr. R.C. Singh, learned counsel for the appellants urged that relegating the appellants to an alternative remedy after 15 years of the pendency of the writ petition was absolutely unjustified and that dismissing the writ petition on the said ground amounts to serious miscarriage of justice. He contends that the appointments of the appellants having been validly made and that the appellants were entitled to payment of salary, as once the appointment letters had been issued and there being no provision for approval by the District Inspector of Schools, there was no occasion for withdrawing the recommendations of appointments of the appellants at the instance of the Committee of Management. It is urged that the appointments of the appellants could not have been interfered with and the District Inspector of Schools committed an error by proceeding to refuse to accord financial sanction to the appointments of the appellants on the said ground. Learned counsel for the appellants further contends that the valuable rights had accrued in favour of the appellants which could not have been taken away by adopting such a procedure and, therefore, the appeal deserves to be allowed and the judgment and order of the learned Single Judge deserves to be set aside.

6. This Court entertained this appeal and vide order dated 24.05.2007, called upon the learned counsel for the appellants to furnish the information with regard to the procedure adopted for the selection and appointments of Class IV employees and also requested him to produce the copy of the advertisement which would indicate that the procedure of selection was adopted fairly and in accordance with the rules. Till date, no affidavit has been filed furnishing the said information. It is well settled by now that the appointments on such posts have to be made in accordance with the procedure prescribed under the rule. The post in question is a Class IV post and of Intermediate College, the salary whereof is paid by the State. The procedure for appointment is the same as in Government Schools. There is nothing on record to indicate that the procedure for appointing a Class IV employee was followed by the Appointing Authority for appointing the appellants. It is for this reason that this Court had called upon the learned counsel for the appellants to furnish this information vide order dated 24.05.2007, which has not been done till date. A perusal of the writ petition also does not indicate such averments which may establish that the posts were advertised, a select list was prepared which would indicate as to how many applications were received and that the procedure adopted was in accordance with law. This was necessary in order to find out as to whether the selections and alleged appointments of the appellants were in conformity with the principle of Articles 14 and 16 of the Constitution of India. As noticed above, nothing has been tendered before this Court which may establish the claim of the appellants of having been appointed in accordance with the procedure prescribed by law. In such a situation, the mandamus as prayed for cannot be issued. Not only this, the writ petition was filed after the order dated 30.01.1992 had been passed. The said order was not even challenged before this

Court. The question as to whether any prior approval of the District Inspector of Schools was required or not, does not arise in this case, inasmuch as for the purposes of payment of salary from the State funds, the District Inspector of Schools, who is the Sanctioning Authority, has limited powers of examining the correctness or otherwise of the appointment in order to ensure that the salary is released in favour of a validly appointment person. In the absence of any challenge to the order of the District Inspector of Schools or any prayer having been made for quashing of the same, no mandamus can issue, as the appellants have failed to establish their rights by brining on record any document, which would establish that their appointments had been preceded by following the due procedure of selections.

7. The issue has been examined by a Division Bench of this Court in Radhey Shyam Dube Vs. District Inspector of Schools, Deoria & Ors., 1987 UPLBEC 553, wherein after examining the scheme of the Statute, the Court came to the following conclusion:-

"The first point urged by the learned counsel was that the District Inspector of Schools has no power to approve or disapprove the appointment of a teacher or an employee of an institution. He could not hence go into the validity of the petitioner's appointment. The submission is devoid of any merit. The petitioner himself has repeatedly asserted that what was sought by the District Inspector of Schools was financial approval which was undeniably necessary under the U.P. High School and Intermediate Colleges (Payment of Salaries to Teachers and other Employees) Act, 1971 (the 'Payment of Salaries Act' in brief) and the District Inspector of Schools has done neither more nor less than refused to accord the same. That the District Inspector of Schools does have that limited power, is fully borne out by this Act which was passed with the object of regulating the payment of salaries to teachers and other employees of High Schools and Intermediate Colleges receiving aid out of the State funds and to provide for matters connected therewith. Under this Act the responsibility for payment of salary to teachers and employees of such institution has been cast on the State Government (vide Section 10). The Act requires the institution governed by it to open an account in a bank a separate account to be operated jointly by a representative of the Managing Committee and by the District Inspector of Schools for purposes of disbursement of salaries to its teachers and employees. Eighty percent of the fees realised by the Management has to be deposited in that account. It is from this fund and the Government grant that the salaries of teachers and employees are disbursed under the signatures of the representative of the Management and the District Inspector of Schools. Under certain circumstances the account can be operated by the District Inspector of Schools singly without the association of the Management. The responsibility cast on the District Inspector of Schools to disburse salaries necessarily carries with it an implied power to satisfy himself that the appointment of the teacher or employee whose salary he is called upon to disburse was appointed in accordance with law and in a bona fide manner. For that limited purpose he is free to make an enquiry and satisfy himself within a reasonable time."

8. Similarly, the issue was reconsidered by this Court in Baij Nath Sharma Vs. District Inspector of Schools Jaunpur & Ors., 1993 ESC 265 wherein the Court held that the appointment of a Class IV employee of a College is made under the U.P. Intermediate Education Act, 1921 and Regulations framed thereunder. Neither the Act nor the Regulations framed thereunder provide for approval of the District Inspector of Schools in the matter of appointment of Class IV employee. Therefore, the appointment can be made by the Appointing Authority without any approval of the District Inspector of Schools. But, while dealing with the issue of payment of salary, the Court held as under:-

".....But when it come to the payment of the salary it is governed by the U.P. High School and Intermediate College (Payment of Salary of Teachers and other Employees) Act, 1971 (hereinafter referred to as the Act) under which the D.I.O.S. is the competent authority to decide the question as to whether the employee is entitled to the payment of salary. Whether an employee is entitled to payment of salary depends on several factors such as existence of the sanctioned post, availability of maintenance grant in respect of that post and manner and method of the appointment. Merely, because an employee has been appointed by the appropriate authority the D.I.O.S. is not bound to pay his salary under the Act unless the conditions precedent are satisfied."

9. The Group 'D' Employees Service (U.P.) Rules, 1985, which are applicable in a case of appointment of Class IV employee in Government aided schools by virtue of the Government Orders issued from time to time, provide for procedure for selection. Rule 19 thereof provides that it is obligatory on the part of the Appointing Authority to determine the number of vacancies and to implement the reservation policy of the State and notify the said vacancies to the Employment Exchange and further to provide for advertisement in local daily newspapers besides pasting the notice for the same on the Notice Board.

10. It is settled legal proposition that appointment to any public post is to be made by advertising the vacancy and any appointment made without doing so violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered.

11. In Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi & Ors., AIR 1992 SC 789, the Hon'ble Apex Court held that calling the names from Employment Exchange may curb to certain extent the menace of nepotism and corruption in public employment.

12. In State of Haryana Vs. Piara Singh, AIR 1992 SC 2130, the Hon'ble Supreme Court held as under:-

"Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, ***some appropriate method consistent with***

the requirements of Article 16 should be followed. *In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly."*

13. Any appointment made on temporary or ad hoc basis in violation of the mandate of Articles 14 and 16 of the Constitution of India is not permissible, and thus void as the appointment is to be given after considering the suitability and merit of all the eligible persons who apply in pursuance of the advertisement.

14. In Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao & Ors., (1996) 6 SCC 216, the larger Bench of the Hon'ble Supreme Court reconsidered its earlier judgment in Union of India & Ors. Vs. N. Hargopal & Ors., AIR 1987 SC 1227, wherein it had been held that insistence of requisition of names from employment exchanges advances rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution, and held that any appointment even on temporary or ad hoc basis without inviting application is in violation of the provisions of Articles 14 and 16 of the Constitution and even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from open market as merely calling the names from the Employment Exchange does not meet the requirement of the said Articles of the Constitution. Same view has been reiterated in Arun Tewari & Ors. Vs. Zila Manaswavi Shikshak Sangh & Ors., AIR 1998 SC 331; Kishore K. Pati Vs. District Inspector of Schools, Midnapur & Ors., (2000) 9 SCC 405 and Subhas Chand Dhrupta & Anr. Vs. State of H.P. & Ors., (2000) 10 SCC 82. Therefore, it is settled legal proposition that no person can be appointed even on temporary or ad hoc basis without inviting applications from all eligible candidates and if any such appointment has been made or appointment has been offered merely inviting names from the Employment Exchange that will not meet the requirement of Articles 14 and 16 of the Constitution.

15. A similar view has been reiterated in Pankaj Gupta & Ors. Vs. State of J & K, (2004) 8 SCC 353; Binod Kumar Gupta & Ors. Vs. Ram Ashray Mahoto & Ors., AIR 2005 SC 2103; National Fertilizers Ltd. Vs. Somvir Singh, AIR 2006 SC 2319; and Commissioner Municipal Corporation Hyderabad & Ors. Vs. P. Mary Manoranjani, 2008 AIR SCW 704.

16. In Secretary, State of Karnataka & Ors. Vs. Umadevi & Ors., (2006) 4 SCC 1, a Constitution Bench of the Hon'ble Supreme Court came to the conclusion that adherence to the provisions of Articles 14 and 16 of the Constitution of India is a must in the process of public employment and an employee who has been appointed without following the procedure prescribed by law, is not entitled for any relief, whatsoever, including the salary.

17. In Union Public Service Commission Vs. Girish Jayantilal Vaghela & Ors., AIR 2006 SC 1165, the Hon'ble Supreme Court held that the appointment to any post under the State can only be made after a proper

advertisement has been issued inviting applications from eligible candidates and holding of selection by a Body of Experts, and any appointment made without following the procedure, would be in violation of the mandate of Article 16 of the Constitution of India.

18. Therefore, it is evident that any appointment made without advertising the vacancy cannot be held to be in conformity with the mandate of Articles 14 and 16 of the Constitution of India and is a nullity.

19. Appellants claim their appointments in the year 1991 when the 1985 rules were already in force. Even otherwise, if no statutory Rules providing for the procedure of selection exist, selections have to be based on a fair procedure and in consonance with Articles 14 and 16 of the Constitution of India. It is for this reason that this Court had called upon the appellants to file an affidavit to support the selections on the strength of any advertisement or any other process which could justify the adoption of a fair selection process. In spite of lapse of almost 9 months, no affidavit has been filed nor any material has been brought on record to substantiate the presumption of a fair procedure of selection. On account of this lapse on the part of the appellants, it is difficult for us to assume that the appointment of the appellants was made in accordance with law.

20. Accordingly, even if the contention with regard to the relegation of the appellants to avail the alternative remedy is entertained and the writ petition is called upon to be assessed on merits, even then the appellants have failed to establish their rights and as such in this view of the matter, they cannot ask this Court for the issuance of a writ in their favour. The appeal, therefore, lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.02.2008

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 7391 of 2008

Smt. Shanti Devi ...Petitioner
Versus
Smt. Uma Devi & others ...Respondents

Counsel for the Petitioner:
Sri B.D. Mandhyan
Sri Satish Mandhyan

Counsel for the Respondents:
Sri Ramesh Chandra Tiwari
S.C.

U.P. Punchayat Raj Act 1947-Section 12-C-Election Petition-prescribed authority decided to recounting of entire votes of elected candidate and found 3 votes invalid-request for re-counting of entire votes refused-thus declared the looser candidate as elected-held-process adopted by prescribed authority-indeed a mockery-court expressed its great concern about functioning of administrative officer-as judicial duty-legislature to entrust these function to the persons trained in law.

Held: Para 24 & 25

The revisional court has correctly appreciated the law relating to recount of votes in recording the findings. The entire process adopted by the Prescribed Authority was indeed a mockery on the legal system.

Before parting with the case the Court observes that India is a mature democracy and that courts have to play a very important roll in developing election laws. The Supreme Court and the High Courts have interpreted and developed the election law almost to perfection. There is hardly any area left in election disputes to be clarified by the courts. The election tribunals presided by Officers with judicial background are by and large have advantage of the decisions of the courts in delivering justice in election matters. The executing officers are however found to be severely lacking in application of mind to these laws. A Sub Divisional Magistrate is not trained to understand or appreciate niceties of election laws. Very often the cases are coming to the court where election tribunals manned by executive officers are not in a position to understand or appreciate the evidence and laws. It gives rise to law of uncertainty and provides an opportunity to the defeated candidate to engage the winning candidate in a battle for several years. The lack of appreciation of law and inconsistent decisions rendered by the Prescribed Authorities under the UP Panchayat Raj Act, leave the electorate divided and leads to acrimony. The legislature should consider to entrust these powers to persons trained in law who properly understand the election laws. The persons with training in law preferably a judicial officer will be better equipped to discharge these functions.

Case law discussed:

2003 ACJ 840; 2004 ACJ 1762, AIR 1978 Alld. 260, 2003 (94) RD 108, 2003 (50) ALR 642, AIR 2004 SC 541, 1985 ALJ 615 (Full Bench), 1992 RD 460, 1974 ALJ 371; 2006 ACJ 707; 2008 (104) RD 57 1986 ALJ 1446, 2002 (2) AWC 954, AIR 1983 SC 848, AIR 1975 SC 2117

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

1. The elections to the post of Pradhan of village Medara, Post Karchhana, District Allahabad, were notified in the year 2005 and held on 20.8.2005. In the counting of votes among the three contestants on 29.5.2005, that both Smt. Shanti Devi-the petitioner and Smt. Uma Devi-respondent no. 1, secured 237 votes each and that Smt. Rajwanti Devi-respondent no. 2 polled 235 votes. 35 votes were found to be invalid. In a lottery held in accordance with the Rules between the petitioner and respondent no. 1 securing equal number of votes, Smt. Uma Devi-respondent no. 1 was the draw and was declared elected.

2. The petitioner preferred an election petition under Section 12C (b) of UP Panchayat Raj Act 1947 (in short the Act). The written statement was filed on 7.2.2006. The proceedings were delayed on which the petitioner filed a writ petition in which a direction was issued by this Court to decide the election petition within a period of one year.

3. The Sub Divisional Magistrate, Karchhana, exercising delegated powers of the Election Tribunal under the Act, summoned the entire election records. By his order dated 12.2.2007, after taking evidence the tribunal held on issue Nos. 1 and 2, that the draw was held in accordance with the procedure prescribed under the Rules, with the consent of both the parties. On issue No. 3, the tribunal held on the statement of Indrawati Nishad, son of Shambhu Nath, examined as DW-1, that Smt. Uma Devi-the petitioner had polled 239 votes but the agents of Smt. Shanti Devi exercised undue pressure on the officers and got the ballots counted again in which two votes counted in favour of Smt. Uma Devi was declared as invalid. The Tribunal found that prima facie there was sufficient evidence to show improper rejection of

the two votes in favour of Smt. Uma Devi and directed recount of votes.

4. The Sub Divisional Magistrate, Karchhana, Allahabad proceeded to recount the ballots on 17.2.2007. He opened the sealed bundles of ballots of Smt. Uma Devi-the elected candidates and found that out of 237 ballots, three ballots namely 4AA6456113; 4AA6456122 and 4AA6456216 were stamped on both the election symbols of the election petitioner and the elected candidate. He found that all these three invalid ballots should have been placed in the bundle of invalid ballots and not in the bundles of the elected candidate.

5. In the meantime, a transfer petition was filed by the elected candidate before the then Revenue Officer, who restrained the Sub Divisional Magistrate to pass any final order in the election petition. Aggrieved a revision was filed under Section 192 of the Land Revenue Act before the Commissioner, Allahabad Division, Allahabad.

6. The interim order could not be extended and thus the Sub Divisional Magistrate proceeded to hear the matter. The elected candidate requested for recounting the entire ballots. The Sub Divisional Magistrate in his order dated 7.3.2007, did not accept the request and relying upon recount of votes of elected candidate on 17.2.2007, in which he had found three invalid votes in the bundle of the elected candidate, declared that since she had polled only 234 votes and Smt. Shanti Devi had polled 237 votes she is declared as elected. The election petition was decided accordingly on 8.3.2007.

7. The Sub Divisional Magistrate did not accept the request to recount the entire ballot papers on the ground that the elected candidate did not make any such request before the recount of the ballot papers and that her request for recount of the entire votes is only an opportunistic attitude adopted by her to take advantage of the situation. She could have made such a request before the order of recount on 17.2.2007.

8. Smt. Uma Devi-respondent no. 1 filed a revision under Section 12C (6) of the Act. The revision was heard and allowed by the Additional District Judge, Court No. 1, Allahabad on 25.1.2008.

9. The revisional court allowed the revision on the ground that in absence of sufficient and foolproof evidence of any irregularity in the counting the petition itself was defective. In paragraph-8 of the election petition, Smt. Shanti Devi the elected Pradhan had alleged that on two ballot papers votes were cast for her but the same was placed among the votes polled by Smt. Uma Devi. The Tribunal should not have recounted of votes of Smt. Uma Devi alone. It should have got the votes of all the candidates recounted. The court below recorded a finding that all three ballots were cast in a way that created a doubt as to whether the same were casted for Smt. Uma Devi or Smt. Shanti Devi. The revisional court then observed:- *"the manner in which the Ld. Court below decided the case has already been discussed above where it has been held that whenever any judgement is to be given it should be given on all issues together unless there is any legal issue which requires findings earlier. In this case the learned Court below gave findings on issue Nos. 1, 2 and 3 on*

12.2.2007, thereafter framed additional issue on its own and gave his verdict on the same on 7.3.2007. The entire process appears to be mockery of the legal system. As such the revision deserves to be allowed and impugned judgement ought to be set aside."

10. I have heard Shri Satish Mandhyan, learned counsel for the petitioner and Shri Ramesh Chandra Tiwari learned counsel for the contesting respondent.

11. The affidavits have been exchanged. With the consent of parties, the matter was heard at the admission stage and is finally decided.

12. The short question that arises for consideration in this writ petition is whether Sub Divisional Magistrate/Election Tribunal adopted a correct procedure in firstly deciding all the issues for the order of recount, and thereafter declared the result only on the basis of re-counting of the votes in the bundles of the elected candidate.

13. Shri Satish Mandhyan, learned counsel for the petitioner would submit that the impugned order is ex-facie illegal, arbitrary, whimsical and against the settled position of law. Various irregularities were found in the counting. The returning officer did not accept any of the objection made by the petitioner. The election officer himself made a parchi for lottery and picked up himself. His conduct was against the principle laid down in Section 12-C of the Act. The evidence was led by both the parties. The trial court however framed a fresh issue No.4 and directed recount of votes. It was categorically found that three votes were added to tally of opposite party no. 1, and as a natural consequence of three invalid votes found in the bundle of the elected candidate, the election petition was allowed. The revisional court was biased and did not go behind the order of the trial court. His findings are perverse and are liable to be set aside.

14. Shri Ramesh Chandra Tiwari has supported the reasons given by the revisional court. He submits that the order of recount of ballots could not be confined to recounting of the votes of the elected candidate alone. If three ballots created doubt the entire ballots should have been counted to declare the result. The petitioner had agreed to draw a lottery and had signed on the proceedings. She cannot thereafter turn around and challenge a procedure of draw of lottery. He would further submit that though the order of the Sub Divisional Magistrate was implemented but then after the revisional court order, Smt. Uma Devi elected as pradhan in the year 2005 was given charge and that the District Magistrate has implemented the order on 5.2.2008 implementing the order of the revisional court and that Smt. Uma Devi is functioning as Pradhan.

15. Shri Satish Mandhyan has relied upon judgements in **Om Prakash vs. Ist Additional District Judge, Ballia and others, 1999 ACJ 668; Smt. Bhoori vs. Additional Sub Divisional Magistrate Amroha, and others 2003 ACJ 840; and Bhagauti vs. State of UP and others 2004 ACJ 1762** in support of his submissions to justify the recount of votes on the evidence led by the election petitioner and declaration of result in her favour. He has also cited judgement in case of **Modi Spinning & Weaving Mills**

Co. and another vs. M/s Ladha Ram & Co. AIR 1978 Alld. 260 in which it was held that the power to frame additional issue is a discretionary power. If the court thinks necessary for determining the matter in controversy, it may frame additional issue, which is a matter only of procedure. The framing of such issue does not decide right of any parties and thus it has to be treated as interlocutory order against which a revision under Section 115 is not maintainable.

16. Shri Ramesh Chandra Tiwari has relied upon judgements in **Smt. Hazzee vs. Prescribed Authority & others 2003 (94) RD 108; Sabir vs. Additional District Judge, Bulandshahar & others 2003 (50) ALR 642; M. Chinnasami vs. K.C. Palanisamy and others AIR 2004 SC 541; Ram Adhar Singh vs. District Judge Ghazipur and others 1985 ALJ 615 (Full Bench); Hamraj vs. Sub Divisional Officer 1992 RD 460; Dhanai Prasad vs. Sub Divisional Magistrate Chunar, District Mirzapur 1974 ALJ 371; Tanaji Ramchandra Nimhan vs. Swati Vinayak Nimhan 2006 ACJ 707; Smt. Susma Devi vs. State of UP and others 2008 (104) RD 57 and Raifaqat Hussain vs. Rama Shanker Kaushik 1986 ALJ 1446 and Anwar Ali vs. Prescribed Authority 2002 (2) AWC 954.** He has also relied upon **Gujarat State Financial Corporation vs. M/s Lotus Hotels Private Ltd AIR 1983 SC 848** on promissory estoppel.

17. The substance of all these decisions is set out in **Bhabhi Vs. Sheo Govind** (AIR 1975 SC 2117) as follows:

"(1) That it is important to maintain the secrecy of the ballot which is acrosant and should not be allowed to be violated on frivolous, vague and indefinite allegations:
(2) That before inspection is allowed, the allegations made against the elected candidate must be supported by adequate statements of material facts;
(3) That the Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;
(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;
(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void and
(6) That on the special facts of the given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials."

18. In **S. Raghubir Singh Gill Vs. S. Gurucharan Singh Tohra** (1980 Supp. SCC 53) it was held as under:

"True, re-count cannot be ordered just for the asking. A petition for re-count cannot be ordered after inspection of ballot papers must contain an adequate statement on material facts on which the petitioner relies in support of his case and secondly the Tribunal must be prima satisfied that in order to decide the dispute and to do complete justice between the parties an inspection of the ballot papers is necessary. The discretion conferred in this behalf should not be exercised in such

a way so as to enable the applicant to indulge in a roving inquiry with a view to fishing out materials for declaring the election void."

19. In Tanaji Ramchandra Nimhan (supra) it was held in para-9:-

"9. This Court after referring to a number of prior decisions, has held in Mahendra Pal v. Ram Dass Malanger and others, JT 2002 (2) SC 396; (2002) 3 SCC 457, that an order for recounting cannot be made as a matter of course. Unless the election petition had laid the foundation and there was clinching evidence to support the case set up by the election petitioner, a recount normally could not be ordered. In Chandrika Prasad Yadav v. State of Bihar and others, JT 2004 (4) SC 264; (2004) 6 SCC 331), relying on an earlier decision in M. Chinnasamy v. K.C. Palanisamy and others, (JT 2003 (9) SC 161; (2004) 6 SCC 341), a bench of three Judges (to which one of us S.B. Sinha, J. was a party) held that an election petition seeking a recount must contain a concise statement of material facts and clear evidence in support of the facts pleaded. It was held that a small margin of victory by itself was not a ground for ordering recount. A roving and fishing inquiry was not permissible while directing recount of votes. The requirement of maintaining secrecy of ballot papers had also to be kept in mind before directing a recount."

20. The order of the Sub Divisional Magistrate, Karchhana dated 12.2.2007 summoning of the election records for recount of votes was not challenged. A perusal of the order would show that the Prescribed Authority did not consider the pleadings and the evidence led on the ground of improper acceptance and improper rejection of the ballots. It did not even discuss the evidence to record a prima facie finding that there was any irregularity in counting of votes and that the recount is necessary, after holding, that the procedure of lottery was correctly followed and for which both the parties had agreed in writing. The Prescribed Authority proceeded to order recount for the reasons that irregularity in counting was accepted by the opposite party No. 2 and that Indrawati Nishad son of Shambhu Nath examined by the elected candidate (opposite party no. 1) as DW1, had admitted that Uma Devi had secured 239 votes, but that after the agents of Shanti Devi created pressure, the votes were recounted and two votes of Uma Devi were illegally declared as invalid. These two reasons alone were given as the reasoning for a finding that there was irregularity in counting of votes. The Sub Divisional Magistrate thereafter observed that the irregularity in counting of votes was accepted by all the parties and then directed to summon the election records to recount the votes on 17.2.2007.

21. The Sub Divisional Magistrate did not consider the pleadings and discuss the evidence before recording prima facie findings of irregularity in the elections. The pleadings to the effect that two valid votes of the election petitioner were counted in favour of elected candidate by playing fraud was neither proved nor any finding was recorded on this aspect. The Prescribed Authority did not discuss the evidence led in support of the allegations of improper addition of two valid votes of the election petitioner as the valid votes of the elected candidate. The Supreme Court, in its decision, beginning from 1975 and followed by High Court, has

reminded the election tribunals again and again that the secrecy of the ballot papers should not be lightly disturbed. The order of recount of votes must be supported by adequate statement of material facts and evidence on which the court must be prima facie satisfied regarding the truth of the allegations for the recount. The court must come to conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties. In the present case this mandate was ignored and that the Prescribed Authority without discussing the sufficiency of the statement of material facts and evidence recorded findings on the basis of admissions made by a third candidate arrayed as opposite party no. 2 and on a vague statement given by one of the defendant witnesses.

22. It is apparent from the record that the Prescribed Authority was swayed upon the fact that both the election petitioner and the elected candidate had polled equal number of votes. It did not record a finding regarding sufficiency of evidence supporting the allegations made in the election petition and proceeded to direct recount only on suspicions. The order of recount as such was not sustained and was set aside by the revisional court.

23. Further the court finds that the Prescribed Authority did not pass any order for recount of votes only in favour of election petitioner. An order of recount is passed to ascertain the truth of the allegations made to challenge the elections. If it is found that the votes were either improperly accepted or improperly rejected or there was any material irregularity in elections, the election tribunal was required to recount the entire votes, to arrive at a positive and just conclusion of the result of the elections. The order of recount cannot be carried out partially in counting the votes of the elected candidate or the person/s who were defeated in the elections. The order of recount also cannot be ordered only to count the rejected ballots. If such an order is passed, the election tribunal would never come to a just conclusion of the outcome of the elections. The recount must ascertain the truth and should not be confined to half truth. Once the Tribunal is satisfied that there is sufficient evidence to support the material facts with regard to irregularity in counting, the recount must be made of the entire number of votes as if a fresh recounting is being made. The recount of few votes would not bring out the correct result. The object of the election tribunal in such case would be to find out and to declare the true result and not to support the pleadings of only one of the parties.

24. The revisional court has correctly appreciated the law relating to recount of votes in recording the findings. The entire process adopted by the Prescribed Authority was indeed a mockery on the legal system.

25. Before parting with the case the Court observes that India is a mature democracy and that courts have to play a very important roll in developing election laws. The Supreme Court and the High Courts have interpreted and developed the election law almost to perfection. There is hardly any area left in election disputes to be clarified by the courts. The election tribunals presided by Officers with judicial background are by and large have advantage of the decisions of the courts in delivering justice in election matters. The executing officers are however found to

be severely lacking in application of mind to these laws. A Sub Divisional Magistrate is not trained to understand or appreciate niceties of election laws. Very often the cases are coming to the court where election tribunals manned by executive officers are not in a position to understand or appreciate the evidence and laws. It gives rise to law of uncertainty and provides an opportunity to the defeated candidate to engage the winning candidate in a battle for several years. The lack of appreciation of law and inconsistent decisions rendered by the Prescribed Authorities under the UP Panchayat Raj Act, leave the electorate divided and leads to acrimony. The legislature should consider to entrust these powers to persons trained in law who properly understand the election laws. The persons with training in law preferably a judicial officer will be better equipped to discharge these functions.

26. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.02.2008

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

Civil Misc. Writ Petition No. 840 of 2005
Connected with

Writ Petitions Nos. 875 of 2005, 1080 of 2005, 1283 of 2005, 1414 of 2005, 1511 of 2005, 1565 of 2005, 1596 of 2005, 1597 of 2005, 1617 of 2005, 543 of 2006, 597 of 2006, 845 of 2006, 1009 of 2006, 1010 of 2006, 1059 of 2006, 1060 of 2006, 1061 of 2006, 1062 of 2006, 1063 of 2006, 1064 of 2006, 1124 of 2006, 1125 of 2006, 1301 of 2006, 1325 of 2006, 1381 of 2006

Oriental Bank of Commerce ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Bharatji Agarwal
Sri Tarun Verma
Sri Ashok Bhatnagar

Counsel for the Respondents:
S.C.

<u>Constitution of India Art. 226-Alternative Remedy-U.P. Trade Tax Act-1948</u>-Whether transaction of renting lockers-amount to sale or transfer of Rights?-pure question of law-No disputed question of facts involved-if this question decided in favour of petitioner impugned demand of Trade Tax-would be wholly without jurisdiction-held-alternative remedy 'No bar'-writ petition can be directly decided on merit.

Held: Para 8

We propose to deal first with the preliminary objection raised by the respondents that the petitioners have a statutory alternative remedy of appeal and, therefore, the writ petitions are liable to be dismissed on the ground of availability of alternative remedy. From the pleadings of the parties, it is evident that the pure and simple question of law involved in these cases is whether renting out a Locker amounts to "transfer of right to use goods" and is taxable under the Act. If it is not taxable under the Act, the entire proceedings are wholly without jurisdiction. One of the exceptions to the principle of exhaustion of alternative remedy is where the order impugned is wholly without jurisdiction. Since, there are no disputed questions of fact involved in this case and pure legal question has been raised which if decided in favour of the petitioners, the entire proceedings and the impugned orders would be wholly without jurisdiction, we are of the view that the

matter deserves to be considered on merits and it is not a case where the petitioners should be non suited on the ground of alternative remedy.

(B) U.P. Trade Tax Act, 1948-Section 2 (m)-Work Contract-letting out locker by the Bank and the rent paid by customers-not at all taxable-No transfer of Rights but a licence use-requirement of sale to attract tax liability not completed-No liability-pay the Trade Tax.

Held: Para 25 & 29

Applying the aforesaid dictum also in the nature of the transaction involved in the present case, we are clearly of the view that the rent paid by the customers to Bank for hiring a Locker amounts to the charges paid for an indivisible contract and, therefore, is not at all taxable under the Act.

Applying the aforesaid to the facts involved and as discussed above, in letting out Bank Lockers to the customers, we are clearly of the view, that there is no transfer of right to use Lockers but only a licence to use and does not answer the requirement of "sale" to attract tax liability under the Act. There is no "sale" element involved in the matter and in effect, it is only a service rendered by the Bank by providing the facility to the customers to keep his valuables in a safe and secured place at the Bank and Locker is only a place specified for such purpose.

Case law discussed:

2003 NTN (Vol. 22) 175, 1988 (70) STSC 215 (A.P.), 2000 NTN (Vol. 16) 425, 1987 (67) STC 199, 2004 UPTC 133, AIR 1958 SC 560, (1972) 1 SCC 472, 2006 (3) SCC 1, JT 2008 (1) SC 496, (1986) 1 SCC 414, 2005 (1) SCC 308, 2002 (3) SCC 314,

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

1. In all these writ petitions, the common question involved is whether the petitioners-Banks are liable to pay trade tax under U.P. Trade Tax Act, 1948 (hereinafter referred to as the 'Act') for renting Lockers to their customers. The incidental question is whether Lockers are "goods" and right to use Locker can be said to be "transfer of right to use any goods" attracting liability of tax under the Act.

2. In some of these cases, assessment orders have been passed, and in some cases, notices for assessment have been issued. Since, the principle question involved in all these writ petitions is common, therefore, as requested and agreed by learned counsel for parties, all these writ petitions have been heard together at this stage under the Rules of the Court and are being decided finally by this common judgment.

3. The writ petition no. 840 of 2005, for the purpose of referring to the documents and pleadings is taken as the leading case.

4. The petitioner, M/s Oriental Bank of Commerce after execution of agreements with its customers, provide facility of using Lockers installed in the Bank on rent to the said customers. It is not disputed that Lockers are installed inside the strong room of the bank, permanently attached to the earth and inseverable by the customers. It is said that the relationship of the Bank and the customers is that of landlord and tenant and not that of bailor and bailee. The Lockers can be operated with two keys, one key remains in possession of the customer and another in the possession of the bank and can be operated when both the keys are simultaneously inserted in the key hole of the Locker. Entry in strong

room for operating Locker is restricted as per the rules of the Bank. A letter was issued on 11.2.2005 by respondent no. 2 requiring the petitioner to furnish details of the operation of Lockers and rental accrued during the assessment years 1998-99 to 2004-05. The Assistant Commissioner, Trade Tax, Meerut, however, issued a notice dated 21.2.2005 to the petitioner for assessment year 2002-03 to show cause as to why trade tax be not charged on rental accrued to the Bank on the Lockers allotted to different persons as it amounts to "sale" under the extended definition of "sale" being "transfer of right to use the goods". Similar notices were issued on 17.3.2005 under Section 21(2) for the assessment year 1998-99. The petitioner submitted reply dated 19.3.2005 stating that neither the petitioner is a "dealer" nor the Lockers can be said to be "goods" nor facility of use of Locker can be said to be "transfer of right to use goods" and, therefore, the petitioner is not liable to pay any trade tax. Details of operation of Locker etc. were also mentioned therein. However, respondent no. 2 passed an assessment order dated 22.3.2005 for the assessment year 2002-03 holding that the petitioner is liable to pay tax as the right to use Locker by customer on rent amounts to "transfer of right to use goods" and, therefore, is taxable under Section 3-F of the Act. Similar assessment orders or notice proposing assessment have been issued in other cases. Aggrieved, the petitioners have filed these writ petitions challenging the proceedings.

5. All the petitioners are banks providing facility of use of Locker to their customers on rent and basic facts are common.

6. The respondents have filed counter affidavit raising a preliminary objection that against the assessment order, the petitioners have an alternative remedy of filing Appeal under Section 9 of the Act and, thereafter, Second Appeal Under Section 10(2), therefore, the writ petitions are liable to be dismissed on the ground of alternative remedy. On merits, it is said that the Bank is a 'dealer' in view of the decision of Apex Court in **State of U.P. & another Vs. Union of India & another 2003 NTN (Vol. 22) 175**, renting out Lockers to their customers is taxable under Section 3-F of the Act and, therefore, the assessments made or proposed against the petitioners are absolutely valid and in accordance with law. Reliance is also placed on the following authorities :

1. **State Bank of India Vs. State of Andhra Pradesh 1988 (70) STSC 215 (A.P.)**
2. **20th Century Finance Corporation Ltd. & another Vs. State of Maharashtra 2000 NTN (Vol. 16) 425**
3. **Bank of India Vs. Commercial Tax Officer Central Section Calcutta 1987 (67) STC 199.**
4. **Sanda Tent House Association Vs. State of U.P. & others 2004 UPTC 133**

7. A supplementary counter affidavit has also been filed wherein it is said that the petitioners-Banks are engaged in business of transfer of right to use bank Lockers and other commercial activities and, thus, they are "dealer" within the meaning of Section 2(c)(vii) of the Act, the transaction of renting out Lockers amounts to "sale" within in the meaning of Section 2(h)(iv) and activities of the

petitioner is "business" within the meaning of Section 2(aa) of the Act. It is also said that the Bank Lockers are "goods" within the meaning of Section 2(d) of the Act. Reference is also made to the Article 366 (29-A)(d) of the Constitution of India, which defines "tax on sale or purchases of goods" and it is said that the present dispute is covered by the said definition. It is also averred that Bank Lockers are made of iron and are really in the nature of shelf in a big cabinet, each shelf having its own door. However, for security and secrecy during the course of operation of the Bank Lockers by the customers, the Bank keep the cabinet in a strong room and entry and exit thereto is also restricted, but that would not detract from the fact that it is a movable property purchased by the Bank for the purpose of carrying out business of letting it on hire to its customers, hence, it is taxable under the Act.

8. We propose to deal first with the preliminary objection raised by the respondents that the petitioners have a statutory alternative remedy of appeal and, therefore, the writ petitions are liable to be dismissed on the ground of availability of alternative remedy. From the pleadings of the parties, it is evident that the pure and simple question of law involved in these cases is whether renting out a Locker amounts to "transfer of right to use goods" and is taxable under the Act. If it is not taxable under the Act, the entire proceedings are wholly without jurisdiction. One of the exceptions to the principle of exhaustion of alternative remedy is where the order impugned is wholly without jurisdiction. Since, there are no disputed questions of fact involved in this case and pure legal question has been raised which if decided in favour of the petitioners, the entire proceedings and the impugned orders would be wholly without jurisdiction, we are of the view that the matter deserves to be considered on merits and it is not a case where the petitioners should be non suited on the ground of alternative remedy.

9. Now we proceed to consider the matter on merits.

10. The term "goods" and "tax on the sale or purchase of goods" are defined under Article 366 (12) & (29-A) of the Constitution. The relevant provisions thereof are reproduced as under:

"366. Definitions.-.....
(12) "goods" includes all materials, commodities, and articles;
.....
(29-A) "tax on the sale or purchase of goods" includes-
(a).....
(b).....
(c).....
(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
(e).....
(f).....
and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

Section 2 (aa) of the Act defines "business" and the relevant part, which been pressed in service in the present case, reads as under:

"2. Definitions.-.....
(aa) 'business', in relations to business of buying or selling goods, includes-
(i) .....
(ii) the execution of any works contract or the transfer of the right to use any goods for any purpose (whether or not for a specified period);..."

Similarly, the term "dealer" is defined under Section 2(c) of the Act and according to the respondents, the present transaction is covered by provisions of Section 2 (C) (vii) (viii), which are reproduced as under :

***"2. (c) "Dealer"** means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes-*
.....
(vii) every person who carries on the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
(viii) every person who carries on business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;"

The "goods" are defined under Section 2(d) of the Act which reads as under :

***"2. (d) 'Goods'** means every kind or class of movable property and includes all materials, commodities and articles involved in the execution of a works contract, and growing crops, grass, threes and things attached to, or fastened to anything permanently attached to the earth which, under the contract of sale, are agreed to be severed but does not include actionable claims, stocks, shares, securities or postal stationery sold by the Postal Department;"*

Since, the respondents have also placed reliance on the definition of "works contract" as contained in Section 2(m), therefore, the same is also reproduced as under:

***"2. (m) 'Works contract'** includes any agreement for carrying out, for cash, deferred payment or other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property;"*

The charging provision attracting tax liability in the present case is Section 3-F and relevant part thereof reads as under:

***"3-F. Tax on the right to use any goods or goods involved in the execution of works contract.-(**1) Notwithstanding anything contained in Section 3-A or Section 3-AAA or Section 3-D but subject to the provisions of Sections 14 and 15 of the Central Sales Tax Act, 1956, every dealer shall, for each assessment year, pay a tax on the net turnover of-*

(a) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration; or
(b) transfer of property in goods (whether as goods or in some other

form) involved in the execution of a works contract.

at such rate not exceeding twenty percent as the State Government may, by notification, declare and different rates may be declared for different goods or different classes of dealers."

11. Thus, from a combined reading of all the aforesaid provisions, the very first indicia to attract the Act is that there has to be "goods" in existence with which a person is carrying on the "business" of buying, selling, supplying or distributing directly or indirectly, for cash or deferred payment or for commission, remuneration etc. Therefore, the first question would be whether Lockers of the Bank can be said to satisfy the definition of "goods" under the Act. The reply of the respondents is that Locker is nothing but a vault fixed in a big cabinet, which is movable item when it is purchased by the Bank, though it is affixed for the purpose of security and safety, but that would not detract from the fact that it is a movable property which the contention of the petitioners is otherwise.

12. We have to examine the correctness of the rival submissions to find out whether a Locker can be said to be "goods" i.e. a "movable property" in the light of the provisions in the Constitution, Act and the admitted facts borne out from the pleadings.

13. It would be appropriate, first to consider as to what is taxable under the Act. Entry 54 List II Schedule-VII of the Constitution confers legislative competence upon the State legislature to make law on taxes on the sale or purchase of "goods" other than newspapers, subject to the provisions of entry 92-A of List I. Prior to 46th Amendment of the Constitution, whereby Clause 29-A was inserted in Article 366, the law as laid down by the Apex Court in **State of Madras Vs. M/s. Gannon Dunkerley and Co. (Madras) Ltd. AIR 1958 SC 560** was holding field as to the meaning of the words sale of "goods". Interpreting Entry 54 in the light of Entry 48 of List II, Schedule VII to the Government of India Act, 1935, the Apex Court held that the old and known concept of sale of goods would apply to the entry in the legislative list which must have three essential components to constitute a transaction of sale of goods, namely, (i) an agreement to transfer title, (ii) consideration, and (iii) actual transfer of title in the goods. It was held that in the absence of any one of these elements, there would be no sale. Considering whether a contract under which a contractor agreed to set up a building would be a contract for sale, the Court held otherwise and said that in law there cannot be an agreement relating to one kind of property and a sale as regards another. The parties could have provided for two independent agreements, one relating to the labour and work involved in the execution of the work and erection of the building and the second relating to the sale of the material used in the building in which case the latter would be an agreement to sell and the supply of materials thereunder. However, where there is a composite contract, it was not classifiable as a sale. The Court held that the words "sale of goods" have to be interpreted in their legal sense. That sense can only be what it had in law relating to "sale of goods". Consequently, the word "sale" was construed and given the same meaning which it had in the Sale of Goods Act, 1930. This view was followed with respect to "meals" served at hotels in

State of Punjab Vs. M/s. Associated Hotels of India Ltd., (1972) 1 SCC 472.

14. Considering, that the aforesaid position had resulted in evasion of tax in various ways, the matter was considered by the Law Commission, who submitted its report in 1974 and, thereafter, Article 366 was amended inserting Clause 29-A, i.e., the definition of "tax on the sale or purchase of goods". The effect of the said amendment is that certain transactions, which were not sale or purchase of goods earlier are now included therein. By legal fiction, the composite contracts like work contracts, hire purchase contracts and catering contracts are deemed to be "sale or purchase of goods" and subjected to sale tax under the relevant State legislation under Entry 54 List II Schedule VII. This development has been noticed by the Apex Court in **Bharat Sanchar Nigam Ltd. & another Vs. Union of India & others 2006 (3) SCC 1**, but the Apex Court observed that though to some extent the principle enunciated in **Gannon Dunkerley** stood modified by 46th Amendment yet it has survived in two respects. In para 43 of the judgment the Court has said that with respect to definition of "sale", for the purpose of Constitution in general and for the purpose of Entry 54 of List II in particular, except to the extent that the clause in Article 366 (29-A) operate otherwise, the position continue to be the same. Even in separate categories of "deemed sale", the composite elements of a sale such as intention of the parties, goods, delivery, etc. would continue to be defined according to known legal connotations. It is said that 46th Amendment has not given a licence to assume that a transaction is a sale and then to look around for what could be the "goods". Words "goods" has not been altered by the 46th Amendment and that ingredient of a sale continues to have the same definition. The second aspect, in which **Gannon Dunkerley (supra)** has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366 (29-A). Transactions which are mutant sales are limited to the clauses of Article 366 (29-A). All other transactions would have to qualify as "sales" within the meaning of Sales of Good Act, 1930 for the purpose of levy of sales tax. The Court has further explained some of the composite transactions, which would not be covered by clause 29-A of Article 366 and in para-44 of the judgment in **Bharat Sanchar Nigam Ltd. (supra),** the Apex Court said:

"Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been Constitutionally permitted in clauses (b) and (g) of Clause (29A) of Art. 366, there is no other service which has been permitted to be so split. For example the clauses of Art.366(29A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a

document and delivers it to his/her client? Strictly speaking with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases."

15. Recently, in respect to an Advertising Agency, the applicability of Karnataka Value Added Tax Act, 2003 in view of the fact that it was already subject to payment of service tax under Finance Tax Act, 1994 came up for consideration in **Imagic Creative Pvt. Ltd. Vs. Commissioner of Commercial Taxes & others JT 2008 (1) SC 496.** Relying on **Tata Consultancy (supra)** and **Bharat Sanchar Nigam Ltd. (supra),** the Apex Court held that where it is the question of changeability of a service contract, the Court must have in mind a distinction between an indivisible contract and a composite contract. If in a contract, an element to provide service is contained, the purport and object for which the Constitution had to be amended and clause 29A had to be inserted in Article 366, must be kept in mind. It further held that a legal fiction is created by the said provision and such a legal fiction should be applied only to the extent for which it was enacted. Though it must be given its full effect, but the same would not mean that it should be applied beyond a point which was not contemplated by the legislature or which would lead to an anomaly or absurdity.

16. Since the above law has been enunciated after considering the amendment in the Constitution as well as in the Act, and the effect thereof, hence, we have to apply the same to the facts and circumstances of the present case to find out the answer to the question which has been raised in this bunch of writ petitions. The first indicia for attracting liability of tax under the Act is that there must be a "goods" in respect whereto a transaction of sale or purchase has taken place. The "goods" as observed earlier has been defined in the Constitution under Article 366 (1), which is a inclusive definition providing that it includes all materials, commodities and articles. Under Section 2(7) of the Sale of Goods Act, 1930, the word "goods" has been defined as under:

*"**2.** (7) "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:"*

17. Similar definition of "goods" has been incorporated under the Act vide Section 2(d), though with minor variations. An incorporal right has been held to be goods in **Anraj Vs. Government of Tamil Nadu (1986) 1 SCC 414**. It was held that a goods may be a tangible or intangible property in **Tata Consultancy Services Vs. State of Andhra Pradesn 2005 (1) SCC 308**, where considering validity of sales tax on computer software, the Apex Court in para 81 of the judgment held that the "goods" may be tangible or intangible property provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. The aforesaid view has been followed by the Apex Court for the purpose of judging what are "goods" for attracting tax liability under the Act in **Bharat Sanchar Nigam Ltd. (supra).** Therefore, in order to constitute "goods" attracting tax

liability under the Act, it is no doubt true that only a movable property would constitute goods and not an immovable property. The learned counsel for the petitioners have contended that the Lockers attached in a Safe Deposit Vault of the Bank embedded with earth is an immovable property and not a kind of movable property attracting liability of tax under the Act. The term "movable property" has not been defined in the Act. The General Clauses Act, 1987, however, defined "immovable property" and "movable property" vide Section 3 (26) and 3(36), which read as under:

"3. definitions.-.....

.....

(26)"immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

(36) "movable property" shall mean property of every description, except immovable property;"

The term "immovable property" is also defined under Section 3 of the Transfer of Property Act, 1882, which reads as under:

"immoveable property" does not include standing timber, growing crops or grass:"

18. The definition of "goods" under the Act referring to every kind of movable property and including growing crops, grass and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale takes away some items which would otherwise be immovable property under the General Clauses Act, 1897 inasmuch certain items which are attached to the earth or permanently fastened to anything permanently attached to the earth, but if are agreed to be severed before sale or under the Contract of sale are treated to be a kind of "movable property" constituting "goods" under the Act, though under the General Clauses Act, it may not be. To that extent, the definition of "goods" under the Act is wider but in all other respects, there is not much difference inasmuch if any other thing, if permanently attached to earth or fastened to anything attached to earth, which is not agreed to be severed before sale or under the contract of sale, that would continue to be an immovable property and, therefore, outside the purview of the term "goods" under the Act. It is not the case of the respondents that the Bank Locker, which is hired by a customer is intended to be severed from earth for user or at the time of user or at any other point of time. On the contrary, the Locker continue to be a part and parcel of a thing attached and embedded with earth and, therefore, in the absence of any material otherwise to show that it has to be severed before sale or under the contract of sale, it cannot be said that it is a movable property included within the definition of "goods" under the Act. We are, therefore, inclined to hold that in the absence of any otherwise material or pleading or record, the Locker, which is part of Safe Deposit Vault embedded to earth in the strong room of the Bank is an immovable property inasmuch it is to be used by the customers in the fixed condition and not by severing it from earth or the things attached to earth. This fact that at the time of purchase of Safe Deposit Vault of which the Lockers were a part, it was a movable property and brought from one place to another would make no difference inasmuch it is not the

Safe Deposit Vault purchased by the Bank from its manufacturer, which is hired by the customer, but it is a Locker forming part of a Safe Deposit Vault, which is embedded with earth in the strong room of the Bank, which is hired by the customer for keeping his valuables therein in safe custody. This reason itself is sufficient to keep the Locker of the Bank outside the purview of the Act and non taxable. The view we have taken herein that the Lockers of the Bank are not a kind of movable property, which may constitute "goods" under the Act finds support from the meaning assigned to the "goods" in **Tata Consultancy Services (supra)** and **Bharat Sanchar Nigam Ltd. (supra).**

19. The issue can also be examined from another angle. The transfer of right to use any goods for any purpose must be for cash, deferred payment or other valuable consideration. Can it be said that the rent charged by the Bank for entering into an agreement with the customers assigning right to use Locker of the Bank amounts to such consideration. This would require us to examine as to what is the principle object of the customer in hiring the Locker of the Bank. In other words, we have to examine what actually is the contract between the Bank and its customers with respect to user of Bank Lockers and the kind of transaction involved therein. In para 22 of the writ petition, it is averred that the Bank is not selling Lockers to its customers for rent. Locker is a part of big vault attached and embedded to earth. The whole extent of the vault is embedded to the strong room which has been specifically designed to ensure proper security and safety to the valuables of its customers. In order to provide security, the Bank has to construct strong room with prescribed specifications necessary for attaining highest security and safety and it is attached to earth. The specifications necessary for security are as per the norms and standards of global standard security. The Bank further installs security alarm surveillance device and ensure constant electric supply for the working of security alarm surveillance device. A regular security guard is employed for round the clock for guarding of Lockers. The customers have limited right to access during specific hours and specific days. The Locker is operable with the use of a key which is in possession of the customer and a master key possessed by the Bank without which, the Locker cannot be opened and operated by the customer. The Bank has every right to stop operation of the Lockers in certain cases. The agreement is said to be a lease-deed wherein the customer is in the capacity of lessee and the Bank in the capacity of lessor. A copy of the draft agreement is on record as Annexure 7 to the writ petition. It is admitted by all the parties concerned that the agreements executed by all the Banks for renting out Lockers are in similar terms. It provides that the Bank reserves right of having the working of the Safe Deposit Vault and of making changes therein without any previous notice or information and the Lockers can be operated by the customer or his authorized agent during such working times as are prescribed by the Regulations or the Bank. Clause 5 of the lease deed reserves rights to the Bank of closing Safe Deposit Vault under extra-ordinary circumstances such as civil commotion, riots and other similar circumstances for such time as may be necessary. Clause 20 provides as to what

shall not be kept in the Locker and reads as under:

"20. The lessee shall not assign or subject the locker or any part thereof, or use or permit it to be used for deposit of any liquid of any thing of explosive dangerous of offensive nature or which may become a nuisance to the Bank or any of its tenants or customers or for any other purpose than for deposit of valuables or other property and shall on demand permit the bank to inspect the contents of the safe for the purpose of ascertaining it the condition is being complied with."

20. Clause 22 provides that in case of receipt of an order from a competent Court, the bank shall have right to refuse access to the customer to the Locker. Clause 23 clearly reads that the relationship of the Bank and the lessee shall be that of a landlord and a tenant and not that of bailor and bailee. The Bank has no responsibility of liability of any kind whatsoever in respect of the contents of the Locker and shall not be responsible for any loss or damage etc.

21. The facts as above are not disputed in the counter affidavit. From the pleadings of the parties as well as arguments advanced on both the sides, three things are evident. Firstly, that Lockers are part of a Safe Deposit Vault embedded to earth. Secondly, that the public go to Bank for hiring Lockers not because they lack a Locker at their residence, but because of the safety and security, which is maintained by the Bank and which is not available at the individual residence. Judicial cognizance can be taken of the fact that normally steel almirah is fitted with a Safe Deposit Locker of high thickness and couched safety. The class of customers, who go to Bank for depositing their valuables in Lockers must have the capacity to possess such almirahs in their house and even otherwise can afford to purchase a steel almirah fitted with such Safe Deposit Locker, but instead of making this arrangement at their residence, people prefer to go to a Bank to hire a Locker thereat in order to keep their valuables in such Lockers. One would not like to keep his valuables at a place which is not in his control or possession instead of keeping it in his house under constant watch unless the reasons for such are so compelling. The foremost compelling reason which can easily be conceived in this case is safety and security available to the Bank Lockers. The Safe Deposit Lockers of Banks are located in impregnable strong rooms and a stranger cannot get access into these strong rooms of the Bank. The high security alarms installed by the Bank provides a feeling of safety to the customers who prefer to have a Locker in the Bank for keeping his valuable therein instead of a Locker at his residence. Even several Government Departments hire Bank Lockers to keep their valuables/important documents due to high degree of safety available therein. Therefore, the rental paid by such person to the Bank cannot be said to be mere rental charges for hiring the Locker but it includes comprehensively the cost of maintaining high safety standards and arrangements at the Bank. In other words, it can be said that a person pay rent for the locker not only for right to use the Locker but also of a host of other services closely associated with maintenance of Lockers by the Bank. In fact the use of Lockers is predominant by other services available at the Bank. In other words, the Bank collect

higher charges which represents a consolidated charge levied by the Bank for variety of services and facilities, of which, use of Locker forms a small part. The various services and items are inseparable due to the nature of such services and purpose involved in the transaction. The third aspect of the matter is that the customer is not given exclusive control of the Locker inasmuch the Bank retains control over the Locker all through and a double locking system ensures that the locker cannot be opened by a customer except with the aid and assistance of the Bank. The agreement clearly provides that the relationship is clearly of lessor and lessee though in fact, it is slightly a bid complex in nature inasmuch the Locker can be used by the customer for keeping his valuables but he can not operate the same according to his free will as and when he likes and is bound to follow the regulations and conditions imposed by the Bank in this regard. Neither the strong room nor the steel cabinet in which the Lockers are fitted is rent out to any particular person. Even the Locker cannot be opened by the customer on his own unless it is first unlocked by the Bank with master key kept by it. The arrangement, therefore, made by the customer with the Bank with respect to Locker cannot be equated with that of hiring of an Almirah or drawer of an Almirah, and, rental for the Locker cannot be said to be consideration for only use of storage space in the cabinet. The dominant aspect involved in the transaction is the security and safety of valuable which is kept by the customers in the Locker of the Bank instead of keeping it at their residence. These services are admittedly not taxable under the Act. The services rendered by the Bank and the charges levied therefor from its customer would not amount to valuable consideration in order to cover transaction in question within the purview of Section 2(c) of the Act read with Article 266 (29-A) of the Constitution.

22. There is another aspect of the matter. As we have already discussed, rental charges includes various other aspects which are in the nature of service rendered by the Bank to its customers. The State is not entitled to entrench upon the Union List and 'tax services' by including the cost of such service in the value of the goods. Even if we assume that the transaction answers the description of "goods", it is not disputed that Banks are in List I and it is the Parliament, which is competent to make law with respect to banking services. Where the charges are inseparable, the value of goods involved in the execution of whole transaction cannot be assessed to sale tax for the reason that the charges pertaining to services rendered by the Bank are not the taxable under the Act. In **Larsen & Toubro Vs. Union of India 1993 (1) SCC 365**, in para-47 of the judgment the Court held:

"The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods;"

23. That being so, the rent charged by the Bank for user of the Lockers also cannot be taxed under the Act and that is another reason vitiating the impugned orders of assessment and notices issued

by the respondents to the Banks attracting liability of tax upon the petitioners under the Act.

24. Moreover, the entire transaction of hiring of a Locker by a customer or letting out a Locker by the Bank to its customers involves service with primary object of safety and security of the valuables of the customers kept in the Lockers. It is an indivisible contract and not a composite contract. Even in those cases, where sales tax would have been chargeable on that element of a contract which is part of a composite contract but is distinct, but in case of an indivisible contract, the amount cannot be separated to attract the liability of sales tax at all. In **Imagic Creative Pvt. Ltd. (supra),** the Court with reference to payment of service tax as well as sales tax observed *"Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract; irrespective of the element of service provided."*

25. Applying the aforesaid dictum also in the nature of the transaction involved in the present case, we are clearly of the view that the rent paid by the customers to Bank for hiring a Locker amounts to the charges paid for an indivisible contract and, therefore, is not at all taxable under the Act.

26. The learned standing counsel at this stage sought to contend that letting out of a Locker by the Bank to its customer amounts to "works contract" under Section 2 (m) but on being required to show as to how it would amount to works contract, he could not explain at all as to in what manner, the said transaction can be termed as "works contract" as defined under Section 2 (m) of the Act. The "works contract" under Section 2 (m) is an exclusive definition and covers an agreement for carrying out for cash, deferred payment or other valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property. The learned Standing Counsel could not at all show us as to in what category, namely manufacture, processing, erection, fabrication etc. letting out of Locker by the Bank to its customer would fall so as to be covered by the definition of "works contract" under Section 2 (m) of the Act. Therefore, we have no hesitation in rejecting the said contention.

27. Now we proceed to consider whether right to use Locker of a Bank can be said to be "transfer of right to use goods". In support of the submission that it constitute "transfer of right to use goods", reliance is placed by the respondents on the Apex Court decision in **State of U.P. Vs. Union of India (supra**) and **20th Century Finance Corporation Ltd. (supra)**. However, we find that the Apex Court decision in **State of U.P. Vs. Union of India (supra)** rendered by the two Hon'ble Judges of the Apex Court was overruled by a three-Judge Bench of the Apex Court in **Bharat**

Sanchar Nigam Ltd. (supra). Similarly, **20th Century Finance Corporation Ltd. (supra)** is cited for the proposition that delivery of possession of goods is not a necessary concomitant for completing a transaction of sale for the purpose of Article 366 (29-A) (d), but in **BSNL's Case,** the Apex Court in para-73 of the judgment has clearly held that the aforesaid decision is not an authority for the said proposition. Therefore, both the aforesaid judgments do not help the respondents at all. On the contrary, the Court said that in order to constitute "goods", it must be capable of being bought and sold and capable of being transmitted, transferred, delivered, stored and possessed. It has held that goods must be available at the time of transfer, must be deliverable and delivered at some stage. It further says that transaction must also show intention to transfer the right to use freely. In **State of Andhra Pradesh Vs. M/s. Rashtriya Ispat Nigam Ltd. 2002 (3) SCC 314**, the contractor was allowed to use machinery for execution of the project and the user of machinery was claimed to be transfer of right to use goods by the sale tax authorities. Negativing, the Court said that :

"The transaction did not involve transfer of right to use the machinery in favour of contractor. ....the effective control of the machinery even while the machinery was in use of the contractor was that of the respondent Company; the contractor was not free to make use of the machinery for the works other than the project work of the respondent or ....."

28. The Apex Court in **BSNL's Case** in para 97 of the judgment has crystalised the following attributes in order to constitute a transaction as "transfer of the right to use the goods", which reads as under:

"97. *To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:*

(a) there must be goods available for delivery;

(b) there must be a consensus ad idem as to the identity of the goods;

(c) the transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;

(d) for the period during which the transferee has such legal right , it has to be the exclusion to the transferor-this is the necessary concomitant of the plain language of the statute viz. A "transfer of the right to use" and not merely a licence to use the goods:

(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

29. Applying the aforesaid to the facts involved and as discussed above, in letting out Bank Lockers to the customers, we are clearly of the view, that there is no transfer of right to use Lockers but only a licence to use and does not answer the requirement of "sale" to attract tax liability under the Act. There is no "sale" element involved in the matter and in effect, it is only a service rendered by the Bank by providing the facility to the customers to keep his valuables in a safe and secured place at the Bank and Locker is only a place specified for such purpose.

30. In two judgments cited on behalf of the petitioners, one is that of a Division Bench judgment of Hon'ble High Court in **Bank of India and others (supra)** and another of an Hon'ble Single Judge of Calcutta High Court in **Bank of India (supra),** it has clearly been held that the hiring of Bank Lockers is not taxable under the relevant sales tax statutes of those States. We are in agreement with the ultimate conclusion reached by the Hon'ble Courts, though with slight different reasons. The Act would not apply to the petitioners for including transaction in question within its ambit.

31. In the result, all these writ petitions are allowed. The impugned orders of assessment and notices issued by the taxing authorities with respect to the various years of assessment are hereby quashed and it is declared that the petitioners-Banks are not liable to pay trade tax under the Act on rent charged for hiring of Safe Vault Lockers to its customers. The respondents are restrained from proceeding ahead for making any assessment against the petitioners with respect to the rent charged by the Bank for user of Lockers from its Customers.

32. There shall be no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2008

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 3082 of 2008

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

Counsel for the Applicant:
Sri Satish Trivedi
Sri Sudhir Shandilya

Counsel for the Opposite Party:
Sri Neeraj Kr. Srivastava
A.G.A.

Code of Criminal Procedure-Section-439-Bail-offence under Section 147, 148, 149, 302 IPC-role of discharging shots by applicant and other persons witnessed by two witnesses-on account of enmity committed murder-day light incident considering strong motive and specific role of applicant-not a fit case for bail.

Held: Para 6

Considering the facts, circumstances of the case and submission made by the learned counsel for the applicant and the learned A.G.A. and the learned counsel for the complainant, and considering the active role of firing is assigned to the applicant and without expressing any opinion on the merits of the case, the applicant is not entitled for bail. Therefore, the prayer for bail is refused.

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

1. This application has been filed by the applicant Hari Shanker with a prayer that he may be released on bail in case

crime no. 110 of 2007 under sections 147,148,149 and 302 I.P.C. P.S. Todi Fetehpur district Jhansi.

2. The fact of the case in brief are that the F.I.R. of this case has been lodged by Dal Chand on 12.3.2007 at 10.30 a.m. in respect of the incident which had occurred on 12.3.2007 at about 7.20 a.m. against the applicant and 9 other co-accused persons, it is alleged that the deceased Lakh Chand, had gone to attend the call of nature on 12.3.2007 at .7.12 a.m., he was sitting in the filed of Matadeen for easing, in the meantime, the applicant, co-accused Hira Lal, Sewa Ram, Himmat Singh, Lalu Virendra, Pushpendra, Kuldeep, Suresh and Kailash armed with gun came there by that time, the deceased came back after easing, the shots were discharged at him by the applicant and other co-accused persons, the alleged incident was witnessed by Ambika and Dashrath after sustaining the gun shot injury the deceased died instantaneously, according to the post mortem examination report, the deceased has sustained six ante mortem injuries, in which injury no.1 was gun shot wound of entry having its exit wounds, injury no.2 was gun shot wound of entry having its exit wound, injury no. 3 was gun shot wound of entry, injury no. 4 was multiple lacerated wound, injury no. 5 was lacerated wound, injury no. 6 was abrasion, one bullet and 12 pellets were extracted from the body of the deceased.

3. Heard Sri Satish Trivedi, Senior Advocate, assisted by Sri Sudhir Shandilya, learned counsel for the applicant, learned A.G.A. for the State of U.P. and Sri Niraj Kumar Srivastava, learned counsel for the complainant.

4. It is contended by the learned counsel for the applicant that according to the prosecution version 10 persons including the applicant discharged shots but the deceased has sustained only five injuries caused by the firearm, the alleged occurrence has taken place at an isolated place, the presence of he alleged witnesses at the place of occurrence was highly doubtful, the witness Ambika was interrogated under section 161 Cr.P.C. after 9 days of the alleged occurrence but he has not disclosed the name of the applicant and other witness Dashrath was not interrogated, the first informant Dal Chand is not an eye witness, the participation of the applicant is highly doubtful, he is innocent, he may be released on bail.

5. In reply to the above contention it is submitted by the learned A.G.A. that the statement of Dal Chand has been recorded who clearly stated that the applicant and other persons discharged shots and the alleged incident was witnessed by Abmika and Dashrath and other persons, on account of old enmity, they have committed the murder of the deceased. It is further contended that first the statement of Ambika has been recorded in which he disclosed the name of the applicant, and the witness Dashrath has been interrogated who also made specific allegation against the applicant that the applicant discharged shot towards the deceased, the F.I.R. of this case has been promptly lodged, it is the day light incident, there was strong motive for the applicant to commit the alleged offence, in case the applicant is released on bail, he shall tamper with the evidence, the bail application of the applicant and the co-accused Hira Lal, Sewa Ram and Himmat have been rejected by another of this

court on 9.7.2007 in criminal misc. bail application 14806 of 2007, therefore the applicant may not be released on bail.

6. Considering the facts, circumstances of the case and submission made by the learned counsel for the applicant and the learned A.G.A. and the learned counsel for the complainant, and considering the active role of firing is assigned to the applicant and without expressing any opinion on the merits of the case, the applicant is not entitled for bail. Therefore, the prayer for bail is refused.

7. Accordingly this application is rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 9645 of 2008

(Smt.) Suhagwati and others
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Sanjeev Kumar Pandey

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

U.P. Zamindari Abolition & Land Reforms Act 1950, Section 198 (4) read with U.P Consolidation of Holding Act 1955, Section 5 (2)-Cancellation of lease for agricultural purpose-during pendency of proceeding-notification u/s 4 (A) of Consolidation of Holding Act whether such cancellation proceeding would abate? Held-provision u/s 198 (4) an special provision-only the collector empowered to consider the cancellation not a proceeding for correction of record-in view of full Bench case of Similesh Kumar-can not be treated to be proceeding under Consolidation of Holding Act.

Held: Para 8

The grant of lease under sections 195 and 197 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 is special provision provided under the U.P. Zamindari Abolition and Land Reforms Act. 1950. Section 198 (4) also contains a provision for cancellation of such lease which power vests in the Collector by virtue of section 198. The Collector can cancel the lease, if he is satisfied that allotment is irregular. Section 5 (2) of the U.P. Consolidation of Holdings Act contemplates abatement of proceedings regarding the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under the U.P. Consolidation of Holdings Act. The proceedings for cancellation of lease are not the proceedings of correction of records. They can also not be treated as suit or proceeding in respect of declaration of rights or interest in any land. The petitioners, who pray for cancellation of lease, do not claim declaration of their rights or interest in the land nor the proceedings under section 198 (4) can be treated to be proceedings taken under the U.P. Consolidation of Holdings Act.

Case law discussed:
1977 RD 408 (FB)

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

1. Heard learned counsel for the petitioners and learned standing counsel representing the respondents No.1 and 2.

2. By this writ petition, the petitioners have prayed for quashing the illegal allotment of agricultural land by the Land Management Committee dated 3.11.2007.

3. Learned standing counsel submits that remedy of the petitioners is to file an application, seeking cancellation of the lease under section 198 (4) of the U.P. Zamindari Abolition and Land Reforms Act, 1950. Learned Counsel for the petitioners submits that village is under consolidation hence, the remedy of section 198 (4) cannot be invoked.

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

5. The question raised in the present writ petition is as to whether, the petitioners have remedy under section 198 (4) of the U.P. Zamindari Abolition and Land Reforms Act, 1950, seeking cancellation of the lease or the said remedy cannot be invoked in view of the fact that notification under section 4 (2) of the U.P. Consolidation of Holdings Act has already been issued.

6. Section 198 (4) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 provides for cancellation of agricultural lease granted under sections 195 and 197. Section 198 (4) of the is to the following effect:

"198 (4) The Collector may of his own motion and shall on the application of any person aggrieved by an allotment of land inquire in the manner prescribed into such allotment and if he is satisfied that the allotment is irregular, he may cancel the allotment and the lease, if any."

7. The effect of notification under section 4 (2) is provided under section 5 (2) of the of the U.P. Consolidation of Holdings Act which is as follows:

"5(2) Upon the said publication of the notification under sub-section (2) of Section 4 the following further consequences shall ensure in the area to which the notification relates, namely-

(a) every proceeding for the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the court or authority before whom such suit or proceeding is pending stand abated:

Provided that no such order shall be passed without giving to the parties notice by post or in any other manner and after giving them an opportunity of being heard:

Provided further that on the issue of a notification under sub-section (1) of Section 6 in respect of the said area or part thereof, every such order in relation to the land lying in such area or part, as the case may be, shall stand vacated;

(b) such abatement shall be without prejudice to the rights of the person$ affected to agitate the right or interest in

dispute in the said suits or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of this Act and the rules made thereunder."

8. The grant of lease under sections 195 and 197 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 is special provision provided under the U.P. Zamindari Abolition and Land Reforms Act. 1950. Section 198 (4) also contains a provision for cancellation of such lease which power vests in the Collector by virtue of section 198. The Collector can cancel the lease, if he is satisfied that allotment is irregular. Section 5 (2) of the U.P. Consolidation of Holdings Act contemplates abatement of proceedings regarding the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under the U.P. Consolidation of Holdings Act. The proceedings for cancellation of lease are not the proceedings of correction of records. They can also not be treated as suit or proceeding in respect of declaration of rights or interest in any land. The petitioners, who pray for cancellation of lease, do not claim declaration of their rights or interest in the land nor the proceedings under section 198 (4) can be treated to be proceedings taken under the U.P. Consolidation of Holdings Act.

9. The Full Bench of this Court in the case of ***Similesh Kumar Vs. Gaon Sabha Uskar Ghazipur & others****, reported in 1977 RD 408*, held that consolidation authorities have no jurisdiction to adjudicate upon validity of lease during currency of the notification under section 4(2) of the U.P. Consolidation of Holdings Act. It is useful to quote following observations of the Full Bench in this context:

"The position, however, in a proceeding under section 198 of the Act is altogether different. The Collector is not to adjudge the validity or legality of an allotment on the basis of possession, but on the finding whether such an allotment had taken place in accordance with the provisions of the Act and the Rules. As a matter of fact, the question of possession is foreign to the controversy involved under section 198 of the Act. In these proceedings, all that one can show is to justify the allotment. Accordingly, the proceedings under section 198 of the Act cannot be kept at par with these summary proceedings, a reference of which has been made above. Simply because at one time there was a provision of a suit under sub-section (4) of Section 198, to our mind, it does not materially effect the position. It, therefore, appears to us that the remedy provided by Section 198 is exhaustive and exclusive, and that the question relating to the validity of a lease cannot be gone into by the consolidation authorities."

10. Following the law laid down by the Full Bench, it is held that proceedings under section 198 (4) U.P. Zamindari Abolition and Land Reforms Act, 1950 shall neither abate nor there is any inhibition in initiating the proceedings during currency of the notification under section 4 (2). Thus, the remedy of the petitioners is very much there under section 198 (4) of the U.P. Zamindari Abolition and Land Reforms Act, 1950. In view of the above, the reliefs claimed

in the present writ petition cannot be granted to the petitioners. The petitioners may avail their remedy under section 198 (4).

11. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2008

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

Civil Misc. Writ Petition No. 53210 of 2007

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

Counsel for the Petitioner:
Sri Anand Kumar Srivastava

Counsel for the Respondents:
Sri H.R. Misra
Sri K.M. Misra
Sri Ghanshyam Joshi
Sri T. Verma
S.C.

Securitisation of Financial Assets & Enforcement of Security Interest Act, 2002 Section 13 (4)-Auction sale of house made on 12.10.07-confirmed on next date-prior to clear expiry of 30 days-period of 30 or 60 days to be counted excluding the date of issuance of notice-held-entire sale proceeding illegal-quashed.

Held: Para 4

Thus, the period of thirty or sixty days was to be counted excluding the date of issuance of notice. Admittedly, the sale certificate was issued on 26.10.2007 and sale deed was executed on 5.11.2007 in favour of the respondent no.3, in spite of order dated 30.10.2007. The entire safe proceedings were illegal. This was prima-facie disobedience of order of the Court.

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

1. We have heard Sri Anand Kumar Srivastava, learned counsel for the petitioner, learned Standing Counsel for respondent no.1, Sri H.R. Misra, learned Senior Counsel assisted by Sri K.M. Misra for respondent no.2 and Sri Ghanshyam Joshi for respondent no3.

2. By way of this writ petition, the petitioner has challenged recovery proceedings initiated against him by the respondent no.2. He has sought relief for quashing the entire recovery proceedings and to direct the respondent no.2 Allahabad Bank to accept payment desired to be made by him.

3. It appears from the record that the petitioner applied to respondent no.2 for loan amounting to Rs. 5 lacs only for construction of house. The loan was sanctioned and amount of Rs.4,39,971/ was paid to the petitioner, which was to be refunded in 180 monthly instalment. The petitioner paid some amount from time to time but he could not regularly pay the instalments due to personal difficulties. The respondent no.2 started recovery proceedings and put his house to auction. It has also been alleged in the writ petition that the petitioner is ready to deposit the entire amount due. The respondent no.2 has also taken similar plea that the petitioner did not repay the loan and committed default, therefore, recovery proceedings were initiated under Securitisation and Reconstruction of Financial Assets and Enforcement of

Security Interest Act, 2002 (hereinafter referred to as Act).

Annexure-2 to the writ petition is notice under section 13(2) of the Act. This was dated 9.7.2007. Admittedly, this was served on the petitioner on 13.7.2007. Another notice dated 13.9.2007 was sent to the petitioner under Section 13 (4) of the Act read with Rule 6(2) and Rule 8(6) of The Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the Rules). After giving notice under Section 13(2) of the Act, possession of house of the petitioner was taken by the Bank on 10.9.2007. The period of sixty days given in the notice under Section 13(2) of the Act was to be counted from the date of notice and not from the date of service. However, this fact was not material in the present case because notice under Section 13(2) of the Act was issued on 9.7.2007 and same was served on the petitioner on 13.7.2007 and possession was taken on 10.9.2007, meaning thereby, possession was taken after sixty days of issuance of notice. The notice under section 13(4) of the Act was dated 13.9.2007 and the house of the petitioner was put to auction on 12.10.2007. As required under Rule 6(2) and 8(6) of the Rules, a clear period of thirty days was to be given to the petitioner for paying dues. This fact was mentioned in the notice under section 13(4) of the Act. In pursuance to that notice, sale proclamation was issued in the news paper 'Amar Ujala' on 13.9.2007, copy of which is paper No. 35 in the application dated 5.2.2008, which is part of affidavit of Sri M.S. Saroha, Assistant General Manager of respondent no.2. This publication shows that notice was published on 13.9.2007 and date fixed for sale was 12.10.2007, meaning thereby date for sale was fixed on 29th day from the date of publication, which was clearly against the law. Admittedly, sale was made on 12.10.2007 and it was confirmed on the next day i.e on 13.10.2007, that was also illegal because clear period of thirty days from the date of notice was to be given to the petitioner for making payment as required by the law, but unfortunately entire sale deed proceedings were finished within thirty days of publication of the notice. The computation of period of notice had to be made under the provisions of Section 9 of U.P. General Clauses Act 1904 which runs as under:

Section 9. Commencement and termination of time-In any (Uttar Pradesh) Act it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to".

4. Thus, the period of thirty or sixty days was to be counted excluding the date of issuance of notice. Admittedly, the sale certificate was issued on 26.10.2007 and sale deed was executed on 5.11.2007 in favour of the respondent no.3, in spite of order dated 30.10.2007. The entire safe proceedings were illegal. This was prima-facie disobedience of order of the Court.

5. Vide order dated 16.1.2008, 31.1.2008 and 6.2.2008, we had directed the Bank authorities to show cause why their public accountability should not be fixed and they should not be taken to task for committing the aforesaid illegalities. In response to our notices, Sri M.S. Saroha, Assistant General Manager, Sri P.K. Mallick, Senior Manager and Sri

Praven Kumar, Manager (Law) of respondent no.2 have filed affidavits tendering unconditional apology. Not only this, respondent no.3 Sanjiv Kumar, the purchaser of the house has also filed affidavit praying for cancellation of sale deed to avoid further complications. He has made request only for refund of price of house, stamp duty and registration charges etc. From the affidavit of the Bank authorities, we are satisfied that though they have committed mistake but there was no malafide on their parts. There was technical bonafide mistake in computing the period of notices and sale etc. Therefore, we accept their unconditional apology and do not pass any order against them. Any observation made against them shall not be treated as adverse.

6. The petitioner is ready to pay the amount due. The respondent no.3 has no objection to it. Admittedly, the petitioner has already deposited first and second instalment as directed in our order dated 30.10.2007.

7. The writ petition is allowed and entire recovery proceedings is quashed. The sale deed of the disputed house dated 5.11.2007 executed in favour of respondent no.3 is also cancelled. The respondent no.3 will get back the amount paid by him as price of house and other charges as under:

(a) Rs.5,10,000/ price of house.
(b) Rs.72,700/ stamp fee.
(c) Rs.5020/ registration fee.
(d) Rs.1000/ Misc. charges.

8. Thus, total amount comes to Rs.5,88,720/- (Five lacs eighty eight thousand seven hundred twenty only). The bank authorities agree that they will pay the said amount to respondent no.3 within fifteen days.

9. The petitioner will repay the remaining amount of loan in two instalments as follows:
(i) 1st instalment by 15th May 2008.
(ii) IInd instalment by 15th August, 2008.

10. It is made clear that in case of default in the payment of any instalment, the Bank shall be at liberty to realize the entire dues according to law.

11. Let a copy of this order be sent to the sub-Registrar concerned for information and necessary action.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2008

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

F.A.F.O. No. 348 of 2008

Shahzad Ahmad Khan and others
...Third Party/Appellants
Versus
Mohd. Ahmad and others
...Plaintiffs/Respondents

Counsel for the Appellants:
Sri Syed Wjaid Ali

Counsel for the Respondents:
Sri Rakesh Kumar
Sri K.L. Grover
Sri Ramesh Singh
Sri A.K. Singh

Code of Civil Procedure-Order 1 Rule 3, 10 (2) Order 22 rule 10-impleadment of third party-during pendancy of suit purchased the disputed property-after 8

years of sale moved application for impleadment-held-No right or title decided-Trail Court rightly rejected-may approach for separate trail.

Held: Para 11

In view of our above discussions, we come to the conclusion that the learned Trial Court has rightly observed that the third party appellants are not proper and necessary party to the suit and their prayer is hit by Section 52 of the Transfer of the Property Act. Moreover, the appellants lack in bonafides in moving the Court after 7 years of the sale deed in which it was specifically disclosed that the suit was pending. The suit is ready for final argument. Rule 3A of Order 1 CPC lays down the provision for separate trial where the joinder of the defendants may delay the trial. As such, this appeal is devoid of merits and it is dismissed summarily under Order 41 11 C.P.C. with costs to the contesting respondents.

Case law discussed:

2005 (6) SCC 733, AIR 2001 SC 2552, 2002 A.C.J. 496, 1996 (27) ALR 203, 2007 (49) All India Cases,

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

1. This appeal has been preferred by the third party-appellants against the order dated 17.11.2007 passed by Addl. District Judge, Court No.6, Saharanpur in Original Suit No. 89 of 1999, by which the application 236C2 moved by them under Order 1 Rule3, 10(2), order 22 Rule 10 and Section 151 CPC for impleadment as defendants has been rejected.

2. We have heard Shri Syed Wajid Ali, learned counsel for the appellants and Shri Rakesh Kumar for the respondents and perused the order passed by the learned court below.

3. It appears from the record that the aforesaid suit has been filed by the plaintiff-respondents no. 1 and 2 against the defendant-respondent no.3 for specific performance of contract to sale of the landed property agreement which was allegedly entered into between them on 13.2.1991, a registered document. When the defendant-respondent no.3 did not execute the sale deed in pursuance to the contract, the plaintiff-respondents no. 1 and 2 filed the suit. In the meantime some more developments took place. During the pendency of the suit on 22nd and 26th May 2000, the defendant-respondent no.3 allegedly sold the property in suit to the present third party-appellants and on the basis of that sale deed (copy annexure-I), they moved application for impleadrnent, which was rejected by the learned Trial Court. The present appeal has been preferred against that order.

The main and only question involved in this appeal is whether the third party-appellants are proper and necessary party to the aforesaid suit under Order 22 Rule 10 CPC. The learned counsel for the appellants has argued that since the owner of the property (defendant-respondent no.3) transferred the disputed property to them in May 2000, therefore, their interest is involved in the property and for the final adjudication of the case it is necessary that they may be allowed to be impleaded as party and put their case before the Court. As against this the learned counsel for the plaintiff-respondents no. 1 and 2 have alleged that the appellants are neither proper nor necessary party to the suit because their case is hit by Section 52 of the Transfer of Property Act.

4. This is admitted case that the suit was filed in the year 1993 and on the basis of registered agreement dated 13.2.1991 to sell the property in dispute, the relief for specific performance of contract has been sought for in the suit. The defendant-respondent no.3 had been contesting the suit. In the meantime, in May 2000 the property was allegedly transferred by the respondent no.3 to the present appellants, meaning thereby, the transfer in favour of the appellants was made during the pendency of the suit. As regards the application of the provisions of Order 1 Rule 3 are concerned they are not applicable in the present case. The provisions of Order 22 Rule 10 CPC have attracted our attention which runs as under:

"Procedure in case of assignment before final order in suit- (i) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.
(ii) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."

5. The appellants moved application for impleadment on the basis of the aforesaid provision but the learned Trial Court rejected their prayer being hit by Section 52 of the Transfer of the Property Act, which runs as under:

"Section-52 Transfer of property pending suit relating there to During the pendency in any Court having authority (within the limits of India excluding the State of Jammu and Kashmir) or established beyond such limits) by (the Central Government) of (any) suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to the affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

6. The aforesaid provision is very clear, in view of which no valid transfer can be made during the pendency of the suit without authority of the Court. Admittedly, in the present case no such permission was sought by the defendant-respondent no.3 to transfer the property in suit or by the appellants to purchase it. The copy of the sale deed, annexure-l to the memo of appeal shows that the parties involved in the transfer had full knowledge of the fact that a suit for specific performance of contract between the plaintiff-respondents and defendant-respondent was pending. There was specific mention of this fact in the sale deed itself, therefore, the appellants cannot say that they had no knowledge of the suit pending between the respondent nos. 1 and 2 on one side and respondent no.3 on the other side. Even having knowledge of the pendency of the suit, no permission for transfer was sought under Section 52 of the Transfer of the Property Act.

7. The learned Counsel for the appellants has cited the case of ***Kasturi Vs. Iyyameperumal and Others 2005 (6)***

SCC 733 and has argued that the appellants were proper and necessary party to the suit but we see no force in this contention. In the aforesaid case the Apex Court held that in a suit for specific performance of a. contract for sale, third party stranger; to the agreement could not claim independent title and possession over the disputed property. Another case cited by the learned Counsel for the appellants is ***Dhurandhar Prasad Singh Vs. Jai Prakash University and Others AIR 2001 SC 2552***, in which it has been held that as a rule of a prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due diligence could have been known by him. The learned counsel for the appellants has also cited the case of ***Jaskirat Datwani Vs. Vidyavati and Others 2002 A.C.J. 496***, in which the Hon'ble Apex Court has held that a transferee during the pendency of the suit would be bound by the decree as he has knowledge of the suit. In the present case before us it is clear from the copy of the sale deed itself that the appellants had full knowledge of the pendency of the suit for specific performance of contract against their vendor and even then they purchased the property without obtaining permission of the Court as required under Section 52 of the Transfer of the Property Act and not only this they slept over the matter for about 7 years without any cause. They applied for impleadment under Order 22 Rule 10 CPC after about 7 years when the hearing of the case was almost concluded and the case was fixed for final argument.

8. The learned counsel for the respondents no. 1 and 2 has cited ***1996 (27) ALR 203 Anit Kumar Singh Vs. Shivnath Mishra***, in which it has been held that in a suit for specific performance of contract the third party has no right to be impleaded as defendant on the basis of assignment, creation or devolution of interest under Order 22 Rule 10 CPC.

9. The latest judgement on this point is ***2007 (49) All India Cases Sanjay Verma Vs. Manik Roy and Others*** in which the Apex Court has taken the same view. In the said case the appellant filed the suit for specific performance of contract against one Rajeshwari Devi, the respondent no.3. During the pendency of the suit Smt. Vinaya Devi, the defendant respondent no.4 transferred a portion of a suit land in favour of one Mihir Kumar Chakraborty. Another defendant Sanjay Prasad also transferred a portion of suit land in favour of Shyam Kumar Dutta. Both of them applied for impleadment under Order 1 Rule 10 CPC. Their application was rejected by the Trial Court but in the writ petition before the High Court, the order of the learned Trial Court was set aside. The SLP was filed against that order. The Apex Court allowed the SLP and set aside the order passed by the High Court. A reference of the case of the ***Dhurandhar Prasad Singh (Supra)*** was also given in' the said case. It was clearly held that the transfer without the permission of the Court was hit by Section 52 of the Transfer of the Property Act. It was also observed that the principle of "lis pendens" embodied in Section 52 of the Transfer of the Property Act being a principle of public policy, no question of good faith or bonafide arises. The principle underlying Section 52 is that a litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. The mere pendency of a suit does not prevent one of the parties from dealing with property

constituting that the alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court. On the basis of principle of "precedence" this judgement, being latest one, will prevail over the earlier judgements cited by the learned counsel for the appellants.

10. The learned Trial court has pointed out a very material thing in its impugned order. The defendant-respondent no.3 has already filed a suit against the present appellants for the cancellation of the sale deed on various grounds which is numbered as Original Suit No. 389 of 2003. Therefore, in the present suit if the appellants are made party on the basis of the sale deed in their favour, there will arise a dispute regarding the genuineness of the sale deed itself between the defendants inter-se, which cannot be decided in the said suit. Thus, it is clear that interest of the third party is contrary to their alleged vendor.

11. In view of our above discussions, we come to the conclusion that the learned Trial Court has rightly observed that the third party appellants are not proper and necessary party to the suit and their prayer is hit by Section 52 of the Transfer of the Property Act. Moreover, the appellants lack in bonafides in moving the Court after 7 years of the sale deed in which it was specifically disclosed that the suit was pending. The suit is ready for final argument. Rule 3A of Order 1 CPC lays down the provision for separate trial where the joinder of the defendants may delay the trial. As such, this appeal is devoid of merits and it is dismissed summarily under Order 41 11 C.P.C. with costs to the contesting respondents.

Appeal dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2008

BEFORE
THE HON'BLE S. RAFAT ALAM, J.
THE HON'BLE VINEET SARAN, J.

Special Appeal No. 203 of 2008

Radhey Shyam ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri S.A.N. Shah

Counsel for the Respondents:
Sri Arvind Kumar Singh
S.C.

U.P. Punchayat Raj Act, 1947-Section 5-A, 95 (1) (g)-Removal of village Pradhan-on ground of being convicted for an offence of Dacoity-challenge made on ground that-against conviction appeal admitted and during pendency of Appeal-operation of conviction order suspended-held not amounts to temporary stay but the execution of sentence suspended and not obliterated.

Held: Para 5

We are not impressed with the submission made before us for the reason that the suspension of sentence ·does not amount to washing out the conviction. It is admitted that the appeal has only been admitted and the appellant has been released on bail and the sentence has been suspended till the disposal of the appeal, which does not amount to setting aside the conviction.

Case law discussed:
(2007) 3 SCC (Crl.) 149
(2005) 1 SCC 754

(Delivered by Hon'ble S. Ratat Alam. J.)

1. This is intra Court appeal under the Rules of the Court arising from the judgment of the Hon'ble Single Judge of this Court dated 10.1.2008 dismissing the petitioner-appellant's Civil Misc. Writ Petition No. 1301 of 2008.

2. It appears that the appellant being aggrieved by the order of the Collector/District Magistrate, Etah·dated 18/19.12.2007 whereby he was removed from the post of Pradhan in exercise of the power under Section 95(1)(g) of the U.P. Panchayat Raj Act, 1947 (in short the Act) challenged its validity in the aforesaid writ petition. The Hon'ble Single Judge, having heard learned counsel for the parties, found that the appellant having been convicted for the offence of dacoity and attempt to murder in sessions trial, is not entitled to hold public office of Pradhan of the village and hence did not find any good ground to interfere with the order of the Collector/District Magistrate impugned in the writ petition.

3. We have heard Sri S.A.N. Shah, learned counsel for the petitioner-appellant and the learned Standing Counsel for the State-respondents no. 1, 2 and 3 as well as Sri Arvind Kumar Singh, learned counsel for the contesting respondent no.4 and have perused the record.

4. Sri S.A.N. Shah, learned counsel appearing for the appellant vehemently contended before us that against the conviction the appellant has preferred Criminal Appeal No. 5152 of 2007 wherein he has been released on bail and the sentences have been suspended vide order dated 30.8.2007, hence he has a right to hold the office of Pradhan. In support of this contention he placed reliance on the judgment of the Hon'ble Apex Court in the case of **Lalsai Khunte Vs. Nirmal Sinha and others, (2007) 3 SCC (Crl.) 149**.

5. We are not impressed with the submission made before us for the reason that the suspension of sentence ·does not amount to washing out the conviction. It is admitted that the appeal has only been admitted and the appellant has been released on bail and the sentence has been suspended till the disposal of the appeal, which does not amount to setting aside the conviction.

6. Section 5-A of the U.P. Panchayat Raj Act provides about disqualification of the membership whereunder a person having been convicted of an offence involving moral turpitude shall be disqualified for being chosen as, and for being the Pradhan or a Member of a Gram Panchayat. Under Section 95(1)(g) of the Act a Pradhan can be removed if he is accused or charged for an offence involving moral turpitude or suffers from any of the disqualification under Chapter II-A of Section 5-A of the Act.

7. In the instant case, since the appellant has been convicted and the appeal is pending, hence he has rightly been removed under Section 95(1)(g) of the Act. Reliance on the judgment of **Lalsai Khunte Vs. Nirmal Sinha and others (supra)** is misplaced and is of no help to the petitioner-appellant. In para-14 of the judgment their Lordships have observed that the suspension does not amount to temporarily washing out the conviction. It has further been observed

that the conviction still remains, only the operation of the order and the sentence remain suspended and that does not amount to temporary stay of the conviction. Besides that a Constitution Bench of the Hon'ble Apex Court in the case of **K. Prabhakaran Vs. P. Jayarajan, (2005) 1 SCC 754** in para-42 has held that the suspension is not of conviction or sentence, but it is only the execution of the sentence or order which is suspended and not obliterated.

8. Therefore, in view of the exposition of law made by the Hon'ble Apex Court, we do not find any factual or legal error in the judgment of the Hon'ble Single Judge. The appeal, being without merit, is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2007

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

Civil Misc. Writ Petition No.7495 of 2006

Union of India ...Petitioner
Versus
Dr. Lalit Varma & another ...Respondents

Counsel for the Petitioner:
Sri. K.C. Sinha
(Assistant Solicitor General of India)

Counsel for the Respondents:
Sri. G.K. Singh
Sri. R.N. Singh
Sri. Arun Singhal
Sri. G.S. Hajela
Sri. G.K. Malviya

All Indian Services (Death cum Retirement benefit Rules 1958) Rule 16-A-change of date of birth-recorded in school certificate-service book-no reasons shown for alteration of date of birth-while the claim already rejected in the year 1988 became final-even if claim accepted-he will be younger than his younger brother-held-cannot be changed.

Held: Para 38

Had the case been so, we fail to understand as what was the occasion for the applicant-respondent to make an application for change of his date of birth in the service record and what was the occasion for him to file a Civil suit or seek a writ of mandamus from the Tribunal to change the date of birth from 01.03.1959 to 13.02.1962. The admission of recording of date of birth in the service record of the applicant-respondent as 01.03.1959 is admitted in view of the rejection of his application for correction of date of birth vide order dated 22.04.1988~,which was never challenged by the applicant-respondent and it attained finality. The aforesaid aspect of the matter had been completely lost sight of by the Tribunal and, thus, there has been complete misreading of Rule 16-A (4) of the Rules 1958. The cumulative effect of the provisions of Rule 16 ·A (4) of Rules 1958 read with notification dated 17th December, 1983 makes it abundantly clear and leaves no room for doubt that the date of birth given by the applicant-respondent in the first application form cannot be changed while filling up the application forms for subsequent examinations and these forms in themselves are referable to Clause 16A(3) of the Rules 1958 for the purpose of date of birth of the candidate.

Case law discussed:

AIR 1993 SC 1367, AIR 1993 SC 2647, AIR 1995 SC 850, AIR 1995 SC 1349, AIR 1995 SC 1449, 1995(2) SCC 1494, 1995(2) SCC 98, AIR 1996 SC 1000, 1996(7) SCC 421, AIR 1997 SC 2452, 2000(8)SCC 696, AIR 2001 SC 1666 AIR 2002 SC 509, AIR 2003 SC 4209, 2005(6) SCC 49, 2005(11) SCC 465, 2002(7) SCC 719, AIR

2005 SC 1868, AIR 1937 PC 101, ILR 97 Cal 849, AIR 1995 SC 1349, 1991(63)FLR 76, 1996(72) FLR 562, 1995(71) FLR 950, AIR 1997 SC 2055, AIR 1943 PC 130, AIR 1957 SC 875, AIR 1974 SC 1791

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

1. This writ petition has been filed challenging the judgment and order dated 10.02.2005 (Annex.5) passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad (hereinafter called the 'Tribunal') by which a direction has been issued by the learned Tribunal to change the date of birth of the applicant respondent No.1 (hereinafter called the applicant-respondent) from 01.03.1959 to 13.02.1962.

2. The facts and circumstances giving rise to this case are that applicant-respondent filed an Original Application before the Tribunal seeking a direction to the respondent-petitioner to make the aforesaid correction in his date of birth on the ground that he was born in St. Stephen's Hospital, Tis Hazari, New Delhi on 13.02.1962, however, his date of birth had been recorded as 01.03.1959 in matriculation certificate in view of the entries made in the Scholar's register on the basis of information given by his grandfather at the time of his admission in the school. The Central Board of Secondary Education (hereinafter called the 'CBSE') issued a certificate in 1975 showing the date of birth of the application-respondent as 01.03.1959. He appeared in the Civil Services (Mains) Examination- 1983 wherein he mentioned in his application form that his actual date of birth was 13.02.1962. He was selected and appointed to Indian Administrative Service (hereinafter called the 'IAS') in the year 1984 and allocated the State of Uttar Pradesh. After completion of probation period, he made a representation on 07.08.1987 for correction of his date of birth, followed by a reminder dated 24.12.1987. The said representation was rejected by the Government of India vide order dated 22.04.1988 and the same was communicated to the applicant-respondent on 07.10.1989. The applicant-respondent made another representation dated 26.09.1990 seeking correction of his date of birth. As the said representation was not dealt with, he filed the Original Application No.522 of 1991 before the Lucknow Bench of the Tribunal, which was later on transferred to the Allahabad Bench and registered as Original Application No. 54 of 1999. In the meanwhile, the applicant-respondent filed Civil Suit No. 870 of 1993 in the Court of Munsif, Azamgarh for declaration that his correct date of birth was 3.02.1962. The sole defendant therein CBSE did not enter appearance. The Civil Court passed an exparte judgment and decree dated 06.01.1994 declaring that his correct date of birth was 13.02.1962 and not 1st March, 1959. The CBSE was directed to make necessary amendment/correction in the certificate. The CBSE filed an application under Order 9 Rule 13 of the Code of Civil Procedure (hereinafter called the 'CPC') for setting aside the exparte decree, however, the said application was rejected vide order dated 02.02.1996. Against the said order, a revision was preferred by the CBSE which was also dismissed by the VIIth Additional District Judge, Azamgarh vide order dated 06.12.1996 and, in pursuance thereof, appropriate corrections had been carried out by the CBSE. Therefore, applicant-respondent

was entitled for the benefits of the said Civil Court's decree.

3. The Union of India contested the application on various grounds, inter-alia, that the said judgment and decree of the Civil Court, Azamgarh was not binding on it as the Union of India was not a party to tho Suit; the said applicant-respondent had passed all the examinations, ie. Higher Secondary, MBBS in 1975 and 1980 respectively showing his date of birth as 1st March, 1959. The applicant-respondent appeared in the Combined Medical Services Examination - 1981 and was selected, however, he did not join the service. He was selected and appointed in Indian Police Service (hereinafter called the 'IPS') in 1983 on the basis of Civil Services Examination 1982 and thereafter, he was selected and appointed in Indian Administrative Service (hereinafter called the 'IAS') in 1984 on the basis of the Civil Services Examination - 1983. Had his correct date of birth been 13.02.1962, he could not have even applied what to talk of selection in the I.P.S. on the basis of Civil Services Examination – 1982. The affidavit filed by the petitioner's father dated 27.08.1965 before the Appropriate Authority made it Clear that the applicant-respondent has three brothers and sisters. His sister Kapila was born on 05.03.1955, his brother Rakesh was born on 27.03.1957, the applicant-respondent was born on 01.03.1959 and his younger brother Sudhir was born on 14.02.1962. In case the judgement of the Civil Court is upheld, the petitioner would be only one day elder to his younger brother Sudhir. No satisfactory proof in respect of age of his younger brother Sudhir Prasad has bean adduced before this Court. The application filed by the him for correction of date of birth was rejected in view of the provisions contained in sub-rule (1) of Rule 16-A of the All Indian Services (Death-cum-Retirement Benefits) Rules, 1958 (herein after called the' Rules 1958'), which provides that the date of birth once accepted by the Central Government shall not be shall not be subject to any alteration except where it is established that a bona fide clerical mistake has been committed in accepting the date of birth under sub-rule (2) or sub-rule (3) thereof. Further reliance has been placed upon the notification issued by the Ministry of Home Affairs, Department of Personnel and Administrative Reforms dated 17th December, 1983, according to which once a date of birth claimed by a candidate is entered in the record of the Commission for the purposes of admission to an examination, no change shall be allowed subsequently or at any other examination of the Commission. Therefore, it had been contended on behalf of the Union of India that once he had shown his date of birth in the Civil Services Examination - 1982 as 01.03.1959, in subsequent examinations, it could not have been altered or the applicant-respondent could not have been permitted to give any other date of birth or two dates of birth.

4. The Tribunal allowed the Original Application issuing a mandamus to the Union of India to alter the date of birth of the applicant-respondent from 01.03.1959 to 13.02.1962. Hence the present writ petition.

5. We have heard Shri K.C. Sinha, learned Assistant Solicitor General of India for the petitioner; Shri R.N. Singh, learned Senior Advocate, with Shri Arjun Singhal, and Shri G.S. Hajela for the respondents.

6. The main thrust of the argument on behalf of the writ petitioner has been that the judgment and decree of the Civil Court was not binding on the Union of . India as it was not a party before the Civil Court. The territorial jurisdiction of the Civil Court at Azamgarh to correct the date of birth in the school certificate issued by the CSSE at New Delhi remained doubtful as the applicant-respondent was born in Delhi, got the education at the School in Delhi. No cause of action, partly or fully, had arisen within its jurisdiction and the same was not examined by the said Civil Court. In such a fact situation, the exparte judgment and decree could not be held to be a judgment in rem in view of the provisions of Sections 40 and 42 of the Evidence Act. The judgment and decree had been obtained on the basis of horoscope which itself is a document of very weak nature and any document procured subsequent to the date of birth entered in the service book is not worth reliable. The date of birth is to be corrected at the earliest, i.e. within a reasonable period from the date of entry in service. Once the Union of India has rejected the application for correction of date of birth in view of the provisions contained in sub rule (4) of Rule 16-A of the Rules 1958 vide order dated 22.04.1988, the question of entertaining the repeated representations could not arise as the order of rejection had been communicated to the applicant-respondent on 07.10.1989. The applicant-respondent did not challenge the order dated 22.04.1988 at any stage before any appropriate forum, which had attained finality and, therefore, the question of issuing any mandamus by any Court or Tribunal without setting side" the said order could not arise. During the pendency of the Original Application, there was no occasion for the applicant-respondent to file a Civil Suit and get an exparte judgment and decree in respect of the same subject matter and that too without impleading the Union of India as a party as it amounted to abuse of process of the Court. The Tribunal had erred in holding that the applicant-respondent did not take any benefit from the date of birth disclosed in the earlier forms and applications, as admittedly the applicant-respondent had been appointed to IPS and remained in active service till the date of his termination from IPS vide order dated 06.12.1984 for joining in IAS, therefore, the judgment and order impugned is liable to be set aside.

7. On the contrary, Shri R.N. Singh, learned Senior Counsel appearing for the applicant-respondent has submitted that insufficiency or inadequacy of evidence cannot be a ground of judicial review. Once the Tribunal has examined all the documents and contentions raised by the present petitioner, this Court cannot act as an appellate forum. There was sufficient material before the Tribunal in addition to the judgment and decree of the Civil Court on the basis of which the application has been allowed. Therefore, there is no occasion for this Court to interfere with the findings of fact recorded by the Tribunal. The petition is liable to be dismissed.

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

9. So far as the issue of correction of date of birth is concerned, the law is crystal clear as the said issue has been examined by the Courts time and again.

10. It is settled proposition of law that the date of birth entered in the service record cannot be corrected at a belated stage. Where the date of birth entry remains in existence for a long time, the same does not require to be disturbed on any ground whatsoever. The onus is on the employee-applicant to prove about the wrong recording of his date of birth in his service record by adducing irrefutable evidence. Court has to insist for clear, clinching and unimpeachable evidence in this regard because the relief sought by an employee, if granted, may entail chain reaction hampering promotional prospects of junior officers and may cause an irreparable injury to them. (Vide Union of India Vs. Harnam Singh, AIR 1993 SC 1367; Secretary & Commissioner, Home Deptt. & Ors. Vs. R. Kirubakaran, AIR 1993 SC 2647; Chief Medical Officer Vs. Khadeer Khadri, AIR 1995 SC 850; Union of India & Ors. Vs. Kantilal Hematram Pandya, AIR 1995 SC 1349; Burn Standard Co. Ltd. & Ors. Vs. Dinabandhu Majumdar & Anr., AIR 1995 SC 1499; Collector of Madras and another Vs. K. Rajamanickam (1995) 2 SCC 98; Union of India & Ors. Vs. Saroj Bala (Mrs), AIR 1996 SC 1000; Union of India Vs. Ram Suia Sharma (1996) 7 SCC 421; State of Orissa & ors. Vs. Shri Ramanath Patnaik, AIR 1997 SC 2452; G.M. Bharat Coking Coal Ltd. West Bengal Vs. Shib·Kumar Dushad & ors., (2000) 8 SCC 696; Hindustan Lever Ltd. Vs. S.M. Jadhav & Anr., AIR 2001 SC 1666; Cement Corporation of India Ltd. Vs. Raghbir Singh & Anr., AIR 2002 SC 509; State of U.P. Vs. Smt. Gulaichi, AIR 2003 SC 4209; State of U.P. & Anr. Vs. Shiv Narain Upadhyaya, (2005) 6 SCC 49; and State of Gujarat Vs. Vali Mohd. Dosabhai Sindhi, AIR 2006 SC 2735.

11. In U.P. Madhyamik Shiksha Parishad Vs. Raj Kumar Agnihotri,(2005) 11 SCC 465, the Apex Court held that an application for correction of date is to be dealt with giving strict adherence to the Rules, if any, framed in this regard and particularly in respect of limitation etc.

12. In State of Madhya Pradesh & ors. Vs. Mohan Lal Sharma, (2002) 7 SCC 719, the Hon'ble Supreme Court held that while examining the issue of correction of date of birth, the Court must be very slow in accepting the case of applicant if issue has been agitated at a much belated stage and it must examine the pros and cons involved in the case even if not raised by the parties. In the said case the Tribunal had allowed application for correcting the date of birth placing reliance on the Horoscope and a certificate issued by the retired Head Master of the School showing a different date of birth. The Apex Court reversed the said judgment observing that if it was allowed the applicant would have joined the service when he was less than 18 years of age, and therefore, accepting such an application would amount to sanctifying his illegal entrance in service. The Court further observed that no reliance could be placed upon the said certificate and Horoscope at all.

13. In State of Punjab Vs. Mohinder Singh, AIR 2005 SC 1868, the Supreme Court held that horoscope is a very weak piece of material to prove age of a person. A very heavy onus lies on the person, who wants to press it into service, to prove its authenticity. It requires to be proved in terms of Section 32 (5) of the Evidence Act by examining the person having special means of knowledge as regards authenticity of date, time etc.

mentioned therein, and in that context, horoscopes have been held to be inadmissible for proof of age. For that purpose, reliance has been placed by the Hon'ble Supreme Court on the judgments in Mt. Biro Vs. Atma Ram & Ors., AIR 1937 PC 101 and also on the judgment of the Calcutta High Court in Satish Chandra, Mukhopadhyaya Vs. Mohindra Lal Pathak, ILR 97 Cal 849.

14. In Union of India Vs. Kantilal Hemantram Pandiya, AIR 1995 SC 1349, the Hon'ble Supreme Court held that the Court must be very vigilant in placing reliance on a document or certificate of date of birth which had been brought into existence for the benefit of the pending proceedings as the correctness and genuineness of such a certificate is not free from doubt and the same might have been obrained for getting the relief by such an applicant. Similar view has been reiterated in R.S. Mehrotra Vs. Central Government Industrial Tribunal, 1991 (63) FLR 76; Maharastra State Electricty Board Vs. Sakharam Sitaram Shinde, 1996 (72) FLR 562; and Nagar Mahapalika Bareilly Vs. Labour Court, Bareilly & Anr., 1995 (71) FLR 950.

15. In Union of India Vs. C. Rama Swami & Ors., AIR 1997 SC 2055, the Apex Court considered the application of the provisions of Rule 16-A of the Rules 1958 while examining a similar issue and held that the date of birth as recorded in the service book as declared by an officer in the application for recruitment has to be accepted as correct by the Central Government and, this can be altered only if under sub-rule (4) of the Rules 1958, it is established that a bona fide clerical mistake had been committed in accepting the date of birth and once an application has been rejected, it would be a case that there was no bona fide clerical mistake which had been committed. The Court further held as under:-

"In such a case, even in the absence of a statutory rule, like Rule 16-A, the principle of estoppal would apply and the authorities concerned would be justified in declining to alter the date of birth.....Once having secured entry into the service, possibly in preference to other candidates, then the principle of estoppal would clearly be applicable and relief of change of date of birth can be legitimately denied."

16. In view of the above, the law can be summarised that an application for correcting the date of birth can be entertained at the initial stage of service and if any statutory Rule/Executive Instructions/Government Order provides for a limitation within which the application can be entertained, it is not permissible for the employer to entertain the application after expiry of the said limitation. There must be evidence of unimpeachable character to support the application. Horoscope or certificate issued by the third parties should not be preferred over the date of birth mentioned in the school certificates. Documents prepared/procured at a stage subsequent to joining the service should not be relied upon without examining their genuineness as there is always a possibility of fabricating the documents to support a bogus claim by an employee. Such an application is liable to be rejected, if as per the correction sought, entry of the applicant in service itself becomes bad, ie. being minor or below the age prescribed in the relevant Rules. The onus to prove

about the wrong recording of the date of birth is always on the employee-applicant.

Rule 16-A of the Rules 1958 reads as under:-

"**16-A Acceptance of date of birth-**

16A (1) For the purpose of determination of the date of superannuation of a member of the service, such date shall be calculated with reference to the date of his birth as accepted by the Central Government under this rule.

16A(2) In relation to a person appointed, after the commencement of the All India Services (Death-cum-Retirement Benefits) Amendment Rules, 1971

(a) Indian Administrative Service under clause (a) or clause (aa) of sub-rule (1) of rule 4 of the Indian Administrative Service (Recruitment) rules, 1954; or

(b) the Indian Police Service under clause (a) or clause (aa) of sub-rule (1) of rule 4 of the Indian Police Service (Recruitment) Rules, 1954; or

(c) the Indian Forest Service under clause (a) or clause (aa) of sub-rule (2) of rule 4 of the Indian Forest Service (Recruitment) Rules, 1966;

the date of birth as declared by such, person in the application for recruitment to the service shall be accepted by the Central Government as the date of birth of such person.

16A(3) In relation to a person to whom sub-rule (2) does not apply, the date of birth as recorded in the service book or other similar official document maintained by the concerned government shall be accepted by the Central Government, as the date of birth of such person.

16A(4) The date of birth as accepted by the Central Government shall not be subject to any alteration except where it is established that a bona fide clerical mistake has been committed in accepting the date of birth under sub-rule (2) or (3).

17. The relevant part of the notification dated 17th December, 1983 which provides for rules for competitive examination - Civil Services Examination to be held by Union Public Service Commission, provides as under:-

"The date of birth accepted by the Commission is that entered in the Matriculation or Secondary School Leaving Certificate or in a certificate recognised by an Indian University as equivalent to Matriculation or in an extract from a Register of Matriculates maintained by a University, which extract must be certified by the proper authority of the University or in the Higher Secondary or an equivalent examination certificate. These certificates are required to be submitted only at the time of applying for the Civil Services (Main) Examination.

No other document relating to age like horoscopes, affidavits, birth extracts from Municipal Corporation, service records and the like will be accepted. .

Note 1. - .....

Note 2.- Candidates should also, note that once a date of birth has been claimed by them and entered in the records of the Commission for the purpose of admission to an Examination, no change will be allowed subsequently or at any other Examination of the Commission."

18. In the instant case, the petitioner's date .of birth had been shown in all the school registers as 1st March, 1959, he filled up his application form pertaining to Indian Civil Services

examination -1982 showing his date of birth as 1st March, 1959. Even after joining the service, his first objection was filed in 1987 and it was rejected. The said applicant-respondent did not challenge the said order dated 22.04.1988 and the same attained finality. Therefore, there was no question to entertain any representation subsequent thereto.

19. So far as the issue of repeated representations are concerned, a Constitution Bench of the Hon'ble Apex Court in Rabindra Nath Bose & Ors. Vs. Union of India & Ors., AIR 1970 SC 470, while considering the case of repeated representations, held as under:-

"He says that the representations were being received by the government all the time. But there is a limit to the time which can be considered reasonable for making representations. If the Government has turned down one representation, the making of another representation on similar lines would .not enable the petitioners to explain the delay."

20. In Swatantar Singh Vs. State of Haryana & Ors., AIR 1997 SC 2105, while dealing with a similar case as is in hand, the Hon'ble Apex Court held as under:-

"The Appellate Authority duly considered and rejected the contention of the petitioner. Repeated representation could render little service. Rejection, therefore, is neither arbitrary nor illegal"

21. In view of the above, we fail to understand that in case the applicant-respondent did not challenge the order dated 22.04.1988 passed by the Government of India, how he could submit further representation and how the exparte judgment and decree of the Civil Court could help him, particularly in view of the fact that the Union of India was not impleaded as party. Our view stands fortified by the judgment of the Hon'ble Supreme Court in Director of Technical Education & Anr. Vs. Smt. K. Sitadevi, AIR 1991 SC 308 wherein the Court has categorically held that the judgment and decree of a Civil Court was not binding on the Department for the reason that it was not a party to the Suit. The said judgment of the Hon'ble Supreme Court was followed by the Division Bench of this Court in Prof. Mohd. Zameeruddin Siddiqui Vs. Executive Council, Aligarh Muslim University, Aligarh & Anr., 1996 (1) ESC 239. This Court also held that in such a fact situation, it becomes the duty of the party to furnish particulars regarding the date of birth of his other family members as in the said case, this Court refused to accept the averments made on behalf of the petitioner therein as he would become younger to his younger brother as per the date of birth shown in the the service book of his younger brother. The said judgment has been upheld by the Hon'ble Supreme Court as is evident from the judgment in Mohd. Zameeruddin Siddiqui Vs. Executive Council Aligarh Muslim University & Anr, (2000) 9 SCC 48.

22. The question of binding nature of the certificate duly corrected by the CBSE on the basis of judgment and decree of the Civil Court is also not reliable/worth consideration for the simple reason that we are very much doubtful about the territorial jurisdiction of the Civil Court at Azamgarh as neither the said applicant-respondent got

education in the said district or in the State of Uttar Pradesh or the CBSE was having any office at Azamgarh. More so, in view of the provisions contained in Section 20 CPC, the Court may not have jurisdiction as no cause of action, partly or fully, had arisen within its territorial jurisdiction. It is beyond our imagination as for what purpose, the suit had been filed in 1993 when the applicant-respondent had already filed the Original Application before the Tribunal in 1991 and even in that application, the applicant-respondent did not ask for quashing of the order of the Government of India dated 22.04.1988.

23. The provisions of Sections 41 to 43 of the Evidence Act make it clear that if a judgment of the Court is a judgment in rem, it is binding in subsequent proceedings on that issue though the parties may not be the same. But if it is a judgment in personam, it does not have any binding effect in subsequent proceedings. This issue was considered by the Privy Council in Mahomed Saddique Yousuf Vs. Official Assignee of Calcutta, AIR 1943 PC 130, wherein it was held that in proceedings of insolvency, an order passed on adjudication is of a binding nature being a judgment in rem and a person, who may not be a party in the insolvency proceedings, cannot challenge the said order for the reason that the order of adjudication was conclusive in nature and cannot be disputed.

24. In Surinder Kumar & ors. Vs. Gian Chand & ors. AIR 1957 SC 875, the Hon'ble Supreme Court held that probate of the Will operates as a judgment in rem, therefore, the objection that the parties in any subsequent proceedings were not parties to it, is not sustainable because of the nature of the judgment.

In Gurdit Singh & Ors. Vs. State of Punjab & Ors., AIR 1974 SC 1791, the Supreme Court explained as under:-

"A judgment of a court is an affirmation, by the authorised societal agent of the State, speaking by the warrant of law and in the name of the State, of the legal consequences attending of proved or admitted state of facts. Its declaratory, determinative and adjudicatory function is its distinctive characteristic. Its recording gives an official certification to a pre-existing relation or establishes a new one on pre-existing grounds."

25. In State of Bihar & ors. Vs. Sri Radha Krishna Singh & ors., AIR 1983 SC 684, the Hon'ble Supreme Court, while considering the Scope of provisions of Sections 13 and 41 to 43 of the Act, to prove the admissibility of judgment, observed as under:-

"Some courts have used Section 13 to prove the admissibility of a judgment as coming under the provisions of Section 43..... We are, however, of the opinion that where there is a specific provision covering the admissibility of a document, it is not open to the court to call into aid other general provisions in order to make a particular document admissible. In other words if a judgment is not admissible as not falling within the ambit of Sections 40 to 42, it must fulfil the conditions of Section 43 otherwise it cannot be relevant under Section 13 of the Evidence Act. The words 'other provisions of this Act' cannot cover Section 13 because this

section does not deal with judgments at all.

It is also well settled that a judgment in rem like judgments passed in probate, insolvency, matrimonial or guardianship or other similar proceedings, is admissible in all cases whether such judgments are inter parties or not. In the instant case, however, all the documents consisting of judgments filed are not judgments in rem and, therefore, the question of their admissibility on that basis does not arise. As mentioned earlier, the judgments filed as Exhibits in the instant case, are judgments in personam and, therefore, they do not fulfil the conditions mentioned in Section 41 of the Evidence Act.

The Court further summarised the law as under:-

(1) A judgment in rem e.g. judgments or orders passed in admiralty, probate proceedings, etc., would always be admissible irrespective of whether they are inter parties or not.

(2) Judgments in personam not inter parties are not at all admissible in evidence except for the three purposes mentioned above.

(3) On a parity of aforesaid reasoning, the recitals in a judgment like findings given in appreciation of evidence made or arguments or genealogies referred to in the judgment would be wholly inadmissible in a case where neither the plaintiff nor the defendant were parties.

(4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little.

(5) Statements, declarations or depositions, etc., would not be admissible if they are post litem motam."

26. While deciding the said case, the Court took into consideration the judgments in Kesho Prasad Singh Bahadur Vs. Bhagjogna Kuer, AIR 1937 PC 69; and Coco-cola Company of Canada Ltd. Vs. Pepsi-Cola Company of Canada Ltd., AIR 1942 PC 40.

27. In Raje Anandrao Vs. Shamrao & ors., AIR 1961 SC 1206, the Supreme Court held that suit under Section 92 of the Code is of public nature and unless the scheme of administration or modification thereof regarding administration of the temple not affecting the private rights of Pujaris who are not parties to the suit, is binding on them. Similar view has been reiterated in Ahmed Adam Sait & ors. Vs. M.E. Makhri & ors., AIR 1964 SC 107, observing that when a representative suit is brought and decree is passed in such a suit, law assumes that all persons, who have the same interest as the plaintiffs in the representative suit, were represented by the said plaintiffs and, therefore, are constructively barred, by the res-judicata, from re-agitating the matters directly or substantively in issue in the said suit. A similar rule follows if the suit is either filed or defended under O. 1 R. 8 of the Code. In that case, persons either suing or defending an action are doing so in a representative capacity and, so, the decree passed in such a suit binds all those whose interests were represented either by the plaintiffs or by the defendant.

28. In Sunni Central Board of Waqf, U.P. Vs. Sirajul Haq Khan & ors., AIR 1954 All. 88, a Division Bench of this Court held that a suit under Section 92 of

the Code can be maintained only in respect of public trust of a permanent character and the judgment in such a suit would be a **judgment in rem** and not a judgment in personam. Therefore, such a judgment is admissible in any other subsequent suit and it is not open to any party to challenge the permanent public nature of the trust.

29. In Vempa Sunanda Vs. Vempa Venkata Subbarao, AIR 1957 AP 424, the Division Bench of Andhra Pradesh High Court held that a decree dissolving a marriage determines the status of the parties and is equivalent to a judgment in rem.

30. Therefore, it depends upon the nature of the proceedings and where the matters are of public nature, the judicial decision may be evidence though not conclusive of what they say, but where the matters are not of public nature, such evidence is not admissible as having binding effect. Therefore, decree like declaration of marriage as or nullity in probate or insolvency proceedings, determination of customary rights, being **matters of public nature**, the judgments are in rem and, therefore, may be admissible but where the question of status of joint family or a suit for restitution of conjugal right, order in lunacy, judgment under Section 42 of the Specific Relief Act or declaration of a person to be a partner in a firm or proceedings of partition suit or in case of adoption, as the judgments are not of a public nature, the same are in personam and the judgments are not admissible if the parties are not the same.

31. **A judgment in rem** means an adjudication pronounced upon the status of a person or thing, by a competent court to the word generally. But it is not conclusive proof of the facts constituting the reasons for the decision. In such circumstance, the order is conclusive only as regards the status but not as regards the grounds on which it is based.

32. Section 41 of the Evidence Act deals with the judgment in rem. Section 42 of the Evidence Act deals with matters relating to public nature and forms. The exception in the general principle of res judicata is partially embodied in Section 11 of the Code of Civil Procedure.

33. However, in Smt. Satya Vs. Teja Singh, AIR 1975 SC 105, the Supreme Court placing reliance upon its earlier judgment in R. Viswanathan Vs. Rukn-Ul-Mulk Syed Abdul Majid, AIR 1963 SC 1, held as under: -

"Section 41 of the Indian Evidence Act provides, to the extent material, that a final judgment of the competent court, in the exercise of matrimonial jurisdiction, is conclusive proof that a legal character, which it confers or takes away, accrued or ceased at the time declared in the judgment for that purpose. **But the judgment has to be of a competent court, i.e. a court having jurisdiction over the parties and the subject matter. Even a judgment in rem is, therefore, open to attack on the ground that the Court, which gave it, had no jurisdiction to do so."** (Emphasis added).

34. In the instant case the Tribunal referred to the issue in a cursory manner but did not examine it in an appropriate manner as to whether the Court had jurisdiction to entertain the suit.

35. The specific plea taken by the Union of India before the Tribunal had been that in case the applicant's date of birth was 13.02.1962, he was ineligible to appear in the examination of the CBSE in 1975 at the age of 13 years or the Medical College or for the Civil Services Examination - 1982 for the reasons that for each examination, a minimum age has been prescribed. The Tribunal has made an observation that even if there was a bar for appearing in the CSSE prior to completing a particular age, the Board could have relaxed the age and the Union of India failed to produce any specific Rules prescribing the minimum age for appearance in the said examination. It was the duty of the applicant-respondent to prove his case by adducing sufficient material and to provide the Rules. The Tribunal has also brushed aside another averment, that is, in case his date of birth was 13.02.1962, he could not apply for the Civil Services Examination - 1982 as he was selected and remained in active service of IPS till 06.12.1984, without dealing with it. The Tribunal failed to appreciate that applicant-respondent, had challenged his date of birth recorded in the service records and therefore, the onus to prove the issue was on him and not upon the Union of India. The Tribunal erred in not appreciating that the case of the applicant had to stand on its own legs and not on the discrepancies/deficiencies in the evidence of the opposite party.

36. Petitioner has filed the copy of the affidavit filed by applicant-respondent's father in 1965 showing the dates of birth of all his four children, according to which his younger brother Suresh Prasad was born on 14.02.1962 and, thus, his date of birth could not be 13.02.1962. This has not properly been explained/denied by the applicant-respondent as it has been stated that the issue was not agitated before the Tribunal. In reply to the averments made in paragraphs 23 and 24 of the writ petition, he has explained that the affidavit given by his father was wrong as no child was born on 14.02 1962. In support of his averments, he has filed the copy of the certificate issued by the Head Master of the Sainik School, Nagrota dated 13.01.2006, according to which his younger brother Sudhir Prasad joined the said School on 18.09.1972 in sixth class and his date of birth was 14.02.1963. He left the said school in 1980 after passing the examination of 11th class. The applicant-respondent has not filed any certificate or copy of the school register where his younger brother was initially admitted in class one. Therefore, the documents cannot be relied and it does not appeal to reason that the affidavit given by his father, who was a teacher, could be false.

37. It is not disputed that in the form submitted by the applicant-respondent in the examination of 1982, he had shown his date of birth as 1st March 1959 and that in case his date of birth was 13.02.1962, he was ineligible to appear in the Civil Services Examination-1982 being below 21 years of age. Once the applicant-respondent joined the service in pursuance of the said application form and enjoyed the benefit thereof, there was no occasion for him, under any circumstance, to seek change in his date

of birth in view of the notification dated 17.12.1983, which puts a complete embargo in changing the date of birth in the forms to be filled up for subsequent examinations. The findings of fact recorded by the Tribunal to the effect that the applicant derived no advantage or benefit of the Civil Services Examination - 1982 on the basis of his selection to IPS is perverse as it is admitted fact that the applicant-respondent was in active service in IPS after selection till his service in IPS was terminated vide order dated 06.12.1984 to join the IAS in pursuance of the Civil Services Examination - 1983. The Tribunal has recorded the following finding:

"The respondents have also not brought on record any order by the Central Government accepting 01.03.1959 as the applicant's date of birth, either on the basis of any entry in the service book or other similar official documents maintained by the concerned department. In fact the date of birth has not been mentioned in the service book."

38. Had the case been so, we fail to understand as what was the occasion for the applicant-respondent to make an application for change of his date of birth in the service record and what was the occasion for him to file a Civil suit or seek a writ of mandamus from the Tribunal to change the date of birth from 01.03.1959 to 13.02.1962. The admission of recording of date of birth in the service record of the applicant-respondent as 01.03.1959 is admitted in view of the rejection of his application for correction of date of birth vide order dated 22.04.1988~,which was never challenged by the applicant-respondent and it attained finality. The aforesaid aspect of the matter had been completely lost sight of by the Tribunal and, thus, there has been complete misreading of Rule 16-A (4) of the Rules 1958. The cumulative effect of the provisions of Rule 16 ·A (4) of Rules 1958 read with notification dated 17th December, 1983 makes it abundantly clear and leaves no room for doubt that the date of birth given by the applicant-respondent in the first application form cannot be changed while filling up the application forms for subsequent examinations and these forms in themselves are referable to Clause 16A(3) of the Rules 1958 for the purpose of date of birth of the candidate.

39. Despite specific query of the Court, learned Senior Counsel for the applicant-respondent could not point out any cause of action or part thereof, which may have arisen within the territorial jurisdiction of the district Court Azamgarh for initiation of suit proceedings for correction of date of birth in the CBSE examination certificate during the pendency of the Original Application before the Tribunal except that the applicant had been posted as District Collector and only reply given is that the issue of jurisdiction is to be raised at the first instance. Since the Union of India was not a party before the Suit proceedings, it has rightly raised the issue before us.

On the basis of the above, we reach the following inescapable conclusions:

(i). The date of birth of the applicant-respondent had been recorded as 01.03.1959 in the school registers.

(ii). The applicant-respondent filled up the forms for examinations in CBSE,

Medical Course and for Civil Services Examination 1982 mentioning his date of birth as 01.03.1959.

(iii). The applicant-respondent was selected for Medical Service, though did not join, and subsequently for IPS on the basis of Civil Services Examination - 1982 and remained in active service till his selection in IAS on the basis of his date of birth as 01.03.1959. Thus, he has taken the benefit of his date of birth filled up by him in the application form for the Civil Services Examination-1982.

(iv). While filling up application form for the Civil Services Examination-1983, first time the applicant-respondent had shown his two dates of birth - 01.03.1959 (contested) and 13.02.1962 (actual). There is nothing on record to show as how could it be a contested one as it is no one's case that the applicant-respondent had made any application before any forum for change of date of birth or made any representation for changing his date of birth already recorded in the service records. No explanation could be furnished by his learned counsel as under what circumstances such a remark had been made and the applicant-respondent could give two dates of birth in the application form.

(v). Representation submitted by the applicant-respondent for correcting the date of birth stood rejected by the Government of India vide order dated 22.04.1988, which had never been challenged and it also attained finality.

(vi). The representation subsequent to 22.04.1988 for change of his date of birth was meaningless and could not be entertained.

(vii). The applicant-respondent filed Original Application in 1991 without challenging the order dated 22.04.1988 rejecting his representation for change of date of birth, seeking a mandamus to correct his date of birth and relied upon the correction made by the CBSE in pursuance of the judgment and decree of the Civil Court.

(viii).No explanation could be furnished as under what circumstances, during the pendency of the Original Application, the suit could be filed for the same relief that too without impleading the Union of India. Though the suit had been decreed exparte but the jurisdiction of the Civil Court at Azamgarh remained doubtful as admittedly the applicant-respondent was born at Delhi, got his education at Delhi, CBSE was having its office at Delhi and no cause of action, partly or fully, had arisen within the territorial jurisdiction of the Civil Court at Azamgarh. The only explanation furnished by his counsel is that he was posted there as District Collector and issue of jurisdiction cannot be agitated at this stage.

(ix). If the jurisdiction of the Civil Court becomes doubtful, the said judgment and decree cannot be held to be a judgment in rem.

(x). The Tribunal erred in placing the onus of proof on the Union of India that the applicant-respondent was not competent to pass the CBSE examination at the age of 13 years or to join the Medical College at such a young age for the reason that for such a course, minimum age is

prescribed. As the issue had been agitated by the applicant-respondent for correcting his date of birth, the onus was definitely upon him to prove that his date of birth had wrongly been recorded and not upon the Union of India.

(xi). Averments made by the petitioner that the applicant-respondent's father had filed an affidavit in 1965 showing the dates of birth of all his four children, according to which, if the case is accepted, the applicant-respondent would be only one day elder to his younger brother, has been denied in his reply by the applicant-respondent stating that this issue has not been agitated before the Tribunal and further that his father's affidavit was false.

(xii). In case the judgment of the Tribunal is upheld, the applicant-respondent was not eligible for appearing in the Civil Services Examination - 1982 on the basis of which, he was ,selected and appointed in IPS.

40. In view of the above, the petition succeeds and is allowed. The order dated 10.02.2005 passed by the respondent no.2 is hereby set aside. In the facts and circumstances of the case, there shall be no order as to costs. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2008

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE V.C. MISHRA, J.

Civil Misc. Writ Petition No.53984 of 2004

Sundar Garden Welfare Association and another ... Petitioners
Versus
State of U.P. & others Respondents

Counsel for the Petitioners:
Sri. S.K. Dubey
Sri Siddharth Srivastava
Sri Ashok Nath Tripathi

Counsel for the Respondents:
Sri. V.K. Singh
Sri. B.K. Narayan
Sri. Ashok Trivedi
Sri. S.K. Mishra
Sri. T.B. Islam Ansari
Sri. Vivek Varma
S.C.

Land Acquisition Act 1894, Section 5-A, 17-Land acquired in the year 2003 for Industrial development-while since 2001 Agricultural land converted in Abadi Land-occupied by 291 member of Society by raising buildings-even U.P.S.I.D.C. a registered Company-established for planned industrial development-not empowered to develop the land for residential purpose-No extreme urgency for exemption of the provisions of Section 5A of the Act shown-held acquisition illegal-Quashed.

Held- Para 14 & 15

We find that the notification dated,16 4 2003..under, Section 4 read with Section 17 of the Act is unsustainable on the grounds of non consideration of correct facts, therefore the opinion of the

Governor is not based upon cogent material and therefore non consideration of relevant facts such as abadi land, as per report of the revenue authorities etc, non compliance of due procedures, as envisaged under Section 4 of the Act, i.e. non publication of notification into two local newspapers having wide circulations in area. The contesting respondents alleged to have published in Dainik Pralayankar and Dainik Bhavi which have not been proved to be widely circulated and known in the area to make people aware of acquisition proceedings. In such circumstances, the notification dated 30.6.2003 under Section 6 read with Section 17 is wrong, bad, unsustainable and illegal and since the objections have not been considered, at all, the satisfaction of the Governor is void ab initio as the relevant factor regarding use of the land is as abadi and not for the agricultural use nor it was vacant land.

We further find that the UPSIDC is a company registered under the provisions of the Companies Act and the same is established for planned industrial development as per Memorandum of Association, under which the UESIDC-is not empowered to develop an abadi for residential purpose,specially when the land, in question had already been declared abadi land subject to the provisions of Ghaziabad Development Authority. The land acquired was abadi in 2001 under Section 143 of the U.P.Z.A. and L.R. Act where as the initiation of the acquisition proceedings took place in April 2003, as such this fact is undisputed that the land in question was abadi land much before the initiation of the acquisition proceedings for which no further enquiry is needed, as the same is already on record and in view of the same, the land in question was not liable to be put under acquisition proceedings, as held in 1998 (6) SCC (Om Prakash Vs. State of U.P. and others) and 2003 (9) SCC 542 (Ved Prakash Vs. Ministry of Industry and others).

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

1. The present writ petition has been filed by the petitioners-Sundar Garden Welfare Association formed by the residents of the society. The petitioner No.2 is the Secretary of the society who has been authorized by the residents of the colony to prefer the present writ petition vide resolution dated 28.11.2004 of the association and authorized the petitioner No.2 to sign and contest the petition on their behalf challenging the notification issued under Sections 4 and 6 of the Land Acquisition Act (hereinafter referred to as the Act) in respect with the plots purchased and owned by the petitioners mentioned in para 5 of the writ petition and seeking a writ order or direction in the nature of certiorari for quashing the said gazette notification along with a writ of mandamus commanding the respondents not to dispossess the petitioners by demolition of the houses situate on the aforesaid plots have been acquired by the State Government.

2. The facts of the case of the petitioners in brief are that the petitioners-association purchased the aforesaid bhumidhar land free from all encumbrances bearing plot Nos.496, 497,544, 501,500, 578, 502, 504, 505, 498, 536, 538, 539 and 541 distributed amongst its members through registered sale deeds. After purchasing the aforesaid plots a colony was developed by the petitioners in the name of Sundar Garden Colony and after developing the said land the houses were constructed thereupon by the members of the society. The said houses are being occupied by the members of the society. The State Government acquired a large

area of land under the Act. The members of the petitioners society had filed Case No.2 of 2001 before the Assistant Collector under Section 143 U.P.Z.A. & L. R. Act for being declared as abadi land. Since the petitioners, as per the report of the Tehsildar, were registered as bhumidhar with transferable rights over the said land on 2.1.2001, the Tehsildar, Ghaziabad recommended for declaration of the said land as abadi and the same was being used as tenure holders for residential purposes and was not being used for Agriculture, Horticulture and Animal Husbandry. The Sub Divisional Magistrate, Loni, Ghaziabad vide its order dated 19.3.2001 declared the said land as abadi.

3. On coming to know of some acquisition proceedings to be initiated by the respondents-State Government in respect with the said land, they filed their objections before the State Government and a survey was made by the concerned authorities of the State Government. As per survey report there exists several residential houses of the members of the society on the aforesaid plots. However, the State Government vide gazette notification dated 16.4.2003 acquired the aforesaid land.which was published in an unknown newspaper, namely, "Dainik Pralayankar". A gazette notification dated 16.4.2003 under Section 17 (1) of the Act was issued by the State Government to the effect that the provisions of Section 17 (1) of the Act are applicable to the said land inasmuch as the same was urgently required for the Planned Industrial Development in District Ghaziabad and it was necessary to ward off the delay likely to be caused by an inquiry and hearing of objections from the owners of the land under Section 5-A of the Act with further directions under Section 16 (4) of the Act making the provisions of Section 5-A of the Act inapplicable. Thus, the due procedure as provided under Section 4 of the Act was not followed as the notification was not published in the two local newspapers having wide circulation neither local publication was made in original language nor the notice was pasted on conspicuous place, even Munadi was not made. This notification was followed by a gazette notification dated 30.6.2003 under Section 6 of the Act being satisfied that the land mentioned in the schedule was needed for the purpose of Industrial Development of Ghaziabad through Uttar Pradesh State Industrial Development Corporation, Kanpur (hereinafter referred to as the Corporation) and directed the Collector, Ghaziabad to take out the order of acquisition for the said land under Section 7 of the Act and that there being urgency to take possession of the land under Section 9 (1) of the Act and to pass an award under Section 11 of the Act.

4. The members of the society on gaining knowledge of such acquisition filed a representation dated 12.5.2004 before the State Government that the aforesaid plots of the petitioners are abadi land declared vide order dated 19.3.2001 by the revenue authorities over which their houses are standing and the same may be excluded from the acquisition. Since no action was taken by the State Government on the representation and the authorities were in hot haste to demolish the construction

standing upon the land, in question, the petitioners filed the present writ petition and prayed for an interlocutory order restraining the respondents from dispossessing and demolishing the constructions made upon the said land and obtained an interim order dated 20.12.2004.

5. The main ground raised in this petition is that the land in question was recorded as abadi land in the revenue records and was being used as such and was not being used as agricultural land and thus could not be acquired, as per the decision given by the Hon'ble Apex Court in the case of Ved Prakash and others Vs. Ministry of Industries, Lucknow and another, reported in 2003 (9) SCC 542. Learned counsel for the petitioners has submitted that the notification issued under Sections 4 and 6 of the Act were null and void as mandatory requirements regarding gazette and publication etc. prescribed under the Act had not been followed and complied with. More so, there was no necessity of applying the provisions of urgency under Section 17 (4) of the Act dispensing with the provisions of Section 5-A of the Act preventing the petitioners from being heard of their objections and holding of an inquiry.

6. In the counter affidavit filed on behalf of the State-respondents No.1 ,2, & 3 it has been stated that the plots of land in question have been acquired under the provisions of U.P.Z.A. & L. R. Act and the owners of the aforesaid land have obtained money and the affected persons have not challenged the Government Notification dated 30.6.2003 thereafter the agreement has come to an end which has not been challenged, and that the petitioners have not been shown as the owners of the land and as such the writ petition is liable to be dismissed with costs. It has also been submitted that the State Government published a news item in two daily.newspapers, viz. "Dainik Jagran" on 23.5.2003 and "Dainik Pralayankar" on 25.5.2003 and a beat of drum was also made and therefore, after expiry of the agreement the petitioners did not continue as owner of the Sundar Garden and since their names do not find place in the revenue record, it seems doubtful that the petitioners have purchased the land for construction of the colony. It is also stated that the General Manager of the Corporation made a proposal for requirement of land for the development of industrial area. On 3.6.1997 about 83.9 acres of land was acquired but considering the gravity of the grievance of the villagers 12 bighas and odd land was left for the interests of the villagers and according to the Nigam proposal for amended acquisition was made. It has also been stated that in the order dated 19.3.2001 passed by Sub Divisional Magistrate with reference to the report of the Tehsildar dated 2.2.2001 wherein it has been mentioned over the vacant land in which plotting had been done for abadi, roads are being constructed between the plots 4 and 5 and consequently, acquiring body entered into some agreement with the land holders which was done in accordance with Section 11 (2) of the Act and after the decision the land owners have been paid their compensation. It has been further stated that the petitioners (Sundar Garden Welfare Association) had entered into an agreement with the land owners through power of attorney and the sale

deeds were executed after the expiry of the period of agreement and as such the petitioners are left with no right, title or interest over the land and as the land in question is registered in the names of land holders in the revenue records therefore, after settlement with the acquiring body the compensation has been paid to them.

7. It has been contended that the counter and supplementary counter affidavits have been filed on behalf of respondent No.4 the requiring body. In para 5 of the counter affidavit filed on behalf of respondent No.4 it has been stated that a proposal was prepared to acquire the land in question and the same was sent to the Collector, Ghaziabad. It has also been contended that the land was being used for agricultural purposes only and was totally vacant.

8. Sri V.K. Singh learned Senior Advocate appearing for the respondent No.4 has raised a preliminary objection regarding maintainability of the writ petition on two counts; Firstly, no document is annexed for establishing the averments made in the paragraphs 3 and 4 of the writ petition by the association or person for enforcement of rights of the members. Neither the rules nor the regulation of the society are available to authorise the association to take legal proceedings on behalf of the members for giving binding effect on them of any order passed or to be passed by the Court in the proceeding even when the association is unregistered. Secondly, payment of single Court fee on behalf of the association in such a situation cannot give in jurial relationship between the members of the association. More so, each of the member of the petitioners' association has a separate cause of action having purchased land under separate sale deed hence, single writ petition cannot be held to be maintainable. He has placed reliance upon a Full Bench decision of this Court in the case of Umesh Chand Vinod Kumar and others Vs. Krishi Utpadan Mandi Samiti, Bharthana and another reported in AIR 1984 Allahabad 46, Paras-17,18,20,34,35 & 45. Learned counsel for the respondents has further submitted that the interlocutory order passed by this Court on 12.1.2005 for giving particulars of the members has not been complied with. Therefore, the petitioners are not entitled to be heard in the present writ petition as the petitioners did not disclose the identity of the petitioners and the number of his members and the description of the land/plots and the constructions made thereupon. The bye laws of association has not been filed neither the resolution referred to in para 2 of the writ petition has been filed.

9. Having heard extensively the learned counsel for the parties and perusal of the record including Full Bench decision of Umesh Chand (supra) in respect with the preliminary objections, we are of the view that the writ petition is very much maintainable on both the counts. Petitioner Nos. 1 and 2 have described in para 3 the details of the plots held by the members of the petitioners' association. No doubt, in para 17 a mention has been made to the effect that there are about 150 members in the petitioners' association but in the supplementary affidavit dated 16.12.2007 the figure of Members has been shown as 291 who had purchased

the land in question through registered sale deeds, much before the initiation of land acquisition proceedings, and at that time the land was recorded as abadi. So for as the joinder or misjoinder of petitioners is concerned, the petitioners have a right to approach this Court in a single writ petition through the association as the right seeking relief against respondents arises from the same act of acquisition of land under the Land Acquisition Act and common questions of law arise and the petitioners are jointly interested in the same cause of action which has been settled by the Full Bench decision of this Court in Mal Singh's case reported in 1968 A.L.J. 210, Paras 24 and 28 followed by another Full Bench decision of this Court reported in AIR 1984 Allahabad page 46, Paras 24 and 25. In paras 36,37 and 38 in the case of Umesh Chand (supra) which reads as under:-

"36. Where a single writ petition by an association or by more than one person is maintainable as mentioned as above, only one set of court-fees would be payable. The levy of court-fee will not depend on the number of persons - who have joined in the writ petition. But, where a single writ petition is not validly maintainable, but nonetheless several persons joint in it, then the principle laid down in Mota Singh's case (AIR 1981 SC 484) will apply; namely, each petitioner will have to pay court-fee separately as if he bad filed a separate writ petition. In such cases the writ petition . may not, in the discretion of the Court, be dismissed outright. The defect of misjoinder of petitioners can be cured by requiring each petitioner to pay separate court-fees.

37. Our answer to the third question is that where a single writ petition by an association or by more than one person is maintainable, then a single set of court-fees would be payable. Else, each petitioner is liable to pay separate court-fees.

38. Our answer to fourth question is that the technical defect of misjoinder of petitioners can, in the discretion of the Court, be cured by each petitioner paying separate court-fees."

10. In the instant case, we are of the view that although the single writ petition on behalf of the association whether registered or unregistered can be held to be maintainable but in the present circumstances particularly in view of the interim order, separate Court fees are directed to be paid to cure the defects, if any. The 291 members of the association disclosed in Annexure-2 of the supplementary affidavit dated 16th December 2007 are directed to pay the Court fees separately for each of them to cure the technical defect of misjoinder of petitioners which the petitioners shall file the Court fees before the Registry and only under such circumstances the certified copy would be made available to the petitioners. The preliminary objections raised by the respondent No.4 is accordingly disposed off.

11. On coming to the merits of the case the learned counsel for the petitioners have submitted that the change of nature and purpose of the user vitiated the entire proceedings under the Land Acquisition Act. The objections under Section 5-A of the Act have not been disposed off by the State

Government-the acquiring body on the ground of urgency and Section 17 of the Act cannot be invoked in the present circumstances since Section 5-A is depriving the legal rights of the petitioners under Article 300-A of the Constitution. The land was surveyed for the purpose of acquisition under the scheme of Planned Industrial Development as far back as in 1997 but the notification was issued under Section 4 of the Act only on 16.4.2003 in respect with the opinion of the State Government for acquiring the land followed by Section 6 of the Act. Both of them have independent scope but while proceedings under Section 17 of the Act depriving the petitioners of their legal rights to file objections and be heard followed by an inquiry while going through satisfaction of the urgency, two matters arise; first is urgency to dispossess and the second is urgency to deprive. Once there is no ground of urgency apparently found to be present then the burden lies on the State to show as to why the objections under Section 5-A of the Act are to be ignored. Secondly, there is non compliance of the consideration under Section 6 of the Act while declaring that the land is required for public purpose. The public purpose has to be specified which in the present case was for Planned Industrial Development required by respondent No.1 the U.P. State Industrial Development Corporation. It has been urged that the abadi land being situated in Ghaziabad which is hub of the residential area and under the master plan the land is put for residential purposes only and not for industrial purpose. Thus, there being a change in user all these facts could be seen and looked into by the State Government at the time when the petitioners' objections under Section 5-A of the Act would have been considered. The industrial development was the only public purpose for which the land was acquired and not the present scheme and no details had been furnished as is required under Section 4 notification. The impugned notification under Section 4 is thus assailed on, the ground of vagueness in disclosing the scheme. Reliance has been placed on (1991) Vol 4 SCC 224 (page 230). In para 12 of the said decision it has been held that acquisition proceedings cannot be allowed to be reopened and land would be available to the owners. Reliance is placed on 1998 (6) SCC-536 (Registrar, Cooperative Societies Vs. Maharshi Dayanand Cooperative Housing Society and others).

12. From the record it is found that the land is no more required for industrial purpose and has been made subject to Ghaziabad Development Authority and placed with the master plan of 2021 of Ghaziabad Development Authority which has already taken necessary steps for proceeding accordingly, as per minutes dated 20.6.2005, a translated copy in English of the said minutes has been placed by the learned counsel for the petitioners before the Court, which is kept on record. A reference has been made to the booklet of Ghaziabad Master Plan 2020. Reliance has been placed on the decision in the cases of 2004 (8) SCC 453, Para 16 and 30 (Union of India Vs. Krishna Lal Arneja), 2004 (8) SCC 14, Para 31 (Union of India Vs. Mukesh Hans) and 2006 (3) UPLBEC 2484 (Kashama Sahkari Avas Samiti Ltd. Vs. State of U.P.).

13. We are of the view that once the land was acquired and taken over by the requiring body for the purposes of industrial development, then it can be public or commercial and residential accommodation connected with the said industrial development. but it cannot enter into simple housing society development scheme performing the job of the development authorities and Nagar Nigams etc., which are authorized under the U.P. Urban·Planning and Development Act, 1973 and other similar Acts.

14. We find that the notification dated 16 4 2003 under, Section 4 read with Section 17 of the Act is unsustainable on the grounds of non consideration of correct facts, therefore the opinion of the Governor is not based upon cogent material and therefore non consideration of relevant facts such as abadi land, as per report of the revenue authorities etc" non compliance of due procedures, as envisaged under Section 4 of the Act, i.e. non publication of notification into two local newspapers having wide circulations in area. The contesting respondents alleged to have published in Dainik Pralayankar and Dainik Bhavi which have not been proved to be widely circulated and known in the area to make people aware of acquisition proceedings. In such circumstances, the notification dated 30.6.2003 under Section 6 read with Section 17 is wrong, bad, unsustainable and illegal and since the objections have not been considered, at all, the satisfaction of the Governor is void ab initio as the relevant factor regarding use of the land is as abadi and not for the agricultural use nor it was vacant land.

15. We further find that the UPSIDC is a company registered under the provisions of the Companies Act and the same is established for planned industrial development as per Memorandum of Association, under which the UESIDC-is not empowered to develop an abadi for residential purpose,specially when the land, in question had already been declared abadi land subject to the provisions of Ghaziabad Development Authority. The land acquired was abadi in 2001 under Section 143 of the U.P.Z.A. and L.R. Act where as the initiation of the acquisition proceedings took place in April 2003, as such this fact is undisputed that the land in question was abadi land much before the initiation of the acquisition proceedings for which no further enquiry is needed, as the same is already on record and in view of the same, the land in question was not liable to be put under acquisition proceedings, as held in 1998 (6) SCC (Om Prakash Vs. State of U.P. and others) and 2003 (9) SCC 542 (Ved Prakash Vs. Ministry of Industry and others).

16. Under the aforesaid facts and circumstances of the case, the Notification No.203/77 -4-203-116-Bha/99 Lucknow dated 16.4.2003 under Section 4 of the Land Acquisition (Annexure-8 to the writ petition) as far as it relate to plot Nos.496, 497, 544, 501, 500, 578, 502, 504, 505, 498, 536, 538, 539 and 541 of village Harampur, pargana Loni, Tehsil and District Ghaziabad and the Gazette Notification dated 30.6.2003 under Section 6 of the Land Acquisition Act. 1894 are hereby quashed.

17. With the above observations, the writ petition is allowed to the extent indicated above. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2008

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

Civil Misc. Arbitration Application No. 32 of 2004

M/s Ganga Plumbering Works, Kanpur ...Applicant
Versus
The Kanpur Development Authority and others ...Respondents

Counsel for the Applicant:
Sri. Shubham Agrawal

Counsel for the Respondents:
Sri. Ajit Kumar Singh

Arbitration Act- Agreement clause 24- provides the decision of Chief Engineer to be final to all-No reference of arbitration-application for appointment of arbitrator-held not maintainable.

Held: Para 9 & 10

The situation as obtaining in the case of Damodar Das (Supra) has thus been clearly excluded from the category of cases which were covered in Jagdish Chander (Supra). The clause in the present case does not state that the decision of the Superintending Engineer on the dispute will be final and binding. His role is principally with respect to designs, specifications and execution of the work.

This being so, the present agreement clause cannot be held to be an arbitration clause. The application is dismissed.

Case law discussed:
AIR 1980 Supreme Court 1522, 1996 2 SCC 216, JT 1990(10) SC 555, JT 2005(3) SC 558, (2007) 5 Supreme Court Cases 28, JT 2007 (6) SC 375.

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

1. Heard Mr. Shubham Agrawal in support of this application.

2. The applicant herein claims to have constructed some 125 houses for the respondent-Kanpur Development Authority. The agreement amount for the construction of the houses has been paid over to the applicant but the security deposit has been forfeited. It is to claim this security amount that the applicant wants the dispute to be referred for arbitration. The applicant is relying upon Clause-24 of the agreement between the parties, which Clause reads as follows:

"**Clause 24.** Except where otherwise specified in the contract the decision of the Chief Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all question relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work

or after the completion or abandonment thereof the contract by the contractor, shall be final, conclusive and binding on the contractor."

3. It is material to note that an identical clause having this matter first came up for consideration before Apex Court in the **State of U.P. Vs Tipper Chand** reported in AIR 1980 Supreme Court, 1522 where the clause provided as follows:

"2. The suit out of which this appeal has arisen was filed by the respondent before us for recovery of Rs.2,000 on acc6unt of dues recoverable from the Irrigation Department of the petitioner State for work done by the plaintiff in pursuance of an agreement, clause 22 of which runs thus:

"Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions, relating to the meaning of the specifications, design, drawing and instructions herein before mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, light, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor."

The Apex Court (a Bench of three Judges) in the case of **The State of U.P. (supra)** observed on this clause as follows:

"After perusing the contents of the said clause and hearing learned counsel for the parties we find ourselves in complete agreement with the view taken by the High Court. Admittedly the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implications, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time."

The Court therefore held that it was not an arbitration clause.

4. A similar question came before the Apex Court in **State of Orissa vs. Damodar Das (1996) 2 SCC 216**. An identical clause was there where also the wording was with respect to the meaning of the specifications designs, drawings, etc. and the question with respect to quality of workmanship or any other question or rights were to be decided by the concerned Engineer. The Apex Court held that the same not to be an arbitration clause.

5. This was followed in **Executive Engineer, REO vs. Suresh Chandra Panda (Dead) Through Lrs.** reported at JT 1999 (1O) SC 555 where also the

supervising authority was given to the Superintending Engineer concerned under the relevant clause of the agreement and a view was taken that it did not come to Arbitration clause.

6. This was followed again in **State of Rajasthan vs. M/s Nav Bharat Construction Co.** reported in JT 2005(3) SC 558 by a Bench of three Judges on the consideration of a similar clause and the Apex Court has again held that the concerned Clause -23 in that agreement will not be an arbitration clause.

7. As far as the judgment in **Damodar Das (Supra)** is concerned, it came to be commented by the Apex Court recently in **Punjab State and others vs. Dina Nath**, reported in (2007) 5 Supreme Court Cases 28. In para 17, the Apex Court observed as follows:

"**17**. From a plain reading of this clause in *Damodar Das* it is evident that the powers of the Public Health Engineer were essentially to supervise and inspect. His powers were limited to the questions relating to the meaning of the specifications, drawings and instructions, quality of workmanship or materials used on the work, or as to any other question, claim, right, matter, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same. However, in the case before us, the Superintending Engineer was given full power to resolve any dispute arising between the parties which power in our view is wide enough to cover any nature of dispute raised by the parties. The clause in the instant case categorically mentions the word "dispute" which would be referred to him and states "his decision would be final and acceptable/binding on both the parties."

8. Mr. Agrawal, learned counsel for the applicant submits that in the present case, same kind of finality has been given to the decision of the Chief Engineer, therefore, it should be treated as a Clause of Arbitration. He has relied upon the judgment of the Apex Court in the case of **Jagdish Chander vs. Ramesh Chander**, reported in JT 2007 (6) SC 375. In para 8 of this judgment, the Court has laid down the principles in which the agreement will constitute an arbitration agreement. They are principally four. (i) The intention of the parties to enter into an arbitration agreement is to be gathered. No specific form of an arbitration agreement is required. (ii) The use of words 'arbitration' and 'arbitral tribunal' are not required. The agreement has to be in writing and there should be a provision and that the decision on the dispute will be binding on that. (iii) However, the Court has added where the clause relating to settlement of disputes, contains words which specifically excluded any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement, and (iv) Again the use of the words used is not very material. In para 8 of this judgment the Court referred to the judgment in the case of **State of Orissa vs. Damodar Das (Supra)** which stated only if an agreement to refer disputes or differences to arbitration is expressly or

impliedly spelt out from the clause, there should be an arbitration clause.

9. The situation as obtaining in the case of **Damodar Das (Supra)** has thus been clearly excluded from the category of cases which were covered in **Jagdish Chander (Supra)**. The clause in the present case does not state that the decision of the Superintending Engineer on the dispute will be final and binding. His role is principally with respect to designs, specifications and execution of the work.

10. This being so, the present agreement clause cannot be held to be an arbitration clause. The application is dismissed.
