ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 34992 of 2008

Susheel Kumar ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioners:
Sri. Pradeep Chauhan

Counsel for the Respondents:
S.C.

Constitution of India-Article 226-Service Law-entitlement of arrears of salary-termination order quashed-reinstatement without specific direction of salary-even no such relief claimed in earlier Writ Petition-second Writ Petition for arrears of salary-not maintainable.

Held: Para 6

Admittedly, in the present case, the order of dismissal was set aside and the Court directed reinstatement of the petitioner. There was no specific direction for the payment of the arrears of the salary while reinstating the petitioner. That judgement has now become final. Consequently, applying the aforesaid principles, as enunciated in the aforesaid decisions since there was no specific direction of payment of arrears of salary, the petitioner could not get the arrears of salary automatically upon his reinstatement.

Case law discussed:
AIR 1992 SC 1439, 1992 AWC 1398, 1996 Cr.LJ 1601, (2005) 3 UPLBEC 2415, 2005 ACJ (FB)359.

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

1. Heard learned counsel for the petitioner.

2. The petitioner has prayed for a writ of mandamus commanding the respondents to pay the arrears of salary from 1.7.2006 till date along with the interest. It transpires that the petitioner was appointed as a Constable and his services were terminated by an order dated 3.1.2007. The petitioner filed Writ Petition No.9186 of 2007 in which he prayed the following reliefs:-

"(a) issue a suitable writ, order or direction in the nature of certiorari quashing the impugned order dated 3. 1 2007, passed by the Senior Superintendent of Police, Agra, respondent no.2 (annexure-3 to the present writ petition).

(b) issue a suitable, writ, order or direction in the nature of mandamus commanding the respondents not to disturb the petitioner's functioning as Constable in the respondent department.

(c) issue such other and further writ, order or direction in the nature of mandamus which this Hon'ble Court may deem fit and proper under the circumstances of the case; so that justice be done.

(d) award cost of the petition throughout to petitioner as against the respondents.

3. The said writ petition was allowed by a judgment dated 6.5.2008 and the order of termination was quashed. As a result of the quashing of the order of termination, the department reinstated the

petitioner on 28.5.2008. The petitioner has now prayed that he should be given the arrears from 1.7.2006, i.e., from the date of his termination till the date of reinstatement.

4. In my view no relief can be granted to the petitioner. When the Court quashed the order of reinstatement, no orders were passed for payment of arrears. It is necessary implies that the relief of arrears of salary was denied to the petitioner.

5. In the case of **M/s Shree Chamundi Mopeds Ltd. Vs. Church of South Indian Trust Association, Madras**, AIR 1992 SC 1439, the Supreme Court held that if there is no specific direction by a Court of law to reinstate a person, consequently, the respondents could not be held liable for any wilful contempt for not reinstating that person.

6. In **Mrs. Harbans Kaur Vs. Sardar (Ch) Narendra Singh & Anr,** 1992 AWC 1398 and in **Tannary and Footwear Corporation Vs. T. Rudra, Chairman-cum-Managing Director & Ors**. 1996 Cr.LJ 1601, the Court held that there was no wilful contempt on the part of the respondents in not paying the salary to the applicant since there was no specific direction for the payment of the salary by the Court. In the **Director of Education, Uttaranchal & Ors. Vs. Ved Prakash Joshi & Ors**., (2005) 3 UPLBEC 2415, the order of termination was set aside and there was no specific direction for the payment of the arrears of salary. The Court held that there was no contempt against the opposite parties since there was no specific direction for the payment of the salary. The said principle enunciated in the aforesaid decisions is clearly applicable in the present case. Admittedly, in the present case, the order of dismissal was set aside and the Court directed reinstatement of the petitioner. There was no specific direction for the payment of the arrears of the salary while reinstating the petitioner. That judgement has now become final. Consequently, applying the aforesaid principles, as enunciated in the aforesaid decisions since there was no specific direction of payment of arrears of salary, the petitioner could not get the arrears of salary automatically upon his reinstatement. The Supreme Court has held in a large number of cases that payment of arrears of salary upon reinstatement is not automatic and each and every case has to be considered in the facts and circumstances of each case.

7. In **Farhat Hussain Azad and others vs. State of U.P. and others**, 2005 ACJ (FB)359, a full Bench of this Court has held that, even where a party does not pray for a relief in the earlier writ petition which he ought to have claimed, even then, he cannot file a successive writ petition claiming that relief. The said principle squarely applicable in the present case.

8. In view of the aforesaid the writ petition fails and is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2008

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No. 9241 of 2008

Krishna Pal Singh Yadav ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri. Rajkumar

Counsel for the Opposite Party:
Sri. P.C. Pathak
A.G.A.

Code of Criminal Procedure-Section 319 - summoning order-challenged on ground solitary statement of P.W. 5 cannot be basis for summoning-held-statement of P.W. 5 is sufficient to prove the charge-cannot be interfered on technical ground.

Held: Para 13

The above three judgments relied upon by the counsel for the applicant does not farther of the case of the applicant at all. All those judgments reiterate the same law that the power under Section 319 Cr.P.C. should be exercised sparingly and that too in the cases where the chances of conviction are not remote. From the facts discussed above, I have held that the evidence of PW5 is sufficient to frame the charge against the applicant and therefore, the power exercised by the trial Judge cannot be said to be de horse the law.

Case law discussed:
AIR 2006 Supreme Court (11)892, (2005) 12 Supreme Court Cases 327, (2005) 12 SCC 432

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

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

2. Learned counsel for the applicant criticized the impugned summoning order of the applicant under Section 319 Cr.P.C. dated 7.4.2008 passed by Special Judge (SC/ST Act) Gautam Budh Nagar in S.T. NO.624 of 2006, P.S. Sector-24, District Gautam Budh Nagar primarily for three reasons. Firstly, that the applicant is not named in the first information report as an accused. Secondly, that he had got no motive to participate in the incident of committing the murder and lastly that PW-5, on whose statement in the Court, the applicant has been summoned to stand the trial, is an interested witness and he colluded with the main accused persons and to save his skin. He has made a U turned in his statement and implicated the present applicant. Learned counsel for the applicant has further contended that solitary statement of P.W. 5 by itself is not sufficient to hold the applicant guilty and hence exercise of power under Section 319 Cr.P.C. by the trial Judge to summon the applicant as an accused is not in consonance with law as well as various pronouncements by the Apex Court. Some of those pronouncements which have been relied upon by the learned counsel for the applicant are **Lokesh Ram Vs. Nihal Singh & another AIR 2006 Supreme Court (11)892 (para 12), Palanisamy Gounder and another Vs. State representated by Inspector of Police (2005) 12 Supreme Court Cases 327 (para 13) and Kavuluri Vivekananda Reddy and another Vs. State of A.P. and another (2005) 12 SCC 432 (para 2)**. Learned counsel for the applicant has further submitted that in

any view of the matter the impugned order of summoning dated 7.4.2008 is bad in law and deserves to be quashed and this application deserves to be allowed.

3. Sri S.L. Kersarwari, learned AGA and Sri P.C. Pathak learned counsel for the respondent, per contra, contended that there is no infirmity in the impugned summoning order and therefore, this application being bereft of any merit deserves to be dismissed.

4. I have cogitated over rival contentions and have gone through the record of this Criminal Misc. Application along with the appended annexures, with special attention to the statement of witness PW5, Mukesh Kumar, recorded in the concerned Sessions Trial No.624/06 State Vs. Krishna Pal Singh Yadav and others.

5. The controversy in this application lies in a very narrow compass. The question which has been mooted for consideration and judicial determination is as to whether power under Section 319 Cr.P.C. has been exercised by the Special Judge (SC/ST Act) G.B. Nagar in consonance with the statutory provision and the law laid down by the Apex Court or not in respect of Section 319 Cr.P.C.?

6. For a ready reference section 319 Cr.P.C. is reproduced below:-

"Power to proceed against other persons appearing to be guilty of offence-*(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*
(2) Where such person is not attending Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
(4) Where the Court proceeds against any person under sub-Section(1) then-
(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard;
(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

7. A perusal of the aforesaid section admits no exception so far as power to summon any person as accused to stand the trial along with already being tried accused persons are concerned.

8. During the course of any trial, from the evidence recorded during the said trial if the evidence comes against any person that he has also committed any offence for which the said person could be tried along with the already being tried accused then that person can also be summoned as accused to stand trial along with the already being tried accused and if such an evidence is brought forth then there is no impediment on the power of the trial Judge to add any person as an accused in the said trial and summon him. Section 319 Cr.P.C. has got two important

ingredients firstly, that there should be some evidence against the person who is not facing trial that he has committed any offence for which he could be tried along with already being tried accused and secondly that the persons concerned who is desired to be summoned is not be facing trial in the concerned trial. But for the aforesaid two ingredients there is no other requirement for the trial Judge to exercise power under Section 319 Cr.P.C.

9. Section 319 has been subjected to various judicial pronouncements both by this Court as well as by the Apex Court and hence the controversy which has been agitated before me today in this Application no longer remains res integra. From the judgments, which has been relied upon by learned counsel for the applicant himself, referred to above, it is dear that the law which has now being expounded by the Apex Court is that power under Section 319 Cr.P.C. should be exercised by the trial Judge only for very compelling reasons in rarest of rare cases and only in those cases where the evidence led before it is prima facie sufficient to frame charges at least. Thus, what comes out from the aforesaid decisions of the Apex Court is that no body should be summoned only to face the trial. Power under Section 319 Cr.P.C. should be exercised only when there is possibility of conviction of the person desired to be summoned from the evidence led in the trial.

10. From such an exposition of law when I examine the facts of the present case it comes out that the incident occurred in day light inside a Maruti car. Motivated murder was committed actuated by the fact that the one of the deceased who was the principal namely Jaswant Singh Tyagi was an injured witness in an earlier murder case in which his son Rajiv Tyagi had lost his life. The earlier murder of the son had occurred inside the Chamber of Jaswant Singh Tyagi. Jaswant Singh Tyagi was to depose in that sessions trial regarding the murder of his son. The accused persons were pressurizing him not to give any evidence and when they failed in their endeavour of pressure tactics then they hatched up a conspiracy and murdered Jaswant Singh Tyagi while he was proceeding towards Noida Development Authority in a Maruti Car which was driven by the present applicant. The movement of the deceased to Noida Development Authority was a fact unknown to the real assailant of the earlier murder case and the applicant. The aforesaid fact was in the knowledge of only 4 persons, the present applicant, Jaswant Singh Tyagi deceased his gunner Murtza Ali who was accompanying him along with Manager of the institution. According to the statement of PW-5, the applicant who was driving the car intentionally stopped it at that very place at the fixed time where the other assailants were waylaying to murder the deceased witness. Such an evidence is sufficient to summon the applicant to face trial as the said evidence by PW 5 if taken to be correct on the face of it, then it can be safely held that the applicant is also guilty of murder.

11. Another reason for which I am not inclined to interfered with the impugned order is that in a post occurrence conduct the present applicant threatened PW 5 not to state about the incident to anybody as has been deposed by him. According to the case of PW 5 he did inform the real incident to SP and SSP

but he was rebuffed by them as SP Noida was a relative of the present applicant. Whether the version of PW 5 in respect of post occurrence conduct is correct or not has to be judged by the trial judge but if his evidence is taken to be correct, there is no gain saying that the applicant can be held to be guilty of murder and at present there is sufficient evidence to frame charges against him. Whether PW 5 has taken a U-turn is a matter to be adjudicated by the trial Judge.

12. Without making any further observations, as it may prejudice the case of the applicant, at this stage I dont find any reason to interfere with the impugned order as in my view it does not suffer from any infirmity of law or of fact. The applicant will have full opportunity to lead his defence and plead his case at the stage of framing of charge under Sections 227 and 228 Cr.P.C. or later on in the trial but so far as the impugned summoning order of the applicant under Section 319 Cr.P.C. is concerned the said order does not suffer from any infirmity of law.

13. The above three judgments relied upon by the counsel for the applicant does not farther of the case of the applicant at all. All those judgments reiterate the same law that the power under Section 319 Cr.P.C. should be exercised sparingly and that too in the cases where the chances of conviction are not remote. From the facts discussed above, I have held that the evidence of PW5 is sufficient to frame the charge against the applicant and therefore, the power exercised by the trial Judge cannot be said to be de horse the law.

14. This application is merit less and it is dismissed as such. Interim order dated 29.4.2008 stands vacated. Since the trial is very old and the attempt in this case was to tamper with the evidence of the earlier murder case, I direct the trial Court to decide the case expeditiously in accordance with law as provided under Section 309 Cr.P.C. and make an endeavour to conclude it preferably within 6 months from the date production of certified copy of this order.

15. So far as the bail prayer of the applicant is concerned, I also consider it appropriate to direct the trial Court to dispose it on the same day if possible, as the entire material against the applicant is available with it.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2008

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 56102 of 2006

U.P. State Handloom Corporation Ltd.
...Petitioner
Versus
U.P. Handloom Sanyukta Karmchari Sangh and another ...Respondents

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

Counsel for the Respondents:
Sri Rajesh Tiwari
S.C.

U.P. State Handloom Corporation (Ltd) (Officer and Staff) Rules 1981-Rule 23(2)(1) Promotion-criteria for promotion-performance of workman-16 persons junior to workman promoted on two different stages-ignoring the claimant-even denying the

consideration-Tribunal rightly granted promotion with all consequential benefits-where the action of employer found arbitrary, illegal-writ Court declined to interfere mere on ground of technical plea-petition dismissed.

Held: Para 15

In my view if the action of the petitioner is arbitrary and has given promotion to 16 junior persons to the respondent workman, in spite of the fact that his service record is unblemished and the petitioner has failed to prove any unsatisfactory working of the concerned workman, in that case in my opinion, the Labour Court was fully justified in awarding the consequential benefit after giving promotion to the concerned workman.

Case law discussed:

(2004) 9 SCC 286, Writ Petition No. 21029 of 1996 decided on 7.11.2005, Writ Petition No. 21030 of 1996 decided on 26.10.2006, 2007 (2) ADJ 657 (D.B.), 2006 (108) F.L.R., 2005 SCC (Labour and Service) 327, 2005 S.C.C. (L & S) 484, 2007 (7) A.DJ 745.

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

1. By means of the present writ petition the petitioner has approached this Court for issuing a writ of certiorari quashing the award dated 19.4.2006 passed by Presiding Officer-I, U.P. Kanpur in Adjudication Case No. 151 of 2002 which was published on 24.6.2006, Annexure-1 to the writ petition.

2. The petitioner U.P. State Handloom Corporation being employer has approached this Court for setting aside the aforesaid award by which the Labour Court has directed the petitioner that respondent-workman be treated on the post of Senior Salesman from 1.4.1981 and from 1.1.1986 be treated as Depot Manager Grade-II and accordingly the salary be paid to the respondent-workman. The respondent-workman who was an employee of the petitioner, as he was denied promotion on the post of Senior Salesman and subsequently on the post of Depot Manager GradeII, raised a dispute before the labour court on the basis of the reference by the State Government. For the ready reference, the reference to the labour court is being quoted below:-

"KYA SEVAYOJKON DWARA APANE KARMCHARI SUSHIL KUMAR PUTRA SRI HARI, D. MASAND PAD SENIER SELSMAN, KENDRIYA VASTRAGAR KO DI. 1.4.81 SE SENIER SELSMAN PAD PAR VA DINANK 1.1.86 SE DIPO MANAGER GRADE-II PAD PAR PRONNAT KI IANI CHAHIYE? YADI HAN, TO KIS TITHI SE, TATHA KIS ANYA VIVARAN SAHIT ? "

3. The labour court on the basis of relevant record and on the basis of written statement filed on behalf of petitioner has considered the claim and has come to the conclusion that respondent-workman is entitled to be given promotion and further promotion in accordance with the reference.

4. Learned counsel for the petitioner Sri S.N. Singh Yadav has submitted before this Court that the labour court has got no jurisdiction to direct the authority to treat a person at a particular post. The labour court has only power to direct the authority concerned to consider the claim of the respondent-workman. It has further been submitted by the learned counsel for the petitioner that according to U.P. State Handloom Corporation Limited (Officer and Staffs) Service Rules 1981 which

provides the provisions for promotion, Sub Clauses (1) and (2) of Rule 23 of the aforesaid rules mention that all promotions form lower posts or grades to the higher posts or grades shall be mainly performance oriented. Promotion to the post of Group 'A' and Group 'B' against the vacancies reserved to be filled up by the promotion from amongst the serving employees, shall be strictly on merit. In taking support of the aforesaid provisions, learned counsel for the petitioner submits that it is on the basis of merit to be considered for promotion, therefore, the labour court was not justified in directing the petitioner to treat the respondent-workman on a particular post. If the labour court was satisfied, he should have directed the petitioner to consider the claim of the respondent-workman. In support of the aforesaid contention, learned counsel for the petitioner has placed reliance upon the judgment of the Apex Court in the case of **K. Samantaray Vs National Insurance Co. Ltd**. reported in (2004) 9 SCC 286 and has placed reliance upon paragraph-6 of the judgment which is quoted below:-

" In all services, whether public or private there is invariably a hierarchy of posts comprising of higher and lower posts. Promotion, as understood under the service law jurisprudence, is advancement in rank, grade or both and no employee has a right to be promoted, but has a right to be considered for promotion. The following observation in Sant Ram Sharma v. State of Rajasthan are significant:

" The question of a proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is for all promotions is to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned it is a heavy burden on the public and a great strain on efficient handling of public business. The problem, therefore is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able man? In other words, the question is how to find a correct balance between seniority and merit in a proper promotion policy."

5. Further reliance has been placed upon a Single Judge judgment of this Court in Writ Petition No. 21029 of 1996, **U.P. State Road Transport Corporation and Another V. Akhileshwar Prasad Sinha and Others** decided on 7.11.2005 and the learned counsel for the petitioner submits that relying upon the judgement of (2004) 9 SCC, 286 this Court has held that no employee has a right to be promoted, but only has a right to be considered for promotion. Further reliance has been placed upon a judgment of this Court in Writ Petition No. 21030 of 1996 **U.P. State Road Transport Corporation Vs. Bipin Behari Lal and Others** decided on 26.10.2006. In support of the aforesaid judgment, learned counsel for the petitioner submits that this Court has taken a view that the labour court

cannot direct for promotion. In such circumstances the labour court has exceeded its jurisdiction.

6. Another judgement relied upon by the learned counsel for the petitioner is 2007 (2) ADJ 657 (D.B.), **New Okhla Industrial Development Authority Vs. U.P. Public Service Tribunal, Lucknow and Others** and reliance has been placed on paras 5 and 6 of the said judgment which are quoted as below:-

"5. Two issues arise for consideration in this petition. The first issue is whether the Tribunal could have passed an order granting promotion to the post of Assistant project Engineers instead of passing an order for consideration of their claim for promotion to the post of Assistant Engineers. The second issue that arises for our consideration is whether the applicants could have been promoted without there being any evidence before the Tribunal that vacancies on the promotional posts existed.

6. In our opinion, the directions issued by the Tribunal for promotion of the applicants to the post of Assistant Project Engineers is against the well settled principles enunciated by the Courts from time to time as the Courts can at best issue a direction to the authorities concerned to consider the cases for promotion but a direction promoting the candidates to the higher post cannot be issued as promotion to a particular post depends upon a number of factors to be taken into consideration by the authorities. In this view of the matter, the direction issued by the Tribunal for promotion to the post of Assistant Project Engineers cannot be sustained. "

7. In view of the aforesaid submissions, learned counsel for the petitioner submits that the award given by the labour court is liable to be set aside because the labour court has exceeded its jurisdiction to direct the petitioner to promote the respondent-workman on a particular post.

8. On the other hand, Sri Rajesh Tiwari, learned counsel for the respondent submits that from the finding recorded by the labour court, it is clear that admittedly the respondent workman has been denied promotion without any reason and he has never been communicated that his performance is not up to the mark. A finding of fact has been recorded by the labour court that admittedly the junior persons to the respondents have been given promotion. In the written statement filed on behalf of the petitioner, various pleas have been taken regarding performance of the respondent-workman. The same was not proved before the labour court. The labour court has recorded finding of fact. The employer has failed to produce any document or service record to this effect regarding denial of promotion to respondent-workman. The labour court has also recorded a finding to this effect that the employer has also failed to disclose any reason regarding denial of promotion to the respondent workman. No document in support thereof was produced and impliedly the petitioner has admitted this fact that junior persons to the respondent-workman have been promoted. In that circumstance the labour court has passed the award and directed the petitioner to promote the respondent-workman. There is no illegality in the award given by the labour court. Reliance has been placed upon a judgment upon this Court reported

in 2006 (108) F.L.R. **U.P. State Sugar and Kane Development Corporation Ltd. Vs. Presiding Officer Labour Court Gorakhpur and Others** and has referred to para-10 of the said judgment. The same is reproduced below:-

"Having heard Counsel for the parties, I am of the view that though promotion normally is a management's function but the Labour Court can interfere in the order of promotion when it finds that it is arbitrary, illegal, malafide or for any other just and proper cause. The Labour Court has given a categorical finding that the workmen had been working on the said posts not only during the season but also during off season i.e., they were working throughout the years and were paid corresponding wages of the posts held by them hence declaring them permanent in the facts and circumstances would not amount to promotion. "

9. In support of the aforesaid decision, learned counsel for the respondent-workman submits that there is no dispute to this effect that promotion is normally a function of the management but the labour court can interfere if it the act of the employer as illegal, arbitrary and mala fide. In that circumstances the labour court can pass an order of promotion.

10. I have considered the submissions made on behalf of the. Parties and perused the record. It is admitted case of the parties that the respondent-workman is an employee and was working in the Corporation. It is also admitted to the petitioner that various junior persons have been promoted but the respondent -workman has not been given promotion as his performance was not up to the mark. In the written statement filed on behalf of the petitioner, various grounds have been taken regarding non-giving promotion to respondent- workman but the allegations made in the written statement was to be proved on the basis of the relevant record. As regards denial of the promotion to the workman concerned, the petitioner has failed to file any document showing therein that at any point of time charge-sheet was ever given to the workman or his performance was not satisfactory. Even the petitioner has failed to prove by cogent document that whether at any point of time any warning was given to the workman concerned.

11. As regards the contention of the petitioner that promotion is oriented on the basis of merit and performance, there is no dispute to this effect that promotion at a particular post cannot be claimed as a matter of right but if some employee is denied promotion, the reason to that effect has to be disclosed. If the performance of a workman is not satisfactory, then it has to be disclosed as and when needed by the employer. Admittedly, no document or reason has been disclosed by the Corporation either before the labour court or before this Court.

12. In such circumstances if the labour court comes to the conclusion that the action of the employer is arbitrary in denying some benefit and privilege to a workman, then in that circumstance the labour court has full jurisdiction to grant or to direct the employer to give promotion and other consequential benefit.

13. It is well settled now that unless and until it is proved that finding recorded by labour court is perverse or against the material on record, the Labour Court being the last court of fact, finding recorded by the labour court is a finding of fact and there should not be any interference by this Court while exercising the jurisdiction under Article 226 of the Constitution of India. In 2005 SCC (Labour and Service) 327, in the case of **S. Pushpa Vs. Sivachannaugavelu** the Apex Court has held that while exercising the jurisdiction under Article 226 and 227 of the Constitution of India there is a very limited scope of interference of the award of the Labour Court as the Labour Court is a final Court of fact. The similar view has been taken in 2005 S.C.C. (L & S) 484 in the case of **Karnataka S.R.T.C. Vs. S.G. Kotturappa.**

14. As regards the decision relied upon by the petitioner, there is no dispute that in the service law if the Court comes to the conclusion that a person has been denied promotion without any rhyme or reason, then this Court can only direct the authority concerned to consider his case. There is no dispute to this analogy raised and submitted by the learned counsel for the petitioner but as regards the present case. admittedly the respondent-workman in spite of approaching various time to the employer, has been denied promotion of not only one post but of two higher posts. once as Senior Salesman from 1.4.1981 and on the post of Depot Manager Grade-II from 1.1.1996. Cogent finding has been recorded by the labour court that employer has failed to submit any document regarding unsatisfactory working of the respondent-workman. If the labour court was of the opinion that the action of the employer was wholly arbitrary and has come to the conclusion that about 16 persons junior to the respondent-workman have been given promotion, in that circumstances, I am of view that the labour court was justified in directing the petitioner to give the promotional benefit including the consequential benefit to the respondent-workman.

15. It has also been argued on behalf of the petitioner that the labour court has got no jurisdiction to award the back wages or the financial benefits while giving the promotion. Admittedly, the respondent-workman has not worked during this period on the promoted post. In my view if the action of the petitioner is arbitrary and has given promotion to 16 junior persons to the respondent workman, in spite of the fact that his service record is unblemished and the petitioner has failed to prove any unsatisfactory working of the concerned workman, in that case in my opinion, the Labour Court was fully justified in awarding the consequential benefit after giving promotion to the concerned workman. In a Division Bench judgement of this Court reported in 2007 (7) A.DJ 745, **State of U.P. and others Vs. Yadunath Singh and others** in para 15 the Division Bench has observed relying upon the High Court judgment that principle of “No Work No Pay” would have no application where the junior persons have been promoted and the employee concerned was neither under suspension nor any disciplinary proceeding was pending against him and on the contrary he was made to suffer on account of the action of the respondent-employer for which he was not responsible. The Apex Court held that

there was no justification in denying him arrears of emoluments from the date of promotion. Para 15 of the judgment is being quoted below:

"15. In Vasant Rao Roman Vs. Union of India and others,1993 Suppl.(2) SCC 324 arrears of salary was denied to the employees though it was held that denial of promotion on the higher post on account of wrong fixation of seniority was illegal. The Apex Court held that the principle of 'no work, no pay' would have no application to the said case since the employee was neither under suspension nor any disciplinary proceeding was pending against him and on the contrary he was made to suffer on account of administrative reason for which he was not responsible. There was shortage of literate Shunters at Gwalior during 1960 and the employee being literate was deputed for table work and therefore for administrative reason he could not complete requisite number of firing kilometers. The juniors were promoted as Shunters and Drivers and his claim was ignored on account of lack of requisite number of firing kilometers. Thus on the one hand the employee was utilized by the department to benefit it self with the qualification of the employee since the literate Shunters to discharge table work were not readily available and on the other hand for the same qualification he was denied promotion on the ground that he has not completed requisite number of firing kilometers. Hence, the Apex Court held that there was no justification in denying him arrears of emoluments from the date he was allowed promotion to the post of Shunter Grade 'B' and Driver Grade 'C'. "

16. In view of the aforesaid fact, I find no merit in the writ petition, The writ petition is hereby dismissed.

No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 9636 of 2001

Dhruv Singh Yadav ...Petitioner
Versus
Director General, C.I.S.F. (Ministry of Home Affairs) and others ...Respondents

Counsel for the Petitioner:
Sri. Ram Mohan
Sri. S.K. Srivastsva
Sri. Sheshadri Treivedi
Sri. A.K. Srivastsva

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

Protection of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 -Section 47- discharge from service on ground of physical disability-petitioner working as Constable in C.I.S.F. Suffering from schizophrenia-confirmed by medical Board-discharged from service 26.09.1995-the Act enforced w.e.f. 07.02.1996-with prospective effect-petitioner approached the Court in the year 2001-almost 5½ years passed-not entitled for any secondary job being unfit for either armed or unarmed post.

Held: Para 12

In my opinion, the Disabilities Act could not annul an order passed by an

authority prior to the enforcement of the Act. Consequently, the Disabilities Act cannot have a retrospective effect to nullify an order of discharge which was passed prior to the enforcement of the Disabilities Act.

Case law discussed:

(2006) 4 ESC 2540,.(2003) 99 FLR 300, 2008 (116) FLR 10, AIR 1986 Supreme Court 842, 1994 (68) FLR 942.

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

1. Heard Sri Sheshadri Trivedi, the learned counsel for the petitioner and Sri A.N. Roy, the learned counsel for the respondents.

2. The petitioner was appointed as a constable in Central Industrial Security Force and was posted at Mathura Refinery of the Indian Oil Company at Mathura. The petitioner fell ill and was admitted to the mental hospital on 17th April 1995 and was discharged on 19th June 1995. Thereafter, it transpires, that a medical board was constituted in which the petitioner was again examined by a panel of doctors and a certificate was issued on 4th July 1995 holding that the petitioner was suffering from a psychotic disorder namely, schizophrenia and that the petitioner was unfit for a security job. The medical board, however, recommended that if the departmental rules permit, the petitioner could be considered for a sedentary job.

3. It transpires that a review board was constituted and the petitioner was again examined by a panel of doctors. The review board gave a certificate dated 22nd August 1995 holding that the petitioner was not fit for a security job either armed or unarmed and, further held that in view of the disease which the petitioner possesses, he was unfit for any sedentary job. In view of the aforesaid, the petitioner was discharged from service by an order dated 26th September 1995. It further transpires that the authorities issued a letter to the petitioner for appointing a member of his family on compassionate grounds. It further transpires that the petitioner as well as his wife refused to accept such appointment on 11th May 1996.

4. The matter rested at that but after some time, the petitioner made a representation on 25th June 1997 for reconsideration of his order of discharge on the ground of mental disability and in the alternative prayed that an appointment on compassionate grounds be provided to his brother. It is alleged that the said representation remained pending and, accordingly a legal notice was issued to the respondents by a notice dated 8th March 1999 and eventually when nothing was done, the petitioner filed the present writ petition in March 2001 praying for the quashing of the order of discharge dated 26.9.1995 and further directing the respondents to provide him a sedentary job.

5. The learned counsel for the petitioner invited the attention of the Court to the Protection of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the Disabilities Act) and submitted that in view of the provision of Section of the said Act, it became mandatory upon the respondents to provide him with an alternate job. The learned counsel submitted that the aforesaid Act and the provisions contained therein would also apply to a case where a decision had already been

taken prior to the enforcement of the Act. The learned counsel submitted that the Disabilities Act is a beneficial peace of legislation which has been enacted with the object of eliminating discrimination against persons with disabilities and that the Act calls for a positive obligation on the State and its authorities to eliminate such discrimination.

6. On the other hand, the learned counsel for the respondents submitted that the Disabilities Act came into force with effect from 7.2.1996, whereas, the order of discharge was passed on 26th September 1995 and that the Disabilities Act could not be taken into consideration nor can the said Act have retrospective effect to nullify an order passed prior to enforcement of the Act. Further, the learned counsel for the respondents submitted that by notification dated 10th September 2002, issued under Section 47 of the Disabilities Act, the post of combatant personnel has been exempted from the rigours of the Disabilities Act and that the said notification has been upheld by a Full Bench of this Court in **Union of India and others Vs. Mohd. Yasin Ansari and others** reported in (*2006) 4 ESC 2540.*

7. No doubt, the admitted position is, that the petitioner was discharged from service on 26th September 1995. The Disabilities Act came into existence with effect from 7th February 1996. The question is, whether the said Act has a retrospective effect and whether it could nullify and action taken by the authorities which had been passed prior to the enforcement of the Disabilities Act? The learned counsel for the petitioner placed reliance upon a decision in **Delhi Transport Corporation Vs. Harpal Singh Ex-Security Guard and another**, reported in *(2003) 99 FLR 300,* wherein it was held that a statutory enactment incorporating a welfare measure particularly for the weaker sections of society has to be given full effect of the said benefit and even though the order of termination was passed prior to the enforcement of the Act but since a reference was made by the person after the enforcement of the Act, the said Act would become applicable. Further reliance was made of another decision in the matter of **Delhi Development Authority Vs. Omvati Kalshan** reported in *2008 (116) FLR 10*, wherein it was held that since the order of discharge was passed after coming into force, the said Act would be applicable once the Act came into force, and the authorities would be deprived from terminating the services of the employee. The learned counsel for the petitioner further placed reliance in **Bharat Singh Vs. Management of New Delhi Tuberculosis Centre** reported in *AIR 1986 Supreme Court 842,* wherein the Supreme Court held that the provision of Section 17-B of the Industrial Act would have a retrospective effect even to those awards passed prior to 21st April 1984 if the said award had not become final, the Supreme Court held in paragraphs 11 and 17 as under:

"In interpretation of statutes, Courts have steered clear of the rigid stand of looking into the words of the Section alone but have attempted to make the object of the enactment effective and to render its benefits into the person in whose favour it is made. The legislators are entrusted with the task of only making laws. Interpretation has to come from the Courts. Section 17B on its terms does not say that it would bind awards passed

before the date when it came into force. The respondents' contention is that a Section which imposes an obligation for the first time cannot be made retrospective. Such sections should always be considered prospective. In our view, if this submission is accepted, we will be defeating the very purpose for which this Section has been enacted. It is here that the Court has to evolve the concept of purposive interpretation which has found acceptance whenever a progressive social beneficial legislation is under review. We share the view that where the words of a statute are plain and unambiguous effect must be given to them. Plain words have to be accepted as such but where the intention of the legislature is not clear from the words or where two constructions are possible, it is the Court's duty to discern the intention in the context of the background in which a particular Section is enacted. Once such an intention is ascertained the Courts have necessarily to give the statute a purposeful or a functional interpretation. Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the Court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of the have-nots and the underdog and which would lead to injustice should always be avoided. This Section was intended to benefit the workmen in certain cases. It would be doing injustice to the Section if were to say that it would not apply to awards passed a day or two before it came into force.

"In our considered view, therefore, the High Court was in error in holding that the legislature did not intend to give retrospective effect to Section 17B. We hold that Section 17B applies even to awards passed prior to August 21,1984, if they have not become final. We set aside the judgment of the High Court and allow this appeal with costs, quantified at Rs. 3000/-.

8. The learned counsel further placed reliance upon a decision of Supreme Court in **Narendra Kumar Chandla Vs. State of Haryana and others reported in *1994 (68) FLR 942,*** in which it was held that Article 21 of the Constitution of India protects the right to livelihood as an integral facet of a right to life and where an employee who was affected with a disease due to which he was unable to perform the duties of the post he was holding it was incumbent for the employer to make every endeavour to adjust the said employee on a post in which the said employee could suitably discharge the duties. The learned counsel submitted that the Supreme Court passed the said order even prior to the enforcement of the Disabilities Act. The learned counsel submitted that the Supreme Court had passed the said judgement in 1994 invoking the provisions of Article 21 of the Constitution of India which was prior to the enforcement of the Disabilities Act was applicable or not, the petitioner was entitled for a suitable relief under Article 226 of the Constitution of India.

9. Having given my thoughtful consideration in the matter, and after hearing the learned counsel for the parties at some length and upon a perusal of the affidavits and the judgements cited by the

learned counsel for the parties, this Court is of the opinion that the petitioner cannot be granted any relief at this stage. From a perusal of the writ petition, there is no averment with regard to the enforcement of any provisions of the Disabilities Act or of Article 21 of the Constitution of India. The argument on these aspects was raised by the leaned counsel at the time of hearing of the petition.

10. No doubt, the Disabilities Act is a beneficial peace of legislation which has been enacted with the object of eliminating discrimination against persons with disability. Even prior to the enforcement of the Act, resort for protection was always available under Article 21 of the Constitution of India. Consequently, it cannot be said that prior to the coming into force of the Disabilities Act, person with disabilities were not given any relief. The Courts were conscious of the provisions of Article 21 of the Constitution of India and in appropriate matters, were enforcing Article 21 of the Constitution of India in matters of right to livelihood and protection was given to the persons with disability. The enforcement of Disabilities Act only acknowledged the constitutionally unacceptable discrimination practised against the disabled for years and the Act seeks to correct that discrimination by unambiguously casting a positive obligation on the state and its authorities to eliminate such discrimination.

11. All Statutory enactments are enforced with prospective effects unless it is specifically stated to be effective with retrospective effect. In the present case, the Disabilities Act was enforced from 7th February 1996. The Disabilities being a beneficial peace of legislation incorporating a welfare measure will be available to those persons who incurred a disability prior to the enforcement of the Act and who are still working and, to that extent, the Act could be applicable retrospectively as held in DTC's case (supra).

12. In my opinion, the Disabilities Act could not annul an order passed by an authority prior to the enforcement of the Act. Consequently, the Disabilities Act cannot have a retrospective effect to nullify an order of discharge which was passed prior to the enforcement of the Disabilities Act.

13. Further this Court finds that by a notification dated 10th September 2002, the provisions of Section 47 of the Disabilities Act has been kept out of purview of the post of combatant personnel in Central Industrial Security Force and, therefore, the said provisions cannot be invoked or utilized by the petitioner for sedentary job in the said post. Even otherwise this Court finds that the review board had recommended that the petitioner was not fit for any industrial security job either armed or unarmed and further found that in view of the disease, the petitioner cannot be given any sedentary job in the force. This opinion has been given by a penal of doctors, who are expert in their fields and such opinions cannot be reviewed at this stage after several years. This Court finds that the petitioner was discharged in the year 1995 and had approached the Court in the Year 2001 after almost five and a half years. Consequently, no direction can be issued to the authorities to consider the petitioner's application for appointment on a sedentary job.

14. In view of the aforesaid, this Court does not find any merit in the writ petition.

The writ petition fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2008

BEFORE
THE HON'BLE BHARTI SAPRU, J.

Civil Misc. Writ Petition No. 715 of 2008

M/s Oriental Insurance Co. Ltd.
...Petitioner
Versus
Motor Accident Claims Tribunal, Baghpat and others ...Respondents

Counsel for the Petitioner:
Sri. Manish Goyal.

Counsel for the Respondents:
Sri. Santosh Kumar Singh

Constitution of India-Article 226- Rejection of recall application of Insurance Company-on the ground of fraud-Motor Accident Claims Tribunal rejected-due to want of provision of review-held-illegal-matter remitted back to decide the allegations of fraud-till the decision, there should be no payment of compensation-fraud vitiate everything-technical objection either before the Tribunal or the before High Court-cannot be allowed.

Held: Para 12:

Having heard learned counsel for the parties and having perused the material on record, I am of the opinion that once an application is moved alleging fraud against the claimants then it was bounden duty of the tribunal to reconsider the matter and examine whether there was a fraud involved in the matter or not.

Case law discussed:
(2000) 2 LRI 12.

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

1. Heard Sri Manish Goyal learned counsel for the petitioner and Sri Santosh Kumar Singh, who has appeared on behalf of the respondents no. 2 to 4.

2. This petition has been filed by the petitioner Insurance Company seeking a direction to set aside the judgement and order dated 31.5.2008 passed by the respondent no.1 in Misc. Case no. 5 of 2007 arising out of MAC no. 61 of 2004. The second prayer is that order or direction may also be issued setting aside the judgement and award dated 23.09.2006 passed by the respondent no. 1 in MAC no. 61 of 2004 and the third prayer is that the respondent no. 1 be restrained from releasing the amount of compensation along with interest in favour of the respondents no.2 to 4 on the basis of the judgement and award dated 23.09.2006.

3. The facts of the case are that a claim petition was filed by the respondents alleging that an accident took place on 13.04.2004 when the deceased was going on a Motor Cycle no. UP 14J-8083 from Baghpat to his village along with Jai Pal Singh, the Motor Cycle was hit by car no. DL-1CF 2901 and on account of the accident , one person died and Jai Pal Singh received injuries.

4. A claim for compensation was made and an award was passed on 23.09.2006 finally by which Rs.5,19,616 was allowed in favour of the claimant-

respondents along with interest at the rate of 6% p.a..

5. After the award was delivered, the petitioner Insurance Company received a complaint from one Har Pal Singh resident of the village Bamnoli P.S. Deoghat District Baghpat to the effect that claim petition had been filed fraudulently on the basis of false representation against the car in collusion with its owner and in fact no accident had taken place with the car that had been-insured by the petitioner.

6. It is the petitioner's case that upon receiving the complaint, the petitioner engaged an independent investigating agency, which established that fraud was committed upon the petitioner by raising claim in collusion with the owner of the car.

7. In fact it was revealed from the chargesheet filed by the police during the investigation that the car that was insured belonged to respondent no. 5, was not even involved in the accident, which took place on 13.04.2004.

8. Upon receiving the report from the investigating agency, the petitioner Insurance Company moved an application for recall of the award on the ground charge sheet filed by the award had been obtained by the claimants on the basis of misrepresentation and fraud. The petitioner Insurance Company also filed an application for condonation of delay along with the said application. It is this application, which had been rejected by the order dated 31.05.2008.

9. Learned counsel for the respondents claimants has appeared and opposed this writ petition saying that the present writ petition under article 227 of the Constitution of India is not maintainable because firstly under the Motor Vehicles Act, 1988 there is no power to review or recall of award passed under section 168 of Motor Vehicles Act, it is open to the petitioner Insurance Company to file an appeal under section 173 of the Act and therefore also this writ petition is not maintainable.

10. Learned counsel for the petitioner has however argued that even though there may be no provision to review the award under the Motor Vehicles Act, every Court has the power to review or recall inherently the order or award, which had been obtained by a party either by fraud or misrepresentation.

11. Learned counsel for the petitioner has relied on a decision of the Hon'ble Apex Court in case of ***United Insurance Co. Ltd. versus Rajendra Singh & ors.*** reported in (2000) 2 LRI 12 in which an identical situation had arisen and the Hon'ble Apex Court has opined that in case of fraud the Insurance Company was justified in moving the High Court in writ jurisdiction. This decision of the Hon'ble Apex Court was also placed before the tribunal while hearing the claim petition.

12. Having heard learned counsel for the parties and having perused the material on record, I am of the opinion that once an application is moved alleging fraud against the claimants then it was bounden duty of the tribunal to reconsider the matter and examine whether there was a fraud involved in the matter or not.

13. In the present case, the tribunal has simply thrown out the matter on the ground of the delay. It is alleged that the entire money has already been deposited in the court below.

14. In the facts and circumstances of the case, I remand the matter to the tribunal for reconsideration afresh with regard to the matter relating to fraud. In pursuance of the award, the money which had been deposited before the tribunal will not be released in favour of the claimant-respondents, until the tribunal decides the application for recall afresh as moved by the petitioner. The claimant-respondents shall also be given every opportunity of hearing in establishing their case. The matter on remand will be heard by the tribunal expeditiously, if possible, within a period of three months from the date of presentation of a certified copy of this order being placed before it. The order dated 31.05.2008 passed by respondent no. 1 in Misc. case no. 5 of 2007 is set aside.

15. The writ petition is disposed of as above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2008

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 37468 of 2008

Laxmi Shankar Bajpai ...Petitioner
Versus
Additional Director of Education (Secondary) and others ...Respondents

Counsel for the Petitioner:
Sri J.P. Mishra
Sri Indra Raj Singh

Counsel for the Respondents:
Sri Kr. R.C. Singh
Sri Shyam Singh Sengar
Sri Arun Kumar Singh
Sri Neeraj Tiwari

Constitution of India-Art. 226-Appointment of Principal by Transfer-duly selection through selection board-challenged by an officiating principal-in absence of regular selected candidate held-No right to continue after joining of selected candidate-nor has right to resist the posting-petition misconceived-dismissed.

Held: Para 5 & 7

Admittedly, the petitioner was officiating as a principal in the college. He is not the regular principal and was acting as an officiating principal in the absence of the appointment of any permanent principal. Dr. Ajai Pal Singh was appointed principal by way of selection by the Board and was regular principal in the CPKU Inter College, Moosa Nagar, Kanpur Dehat and had a right to claim for the transfer. His transfer has been made against the vacancy existed in Gangadeen Gaurishankar Inter College Kanpur Nagar on the recommendation of the Committee of Management of both the colleges. Therefore the transfer of Dr. Ajai Pal Singh cannot be said to be illegal by any means. Moreover, the petitioner being an officiating principal cannot challenge the transfer of a permanent principal and cannot claim to be retained in the college as officiating principal.

In the present case, the petitioner is not a selected candidate on the post of principal and was only officiating on the post of principal in the absence of any permanent principal and, therefore, had no right to challege the transfer of the respondent no.6 Dr. Ajai Pal Singh.

Case law discussed:
(2007) 3 UBLBEC, 2497.

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

1. By means of the present writ petition, the petitioner is challenging the transfer order dated 22.07.2008 passed by the Additional Director of Education (Secondary), U.P., Allahabad by which Dr. Ajai Pal Singh has been transferred from CPKU Inter College, Moosa Nagar, Kanpur Dehat to Gangadeen Gaurishankar Inter College, Kanpur Nagar.

2. The petitioner claims to be senior most lecturer in Gangadeen Gaurishankar Inter College, Kanpur Nagar an institution duly recognized under the U.P. Intermediate Education Act, 1921 and it was governed under U.P. Act No.24 of 1971, Act No.5 of 1982 and the Rules framed thereunder. On the retirement of Harish Narain Bajpai on 30.06.2006, who was the officiating principal of the college, Sri Jagat Narain Dwivedi took the charge of the college as officiating principal and continued upto February, 2007 and thereafter w.e.f. 8th February, 2007, the petitioner became the officiating principal of the college. Learned counsel for the petitioner submitted that by the transfer and appointment of Dr. Ajai Pal Singh as principal of the college the right of the petitioner has been infringed.

3. Sri Arun Kumar Singh and Sri R.C. Singh, learned counsel appearing on behalf of Dr. Ajai Pal Singh and learned Standing Counsel appears on behalf of other respondents submitted that Dr. Ajai Pal Singh was selected by the U.P. Secondary Education Services Selection Board and was appointed as a principal in CPKU Inter College, Moosa Nagar, Kanpur Dehat and was working as Principal in the said college. As the post of the principal of Gangadeen Gaurishankar Inter College, Kanpur Nagar was vacant, he applied for the transfer and his transfer has been recommended by the Committee of Managements of CPKU Inter College, Moosa Nagar, Kanpur Dehat as well as Gangadeen Gaurishankar Inter College, Kanpur Nagar and accordingly, he has been transferred. Necessary papers in this regard has been produced before this Court. He further submitted that Dr. Ajai Pal Singh has given the charge as principal of CPKU Inter College, Moosa Nagar, Kanpur Dehat on 23.07.2008 and has taken over charge as principal of Gangadeen Gaurishankar Inter College, Kanpur Nagar on 24.07.2008. The signatures of Dr. Ajai Pal Singh has been attested by Prabandh Sanchalak of the college and also by the District Inspector of Schools on 24.07.2008. Papers in this regard has also been produced before this Court. He further submitted that the petitioner was simply officiating on the post of principal in the absence of any permanent principal. Therefore, he has no right to challenge the transfer order inasmuch as he cannot claim his continuity to officiate as principal in the college after the appointment of permanent principal.

4. Having heard the learned counsel for the parties, I have perused the relevant papers.

5. Admittedly, the petitioner was officiating as a principal in the college. He is not the regular principal and was acting as an officiating principal in the absence of the appointment of any permanent principal. Dr. Ajai Pal Singh was appointed principal by way of selection by the Board and was regular

principal in the CPKU Inter College, Moosa Nagar, Kanpur Dehat and had a right to claim for the transfer. His transfer has been made against the vacancy existed in Gangadeen Gaurishankar Inter College Kanpur Nagar on the recommendation of the Committee of Management of both the colleges. Therefore the transfer of Dr. Ajai Pal Singh cannot be said to be illegal by any means. Moreover, the petitioner being an officiating principal cannot challenge the transfer of a permanent principal and cannot claim to be retained in the college as officiating principal.

6. The decision cited by the learned counsel for the petitioner of this Court in the case of **Asha Singh Versus State of U.P. and others reported in (2007) 3 UBLBEC, 2497** is not applicable to the present case as the facts of that case was entirely different. In that case, in pursuance of the advertisement published by the U.P. Secondary Education Services Selection Board, Allahabad for the appointment as L.T. Grade Teacher in the subject of Physical Education. The petitioner applied and was successful in the written examination and was, therefore, invited for participation in the Interview on 15.05.2006. The petitioner was selected for the post of L.T. Grade Teacher in Physical Education and empaneled against the vacancy which was available in Indian Girls Inter College Allahabad. On these facts, the petitioner challenged the transfer on the ground that once the vacancy was advertised on a requisition made by the Committee of Management by the U.P. Secondary Education Services Selection Board, Allahabad, the Committee of Management looses its discretion to resort to mode of appointment by way of transfer and then it is only by direct recruitment on the recommendation of the U.P. Secondary Education Services Selection Board, Allahabad that any appointment against the vacancy advertised can be made.

7. In the present case, the petitioner is not a selected candidate on the post of principal and was only officiating on the post of principal in the absence of any permanent principal and, therefore, had no right to challege the transfer of the respondent no.6 Dr. Ajai Pal Singh.

8. In this view of the matter, the writ petition is devoid of any merit and is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 27426 of 2006

Royon International School Karamchari Sangh, Gautam Budh Nagar. ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Miss. Bushra Maryam

Counsel for the Respondents:
Sri Vishwa Ratan Dwivedi
S.C.

U.P. Industrial Dispute Act, 1947-Section 4-K-Rejection to refer the dispute-on the ground of locustandi-as the petitioner being union is not within meaning of aggrieved party-held-without jurisdiction-reference based on subjective satisfaction-an administrative function-order of refusal on denial to

refer the dispute-cannot destroy the claim-petitioner to approach before labour court.

Held: Para 5

Reference order is based on subjective satisfaction of the appropriate Government. Such subjective satisfaction relating to factual existence of dispute or its apprehension and expediency of making reference is not justifiable as the appropriate Government has no power or judicial review. The order of reference is only an administrative function. The authority for making a reference to Labour Court or Industrial Tribunal by the appropriate Government is derived from the key used in Section 4K of the U.P. Industrial Disputes Act, 1947 that any industrial dispute exists or is apprehended. Once the conciliation proceeding is moved for settlement of any dispute then such dispute prima facie comes into existence and is apprehended. An administrative order of refusal to refer a dispute cannot destroy or destruct the right of an aggrieved party to establish before the Labour Court that what has been referred in fact is an industrial dispute. After existence of dispute the appropriate Government can only prima facie has to satisfy that what is being referred is not a frivolous or state dispute and it can not be permitted to delve into merits of any industrial dispute raised by the aggrieved party. All these questions can be decided by the Labour Court. The petitioner may raise all these questions before the Labour Court for adjudication.

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

1. Heard learned counsel for the parties and perused the record.

2. By the impugned order dated 7.10.2005 the State Government had refused to refer the Industrial Dispute raised by the petitioner on the ground that the demands raised by the petitioner union is not valid and the workers' union is not competent to raise this dispute. The impugned order dated 7.10.2005 is as under:-

''प्रेषक,
सचिव, श्रम अनुभाग-१
उत्तर प्रदेश शासन, पो० बा० २२०
कानपुर।

प्रेषित मंत्री,

रियान इण्टर नेशनल स्कूल कर्मचारी
संघ प्रताप भवन,
नोएडा गौतमबुद्ध नगर।

संख्या /- / शाखा सचिवालय सी०बी०-०४/२००३ नोएडा

रियान इण्टर नेशनल स्कूल।

विषयः- औद्योगिक विवाद संख्या-डी०-४६, सेक्टर-३६, नोएडा उ०प्र० तथा उनके श्रमिकों के बीच उत्पन्न औद्योगिक विवाद
(प्रार्थी को सूचित किया जाता है कि उक्त विवाद को सरकार से अभिनिर्णय हेतु अनुपयुक्त समझा है। अतएव यह विवाद दाखिल दफ्तर कर दिया गया है।

कारणः- मांगों का अनौचित्यपूर्ण होना तथा श्रमिक संघ के बाद प्रस्तुत करने में अक्षम होने के फलस्वरूप।

ह० अपठनीय
(उप श्रमायुक्त उ०प्र०)
कृते विशेष सचिव।''

3. Learned counsel for the respondents submits that respondent no.4 is a private education institution and not an industry, hence no industrial dispute can be raised under the provisions of U.P. Industrial Disputes Act, 1947. It is settled that in an Educational Institution the teachers may not fall within the ambit of definition of workman as given in Section 2(z) of the U.P. Industrial Disputes Act, 1947 but class III and IV employees are workmen. Even if the petitioner wants to

raise this objection he could do so before the Labour Court to whom the reference may be made.

4. In my opinion, the Conciliation Officer could not adjudicate upon the dispute as to whether demands by the workmen are justified or not and whether the union was competent to raise the dispute or the workman himself individually are missed questions of facts and law. These can be decided only on basis of evidence which may be adduced by the parties.

5. Reference order is based on subjective satisfaction of the appropriate Government. Such subjective satisfaction relating to factual existence of dispute or its apprehension and expediency of making reference is not justifiable as the appropriate Government has no power or judicial review. The order of reference is only an administrative function. The authority for making a reference to Labour Court or Industrial Tribunal by the appropriate Government is derived from the key used in Section 4K of the U.P. Industrial Disputes Act, 1947 that any industrial dispute exists or is apprehended. Once the conciliation proceeding is moved for settlement of any dispute then such dispute prima facie comes into existence and is apprehended. An administrative order of refusal to refer a dispute cannot destroy or destruct the right of an aggrieved party to establish before the Labour Court that what has been referred in fact is an industrial dispute. After existence of dispute the appropriate Government can only prima facie has to satisfy that what is being referred is not a frivolous or state dispute and it can not be permitted to delve into merits of any industrial dispute raised by the aggrieved party. All these questions can be decided by the Labour Court. The petitioner may raise all these questions before the Labour Court for adjudication.

6. For the reasons stated above, the writ petition is allowed and the impugned order dated 7.10.2005 is quashed. The respondents are directed to consider the matter of reference afresh within 15 days from the date of production of a certified copy of this order.

7. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2008

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 19182 of 2008

Deevani Nyayalaya Karmchari Sangh and another ...Petitioners
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri Radha Kant Ojha
Sri Arun Kumar Mishra

Counsel for the Respondents:
Sri Amit Sthalekar
Sri Yashwant Verma
Sri Vivek Srivastava
S.C.

Constitution of India, Art. 226- Entitlment of C.C.A. and H.R.A.-Class III and IV employee working under judgeship of Kanpur Dehat-denial of said benefit as per employees working in judgeship of Kanpur City-the decision of committee as well as the decision of Govt. based on mis reading of G.O. dated 11.6.99 and other various Govt. orders issued from time to time-both the

judgeships are situated across the road-decision of committee based on no material-perverse-set a side-held-the employees working under judgeship of Kanpur Dehat-entitled for C.C.A. and H.R.A.

Held: Para 12

The finding has been recorded without any basis and in my view, it is a clear misreading of G.O. dated 11.6.1999. The Committee has miserably failed to consider the effect and consequences in the light of the contents of various G.Os issued from time to time and, therefore, has also erred in law in making or coming to a conclusion which is ex facie perverse and based on no material. The view taken by the State Government also cannot be sustained in the light of discussion of contents of various G.Os issued by State Government with respect to admissibility of HRA from time to time.

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

1. Heard Sri Radha Kant Ojha for the petitioner, learned Standing Counsel for respondent no.1 and Sri Amit Sthalekar for respondents no.2 and 3. With the agreement of learned counsel for the parties, the writ petition has been heard finally under the Rules of the Court at this stage and is being decided.

2. An association namely, Dewwani Karmchari Sangh U.P., Kanpur Dehat through its President has filed this writ petition challenging the order dated 1.4.2008, passed by District Judge, Kanpur Dehat and dated 22.2.2008 issued by the State Government whereby it has held that employees of Judgeship Kanpur Dehat are not entitled for any City Compensatory Allowance (*in short 'CCA'*) and House Rent Allowance (*in short 'HRA'*) at the rate admissible at Kanpur Nagar.

3. Brief facts giving rise to the present writ petition are as under:

4. Sometimes in the year 1985 a new Judgeship "Kanpur Dehat" was created by carving out certain areas from Kanpur and Kanpur itself was renamed as "Kanpur Nagar". Due to lack of infrastructure etc. in Kanpur Dehat, District Judgeship was actually established in Kanpur Nagar, that too in the vicinity of the Judgeship of Kanpur Nagar and since then it is continuously functioning there. Both the Judgeships are across the road in Kanpur Nagar. Employees of Judgeship Kanpur Dehat are actually residing in nearby areas in Kanpur Nagar.

5. The facility of HRA and CCA has been extended to the Government employees through various Government Orders (*In short 'G.O.'*). Government Order dated 15.12.1981 (Annexure 6 to the writ petition) provides that HRA shall be paid to all such government servants who are posted in cities mentioned in Annexure-1 within their municipal limits or within 8 Km. of distance outside the municipal limits. Consequently, the employees of District Judgeship Kanpur Dehat were also paid H.R.A. under the G.O. dated 15.12.1981. Similarly, they were also paid CCA admissible at Kanpur Nagar in accordance with relevant Government Orders. However, one Additional District Judge posted in Kanpur Dehat Judgeship who was not paid CCA at the rates admissible in Kanpur Nagar sent a representation to the State Government claiming C.C.A. at the rate admissible at Kanpur Nagar. The same was declined by the State

Government vide order dated 22.2.2008 holding that Government employees posted in Kanpur Dehat are not entitled for CCA. In the light of the said decision of the Government, the District Judge constituted a committee of four Judicial Officers which submitted its report on 28.3.2008 holding that neither C.C.A. is payable to Class III and Class IV employees of District Judgeship of Kanpur Dehat nor they are entitled to H.R.A. at the rate admissible at Kanpur Nagar and further the amount already paid under the two heads to such employees is liable to be recovered. The said report in respect of CCA and HRA was has been accepted by District Judge vide order dated 1.4.2008 although on some other aspects he has required some clarification from the committee. The petitioners are aggrieved by the decision of District Judge denying CCA and HRA as admissible at Kanpur Nagar and recovery thereof.

6. Sri Ojha learned counsel for the petitioner vehemently contended that since District Judgeship, Kanpur Dehat is functioning at Kanpur Nagar itself, mere nomenclature of the judgeship would not render the petitioners ineligible or disentitle for CCA and HRA at the rates admissible for the place where the petitioners are actually working. He further submitted that the decision taken by the Committee is wholly erroneous, and on account of misreading of various G.O., therefore, the impugned orders are illegal and liable to be set aside.

7. Sri Amit Sthalekar, learned counsel for respondents no.2 and 3 submitted that in view of the decision taken by the State Government that employees posted in the District Judgeship of Kanpur Dehat are not entitled for CCA or HRA admissible to employees of Kanpur City, the matter was examined by the District Judge and in view of the report submitted by the Committee constituted by him, it was found that the petitioners are not entitled to HRA and CCA admissible to Kanpur Nagar. He thus submitted that for reasons stated in the report of the Committee which is on record as Annexure 3 to the writ petition, the petitioners are not entitled to any relief and writ petition is liable to be dismissed. The learned Standing Counsel also adopted the same arguments.

8. The short questions required to be answered in this case are:

1. Whether the petitioners can be denied HRA at the rate admissible to the employees working at Kanpur Nagar merely on the ground that they are posted in a Judgeship which has been created for the area outside Kanpur Nagar and is known as Kanpur Dehat ?
2. Whether various G.Os. providing for HRA have rightly been interpreted by respondent no.4 ?
3. Whether the petitioners are not entitled for CCA though as a matter of fact their office in which they are posted is situated at Kanpur Nagar and they are all working and residing in Kanpur Nagar or nearby area within 8 km of municipal limits ?

9. To answer the above questions this Court proposes first to deal with the issue pertaining to HRA.

10. Questions no.1 and 2 pertaining to HRA can be considered and answered together. Entitlement for H.R.A. was

made admissible by State Government pursuant to recommendation of U.P. Second Pay Commission accepted by the Government vide resolution dated 29.9.1981 and in furtherance thereof G.O. No. G-1-1745/X-81, Vitta (Sa.Anu-1) dated 15.12.1981 was issued. Para 1 of the said G.O. provides that as per the decision of the Governor all employees under the rule framing authority of the Government other than those working on work charge or contingency paid fund, shall be entitled for H.R.A. if their place of working is situated within municipal limits of cities contained in Schedule-I or outside the said municipal limits but within 8 km. thereof. In subsequent paragraphs certain other conditions as well as rates of HRA etc. was provided. The aforesaid G.O. was sought to be clarified by G.O. No. Vitta(Samanya) Anubhag-1 No. G.-1-2569/X-83/209/81 dated 28th February 1984 with respect to question of admissibility of HRA to husband and wife who are in employment of the Government and are residing in the same house and the manner in which HRA would be admissible. The G.O. dated 28.2.1984 was rescinded by subsequent G.O. No.G-1-1887/X-209/81-Vitta (Sa) Anu.-1, dated 29.10.1984. Besides it, some other amendments were made vide G.Os. dated 15.12.1981, 29.12.1981, 14.3.1983, 28.1. 1985, 2.3.1987 and 9.7.1987. Thereafter again on the recommendation of U.P. Third Pay Commission, accepted by the State Government vide its resolution dated 14.8.1988 rates of HRA were revised vide G.O. dated 19.9.1988 but in para 7 thereof it was stated that in respect to other terms and conditions various G.Os. earlier issued shall continue to be in force. Partial amendment in the rate of HRA in G.O. dated 19.9.1988 was made by G.O. Dated 26.10.1988. It was also provided that the employees who are appointed and posted outside the State of U.P. shall be entitled for HRA at the same rate as prescribed by Government of India to its employees of equal status. Another clarification was issued by G.O. dated 28.2.1989 as to whether HRA would be payable to employees posted in the offices situated outside Municipal limits of city but within 8km. thereof and it was clarified that in such a case also HRA at the rate admissible in the said city shall be payable. The employees who were working and posted in rural area, for them, rates of HRA were modified by G.O. dated 24.7.1992 which made partial amendment in the earlier G.O. dated 22.9.1988 issued for providing rates of HRA in rural area. Pursuant to the Fourth Pay Commission's recommendation, 1998, which were made effective w.e.f. 1.1.1996, rates of HRA were again revised vide G.O. dated 11.6.1999, making amendment in earlier G.O. dated 24.7.1992 but nowhere it superseded or rescinded the initial Government Order dated 15.12.1981 which lays down conditions for entitlement of HRA, and, mainly the changes made by G.O. dated 11.6.1999 were in respect to rates. Some partial amendments were further made vide G.O. dated 11.6.1999 and dated 6.12.1999. Again a clarification was made by G.O. dated 25.2.2000 referring to G.O. dated 15.12.1981 and 11.6.1999 and stating that irrespective of the fact as to where a Government servant is residing, he would be entitled for HRA if his office, i.e., place of working is situated in the Municipal Limits of the city or within 8 km. thereof. It would be relevant to quote the clarification given by G.O. dated 25.2.2000:

"1.Shasnadesh Sankhya G-1-1795/Dus-81, 209-81 Dinank 15 December, 1981 Me Yeh Pravidhan Hai Ki Makan Kiraya Bhatta Sambandhit Nagar Ki Arhkari Seema Ke Bahar 8 Kilometer Ki Doori Tak Sthit Karyalayon Me Karyarat Sarkari Sewakon Ko Deya Hoga Chahe Sambandhit Sarkari Sewak Kahin Bhi Niwas Karta Ho. 8 Kilometer Ki Doori Sab Se Kam Doori Wale Marg Se Naapi Jayegi Aur Iski Pushti Poorva Ki Bhanti Ziladhikari Se Karani Avashyak Hogi. Shasnadesh Sankhya G-1-1887/Das-209-81, Dinank 29 October 1984 Me Yah Bhi Vyavastha Ki Gayi Thi Ki Makan Kiraya Bhatta Prakhyapit Nagapalikaon Se Sanlagna Sthaniya Nikayon Ki Poori Seema Me Purvavat Milta Rahega, Kintu Ukt Sanlagna Sthaniya Nikayon Ke Bahar Sthit Karyalayon Se Doori Makan Kiraya Bhatta Ke Liye Mool Nagarpalika Ki Seema Se Hi Naapi Jayegi., Sanlagna Sthaniya Nikay Ki Seema Se Nahi.

"2. Is Sambandh Me Mujhe Yeh Kahne Ka Nirdesh Hua Hai Ki Uprokt Vyavastha Shasnadesh Sankhya G-1-373/Dus-99-205-99, Dinank 11 June, 1999 Evam Shasnadesh Sankhya G-1-526/Das-205-99, Dinank 22 July, 1999 Dwara Sanshodhit Makan Kiraya Bhatta Ki Daron Ke Sandarbh Me Bhi Lagu Rahegi."

(English translation):

"1. It is provided in Government Order No. G-1-1795/Das-81, 209-81 Dinank 15 December, 1981 that house rent allowance shall be payable to Government Servants working in offices situated within 8 km. outside the municipal limits irrespective of place of residence of Government servant. Distance of 8 km. shall be measured from the shortest route and its approval must be made by the District Magistrate as was being done in past. It was also provided in Government Order No. G-1-1887/Dus-209-81, Dinank 29 October 1984 that house rent allowance shall be continued to be given to employees working in the entire limits of local bodies attached to notified municipalities, but for the purpose of HRA, measurement of distance of offices of local bodies situated outside their limits shall be made from the original limit of municipality and not from local body's limits."

"2. In this connection, I am also directed to say that the aforesaid provision shall be applicable to the rates of house rent allowance amended vide Government Orders No. G-1-373/Dus-99-205-99, dated 11 June, 1999 and G-1-526/Dus-205-99, dated 22 July, 1999"

11. Rates of HRA set out vide G.O. Dated 4.6.1999 were again modified in respect to certain areas vide G.O. dated 16.4.2001.

12. A conjoint reading of all the above G.Os make it very clear, particularly the G.O. Dated make it very clear, particularly the G.O. dated 25.2.2000 that the G.O. dated 15.12.1981 as such has not been rescinded or revoked by G.O. dated 11.6.1999 and any other previous or later G.O. The only changes made by G.O. dated 11.6.1999 was in respect to rates of HRA in different areas and other things contained therein but in respect to rest of the matters where no specific provisions were made by the G.O. dated 11.6.1999, the provisions of G.O. dated 15.12.1981 laying down conditions with respect to admissibility of HRA had continued to operate and that has been reiterated in G.O. dated 25.2.2000 while clarifying certain aspects

of the matter as discussed above. This Court could not find out any reason in the entire report of the Committee appointed by District Judge as to how and in what manner they came to the conclusion that the G.O. dated 11.6.1999 has resulted in repealing G.O. dated 15.12.1981. The finding has been recorded without any basis and in my view, it is a clear misreading of G.O. dated 11.6.1999. The Committee has miserably failed to consider the effect and consequences in the light of the contents of various G.Os issued from time to time and, therefore, has also erred in law in making or coming to a conclusion which is ex facie perverse and based on no material. The view taken by the State Government also cannot be sustained in the light of discussion of contents of various G.Os issued by State Government with respect to admissibility of HRA from time to time.

13. The matter of HRA can be considered from another angle also. If place of working would have actually situated in rural area, not covered by provision of Government Order dated 15.12.1981, obviously an employee if residing in a city could not have claimed HRA at the rate admissible in city. But where the office has been created at a different place but as a matter of fact has been established in a different city and is actually working and functioning in that city, then how and why HRA admissible in that city would not be admissible to the employee(s) posted in that office, particularly when none of the G.Os disentitles them in such a contingency for payment of HRA. Learned counsel appearing for the respondents also could not show or bring anything to the notice of this Court for taking a different view. Therefore, I have no hesitation in holding that learned District Judge has also erred in law in mechanically accepting the decision of the Committee in the light of the decision of the State Government as communicated by letter dated 22.2.2008 and therefore, with respect to payment of HRA the impugned orders cannot sustain and are liable to be quashed. Questions no.1 and 2 are answered accordingly.

14. Now I proceed to consider question with respect to CCA in the light of various G.Os whereunder the same is admissible. The provision made for CCA also stand on the same footing as we have found the things exist with respect to HRA. Starting from initial G.O. No. G-1-871/Dus-87-209-81 T.C. dated 9.7.1981 and subsequent G.Os No. G-1-422/Dus-207-81 dated 11.3.1982, G-1-603/Dus-86-209/86 dated 15.4.1986 and G-1-1166/Dus-262/88 dated 17.9.1988, it is evident that CCA was made admissible to Government employees who were working in the cities mentioned in the said G.Os. Various G.Os issued from time to time only made difference either in the rate of CCA admissible in various cities mentioned in the G.Os. or included or excluded name of a particular city/cities for admissibility of CCA under the aforesaid G.Os. It is not that the very basis with respect to admissibility of CCA at any point of time has been altered. The G.O. Which has been considered by the Committee in order to deny CCA to the petitioners with effect from 10.6.1999 is G.O. No. G-1-375/Dus-99-203-99 dated 10.6.1999 which made amendment in the preceding G.Os No. G-1-1166/Dus-262/88 dated 17.9.1988 and G-1-977/Dus-262/88 dated 16.8.1993. The Committee has inferred that the aforesaid G.O. dated 10.6.1999 has the effect of rescinding earlier G.Os and, therefore, the petitioners

were not entitled to CCA w.e.f. 10.6.1999. The Court finds that the inference drawn by the Committee is clearly erroneous and is a result of misreading of the said Government Order.

15. First I propose to consider the G.O. dated 17.9.1988 which after referring to G.Os. dated 9.7.1981, 11.3.1982, 24.5.1983 and 15.4.1986 provided that accepting the recommendations of Pay Commission, U.P., 1987, the Government has decided vide its resolution dated 14.8.1986 to provide revised rate of CCA w.e.f. 1.1.1986 to the Government employees working in Kanpur, Agra, Allahabad, Lucknow, Varanasi, Meerut, Bareilly, Gorakhpur, Moradabad and Aligarh and the aforesaid revised rate of CCA was made admissible w.e.f. 1.1.1986. The G.O. dated 10.6.1999 has been issued pursuant to the recommendations of Pay Commission, U.P. 1998 and decision of the Government to implement the same and in furtherance thereof it has revised the rate of CCA as well as made certain amendments with respect to admissibility of CCA in the cities of Kanpur, Lucknow, Varanasi, Bareilly, Meerut, Ghaziabad, Gorakhpur, Agra and Allahabad. Revised rate of CCA in the aforesaid cities has been provided w.e.f. 1.6.1999. G.Os dated 17.9.1988 and 16.8.1993 have been amended only to certain extent as provided in the G.O. dated 10.6.1999 but it has not rescinded or revoked the earlier G.Os in entirety. Revision has been made effective from 1.6.1999. The difference between G.O. dated 17.9.1988 and 10.6.1999, besides rate of CCA, is that city Aligarh has not been included in the G.O. dated 10.6.1999 and, therefore, as per the revised G.O. the said rate of CCA is not admissible to the Government servant working at Aligarh. This is the only distinction in various G.Os and the Court did not find anywhere suggesting or even having any iota of indication that the earlier G.Os stand revoked and word 'working' in the cities mentioned in the said G.Os has been altered with the word 'posted' . The petitioners are posted in Judgeship Kanpur Dehat but admittedly, since the establishment of Kanpur Dehat Judgeship, its headquarters is at Kanpur Nagar itself, the employees of Kanpur Dehat Judgeship cannot be said to be working at a place other than Kanpur Nagar. The G.O. dated 10.6.1999 has been amended vide G.O. No. G-1/890/Dus-99-203/99 dated 6.12.1999 adding "Gautam Budh Nagar" in the column of Kanpur, and in the column of cities Bareilly, Meerut, Ghaziabad, Gorakhpur, Agra and Allahabad, two cities--"Moradabad and Aligarh" have also been included. Now presently by G.O. No. G-1-258/Dus-2001-203-99 dated 16.4.2001, the rate of CCA admissible to Lucknow has been changed and equated with Kanpur by placing in the same column in which Kanpur is placed and this has been made effective from 1.4.2001. No substantial difference in respect to the word 'working' which makes CCA admissible has been made so far and none has been shown to the Court by the respondents.

16. Learned counsel for the respondents could not place before the Court that though the employees are working in the cities in which CCA is admissible under the aforesaid G.Os, yet it is not payable in the office in which they are functioning or established in the cities mentioned in G.Os. They failed to show that the petitioners would not be entitled to CCA at the rate admissible in

the cities provided in the aforementioned G.Os where they are in fact 'working'.

17. I, therefore, have no hesitation in holding that denial of CCA and HRA at the rate admissible at Kanpur Nagar to the petitioners is clearly erroneous, illegal and arbitrary and is not consistent with various G.Os, under which the aforesaid two allowances are admissible as discussed above.

18. The writ petition is accordingly allowed. The petitioners shall be entitled to HRA and CCA at the rate admissible at Kanpur Nagar so long as Judgeship of Kanpur Dehat is functioning at Kanpur Nagar. The impugned orders dated 1.4.2008, passed by District Judge, Kanpur Dehat and dated 22.2.2008 issued by the State Government are accordingly quashed. The petitioners shall be entitled to costs which is quantified at Rs.2000/-.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No. 14172 of 2004
And
Criminal Misc. Application No. 59 of 2005

Ramapati Mishra ...Applicant
Versus
State of U.P. and another ...Respondents

Counsel for the Applicant:
Sri P.N. Tripathi

Counsel for the Respondents:
Sri H.K. Shukla
A.G.A.

Code of Criminal Procedure-482-Quashing of complaint case-offence under Sections 417, 467, 471, 504 I.P.C.-dispute personal in nature-settled out of the Court-no reason to disbelief the facts stated in Counter affidavit-held-if the proceeding allowed to continue-amount to abuse the process of Court-proceeding of complaint Case Quashed.

Held: Para 6

Having regard to the observations made in the rulings mentioned herein-above, I am of the opinion that it would be an abuse of the process of the Court, if the criminal proceedings against the applicants is allowed to continue, as the dispute was of personal nature, which has been settled out side the court by means of compromise. Therefore, to do the complete justice, the proceedings of Complaint Case No. 1422 of 2003 may be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

Case law discussed:
(2003) 4 Supreme Court Cases 675, [2006(30) JIC 135 (Alld)], 2005 (51) ACC 21, 2007 (59) ACC 123. 2007 (59) ACC 148, 2007 (57) ACC 981

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

By means of these applications under section 482 of the code of Criminal Procedure (in short the 'Cr.P.C.'), the applicants Ramapati Mishra and Deena Nath have invoked the inherent jurisdiction of this Court, praying for quashing of the proceedings of Complaint Case No. 1422 of 2003 (Raj Kumar vs. Deena Nath & others), pending in the court of Additional Chief Judicial Magistrate Gyanpur (Bhadohi).

2. Shorn of unnecessary details, the facts leading to the filing of the applications under section 482 Cr.P.C., in both these cases are that Raj Kumar

Mishra (Opposite party No. 2 herein) had filed a complaint in the court of Additional Chief Judicial Magistrate Ghaypur (Bhadohi) on 07.07.2003, which was registered as complaint Case No. 1422 of 2003. The allegations made in the complaint, in brief, are that the accused Deena Nath in collusion with the accused Rama Pati Mishra playing fraud executed a sale deed of plot No. 149 in favour of the complainant after receiving Rs.30,000/-, whereas he was not the owner of this plot. After recording the statement of the complainant under section 200 Cr.P.C. and taking evidence under section 202 Cr.P.C., the accused Deena Nath and Ramapati were summoned to face the trial under section 417, 467, 468, 471, 504 and 506 IPC vide order dated 16.08.2003. Against that summoning order, objections were filed by the applicants in the court of magistrate concerned, who declined to recall the summoning order. Thereafter criminal revision was filed by the applicants challenging the summoning order, but the said revision was dismissed being not pressed vide order dated 27.11.2004. Now the applicants-accused have come to this court for quashing the proceedings of complaint case mentioned herein-above.

3. Heard argument of Sri P.N. Tripathi Advocate appearing for the applicants, Sri H.K. Shukla learned counsel for the O.P. No. 2/complainant and learned AGA for the State.

4. It was submitted by learned counsel for the parties that the dispute is of personal nature, which has been settled by the parties outside the court and hence the proceedings of complaint case should be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C., as continuance of the said proceedings would be an abuse of the process of the Court. For this submission, the parties counsel have placed reliance on the cases of ***B.S. Joshi & others vs. State of Haryana & another (2003) 4 Supreme Court Cases 675 and Ausaf Ahmad Abbasi & ors. vs. State of U.P. & another.[2006(30) JIC 135 (Alld)].***

5. The complainant/ O.P. No. 2 Raj Kumar has filed counter affidavit in Crl. Misc. Application No. 59 of 2004. It is alleged in the said counter affidavit that the parties have entered into compromise and in pursuance of that compromise, the accused have made part payment to the deponent and have given assurance to make remaining payment after withdrawl of the complaint by the deponent. It is prayed in para 6 of the counter affidavit that criminal proceedings of Complaint Case No. 1422 of 2003 be quashed. In para 3 of the counter affidavit it is stated that the complainant/ deponent dose not want to prosecute the complaint in view of the compromise entered into between the parties. There is no reason to disbelieve the averments made in the counter affidavit and since the complainant himself does not want to prosecute his complaint and has made request to quash the proceedings of his complaint case, hence keeping in view the observations made in cases of ***B.S. Joshi vs. State of Haryana and Ausaf Ahmad Abbasi vs. State of U.P.*** (supra), proceedings of the complaint case referred to above may be quashed by this Court on its inherent jurisdiction. In the case of ***Ruchi Agarwal vs. Amit Kumar Agrawal & others 2005 (51) ACC 21***, the Hon'ble Apex Court quashed the proceedings of the criminal case due to

the compromise entered into between the parties. Following this case, this court in the case of ***Shikha Singh & others vs. State of U.P. & another 2007 (59) ACC 123***. quashed the proceedings of criminal case due to the compromise entered into between the parties. Similarly in the case of ***Dinesh Kumar Jain & others vs. State of U.P. & Others 2007 (59) ACC 148***, this court has quashed the proceedings of the criminal case under section 498A, 323, 504, 506 IPC and 3/4 D.P. Act due to the compromise entered into between the parties in the proceedings under section 125 Cr.P.C. Reliance in this case has been placed on ***B.S. Joshi vs. State of Haryana*** (supra). In the case of ***Ganga Charan Rajpoot vs. State of U.P. & others 2007 (57) ACC 981***,the proceedings of criminal case was quashed by the Court due to the compromise entered into between the parties outside the court.

6. Having regard to the observations made in the rulings mentioned herein-above, I am of the opinion that it would be an abuse of the process of the Court, if the criminal proceedings against the applicants is allowed to continue, as the dispute was of personal nature, which has been settled out side the court by means of compromise. Therefore, to do the complete justice, the proceedings of Complaint Case No. 1422 of 2003 may be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

7. Consequently, the applications under section 482 Cr.P.C. in both the cases are allowed and proceedings of Complaint Case No. 1422 of 2003 (Raj Kumar vs. Deena Nath & others), under sections 417, 467, 468, 471, 504 & 506 IPC, pending in the court of Additional Chief Judicial Magistrate Gyanpur (Bhadohi), are hereby quashed.

This order will form part of Crl. Misc. Application No. 14172 of 2004 and a copy thereof will be kept on record of Crl. Misc. Application No. 59 of 2005.

The office is directed to send a copy of this order to the Additional Chief Judicial Magistrate Gyanpur (Bhadohi) for necessary action.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ARUN TANDON, J.

Special Appeal No.1080 of 2002

Satya Narain Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri R.K. Porwal

Counsel for the Respondents:
S.C.

Constitution of India, Art 226-Pension-petitioner retired prior to the commencement of G.O. 18.10.97-which provides benefit of pension who retired prior to that-claim of petitioner/Appellant for counting the service period of Junior High School working w.e.f. 25.7.59 to 13.9.69 rejected by the authorities learned Single Judge rightly dismissed the petition in view of D.S. Nakkara's case para 14-if the provision of pension not applicable on the date of retirement-not entitled for the benefit claimed.

Held: Para 9

The judgment of the Apex Court in *D.S. Nakara's* case (supra) is not applicable in facts of the present case since in the said case the benefit of liberalised pension were arbitrarily withheld from one class of the employee, who had retired. In the said case before the Apex Court the Iiberalised pension scheme has to be applied to all pensioner and from the date of retirement no distinction could have been made for applicability of the liberalised pension. Present is a case where benefit of adding of service rendered in other department for the first time was extended by the Government on certain conditions, hence cut-off date fixed in the Government order cannot be said to be arbitrary.

Case law discussed:

A.I.R. 1993 S.C. 130, (1997)1 S.C.C. 208, (2002) 2 S.C.C. 179

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

1. Heard Sri R.K. Porwal, learned counsel appearing for the appellant.

2. This is an appeal against the judgment and order dated 9th September, 2002 passed by learned Single Judge by which order the writ petition filed by the appellant was dismissed.

3. The appellant filed the writ petition by which he challenged the Government order dated 18th October, 1997 by which Government order it was provided that benefit of the Government order shall be given to the teachers and non teaching employees, who retired on the date of issue of the Government order or thereafter. The appellant had earlier filed a writ petition being Writ Petition No.41235 of 1998 praying that his period of service in Junior High School from 25th July, 1959 up to 13th September, 1969 be added in his service in Sri Shiv Narain Inter College from where he retired. This Court disposed of the writ petition directing the Joint Director of Education to decide the representation. The Joint Director of Education vide his order dated 19th March: 1999 took a decision that the period of services of the appellant in Parisadiya institution cannot be added in his service in Inter College since he has retired prior to 18th October, 1997 and the benefit of the Government order was given to those employees who had retired either on 18th October, 1997 or thereafter. The petitioner had challenged both the orders in the writ petition which was dismissed by the learned Single Judge.

4. Learned counsel for the appellant contends that appellant fulfils all the condition of the Government order except condition of cut-off date. Learned counsel for the appellants further contends that cut-off date fixed in the Government order dated 18th October, 1997 is arbitrary. He submits that appellant was also a pensioner and fixing of cut-off date by a Government order was arbitrary and without any rational basis. He has placed reliance on a judgment in the case of ***D.S. Nakara and others vs. Union of India*** reported in A.I.R. 1993 S.C. 130.

5. We have considered the submissions of learned counsel for the appellant and perused the record.

6. The submission, which has been pressed before us, is with regard to cut-off date fixed in the Government order dated 18th October, 1997. Learned counsel for the appellant contended that the cut of date is arbitrary since there is no rational basis for fixing cut-off date. He submitted that merely because the appellant had retired prior to cut-off date, he cannot be denied the benefit. Reliance was placed

upon the judgment in ***D.S. Nakara's*** case (supra). In the said judgment following was laid down in paragraph 49:-

"49. But we make it abundantly clear that arrears are not required to be made because to that extent the scheme is prospective. All pensioners whenever they retired would be covered by the Iiberalised pension scheme, because the scheme is a scheme for payment of pension to a pensioner governed by 1972 Rules. The date of retirement is irrelevant. But the revised scheme would be operative from the date mentioned in the scheme and would bring under its umbrella all existing pensioners and those who retired subsequent to that date. In case of pensioners who retired prior to the specified date, their pension would be computed afresh and 198 would be payable in future commencing from the specified date. No arrears would be payable. And that would take care of the grievance of retrospectivity. In our opinion, it would make a marginal difference in the case of past pensioners because the emoluments are not revised. The last revision of emoluments was as per the recommendation of the Third Pay commission (Raghubar Dayal Commission). If the emoluments remain the same, the computation of average emoluments under amended Rule 34 may raise the average emoluments, the period for averaging being reduced from last 36 months to last 10 months. The slab will provide slightly higher pension and if someone reaches the maximum the old lower ceiling will not deny him what is otherwise justly due on computation. The words "who were in service on 31st March, 1979 and retiring from service on or after the date" excluding the date for commencement of revision are words of limitation introducing the mischief and are vulnerable as denying equality and introducing an arbitrary fortuitous circumstance can be severed without impairing the formula. Therefore, there is absolutely no difficulty in removing the arbitrary and discriminatory portion of the scheme and it can be easily severed."

7. The challenge is that there is no rational basis for fixing the cut-off date. The Government order dated 18th October, 1997 provides that the services rendered in any Government Department/Government Institution can be added in the services of an employee of aided Higher Secondary Schools for the purposes of pension on fulfilling the conditions. The Government order itself makes it clear that those employees who have retired prior to issuance of the Government order, shall not be given the said benefit. The appellant who had retired from an Intermediate College was governed by the pension scheme, namely, Uttar Pradesh Contributory Provident Fund Insurance Pension Rules, which came into force on October 1, 1964. The said Rule did not provide for adding services rendered in any other institution or department. This was the reason why the Government order was issued on 18th October, 1997 making it permissible to add the served rendered in other Government Department or aided institutions. The respondents for the first time brought a provision giving the benefit of adding the period of service rendered in Government Department or aided institutions on fulfilment of certain conditions. The said Government order was applied to those teachers and non teaching staff who were in service and retired on the date of issue of the Government order or thereafter.

8. The cut-off date, which was fixed in the Government order has rational basis since it provided a classification between the employees who were already retired and those who were in service. The benefit was given only to those employees who have rendered services in some other Government Institution or Department on fulfilment of certain conditions including deposit of contribution in the Treasury. Due to the said reason the Government decided to make the Government order applicable to those employees who were in service on the date of issue of the Government order. Thus the basis of fixing a cut-off date has rational basis and it cannot be said that the same is arbitrary.

9. The judgment of the Apex Court in ***D.S. Nakara's*** case (supra) is not applicable in facts of the present case since in the said case the benefit of liberalised pension were arbitrarily withheld from one class of the employee, who had retired. In the said case before the Apex Court the Iiberalised pension scheme has to be applied to all pensioner and from the date of retirement no distinction could have been made for applicability of the liberalised pension. Present is a case where benefit of adding of service rendered in other department for the first time was extended by the Government on certain conditions, hence cut-off date fixed in the Government order cannot be said to be arbitrary.

10. The Apex Court had occasion to consider almost similar submissions in the case of ***Commander Head Quarter, Calcutta and others vs. Capt. Biplabendra Chanda*** reported in (1997)1 S.C.C. 208. In the said case the respondent had retired on 18th May, 1982 and according to the Rules, as in force at that time, only 2/3rd of the pre-commissioned service was allowed to be counted towards qualifying service for earning pensionary benefit. A minimum period of qualifying service was also provided for becoming eligible for pension on the basis of which the respondent was found ineligible for grant of pension. After about four years Rules relating to qualifying service were changed with effect from 1st January, 1986. One of the features of the amended Rules was that full pre-commissioned service was to be taken into count for working out the qualifying service required for earning pensionary benefits. The submission was raised before the Apex Court that amended Rules are discriminatory and violates the principles as laid down by the Apex Court in ***D.S. Nakara's*** case (supra). The Apex Court repelled the submission and laid down that there was no question of discrimination between similarly situated persons. Following was laid down in paragraphs 4 and 5 of the said judgment:-

*"**4**. We are of the opinion that the ratio of D.S. Nakara has no application here. D.S. Nakara prohibits discrimination between pensioners forming a single class and governed by the same Rules. It was held in that case that the date specified in the liberalized pension Rules as the cut-off date was chosen arbitrarily. What is not the case here. No pension was granted to the respondent because he was not elibible therefore as per the Rules in force on the date of his retirement. The new and revised Rules [it is not necessary for the purpose of this case to go into the question whether the Rules that came into force with effect from January 1, 1986 were new Rules or merely revised or*

liberalized Rules] which came into force with effect from January 1, 1996 were not given retrospective effect. The respondent cannot be made retrospectively eligible for pension by virtue of these Rules in such a case. This is not a case where a discrimination is being made among pensioners who were similarly situated. Accepting the respondent's contention would have very curious consequences even a person who had retired long earlier would equally become eligible for pension on the basis of the 1986 Rules. The cannot be.

5. *The decision in D.S. Nakara has indeed been explained by two subsequent Constitution Bench decisions of this Court in Krishna Kumar & Ors. V. Union of India & Ors. [1990 (4) S.C.C. 207] and Indian Ex-Services League & Ors. Etc. v. Union of India & ors etc. [1991 (1) S.C.R. 158]. In the later decision, it has been held that "the petitioners' claim that all pre-1.4.1979 retirees of the Armed Forces are entitled to the same amount of pension as shown in appendices 'A', 'B' and 'C' for each rank is clearly untenable and does not flow from the Nakara decision". We may also refer in this connection to the observations in another decision of this Court in State of West Bengal v. Ratan Behari Dey [1993 (4) S.C.C. 62] to the following effect:*

"...it is open to the State or to the Corporation as the case may be, to change the conditions of service unilaterally. Terminal benefits as well as pensionary benefits constitute conditions of service. The employer has the undoubted power to revise the salaries and/or the pay scales as also terminal benefits/pensionary benefits. The power to specify a date from which the revision of pay scales or terminal benefits/ pensionary benefits, as the case may be, shall take effect is a concomitant of the said power. So long as such date is specified in a reasonable manner, i.e., without bringing about a discrimination between similarly situated persons, no interference is called for by the court in that behalf

..... the power of the State to specify a date with effect from which the Regulations framed or amended, as the case may be, shall come into force is unquestioned, a date can be specified both prospectively as well as retrospectively. The only question is whether the prescription of the date is unreasonable or discriminatory. Since we have found that the prescription of the date in this case is neither arbitrary nor unreasonable, the complaint of discrimination must fail."

11. Again in the case of ***State of W.B. and another vs. W.B. Govt. Pensioners' Associations and others*** reported in (2002) 2 S.C.C. 179. The Apex Court considered ***D.S. Nakara's*** case (supra) and repelled the similar submissions upholding the cut-off date. Paragraphs 10 and 14 of the judgment are relevant and quoted as below:-

"10*. The subject matter of decision in that case was an Office Memorandum dated 25.5.1979 by which the Ministry of Finance, Government of India propounded a liberalised formula for computation of pension and made it applicable to Government servants who were in service on 31.3.1979 and retired from service on or after that date. Pre-1979 retirees were being paid pension on the basis of average emoluments of 36*

months' salary which preceded the date of retirement. The liberalised formula provided for i) average emoluments with reference to the last 10 months of service; ii) a higher minimum ceiling on the pension payable and iii) introduced a slab system for computation of pension. After an exhaustive review of decisions relating to Article 14 of the Constitution, the Court held that pension was not only compensation for loyal- service rendered in the past but was a measure of socio economic justice, and that there was no reason given for choosing 1.4.1979 as a cut-off date for applying the formula. In coming to the conclusion that the cut off date was invalid and must be struck down and that the liberalised formula must be made available to all pensioners, the Court noted that it was not a case of contributable scheme or a pension fund from which alone the pension was to be disbursed neither was it a new retiral benefit but it was an "upward revision of an existing benefit". The argument of the Government regarding the non-availability of funds was found unacceptable since, it was said, that application of the same pension formula to all pensioners would only make a marginal difference in the case of past pensioners because the emoluments were not revised and all that the old pensioners would get by reason of computation on the liberalised formula would be a slightly higher pension.

14. *Illustrative of another aspect of the Nakara principle, is the decision in Commander Head Quarter, Calcutta and Others V. Capt Biplabendra Chanda, which said that the requirement of equality prescribed by Nakara did not extend to a new retiral benefit but was limited only to an upward revision of an existing benefit. It was held therefore that a person who was not entitled to receive pension on the date of his retirement could not claim a grant of pension because of a subsequent change in the criteria of eligibility for such grant. [See also Union of India and Others V. Dr. Vijaypurapu Subbayama 2000 (7) SCC 662 and V.N.Kasturi V. Managing Director, State Bank of India, Bombay and another 1988 (8) SCC 30.}"*

12. In view of the aforesaid, we do not find any error in the order of learned Single Judge dismissing the writ petition, however, for the reasons as noted above.

13. The special appeal is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.08.2008

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE R.K. RASTOGI, J.

Criminal Appeal No. 875 of 1979

Nanku ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri G.S. Chaturvedi
Kumari Meena

Counsel for the Respondent:
A.G.A.

Indian Penal Code-Section 302/34-Criminal Appeal-against the conviction of life imprisonment-record of session Trail summoned-reported by District Judge burnt out-retrial also not possible in absence of basic document-No alternative except to allow the appeal by setting aside the conviction order.

Held: Para 4

Under these circumstances, when reconstruction of the record is not possible and when retrial is also not possible in the absence of the basic documents, there is no other alternative but to allow this appeal and acquit the accused as laid down by the Hon'ble Apex Court in the aforesaid ruling in the case of Abhay Raj Singh (Supra).

Case law discussed:

2004 SCC Crl. 901

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

1. The facts relevant for disposal of this appeal are that the appellant and two others named Ram Kumar and Uttam were charged under Section 302/34 IPC and tried for the offence. The trial court, after hearing of the case, came to the conclusion that the charge was sufficiently proved against Uttam. Hence, Uttam was acquitted of the charge but Ram Kumar and Nanku were convicted under Section 302/34 IPC and sentenced to life imprisonment. Aggrieved with that judgment and order Nanku filed this appeal.

2. When the record of the trial court was summoned for hearing of this appeal, it was reported that the record had been burnt in the incident of fire in the Record Room of the District Court. Thereafter steps were taken for reconstruction of the record but the record could not be reconstructed as no documents were available either with the prosecution, or with the accused or with the police or with the complainant. As reported by Sri S.K. Pandey, District Judge, Bareilly vide his letter No. 55 (v)-Cri. Dated 27.7.07 that reconstruction of the record is not possible.

3. Thereafter directions were issued to the Distt. and Sessions Judge to take steps for retrial of the case in accordance with the directions of the Hon'ble Apex Court in the case of **State of U.P. Vs. Abhay Raj Singh 2004 SCC Crl. 901** vide order dated 2.11.07 In compliance thereof a report has been received from the District Judge, Bareilly vide Letter No. 75/v-Crl. Dated 29.11.07 that no document is available for retrial and so it is not possible to conduct retrial of the case.

4. Under these circumstances, when reconstruction of the record is not possible and when retrial is also not possible in the absence of the basic documents, there is no other alternative but to allow this appeal and acquit the accused as laid down by the Hon'ble Apex Court in the aforesaid ruling in the case of Abhay Raj Singh (Supra).

5. The appeal is, therefore, allowed and the accused appellant is acquitted of the charge under Section 302/34 IPC. He is on bail and he need not to surrender. His bail bonds are cancelled and his sureties are discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 45307 Of 2003

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

Counsel for the Petitioner:
Sri R.P. Tiwari

Counsel for the Respondents:
Sri P.C. Shukla
Sri Piyush Shukla
Sri Amit Sthalekar
S.C.

Constitution of India-Art. 226-termination of Service-on the ground appointment made during ban period-petitioner joined as Junior Clerk on 6.11.97 ban imposed by G.O. 3.11.97 termination order passed 12.11.97-subsequent advertisement of same vacancy on 9.8.07-held-when the petitioner got selected prior to enforcement of ban, joining date immaterial being ministerial task-however in view of law as developed-when the ban lifted-the selected candidate entitled to join with all consequential benefit, except salary-fresh selection held-contrary to law.

Held: Para 9

In view of the aforesaid, it is clear that the appointments of the petitioners were cancelled in consequence of the ban order. Since no irregularity in the selection process was found by the respondents, and since the ban order has now been lifted, the petitioner, who was earlier given the appointment letter, is now liable to be issued a fresh appointment on the basis of the selection held in the year 1997.

Case law discussed:
2004 (1) ESC 438, 2007 (7) ADJ 355,

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

1. It transpires that applications were invited for appointment on the post of Junior Clerk. The petitioner's name was sponsored by the Employment Exchange. The petitioner appeared in the written test and was declared successful, and thereafter, was called for the interview. A select list was published, which included the name of the petitioner, and the respondents thereafter, issued an appointment letter dated 5th of November, 1997. The petitioner joined the services as a Junior Clerk on 06.11.1997 and discharged his duty till 12th of November, 1997, on which date, the services of the petitioner was terminated on the ground that the State Government has issued an order dated 3rd of November, 1997 imposing a ban on all appointments in the State of U.P., and therefore, the petitioner could not be appointed pursuant to the ban order issued by the State Government. The petitioner, being aggrieved by the said order, filed a Writ Petition No. 38644 of 1997. The writ Court, by a judgment dated 17th February, 2003, quashed the order of termination and directed the respondents to pass a fresh order after giving an opportunity of hearing to the petitioner. Based on the said direction, the respondents passed an order dated 16th September, 2003, rejecting the representation of the petitioner, holding that it was not possible to take back the petitioner in service again. The petitioner, being aggrieved by the said order, filed the present writ petition, and during the pendency of the writ petition, an interim order was issued directing the authorities to pass a reasoned and speaking order, since the impugned order dated 16th September, 2003 did not contain any reason. Based on the interim order of the Court, the respondents passed an order dated 23rd June, 2005 rejecting the claim of the petitioner, holding that the petitioner could not be appointed since a ban was imposed by the State Government by an order dated 3rd of November, 1997.

2. In the meanwhile, the respondents issued an advertisement on 6th of August 2002 and again on 9th of August, 2007, inviting applications for the post of Junior Clerk. These advertisements were stayed by an interim order of the Court.

3. After hearing Shri R.P. Tiwari, learned counsel for the petitioner and the learned Standing Counsel for the respondents, this Court is of the opinion that the action taken by the respondents cannot be sustained and the impugned orders issued by the authorities from time to time was liable to be quashed. In the first place, the order of the State Government dated 3rd November, 2007 imposing a ban on all appointments appears to be an arbitrary exercise of power by the State Government. No reasons whatsoever has been disclosed in the said order as to why such a drastic decision had been taken by the State Government imposing a ban on all appointments in the State of U.P.. Appointments on a public post are made pursuant to the provisions indicated in the statute and the procedures evolved under the said statute. The exercise of filling up of posts cannot be stopped arbitrarily on the whims and fancies of the State Government, for oblique purposes.

4. In the present case, the Court finds that the exercise for filling up the vacancies was initiated much prior to the issuance of the Government Order of 3rd November, 1997, and only the ministerial task of issuance of the appointment letter by the competent authority was left and which had been issued by the competent authority on 5th of November, 1997.

5. In my opinion, assuming that the State Government had the power to impose a ban on all the appointments, such imposition of a ban could only be made prospectively and would not apply where the selection process had already been initiated and was nearing completion.

6. Quite apart from the aforesaid, it has come on record that the respondents had issued an advertisement on 6th of August, 2002, and again, on 9th of August, 2007, inviting applications for filling up the post of Junior Clerks. The issuance of the advertisement necessarily implies that the State Government has lifted the ban. Once the ban is lifted, the selection made in the year 1997 was required to be carried out.

7. In **Excise Commissioner, U.P., Allahabad & Ors. Vs. Sanjay Kumar Yadav & Anr.,** 2004 (1) ESC 438, a Division Bench of the Court held that once a ban has been lifted by the State Government, it would mean that the stay on issuance of such appointments on such posts had been withdrawn, and therefore, those candidates validly selected for appointments on the said posts, would be entitled again for appointment immediately on withdrawal of such ban. The Court held as follows:-

"In the present case the only reason given by the Government for not giving appointment to the writ petitioners was because of the Government Order dated 4.11.1997. By the said Government Order, the appointments and joining of the candidates had only been stayed. Once the State Government has accepted that the vacancies still exist and had even issued fresh advertisement for filling up such vacancies, it obviously means that the stay on the issuance of the

appointment on such post had been withdrawn. The writ petitioners who had been validly selected for appointment on such post would thus be entitled for appointment immediately on the withdrawal of such stay/ban on the appointments. Hence the writ petitioners would be entitled for appointment in pursuance of the selection held on the basis of Advertisement No. 17701. However, although they shall be entitled to the seniority and other consequential benefits but they shall be entitled for payment of salary only from the date of their appointment pursuant to this order. The appellants shall give appointment to the writ petitioners within a period of three months and in case if such appointment is not given, they shell be entitled for payment of salary immediately after expiry of three months from today."

8. In **Manoj Kumar & Ors. Vs. State of U.P. & Ors.,** 2007 (7) ADJ 355, pursuant to the select list, some of the selected candidates were issued appointment letters, and based on that, some were allowed to join, but subsequently, on the basis of the ban order, the appointments were cancelled. The Court held that once the ban order was lifted and the selection procedure was not found to be invalid, the cancellation of the selection process and refusal to give appointment to the selected candidates was not justified. The Court directed the respondents to issue appointment letters on the basis of the selection held by them.

9. In view of the aforesaid, it is clear that the appointments of the petitioners were cancelled in consequence of the ban order. Since no irregularity in the selection process was found by the respondents, and since the ban order has now been lifted, the petitioner, who was earlier given the appointment letter, is now liable to be issued a fresh appointment on the basis of the selection held in the year 1997.

10. Consequently, the impugned orders dated 12.11.1997, 16.09.2003 and 23.06.2005 passed by the respondents are all quashed. The writ petition is allowed. The advertisement dated 9th August, 2007, issued by the respondents will not be given effect to, and the Court directs the respondents to issue an appointment letter to the petitioner pursuant to the selection held by them in the year 1997 within four weeks from the date of the production of a certified copy of this order. The relief for consequential benefits of service and salary from 12.11.1997 cannot be granted on the principle of 'no work no pay'.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 33057 of 2006

Virendra Kumar Premi ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri A.D. Saunders

Counsel for the Respondents:
S.C.

U.P. Police Officers subordinate Ranks (Punishment & Appeal) Rule 1991-Rule-8 (2)(b)-dismissal without enquiry-without recording any reason for

dispension of formal enquiry-petitioner a Constable brought the accused for appearance before the Court-while accused requested to ease himself snatched the rope and escaped on-held-charges so leveled can be easily seen in disciplinary enquiry-order of dismissal-illegal with liberty to fresh full fledged enquiry-during suspension period no subsistence allowance payable.

Held: Para 6

In view of the aforesaid, I am of the opinion that the impugned order of termination does not contain sufficient reasons for dispensing with the inquiry. The charges so levelled are such, that it can easily be enquired through a departmental enquiry. It is not a case where it could be said that it was not reasonably practicable to hold an inquiry. In my opinion, the decision of the disciplinary authority was wholly arbitrary. The reasons given for dispensing with the enquiry was wholly irrelevant. I am of the view that the disciplinary authority has misused its powers. Similar view was taken by me in Dharam Pal Singh vs. State of U.P. and others, 2005 ALJ 819 = 2005(1)ESC 566.

Case law discussed:

1991(1)SCC 729, (1991)1 SCC 362, 2005 ALJ 819 = 2005(1)ESC 566

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

1. Heard Sri A. D. Saunders, the learned counsel for the petitioner and the learned standing counsel for the respondents.

2. The petitioner is a constable and his services was dispensed with, without holding a fulfledged inquiry, by using the provisions of Rule 8(2)(b) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules 1991 on the ground that it was not reasonably practicable to hold an inquiry. It transpires that the petitioner had brought the accused to the Civil Court for his appearance in the Court and during the course of the day, the accused made a request that he wanted to ease himself and, at that moment of time, it is alleged that the accused snatched the rope and escaped on a motorcycle which was waiting for him. The petitioner's services has been dispensed with by an order dated 16.5.2006 by invoking the provision of Rule 8(2)(b) of the Rules of 1991 on the ground that it was not reasonably practicable to hold such an inquiry because the petitioner could influence the witnesses. In my opinion, this is an escape route adopted by the authorities by taking an easy way out from not holding an enquiry. The petitioner is only a Constable and is not holding such a powerful position where he could influence the witnesses.

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

"8. (2)(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry."

4. The language of the aforesaid rule is similar to the second proviso to Article 311(2) of the Constitution of India. In **Union of India and another's vs. Tulsiram Patel, AIR 1985 SC 1416**, the Supreme Court held:

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

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

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

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

In Tulsiram Patel's case (supra) the Supreme Court further held:

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

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

The Supreme Court further went on to say:

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

In **Chief Security Officer and others vs. Singasan Rabi Das, 1991(1)SCC 729**, the Supreme Court held that there was a total absence of sufficient material or good ground for dispensing with the inquiry and accordingly held that the order of termination dispensing with the inquiry was illegal.

5. In **Jaswant Singh vs. State of Punjab and others, (1991)1 SCC 362**, the Supreme Court held:

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

The Supreme Court further held:

"The decision to dispense with the departmental inquiry cannot, therefore, be rested solely on the ispe dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a Court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim of caprice of the concerned officer."

6. In view of the aforesaid, I am of the opinion that the impugned order of termination does not contain sufficient reasons for dispensing with the inquiry. The charges so levelled are such, that it can easily be enquired through a departmental enquiry. It is not a case where it could be said that it was not reasonably practicable to hold an inquiry. In my opinion, the decision of the disciplinary authority was wholly arbitrary. The reasons given for dispensing with the enquiry was wholly irrelevant. I am of the view that the disciplinary authority has misused its powers. Similar view was taken by me in **Dharam Pal Singh vs. State of U.P. and others, 2005 ALJ 819 = 2005(1)ESC 566**.

7. In my opinion, the charge against the petitioner is such which can be decided if a full fledged inquiry is held against him under the Rules of 1991. Consequently the invocation of the provisions of Rule 8(2)(b) by the authority was totally arbitrary. In view of the aforesaid decisions, the exercise by the authority of this provision was totally arbitrary. Consequently, the impugned order terminating the services of the petitioner cannot be sustained and is quashed. The writ petition is allowed and the matter is remitted to the authority to proceed from the stage prior to the passing of the impugned order and conclude the inquiry within a period of six months from the date of the production of a certified copy of this order.

8. It has been stated at the Bar that prior to the order of dismissal the petitioner was under suspension. Consequently, the petitioner would remain under suspension till the disposal of the inquiry proceedings but for the period from the date of suspension till today, the petitioner will neither be paid the suspension allowance nor any arrears for this period. Final orders on this aspect would also be passed by the authority after the conclusion of the inquiry and upon passing the order of the penalty, if any.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2008

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 23571 of 2008

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

Counsel for the Petitioner:
Sri Satyendra Singh

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

Constitution of India, Art. 226-Interest on delayed payment of gratuity-petitioner retired from the post of Bore well technician 31.12.95-10% G.P.F. with held-total amount workout on Jan 1997 as Rs.32073/- paid amount on 19.6.08-No justification for withholding the said amount for about 13 years-held-entitled 12% interest w.e.f. Feb., 1997 to 19.6.2008 with cost of Rs.20000/-.

Held: Para 8

In view of what has been observed in the aforesaid judgment, which is squarely applicable to the facts and circumstances of the present case also, where the respondents have not been able to show any justification whatsoever for no payment of balance 10% G.P.F. amount to the petitioner within the period prescribed in the Rules and having caused the delay of almost 13 years in payment thereof, this Court is satisfied that the petitioner deserves not only payment of penal interest on balance 10% amount of G.P.F. for the delay but also entitled for exemplary cost.

Case law discussed:
2007 (8) ADJ 553

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

1. Heard Sri Satyendra Sing, learned counsel for the petitioner, learned Standing Counsel for the respondents no. 1, and 3 and Sri Satish Chaturvedi for the respondent no. 2. With the consent of the learned counsel for the parties, this writ petition is being decided under the Rules of the Court at this Stage.

2. The petitioner was working as Boarwell Technician in the department of Minor Irrigation and attained the age of superannuation on 31.12.1995. Towards payment of retiral benefits and provident fund, the respondents, though paid other dues and 90% of G.P.F. amount but balance 10% G.P.F. amount was not paid to the petitioner for more than a decade despite several representations and hence, having no other alternative, the petitioner has approached this Court invoking extraordinary jurisdiction under Article 226 of the Constitution by means of the present writ petition.

3. A counter affidavit has been filed on behalf of respondent no. 2 stating that 10% balance amount of G.P.F. along with interest as on January 1997 determined to Rs.32,073/- has been paid to the petitioner vide letter dated 19.6.2008, a copy whereof has been placed on record as Annexure-1 to the counter affidavit. On the face of it, the aforesaid amount, thus, has been paid to the petitioner after almost 13 years of his retirement. The reason for such a delay has been sought to be explained by respondent no. 2 in para-7 of the counter affidavit stating that 10% final payment was forwarded by Executive Engineer, Minor Irrigation Division, Gorakhpur vide letter dated 4.11.2004 to the respondent no. 2 whereupon an authority letter dated 21.12.204 was issued for payment of Rs.32,073/-. However, it appears that the said payment was not made by the departmental authorities and when the matter came to the notice of respondent no. 2, it issued another authority letter dated 19.6.32008 to the Executive Engineer, Minor Irrigation, District Deoria with a copy thereof to the Treasury Officer, Deoria and to the petitioner and in this way, the payment has been made.

4. Learned Counsel for the petitioner submitted that without any valid reason or justification, the 10% amount of G.P.F. has been paid to him after such a long

time and that too without any interest on the due amount on and after January, 1997. Hence, he submitted that the petitioner is entitled for suitable penal interest for the laxity shown by the respondents and the writ petition deserves to be allowed with exemplary cost.

5. On behalf of respondents no. 1 and 3, they have not chosen to file any counter affidavit. The respondent no. 2 has also not been able to disclose any valid justification for delay for such a long time in payment of 10% of G.P.F. amount and that too without interest till the date of payment.

6. The liability of interest and manner of payment of funds are provided under Rules 11 and 24 of General Provident Fund Rules, 1985 (in short '1985 Rules'). A Division Bench of this Court dealing with the aforesaid provisions in **Kunwar Bahadur Saxena Vs. State of U.P. & others 2007 (8) ADJ 553** has observed as under:

"From a perusal of Rules, 1985, particularly Rule 24, it is evident that the liability for payment of subscribers fund is absolute under sub rule (1) on the authority concerned maintaining the said fund. It is provided that when the amount standing to the credit of a subscriber in the fund becomes payable, it shall be paid as provided in Section 24 of the Provident Funds Act, 1925. However, the manner of payment has been prescribed in subsequent provisions of Rule 24. For the purpose of present case, it is not disputed that sub rule (5) of Rule 24 would apply since the petitioner was an employee, other than Group -D employee. Sub rule 5 (a) of Rule 24 provides that the subscriber shall submit two applications in Form 425-A set forth in Fourth Schedule to the drawing and disbursing officer, in triplicate, one for payment of 90% of balance in the G.P.F. Pass book and the other for the residual amount. It further provides that ordinarily, the applications shall be made six months prior to the date of retirement in case of retirement on superannuation and within one month from the date on which the amount became payable in other cases. Sub clause 5 (b) of Rule 24 of Rules 1985 provides that the drawing and disbursing officer shall thereupon prepare calculation sheets on the prescribed form, the current as well as five preceding financial years, in triplicate, and forward within one month from the date of receipt of the applications, two copies of the calculation sheets with two copies of the application and G.P.F. pass book to the senior most officer dealing with accounts attached to the Head of the Department, who, after subjecting them to appropriate checks forward the same within one month to the sanctioning authority mentioned in paragraph 2 of the second schedule with his recommendation for payment of 90% of the balance of G.P.F. pass book. The Sanctioning authority thereafter is required to pass an order of payment of 90 % of the balance G.P.F. on the application and communicate the same to the drawing and disbursing officer, the Treasury Officer concerned and the Account officer, in the from set forth in appendix "C" so as to enable to the recipient to receive the payment. Therefore the entire procedure under sub rule (5) of Rule 24 of the Rules 1985 is based on the amount mentioned in the G.P.F. Pass book. The balance amount shown therein would be the basis against which 90% and 10% of the amount

respectively shall be mentioned by the officer concerned in Form 425-A ."

7. Further, deprecating the attitude of the authorities in harassing its retired employees with respect to payment of their retiral dues and in particular, the provident fund, the Court in **Kunwar Bahadur Saxena (supra)** further observed as under:

"Interest on the amount of provident fund is not only compensatory but is a statutory liability of the respondents to pay the same for the reason that the amount deducted from the petitioner's salary remain with the respondents and they may have utilized the same for their own purpose hence entitling the petitioner for payment of interest on the said amount. Had the amount of provident fund been paid in time to the petitioner, he could have invested the same for better utilization so as to live an honerable life after retirement in the absence of any other source of earning livelihood . The attitude and conduct of the respondents borne out from the record is nothing but is reprehensible and should be condemned in strongest words. It is no doubt true that an employer for just and valid reasons and in exercise of power vested in it can defer or deny pension and other retiral benefits to an employee provided the action of the employer is in accordance with the procedure prescribed in law and such a power also emanates from statute or the relevant provisions having force of law. In our system, the Constitution being supreme, yet the real power vest in the people of India since the Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man and in particular when the person subject to harassment is his own ex-employee who has served for a long time and has earned certain benefits under the rules recoverable after attaining the age of superannuation. Pension and retiral benefits are not bountee but right of an employee crystallized in deferred wages to which he is entitled under the rules after retirement and non payment thereof is clearly violative of Article 21 of the Constitution of India. Therefore, it becomes more important for the public functionaries and the authorities to act with better sense of responsibility so that their ex-employee may not be subject to harassment at the old age when they have already retired and have to survive and maintain themselves and their family with the meager amount payable in the form of retiral benefits. The respondents being a State Government and function through its officers appointed in various department is suppose to discharge his duty strictly in accordance with law as observed under our Constitution, sovereignty vest in the people. Every limb of the constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this Court should remind the respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large and in particular their ex-employees like the petitioner. The respondents have the support of the entire machinery and the various powers of the statute and an ordinary citizen or a common man is hardly equipped to match such might of

the State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended. No authority can allow itself to act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to the occasion otherwise the confidence of the common man would shake. It is the responsibility of the Court in such matters to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain the arbitrary and arrogant unlawful inaction or illegal exercise of power on the part of the public functionaries.

In a democratic system governed by rule of law, the Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or in action may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this court that the Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this court has never been a silent spectator but always reacted to bring the authorities to law."

8. In view of what has been observed in the aforesaid judgment, which is squarely applicable to the facts and circumstances of the present case also, where the respondents have not been able to show any justification whatsoever for no payment of balance 10% G.P.F. amount to the petitioner within the period prescribed in the Rules and having caused the delay of almost 13 years in payment thereof, this Court is satisfied that the petitioner deserves not only payment of penal interest on balance 10% amount of G.P.F. for the delay but also entitled for exemplary cost.

9. The writ petition is, accordingly, allowed. The respondents are directed to pay interest at the rate of 12% per annum on the balance 10% G.P.F. amount to the petitioner for the period from February 1997 to 19.6.2998 on which date, the said payment was made. The petitioner shall also be entitled to cost, which is quantified to Rs. 20,000/-. The payment under this judgment shall be made to the petitioner within four months from the date of production of certified copy of this order before the respondents.

10. However, the respondents are at liberty to recover the amount, which they are required to pay to the petitioner under this order, from the official concerned, who is found to be responsible for such negligence and delay, after making appropriate enquiry in the matter in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 18399 of 2006

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

Counsel for the Petitioner:
Sri R.P. Ram

Counsel for the Respondents:
Sri P.K. Pandey
Suman Sirohi
Sri Ghanshyam Dwivedi
Sri B.P. Singh
Sri I.C. Pandey
S.C.

Constitution of India Art. 226- Regularisation-petitioner working as Motor Vote Driver for the last 37 years-four junior to petitioner-regularised-claim of petitioner rejected on the ground of no vacancy-specific contention of 4 existing vacancy of operator- not denied, nor the regularized of junior to the petitioner denied-even on direction of court instead of regularizing in pay scale of 4000-6000/- regularized on in the pay of Rs.2610-3540/- only objection that petitioner is not qualified-No steps taken to dispensing the services nor the authorities taken any steps for creation of the post of M.V. Driver-held-entitled to be regularized w.e.f. one day prior to the regularization of junior on the post of operator-grad-I-order rejecting representation as well as regularization on lower pay scale quashed.

Held: Para 11

As I have held that for 37 long years the petitioner has been functioning on a non-existing post, and the Department made no effort to dispense his services or to create a post for his absorption. Further, admittedly, juniors to the petitioner have been regularised and the petitioner has been discriminated. Consequently, the policy adopted by the respondents is clearly arbitrary and violative of Articles 14 and 16 of the Constitution. In matters of public employment, the respondents cannot choose a policy of 'pick and choose' by absorbing juniors to the detriment of the petitioner. This Court further finds that the order of regularisation has been made on a post lower than what the petitioner has claimed. Further, no effort has been made to give the petitioner the pay protection, which he is entitled to, under law, since he was receiving a higher pay-scale.

Case law discussed:
JT (2006) 4 SC 420, 2008 All C J 493

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

1. Heard Shri R.P. Ram, the learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents.

2. The petitioner has filed the present writ petition for the quashing of the orders dated 19.10.1996, 16.12.2005, 26.08.2006 and 29.08.2006, and further has prayed for a writ of mandamus commanding the respondents to regularise the petitioner on the post of Operator Gr. I. The facts leading to the filing of the

writ petition is, that the petitioner was appointed on work charge as a Motor Boat Driver/Operator in the Irrigation Department in the year 1971, and since then, is working on that post. The petitioner alleged that the services of 19 other employees in the Irrigation Department, who were junior to the petitioner, have been regularised, and that the petitioner has been discriminated and, has not been regularised in the service of the Department, for reasons best known to the respondents. The details of the persons, who were junior to the petitioner, and who have been regularised, has been mentioned in paragraph 3 of the writ petition. The petitioner further contended that he is working continuously without any break in service, and that, he made a representation in the year 1995 for the regularisation of his services, which remained pending, and consequently, Writ Petition No. 41 of 1996 was filed, which was disposed of by an order dated 8th of January, 1996, directing the Superintending Engineer to decide the representation. Even this direction was not complied with, and the petitioner had to file a contempt application, as a result of which, the Executive Engineer issued an order dated 19th of October, 1996, appointing the petitioner as a temporary employee on the post of Mate in the pay-scale of Rs.775-1025/-. Since the petitioner was working as an Operator and was getting a higher pay-scale, he refused, and made a representation dated 30th January, 1997, praying that he should be given the pay-scale of an Operator in the pay-scale of Rs.1200-2040/-. This representation remained pending and the petitioner again approached the writ Court by filing Writ Petition No. 31403 of 1997. The writ Court, by an order dated 27th August, 2004, disposed of the writ petition directing the authorities to decide the representation. Even this direction of the Court was not complied with, and accordingly, the petitioner filed another contempt application, and on the fear of the contempt proceedings, the respondents, by an order dated 16th December, 2005, rejected the representation of the petitioner, refusing to regularise his services, on the short ground that there was no sanctioned post of an Operator. The petitioner, being aggrieved by the said order, has filed the present writ petition.

3. The petitioner contended that four posts of Operator was existing in the office of the Superintending Engineer in Obra in district Sonbhadra, and that, various Government Orders had been issued from time to time, with regard to the regularisation of work charge employees in the Irrigation Department, which has not been adhered to by the authorities.

4. The respondents, in their counter affidavit, have admitted in paragraph 4 that the petitioner was appointed on the post of Motor Boat Driver/Operator and that his services could not be regularised as there was no vacancy in the Division/Circle of the Irrigation Department. The respondents further admitted that the services of the petitioner was regularised on the post of Mate, which the petitioner did not accept, as he was getting a higher salary, and that, the post of Operator Gr. I was not available, and therefore, the petitioner's services could not be regularised. In paragraph 12 of the counter affidavit, the respondents admitted that 4 posts of operator was available in Obra in district Sonbhadra, but it was not possible for the respondents

to regularise the petitioner on that post, and that, the same could only be done by the Chief Engineer (Zonal) of Sonbhadra Division.

5. Based on the aforesaid averments, made in the counter affidavit, the Court issued an order dated 26th April, 2006, directing the Superintending Engineer to send his comments to the Chief Engineer, who, in turn, would issue the necessary directions to the Chief Engineer (Zonal), and who will decide the claim of the petitioner. It transpires that, based on the aforesaid direction, the Executive Engineer issued an order dated 26th August, 1986, appointing the petitioner on the post of Operator in the pay-scale of Rs.2610-3540/-. It was contended that the order was passed by the Executive Engineer upon the directions of the Chief Engineer (Zonal) and the Superintending Engineer, and that, the petitioner was regularised on the post, which was vacant in Obra in district Sonbhadra. The petitioner, being aggrieved by this order, filed an amendment application, which was allowed, and an additional prayer was made for quashing of this order dated 26th August, 2006 on the ground that the petitioner was receiving a higher pay-scale and was entitled to be regularised as an Operator Gr. I in the pay-scale of Rs.4000-6000/-.

6. The Court has heard the parties at some length and has also perused the original record as well as the service book of the petitioner, which was produced by the respondents, as per the directions of the Court. From the counter affidavit, filed by the respondents, it is clear that the petitioner was appointed in the year 1971 on the post of Motor Boat Driver/Operator. The said appointment was made on a non-existing post. No effort was made by the Department to create a post of Operator, nor any effort was made by the respondents to dispense the services of the petitioner on account of non-existence of a post. The service record, on the other hand, discloses that from time to time the petitioner was given an increment, and as and when the pay-scale of Operator was revised, the petitioner was given the said pay-scale. Consequently, for all practical purposes, the respondents were treating the petitioner as a confirmed employee. The service book clearly indicates that all the benefits of a confirmed employee was being given to the petitioner.

7. However, when the time came to regularise the services of the petitioner, a strange stand was adopted by the respondents, namely, that the services of the petitioner could not be regularised because there is no vacant post. If there was no vacant post, the respondents should have dispensed with his services, but, they chose not to do so, because the respondents required the services of the petitioner to operate the motor boat on the rivers of Allahabad to take the officials up and down the river. The respondents, in their counter affidavit, have admitted that juniors to the petitioner have been regularised, and that the services of the petitioner could not be regularised as there was no vacant post.

8. For the sake of repetition, the petitioner was appointed in 1971, and till date, the stand taken by the respondents after 38 years is, that there is no vacant post of Operator in the Circle/Division at Allahabad, and eventually, when the Court directed by an order dated 26th August, 2006, the respondents regularised

the services of the petitioner on the post of Operator on a vacant post existing in Sonbhadra, and that too, on a lower pay-scale. The respondents in their supplementary counter affidavit dated 29th March, 2007, admitted that the regularisation of the petitioner on the post of Operator is on a lower pay-scale than what the petitioner is drawing as on date, and that, the question of protection of his last pay-scale can only be considered by the Department only when the petitioner joins the post.

9. In the light of the aforesaid, the admitted position is, that the petitioner was appointed on the post of Motor Boat Driver/Operator in 1971 on a non-existing post, and that, no sanctioned post of Motor Boat Driver/Operator is existing as on date in the Circle/Division of the Irrigation Department. These admitted facts indicates the unfair labour practice adopted by the Irrigation Department. The Irrigation Department, which is part and parcel of the State machinery, is required to act as a model employer, and is not required to adopt an unfair labour practice. No effort has been made by the Department to create a post or ask the Government for sanctioning of a post. Further, juniors to the petitioner have been regularised. The petitioner has clearly been discriminated. The Court further finds that different stand has been taken by the respondents at different moment of time. Initially, the respondents took a stand that the services of the petitioner could not be regularised because there was no vacancy existing on the post of Operator Gr. I in the Circle/Division, and now, after the respondents have regularised the services of the petitioner on the post of Operator, a stand has been taken that the said regularisation is on account of the educational qualification which the petitioner possesses, and, on that basis, the petitioner could only be regularised on the post of Operator and not on the post of Operator Gr.I. The respondents have not considered the length of service, which the petitioner has put in on the post in which he was working. Thirty seven long years gives a sufficient experience to a person for being considered on a post, irrespective of the fact, whether he has the requisite qualification or not. Further, requisite qualification is a necessary ingredient when an appointment is made through direct recruitment, but is not the only essential factor when regularisation is to be considered. Length of service experience becomes an essential ingredient also for consideration for regularisation of the service. The respondents are totally adopting an unfair labour practice. If the petitioner was not qualified, then how has the respondents allowed the petitioner to function as a Motor Boat Driver/Operator for 37 long years, and when the question of regularisation comes into play, the respondents have the audacity and the cheek to suggest that the petitioner did not have the requisite education qualification, and therefore, could not be regularised on the post of Operator Gr. I.

10. In my opinion, the stand taken by the respondents is a clear indication of the unfair labour practice adopted by the respondents. A feeble attempt was also made by the respondents to take refuge to a decision in **Secretary, State of Karnataka & Ors. Vs. Uma Devi & Ors.**, JT (2006) 4 SC 420, wherein, the Supreme Court has held that a back door entry cannot be permitted for such employees, who have been appointed

illegally. Further, reliance was made on another Division Bench of this Court in **Amit Kumar Sharma & Ors. Vs. State of U.P. & Ors.,** 2008 All C J 493, wherein, it was held that a daily wager cannot claim that he was holding a post and cannot claim parity with regular employees of the establishment. In my opinion, the judgment cited by the respondents are clearly distinguishable. There is nothing to indicate that the appointment of the petitioner was ex facie illegal or de hors the rules. The only error was that the petitioner was appointed on a non-existing post. But then, the petitioner was not at fault and the respondents are totally responsible for allowing the petitioner to continue in service for 37 years, on a non-existing post. The illegalities committed by the respondents would have been cured by the creation of a post.

11. As I have held that for 37 long years the petitioner has been functioning on a non-existing post, and the Department made no effort to dispense his services or to create a post for his absorption. Further, admittedly, juniors to the petitioner have been regularised and the petitioner has been discriminated. Consequently, the policy adopted by the respondents is clearly arbitrary and violative of Articles 14 and 16 of the Constitution. In matters of public employment, the respondents cannot choose a policy of 'pick and choose' by absorbing juniors to the detriment of the petitioner. This Court further finds that the order of regularisation has been made on a post lower than what the petitioner has claimed. Further, no effort has been made to give the petitioner the pay protection, which he is entitled to, under law, since he was receiving a higher pay-scale.

12. In view of the aforesaid, the writ petition is allowed. The impugned orders dated 19.10.1996, appointing the petitioner on the post of Mate, and the order dated 26th August, 2006, appointing the petitioner on the post of Operator, are quashed. The order dated 16.12.2005, rejecting the representation of the petitioner, is also quashed. A writ of mandamus is issued, commanding the respondents to regularise the services of the petitioner on the post of Operator Gr. I w.e.f. one day before the date juniors to the petitioner were regularised in the services of the Department. Consequential benefits that will flow from the regularisation will follow and the petitioner's pay would be re-calculated accordingly. In the event the pay of the petitioner works out to be less than what he was being paid at the relevant moment of time, the difference will not be recovered from the petitioner, and that, the petitioner would be granted the pay protection. In the event, the petitioner is entitled for a higher pay after recalculation, the arrears, if any, would be paid to the petitioner within six weeks from the date of the production of a certified copy of this order.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No. 1813 of 2008

Ram Prasad and others ...Applicants
Versus
1.State of U.P.
2.Jeetan ...Opposite parties

Counsel for the Applicants:
Sri M.P. Tiwari

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

Code of Criminal Procedure-482-Quashing of criminal proceeding-offence under Section 323, 504 and 506 I.P.C.-dispute personal nature-on reference of High Court-mediation center settled their differences on the basis of compromise-in continuing proceeding-No useful purpose shall be-held-to do complete justice-proceeding of complaint case Quashed.

Held: Para 6

Having regard to the observations made in the rulings mentioned herein-above, I am of the opinion that it would be an abuse of the process of the Court, if the criminal proceedings against the applicants is allowed to continue, as the dispute was of personal nature, which has been settled by way of compromise. Therefore, to do the complete justice, the proceedings of Complaint Case No. 1547 of 2007 may be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

Case law discussed:
(2003) 4 Supreme Court Cases 675, [2006(30) JIC 135 (Alld)], 2005 (51) ACC 21, 2007 (59) ACC 123, 2007 (59) ACC 148, 2007 (57) ACC 981,

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

By means of this application under section 482 of the code of Criminal Procedure (in short the 'Cr.P.C.'), the applicants Ram Prasad, Shri Dev, Jai Dev and Atma Darshi have invoked the inherent jurisdiction of this Court, praying for quashing of the proceedings of Case No. 1547 of 2007 (State vs. Ram Prasad & others), pending in the court of Judicial Magistrate Gorakhpur.

2. Shorn of unnecessary details, the facts leading to the filing of the application under section 482 Cr.P.C., in brief, are that opposite party No. 2 Jeetan had moved an application under section 156 (3) Cr.P.C. in the Court of Judicial Magistrate-II Gorakhpur. On the basis of the order passed on that application, an FIR was lodged on 13.06.2007 at P.S. Jhagaha, where a case under sections 323, 504, 506, 394 IPC and 3 (i) (X) SC/ST Act was registered at Crime No. 376 of 2007 (C) against the applicants Ram Prasad, Shri Dev, Jai Dev and Atma Darshi. After investigation charge-sheet under section 323, 504, 506 IPC and 3 (i) (X) SC/ST Act has been submitted against the applicants, on the basis of which Criminal Case No. 1547 of 2007 has been registered. Now the applicants-accused have come to this court for quashing the proceedings of aforesaid case.

3. Heard learned counsel for the parties and perused the record.

4. It was submitted by learned counsel for the applicants that the dispute is of personal nature, which has been settled by the parties due to intervention of Allahabad High Court Mediation Centre and hence the proceedings of Criminal Case No. 1547 of 2007 should be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C. For this submission, the counsel for the applicants has placed reliance on the cases of ***B.S. Joshi & others vs. State of Haryana & another (2003) 4 Supreme Court Cases 675 and Ausaf Ahmad Abbasi & ors. vs. State of U.P. & another.[2006(30) JIC 135 (Alld)]***.

5. The matter was referred for reconciliation to Allahabad High Court Mediation Centre. The parties settled their dispute on 06.04.2008. Settlement agreement is on record, which shows that the dispute with regard to Crl. Misc. Application No. 1813 of 2008 (instant case) has been amicably settled by the parties through the process of conciliation/mediation. Since the dispute of personal nature has been settled by the complainant and the applicants due to intervention of Allahabad High Court Mediation Centre, hence no useful purpose would be served by continuing the proceedings of Crl. Case No. 1542 of 2007. Therefore, having regard to the observations made in cases of ***B.S. Joshi vs. State of Haryana and Ausaf Ahmad Abbasi vs. State of U.P.*** (supra), the proceedings of the criminal case referred to above may be quashed by this Court on its inherent jurisdiction. In the case of ***Ruchi Agarwal vs. Amit Kumar Agrawal & others 2005 (51) ACC 21***, the Hon'ble Apex Court quashed the proceedings of the criminal case due to the compromise entered into between the parties. Following this case, this court in the case of ***Shikha Singh & others vs. State of U.P. & another 2007 (59) ACC 123***. quashed the proceedings of criminal case due to the compromise entered into between the parties. Similarly in the case of ***Dinesh Kumar Jain & others vs. State of U.P. & Others 2007 (59) ACC 148***, this court has quashed the proceedings of the criminal case under section 498A, 323, 504, 506 IPC and 3/4 D.P. Act due to the compromise entered into between the parties in the proceedings under section 125 Cr.P.C. Reliance in this case has been placed on ***B.S. Joshi vs. State of Haryana*** (supra). In the case of ***Ganga Charan Rajpoot vs. State of U.P. & others 2007 (57) ACC 981***,the proceedings of criminal case was quashed by this Court due to the compromise entered into between the parties outside the court.

6. Having regard to the observations made in the rulings mentioned herein-above, I am of the opinion that it would be an abuse of the process of the Court, if the criminal proceedings against the applicants is allowed to continue, as the dispute was of personal nature, which has been settled by way of compromise. Therefore, to do the complete justice, the proceedings of Complaint Case No. 1547 of 2007 may be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

7. Consequently, the application under section 482 Cr.P.C. is allowed and proceeding of Crl. Case No. 1547 of 2007 (State vs. Ram Prasad & others),

under sections 323, 504, 506 IPC and 3 (i) (X) SC/ST Act, pending in the court of Judicial Magistrate-II Gorakhpur is hereby quashed.

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

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ARUN TANDON, J.

Special Appeal No. 979 of 2008

Tungeshwar Nath ...Appellant
Versus
The State of U.P. & another...Respondents

Counsel for the Appellant:
Sri Saroj Kumar Tiwari

Counsel for the Respondents:
S.C.

Constitution of India Art. 14 and 16- Appointment on Class 4th post-in the office of Advocate General-without advertisement at least two news paper having wide circulation-selection on basis of vacancy notified on Notice Board-goes in favour of close to the official and exclusion of meritorious candidates-cancellation of entire selection-held-proper.

Held: Para 15

In our considered opinion it would be a sad day for a democratic country like India, which is to be governed by rule of law, if appointments on various posts in the office of the Advocate General, who is a Constitutional functionary (reference Article 165 of the Constitution of India), are permitted to be made through a notice published on the notice board only, whereby Articles 14 and 16 of the Constitution are given a go by. Advocate General has to advise the State on legal matters and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force. Reference Article 165 (2). The responsibility upon the holder of such an office, to ensure that constitutional rights conferred by Article 14 and 16 are not infringed qua appointments under his authority, is therefore more stringent.

Case law discussed:
AIR 2006 SC 1165, (1994) 3 UPLBEC 1551

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

1. This is an appeal against the judgment and order dated 29th July, 2008 passed by the learned Single Judge dismissing the writ petition filed by the appellant. The writ petition was directed against the order dated 02nd July, 2008 passed by the Advocate General, by which the selections on Class-IV posts made in the year, 2005 have been cancelled. Facts in brief for deciding this special appeal are as follows:

2. In the year 2005 appointment on vacant class IV posts in the office of Advocate General at U.P. and in the office of Government Advocate at Allahabad were made in the year 2005. Writ Petition No. 1200 of 2006; Vivek Kumar & Ors. vs. State of U.P. & Ors. was filed before this Court questioning the said selections. In the writ petition a statement was made by the learned Advocate General that in view of the discrepancies noticed in selections, a

decision has been taken to cancel the selections held for Class-IV posts in the office of Advocate General as well as of Government Advocate and suitable orders for cancelling the selections shall be passed within week. In view of the aforesaid statement, the Court disposed of the writ petition after recording the statement of Additional Advocate General.

3. On 10.04.2006 the Advocate General is stated to have passed the order cancelling the selections so made. Another writ petition, being Writ Petition No. 24620 of 2006; Km. Hemlata & Ors. vs. State of U.P. & Ors., was decided vide judgment and order dated 31.05.2007, whereby the order dated 10.04.2006, terminating the services of the selected candidates, was set aside only on the ground of violation of principles of natural justice. However, liberty was given to learned Advocate General to examine the matter and to take fresh decision.

4. In view of the liberty given under the order dated 31st May, 2007, the learned Advocate General re-examined the matter and by means of the order dated 02nd July, 2007 took a view that entire selections deserve to be cancelled since the selections had been made without any advertisement being published in any newspaper.

5. The said order was subjected to challenge in Writ Petition No. 37188 of 2008 by the appellant. Learned Single Judge by means of the impugned judgment and order has dismissed the writ petition after recording that any appointment on a post in public office without advertisement being published in newspaper would be violative of Article 14 and 16 of the Constitution of India.

6. Learned counsel for the appellant contends that earlier also when the issue of selection was raised in earlier writ petitions, no such objection qua advertisement was raised. It was only in the order dated 02nd July, 2007 such an objection has been raised for the first time. The same office of Advocate General had earlier defended the selections made. Respondents cannot now be permitted to turn around and assert that the selections were illegal for want of advertisement. Details of number of persons who actually applied for the post have also been referred to for contending that selections were fair.

7. We have heard learned counsel for the appellant and learned Standing Counsel.

8. In the order of the learned Single Judge as well as in the order of the Advocate General dated 2/3.07.2007 it has been specifically recorded that no advertisement was published in any newspaper qua the posts in question and that selections were made on the basis of notice, which was pasted on the notice board of the office concerned.

9. The selections on Class-IV posts were in the office of Advocate General and Government Advocate are against the posts which were sanctioned by the State Government, salary whereof is paid through public exchequer, and are in the nature of public employment.

10. The Hon'ble Supreme Court time and again has reiterated that selection on any public post musts be held after due

publication of advertisement in newspaper so that eligible candidates have an opportunity to participate in the selection.

11. 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.

12. 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.

13. There being a categorical finding that the entire selections were conducted without there being any advertisement in the newspaper, no error has been committed by the learned Single Judge in dismissing the writ petition filed by the appellant. A Full Bench of this Court in the case of *Radha Raizada & Ors. vs. Committee of Management & Ors, reported in (1994) 3 UPLBEC 1551* has held that notice of the vacancy on the notice board is no advertisement in the eyes of law.

14. We are of the view that for holding selection against a public post, it is but necessary to publish an advertisement in the newspaper so that all eligible candidates may participate. Non-publication of the advertisement in newspaper is a denial of equal opportunity to all the eligible candidates qua participation in the selection and therefore violative of Article 14 and 16 of the Constitution of India rendering the selections a nullity.

15. In our considered opinion it would be a sad day for a democratic country like India, which is to be governed by rule of law, if appointments on various posts in the office of the Advocate General, who is a Constitutional functionary (reference Article 165 of the Constitution of India), are permitted to be made through a notice published on the notice board only, whereby Articles 14 and 16 of the Constitution are given a go by. Advocate General has to advise the State on legal matters and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force. Reference Article 165(2). The responsibility upon the holder of such an office, to ensure that constitutional rights conferred by Article 14 and 16 are not infringed qua appointments under his authority, is therefore more stringent.

16. Notice published on the notice board of the office has the consequence creating a situation where only candidates close to the office goers or

their well wishers are made aware of the vacancies to the exclusion of other eligible candidates. Thus a situation is created whereby the field of consideration is restricted to chosen few only.

We record that the learned Single Judge has rightly dismissed the writ petition vide his order dated 29.07.2008. Any interference in the matter would have only perpetuated an illegality. Appeal is, accordingly, dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No. 67 of 2005

Baleshwar and others ...Applicants
Versus
State of U.P. ...Opposite party

Counsel for the Applicants:
Sri Manoj Vashisth

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Section-111, 114-Notice by S.D.M. to execute personal bond of Rs.30,000/- without specify the cases number offence and Section-held-wholly illegal-without application of judicial mind-contrary to statutory provisions-can not sustain.

Held: Para 11

In view of the observations made in the cases mentioned herein-above, the impugned notice being wholly illegal and void is liable to be set-aside.

Case law discussed:
2002(45) ACC 627, 1975ALR 627, 1971 Cr. L.J. 1720, 1977 ACC 333

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

By means of this application under section 482 of the code of Criminal Procedure (in short the 'Cr.P.C.'), the applicants have challenged the validity of impugned notice dated 02.11.2004 purporting to be issued under section 111 Cr.P.C. by the S.D.M. Mawana, District Meerut.

2. From the impugned notice (Annexure 1), it transpires that being satisfied with the report dated 02.11.2004 of S.O. P.S. Mawana, the S.D.M. Mawana District Meerut passed an order under section 111 Cr.P.C. in the proceedings under section 107/116 Cr.P.C. in Case No. 943/9 of 2004 (State vs. Baleshwar and others) and in pursuance of that order impugned notice was issued to the applicants to show cause as to why they be not ordered to execute a personal bond for Rs. 30,000/- and furnish two sureties each in the like amount to keep peace for a period of one year.

3. Heard Sri Manoj Vashisth learned counsel for the applicants and learned AGA for the State.

4. It was contended by the learned counsel for the applicants that the impugned notice purported to be issued under section 111 Cr.P.C. is void, as full substance of the police report has not been mentioned in the notice. For this contention, reliance has been placed on the case of ***Ranjeet Kumar & others vs. State of U.P.[2002(45) ACC 627]*** and

Trijugi Narain Shukla vs. State of U.P. & another 1975ALR 627.

5. The learned AGA on the other hand, submitted that there is no illegality in the impugned notice and hence interference by this Court in the said notice is not warranted.

6. Having given my thoughtful consideration to the rival submissions made by parties counsel and after going the impugned notice, I find force in the aforesaid contention of the learned counsel for the applicants that the impugned notice is wholly illegal and void. Annexure 1 is the copy of the impugned notice, which was issued by SDM Mawana (Meerut) to the applicants, whereby they were called upon to appear on 10.12.2004 and show cause as to why they be not ordered to execute a personal bond for Rs.30,000/- and furnish two sureties each in the like amount to keep peace for a period of one year. In this notice it is only mentioned by the SDM concerned that he is satisfied with the report of S.O. of P.S. Mawana that due to old litigation, there is enmity between the parties, due to which there is likelihood of the breach of peace. It is not mentioned in this notice that what type of litigation is going on between the parties and in which court the said litigation is pending. Number of the case and other details of the said litigation have also not been mentioned in the impugned notice. As such the impugned notice issued by the learned SDM Mawana is vague and it does not fulfil the requirements of section 111 Cr.P.C. This type of notice has been held to be illegal by this Court in the case of **Ranjeet Kumar vs. State of U.P.** (supra).

7. Making an order under section 111 of the Code is not an idle formality. It should be clear on the face of the order under section 111 Cr.P.C. that the order has been passed after application of judicial mind. If no substance of information is given in the order under section 111, the person against whom the order has been made will remain in confusion. Section 114 of the Code provides that the summons or warrants shall be accompanied by a copy of the order made under Section 111. This salutary provision has been enshrined in the Code to give notice of the facts and the allegations which are to be met by the person against whom the proceedings under section 107 Cr.P.C. are drawn.

8. It should be borne in mind that the proceedings under Section 107/116 of the Code some times cause irreparable loss and unnecessary harassment to the public, who run to the court at the costs of their own vocations of life. Unless it is absolutely necessary, proceedings under section 107/116 Cr.P.C. should not be resorted to. Experience tells that proceedings like the one under section 107/116 of the Code are conducted in a most lethargic and lackadaisical manner by the learned Executive Magistrate causing harassment to public beyond measure.

9. In the case of ***Madhu Limaye vs. S.D.M. Mongyr 1971 Cr. L.J. 1720***, the Apex Court, in para 36 of its judgment observed:-

"We have seen the provisions of Section 107. That section says that action is to be taken in the manner herein-after provided and this clearly indicates that it is not open to a Magistrate in such a case to depart from the procedure to any substantial extent. This is very salutary because the liberty of the person is involved and the law is rightly solicitious that this liberty should only be curtailed according to its own procedure and not according to the whim of the magistrate concerned. It behoves us, therefore, to emphasise the safeguards built into the procedure because from there will arise the consideration of the reasonableness of the restrictions in the interest of public order or in the interest of the general public."

In this very case the Apex Court went on to observe as under in para 27:-

"Since the person to be proceeded against has to show cause, it is but natural that he must known the grounds for apprehending a breach of the peace or disturbance of the public tranquillity at his hands. Although the section speaks of the 'substance' of the information it does not mean the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word 'substance' means the essence of the most important parts of the information."

10. In the case of ***Mohan Lal vs. State of U.P. 1977 ACC 333***, this Court observed that "there are a series of decisions in which the same principles have been repeated again and again. It is distressing to note that the repeated pronouncement of this Court as also the perception made by the Supreme Court have fallen on the deaf ears of our Executive Magistrates who still treat the making of order under Section 111 an idle formality. Unfortunately due to lack of clear perception of law the learned VIIIth Additional Sessions Judge, Agra has also put his seal of approval on the invalid order under Section 111. In modern time the judiciary, like any other State Organ, is under scrutiny of the public and rightly so, because in a democracy the people are the ultimate masters of the country and all State organs are meant to serve the people. The lack of vigil on the part of the lower revisional court is regrettable."

11. In view of the observations made in the cases mentioned herein-above, the impugned notice being wholly illegal and void is liable to be set-aside.

12. In the result, the application under section 482 Cr.P.C. is allowed. The order dated 02.11.2004 and impugned notice issued in pursuance thereof as well as the proceedings of case No. 943/9 of 2004 (State vs. Baleshwar and others) under section 107/116 Cr.P.C. pending in the court of SDM Mawana District Meerut are hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2008

BEFORE
THE HON'BLE BHARTI SAPRU, J.

Civil Misc. Writ Petition No.33383 of 2008

Satyendra Chaturvedi ...Petitioner
Versus
Small Scale Industries Research and Development Organization ...Respondent

Counsel for the Petitioner:
Sri Manish Goyal

Counsel for the Respondent:
Sri R.N. Singh
Sri Anil Kumar Aditya
Sri A. Narayan

Code of Civil Procedure-Order 39 Rule-I-grant of Injunction-petitioner running nursery shot on the land of SIRDO-a research Institute-initially lease granted for 11 months with partner extension of 33 months-after expiry of that period petitioner has no right to continue in possession-both courts below rightly declined to grant injunction-petitioner running manufacturing unit for commercial use can not be encouraged contrary to scientific development-merely on basis of illegal possession without prima facie case, in absence of balance of convenience-can not be interfered by writ court.

Held: Para 37 & 38

Lastly in so far as the irreparable injury is concerned, the petitioner is simply a manufacturing unit and is individual, whereas the public at large benefits if new research projects are set up. No doubt the petitioner was having a manufacturing unit, which employed a few people but when the entire purpose of respondent SIRDO is to encourage research and development work by the new entrepreneurs, it would be in the larger interest and that is much greater than the individual's interest like the petitioner.

Thus in my opinion that both the courts below have committed no error in coming to the conclusion that the petitioner failed to make out a case for grant of injunction.

Case law discussed:
(2004) 1 SCC 769, (2004) 2 SCC 137, (2006) 8 SCC 367, 2006 (63) ALR 161, AIR 1989 SC 2097, AIR 1968 SC 620, AIR 1984 Alld 60, AIR 1963 Alld 581 (Division Bench), 1885 ILR 7 Alld 900 (Full Bench), AIR 1972 Alld 155, 2004 (55) ALR 260 SC, JT 1996 (8) SC 50, JT 2000 (4) SC 186, (2008) 3 SCC 279

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

1. Heard Sri Manish Goyal learned counsel appearing on behalf of the petitioner and Sri R.N. Singh, learned senior counsel for the respondent.

2. This writ petition has been filed under Article 226 of the Constitution of India seeking writ of certiorari calling for the records of the case and quashing the judgment and order dated 2.7.2008 passed by the Addl. District Judge, Allahabad in MCA no.39 of 2008 (Satyendra Chaturvedi versus Small Scale Industries Research and Development Organisation). The second prayer is also for a writ of certiorari to quash the judgment and order dated 30.1.2008 passed by the Civil Judge (Senior Division), Allahabad on the application paper no.6-C in the Original Suit no.1300 of 2007. The third prayer is for a writ of prohibition restraining the respondent from causing interference in the running of the unit of the petitioner on shed no.3 Plot no.4, SIRDO Campus, Industrial Area P.O. T.S.L. Naini, Allahabad and the last is

the residuary prayer seeking appropriate direction which the Court may deem fit and proper according to the circumstances of the case.

3. The facts of the case are that the petitioner had entered into an agreement of lease with the respondent with regard to Nursery shed no. 3, plot no. B-4, SIRDO Campus, Industrial Area P.O. T.S.L. Naini, Allahabad (hereinafter referred to as the premises). The shed belongs to the respondent, which has several sheds and which it gives out to entrepreneurs to set up research projects. A copy of the lease deed dated 16.1.1993 has been filed by way of a supplementary affidavit.

4. The lease with regard to the premises is admitted to both sides. The lease was made between the two parties, initially for a period of 11 months started from 16.10.1993 for a sum of Rs.600/- per month along with taxes and other charges. Under the terms of the lease as stated earlier, the lease was for a period of 11 months initially, which could be extended but not in any case for more than 33 months from its commencement i.e. 16.10.1993. Clause 5 of the lease is reproduced below:

"5. That with the mutual consent in writing, the period of the agreement can be extended by the parties, on the same terms and conditions or on such modified terms as may be determined by the first party. But in any case, the total period of occupations shall not be for more than thirty three months."

5. Amongst other conditions, clause 9 and 10 of the lease deed also indicate the conditions for termination of lease. The clauses 9 and 10 of the lease agreement are reproduced below:

"9. That the second party shall be permitted to use the shed/building on month-to-month basis. The lease shall be terminable by the first party by one month's notice in writing. Likewise if the second party intends to vacate the shed/building earlier, he will also have to give one month's notice or one month's service charges in advance.

10. That this lease deed is for fixed term of eleven months. After the expiry of the fixed period, if one month before the fixed period is not extended, the second party shall have no right to continue as lessee and first party will have right to take possession of the shed/building at the expiry of the said period."

The petitioner, who had established the manufacturing unit of the sale of protein food, minerals, vitamins products etc. under the name and style of M/s. G.S. Formulations, continued to occupy the plot leased out to it beyond the period of 11 months and thereafter even 33 months.

6. The aims and objects of the Small Industries Research & Development Organization (SIRDO) are to encourage the entrepreneurs engaged in the research projects and to allot them sheds for their research projects for specified period and thereafter the said sheds are to be allotted to new entrepreneurs engages in the similar research work.

7. Since the premises in dispute i.e. Nursery shed no.3, Plot no.4 was required to be allotted to a new

entrepreneur by the respondent, it filed suit no.93 of 2004 (Small Industries Research and Development Organization versus Satyendra Chaturvedi) in the Court of J.S.C.C., Allahabad, seeking the petitioner's ejectment from the disputed premises. The said suit was later on withdrawn by the order dated 9.10.2007.

8. After the suit was withdrawn by the respondent SIRDO, it issued to the petitioner a notice dated 31.10.2007 to vacate the premises. It is this notice, which is starting point of the present *lis*.

9. Under the notice dated 31.10.2007, the respondent asked the petitioner to vacate the premises within a period of 30 days.

10. Before 30 days could expire, the petitioner filed a suit for injunction being O.S. no.1300 of 2007 on 22.11.2007 and also filed an application for an ad interim injunction under Order 39 Rule 1 C.P.C. The said application filed by the petitioner was rejected by the trial court on 30.1.2008 holding that the petitioner could not fulfil the requirement for the grant of a temporary injunction i.e. *prima facie* case, balance of convenience an irreparable injury.

11. Aggrieved by the order dated 30.1.2008 passed by then trial court, the plaintiff petitioner filed MCA no. 39 of 2008 and the said appeal of the petitioner has also been rejected by the order dated 2.7.2008. It is these two orders, against which the petitioner has filed present writ petition.

12. Learned counsel for the petitioner has argued at length that the appellate order is bad because the appellate order does not contain any reason for dismissing the appeal filed by the petitioner. It merely notices certain case laws and has recorded conclusions without going into the depth of the matter. He has further argued that the trial court while refusing to grant a temporary injunction has acted upon irrelevant consideration. His first argument is that the trial court has wrongly passed its findings upon initial agreement, which was only for 33 months and the date of that agreement was dated 16.10.1993.

13. According to the learned counsel for the petitioner, the so-called agreement dated 16.10.1993 had already lapsed by efflus of time and therefore the agreement was of no consequence for consideration of the grant of injunction because even after expiry of agreement, the petitioner had continued to pay rent and the same was being accepted by the defendant-respondent.

14. According to the learned counsel for the petitioner, notice dated 31.10.2007 fully establishes that the authority under which the petitioner was occupying the premises and the non-renewal of the agreement of lease was of no consequence as it did not wipe out the right of the petitioner to continue in the premises as a tenant by holding over.

15. The argument of the learned counsel for the petitioner is that the petitioner was in possession by virtue of holding over as a tenant and therefore only way, by which he could be dispossessed, was by the institution of suit for eviction filed by the respondent

landlord on the basis of a decree which would have to be passed by the court of competent jurisdiction.

16. Learned counsel for the petitioner further argued that in any case his lease had not been terminated by the issuance of the notice dated 31.10.2007 as it did not amount to a valid order of termination but simply it asked the petitioner to vacate the premises.

17. Learned counsel for the petitioner next argued that in so far as the balance of convenience was concerned, the court below had failed to properly assess as to in whose favour balance of convenience lay. According to him, because no injury was being caused the respondent who had several sheds in its possession and as the petitioner was a manufacturing unit, if it shuts down, the grievous prejudice would be caused to the petitioner.

18. Other than this, learned counsel for the petitioner has argued that the trial court ignored material which was placed by the petitioner before it. He argued that the trial court ignored the notice dated 31.10.2007 which was a notice demanding possession and was not a notice terminating the tenancy.

19. Secondly learned counsel for the petitioner further argued that the earlier suit for eviction being O.S. no.93 of 2004 had been withdrawn by the respondent on 9.10.2007 without taking any liberty to file a fresh suit.

20. Thirdly he argued that the trial court ignored the facts that the petitioner had continuous possession of the premises in question and since 1993 had continued to pay rent, which was accepted by the respondent. He further argued that the trial court had ignored the facts brought to its notice that the entry of the petitioner was being obstructed from 20.11.2007 onwards. The trial court also ignored the rent receipts showing the regular deposit of the rent by the petitioner as lessee, which had continued right from 1993 and the legal right of the petitioner as tenant by holding over particularly when the notice dated 31.10.2007 was confined to a demand for possession and did not terminate the lease. Most of all the trial court ignored the status, which the petitioner has secured as tenancy on month-to-month basis and secondly the legal right vested in it.

21. Learned counsel for the petitioner has argued that balance of convenience lies in his favour because the petitioner has been running a factory since 1993 and was utilizing the premises for the purpose for which he was let out to the petitioner and if the running of the factory was stopped, it would result grievous prejudice to the petitioner and it is sufficient to establish that the balance of convenience was in favour of the petitioner.

On the point of irreparable Injury, the learned counsel for the petitioner argued that in case the factory of the petitioner shuts down, it would result unemployment of several persons and loss of capital invested. It would further result in loss of revenue to the State Government and this will be detrimental to the public exchequer. On the other hand, he argued that by grant of injunction, no loss would be caused to

the respondent. He had several sheds vacant, which could be allotted to other entrepreneurs who are willing to undertake research projects.

Learned counsel for the petitioner argued at length that inference could be drawn from conduct of the respondent who has taken the recourse of filing of the suit for vacation in the year 2004 but subsequently withdrawn the suit without seeking liberty to file a fresh suit and therefore such conduct on their part amount to acquiesce and also accepts the petitioner as tenant by holding over.

22. Learned counsel for the petitioner has cited several decisions to establish his point of settled possession and sought to establish that once a person is in possession then he cannot be ousted except in accordance with law. In support of this argument, the learned counsel for the petitioner has cited the following decisions:

1. Ram Gowda versus M. Varadappa Naidu, reported in (2004) 1 SCC 769;

2. Sopan Sukhdeo Sable and others versus Assistant Charity Commissioner and others, reported in (2004) 2 SCC 137;

3. M. Guridas and others versus Rasaranjan and others, reported in (2006) 8 SCC 367;

4. Anupam Sahkari Avas Samiti Ltd. versus Additional District Judge and another, reported in 2006 (63) ALR 161;

5. Krishna Ram Mahale versu Mrs. Shobha Venkat Rao, reported in AIR 1989 SC 2097;

6. Lallu Yashwant Singh versus Rao Jagdish Singh others, reported in AIR 1968 SC 620;

7. Bhola Nath and others versus Maharao Raja Saheb Bundi State, reported in AIR 1984 Alld 60.

The other than the settled possession, the learned counsel for the petitioner has also argued at length on the point that notice dated 31.10.2007 was not a proper notice as it was only a notice demanding possession and did not actually terminate the tenancy.

Learned counsel for the petitioner has cited the following decisions with regard to this point:

(i) Ahmad Ali versus Mohd. Jamal Uddin, AIR 1963 Alld 581 (Division Bench);
(ii) Bradley versus Atkinson, 1885 ILR 7 Alld 900 (Full Bench);
(iii) Farooq Ahmad versus Muneshwar Bux Singh, AIR 1972 Alld 155.

23. In reply to the argument of the learned counsel for the petitioner, Sri R.N. Singh Senior Advocate has argued that the petitioner is seeking discretionary relief under Article 226 of the Constitution of India by the present writ petition against refusal to grant ad interim injunction by both the courts below. He has argued that after both the courts below have recorded clear findings that in his favour, the petitioner has neither *prima facie* case nor irreparable injury nor balance of

convenience, which are the necessary ingredients for the grant of an ad interim injunction. He has also argued that the admitted position is that the plaintiff-petitioner had continued in possession of the premises after the expiry of the terms of lease. The Original lease was made on 16.10.1993 for a period of 11 months and thereafter under its terms lease could have been extended for another period of 33 months and after this extension, the lease automatically came to an end. He has also argued that after the expiry of period of 33 months, the possession of the premises by the petitioner is illegal and he is a trespasser and the other admitted position is that the respondent organization is the true owner. He has next argued that it is not open to a trespasser to obtain injunction against the true owner. In support of this argument, he has placed complete reliance on a decision of Delhi High Court rendered in the case of D.T.T.D.C. versus M/s D.R. Mehara & sons, reported in AIR 1996 Delhi 351 and has relied on para 16, 17 and 18 of the said judgment, which are quoted herein below:

"16. It is argued for the appellant that this may be anomalous. It is said that the trespasser has a "right" to an injunction against the true owner, and this is complementary to the duty of the owner not to evict the trespasser outside the judicial process. In our view, there is no anomaly. Each of these is based on a different legal principle. If the plaintiff wants the defendant to act in accordance with law he must first abide by the law himself and vacate the property as one would expect a law abiding citizen to behave.

17. It is then argued that this may lead to multiplicity of proceedings. Should the plaintiff be allowed to be forcibly evicted so as to compel him again to seek restoration of possession under section 6, Specific Relief Act, or otherwise? The danger could be prevented? This argument based on multiplicity of proceedings, in fact, goes against the trespasser in possession. The plaintiff can, on the same parity on reasoning - behave in such a manner as to make it unnecessary for the owner to sue for possession separately. The duty to be a lawful citizen is not one sided. It does not apply only to the owner but applies to the trespasser as well.

18. For the above reasons, we are of the clear view that the appellant plaintiff whose licence has expired and which had itself pleaded in 1992 for a short period to vacate from the shop and which had been given a large number of notices to vacate and where the owners have even show alternative premises, which appellant could have, occupied, cannot be granted the helping hands of the Court for temporary injunction. The appeal is therefore dismissed in limine."

24. Learned counsel for the respondent also drew the attention of the Court to the decision in the case of **Sopan Sukhdeo Sable and others versus Assistant Charity Commissioner**, reported in 2004 (55) ALR 260 SC, in which the Apex Court has approved the judgment of Delhi High Court rendered in the case of D.T.T.D.C. versus M/s D.R. Mehara & sons (supra) in para 22,23, 24.

25. Learned Senior Advocate for the respondents has argued that anybody who seeks justice must abide by the law

himself as would be expected of law abiding citizens.

26. He has argued that duty of the lawful abiding citizen is not one sided. It does not apply to true owner alone but also applies to a trespasser on the principle that "he who seeks equity must do equity." He has further argued that judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court. He has also argued that the petitioner had entered into a lease agreement with the respondent and was bound by the terms of agreement and even after the agreement came to an end, he should have respected terms of the agreement rather than seeking to take advantage of his own wrong. He has argued that by way of a lease agreement, the petitioner has entered into a contract with the respondent SIRDO and he cannot seek the protection of the Court to wriggle out of the contract. For this purpose, he has relied upon the decision of the Apex Court in the case of **State of Orrisa versus Narain Prasad & Ors.,** reported in JT 1996 (8) SC 50 and has also relied on **State of Rajasthan & ors. Versus Anil Kumar Sunil Kumar & party & another,** reported in JT 2000 (4) SC 186.

27. I have heard learned counsel for the parties at length and have also perused both the orders of trial court as well as the order of the appellate court.

28. The admitted position, which emerges is that there was a lease agreement between two parties, which was initially for a period of 11 months and thereafter could have been extended under the terms of the agreement for a maximum period 33 months. The lease deed was dated 16.10.1993. Therefore the relationship between the petitioner and the respondent was found on the lease agreement. There is no dispute about the fact that the lease agreement came to an end on 16.7.1996. After that the possession of the petition would be at the most of a tenant who stayed by holding over month by month or at the most for six months under the provisions of section 116 of the Transfer of Property Act.

29. In the instant case, the petitioner continued to hold over uptil 31.10.2007 when the petitioner was given a notice to give vacant possession after a period of one month.

30. Learned counsel for the petitioner has argued that the notice to terminate was not a valid notice terminating the tenancy and has cited decisions to the effect that unless the language of the notice clearly explicits that the tenancy itself be terminated, it would not amount to notice of the termination. However such a plea could be taken only when there was a valid tenancy not in case where the petitioner was continued by way of holding over.

31. Moreover under clause 9 of the agreement, a notice was to be given by the respondent, a notice was to be given by the respondent. Even if the notice was not happily worded, the intention of the notice was to give to the petitioner a month's notice to vacate the premises. The clumsy drafting of the notice would not render the notice either illegal or invalid.

32. In so far as the question of settled possession is concerned, I am not inclined to agree with the arguments as advanced by the learned counsel for the petitioner in the facts and circumstances of the case, because here the petitioner was seeking to take advantage of by holding over. The true owner had resorted to give a legal notice to terminate the holding over thereby bringing a legal end to the holding over. The so-called settled possession as claimed by the petitioner was brought to an end by the issuance of a valid notice to terminate the so-called tenancy. It could not have been claimed thereafter against a true owner.

33. Reference may be had to the contents of para 27 of the judgment of Supreme Court in the case of ***New India Assurance Co. Ltd. versus Nusli Neville Wadia, reported in (2008) 3 SCC 279*** "The occupant may have been a trespasser or may have breached the conditions of the tenancy or may have been occupying the premises as a condition of service but in any of these cases continued to occupy the premises despite cession of contract but the fact remains that no matter what the relationship was, it was brought to an end and after that it ceased to exist.

34. The law is well settled that no judicial proceedings can be initiated to protect or perpetuate wrongs.

35. The court below while examining three ingredients that are required for the grant of ad interim injunction also came to the conclusion after examining the facts and circumstances of the case that the petitioner was not able to make out any ground for the grant of ad interim injunction.

36. I am not in agreement with the arguments as made by the learned counsel for the petitioner that the trial court or the appellate court has failed to examine the basic ingredients for the grant of ad interim injunction. In so far as the *prima facie* case is concerned, it is abundantly clear that the lease on the strength of which the petitioner had entered as a tenant, had expired. The petitioner was petitioner was continuing simply by holding over. In so far as the balance of convenience is concerned, the balance was in favour of the respondents who is the organization which encourages the entrepreneurs to set up more and more new research projects. Their intention by leasing out the premises to the petitioner was not to aid to set up his commercial and manufacturing unit. Moreover the public at large which is desirous to set up the research projects is prevented from getting the new units established if the petitioner is allowed to hold over the premises in dispute his commercial entrepreneurs. The very purpose of giving the shed was not to set up a manufacturing unit for commercial use by the petitioner but to encourage the new entrepreneur such the petitioner for research projects for development of scientific pursuits.

37. Lastly in so far as the irreparable injury is concerned, the petitioner is simply a manufacturing unit and is individual, whereas the public at large benefits if new research projects are set up. No doubt the petitioner was having a manufacturing unit, which employed a few people but

when the entire purpose of respondent SIRDO is to encourage research and development work by the new entrepreneurs, it would be in the larger interest and that is much greater than the individual's interest like the petitioner.

38. Thus in my opinion that both the courts below have committed no error in coming to the conclusion that the petitioner failed to make out a case for grant of injunction.

39. This writ petition is dismissed as above. The observation made by this court is only with regard to the grant of an ad interim injunction and shall not prejudice the case of the petitioner arising out of the suit to be decided by the court below.
